CRAWFORD AND EXPERT TESTIMONY AS HEARSAY:

A PRACTICAL GUIDE TO NAVIGATING THE UNCERTAIN CURRENTS OF EXPERT TESTIMONY UNDER *CRAWFORD*

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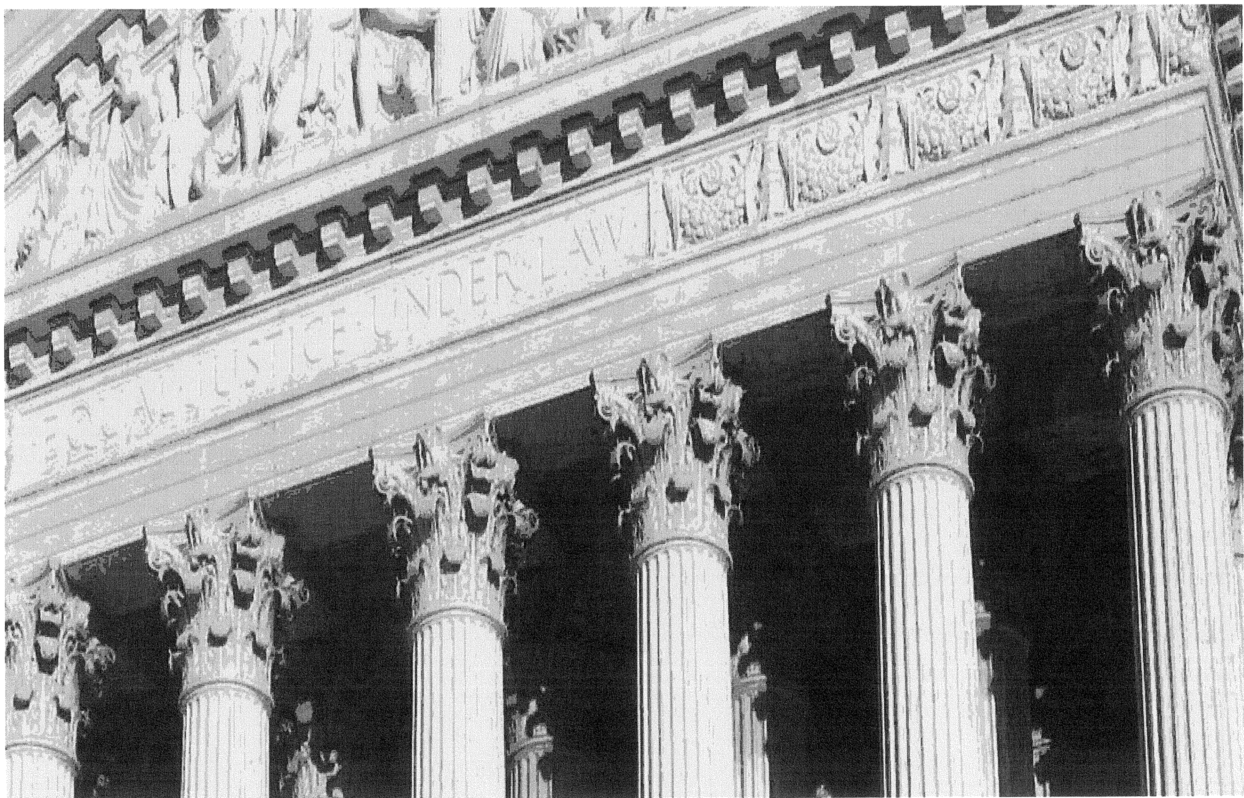

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I. INTRODUCTION

"Hired guns"…"Ringers"…etc. These are some the names used to describe expert witnesses. No matter what they are called, there is no question the testimony of an expert witness can make or break a case. Once a witness is deemed an "expert," his testimony becomes sacrosanct in the eyes of jurors. An expert's testimony is seen as more important and reliable because testimony is based on "scientific, technical, or other specialized knowledge."[2] Jurors give more credence to the testimony of an expert; it can be a nail in the coffin to the opposing party. Courts, therefore, should use caution when deeming a witness an "expert," especially when the expert's opinion is based on inadmissible hearsay. Contrary to this idea, the U.S. Supreme Court has found, information that helps form the expert opinion does not itself need to be admissible in evidence. It must only be the kind of information experts in the field would typically use for reaching conclusions or opinions like the one offered by the expert.

Experts have traditionally been allowed to testify even if their testimony is based on inadmissible hearsay and this raises Confrontation Clause issues.[3] Despite the glaring Sixth Amendment Confrontation Clause issue, the Court has held the use of such testimony does not pose such an issue.[4] This holding, and the allowance of such testimony, nonetheless is contrary to the Sixth Amendment Confrontation Clause, as the defendant is not given the opportunity to cross-examine, or confront, the sources of the expert's testimony. In 2004, the Court's decision in *Crawford v. Washington* dramatically changed the analysis of Confrontation Clause claims, and perhaps how expert testimony should be viewed.[5] *Crawford* has seemingly given way to a re-examination of when an expert is simply the "devil in disguise," or a mere conduit for the testimony of others.

The Court's opinion in *Crawford* focused on whether out-of-court statements of witnesses unavailable at trial should be admitted into evidence if the defendant did not have a prior opportunity to cross the witness. The Court held, such statements must be barred from evidence, under the Confrontation Clause, if they are deemed to be "testimonial" or given in

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[2] FED. R. EVID. 702.
[3] *See* Delaware v. Fensterer, 474 U.S. 15, 18 (1985).
[4] *Id.*
[55] 541 U.S. 36 (2004).

circumstances which would be akin to testimony.[6] Accordingly, if a prior statement is found to be "testimonial," and the declarant is not testifying at trial, the hearsay may be introduced against a criminal defendant only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[7] If the prior statement is not testimonial there is no Confrontation Clause issue, then the testimony may be presented. Although *Crawford* breathed life back into the Confrontation Clause, a myriad of other issues arose. What is testimonial? How deeply must the Court look into the reason the statement was made, the circumstances it was made in, or to whom the statement was relayed to? Important to this article, however, is the testimony of the expert witnesses who are relying upon inadmissible hearsay as the basis of their opinion.

Expert witnesses are required to provide the "basis" of their testimony, or what they relied upon in forming their conclusions. If an expert's basis is the testimony of others, a red flag should arise, as this seems to be a direct violation of the Confrontation Clause. In light of the Court's elaboration on the Sixth Amendment Confrontation Clause in *Crawford*, this issue seems ripe for review. The Court now, or in the near future, will have to determine if the Confrontation Clause, as explained in *Crawford* will, or should, bar testimonial evidence by expert witnesses when their conclusions are based on otherwise inadmissible hearsay.

This paper will explore whether the confrontation clause, as explained in *Crawford* v. Washington, bar testimonial evidence by expert witnesses when their conclusions are based on otherwise inadmissible evidence? When is an expert an expert? When is an expert merely a conduit for inadmissible hearsay?

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[6] *Id.* at 37, 53-54.
[7] *Id.*

II. PROTECTIONS OF THE CONFRONTATION CLAUSE

A. The Right to Confront Witnesses Against Interest

The Sixth Amendment's Confrontation Clause provides, "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him…."[8] and applies to both federal and state prosecutions.[9] This right is especially important to the criminal defendant, as a witnesses' testimony against a defendant may be the basis of the state or federal government's prosecution. The right to confront a witness is also firmly rooted in judicial history.

The historical right to confront one's accuser is a concept that dates back to Roman times.[10] As is the basis for all American law, the immediate source of the concept was English common law. The *Crawford* court stated that "[t]he common-law tradition is one of live testimony in court subject to adversarial testing…."[11] This right, however, was not always guaranteed to defendants against a witness; common law history is rife with instances of a defendant's inability to cross-examine a witness causing his demise, such as the 1603 trial of Sir Walter Raleigh.[12] Such abuses continued until "law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment."[13]

As English common law became the model for our current jurisprudence, the right of an accused to confront witnesses against him is found in early Colonial declarations[14] and was vigorously debated. One proponent of this right noted, "[n]othing can be more essential than the

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[8] U.S. Const. amend. VI.
[9] Pointer v. Texas, 380 U.S. 400, 411 (1965).
[10] Coy v. Iowa, 487 U.S. 1012, 1015 (1988).
[11] *Crawford*, 541 U.S. at 43.
[12] The 1603 trial of Sir Walter Raleigh is seen as the most glaring example of the perils of a defendant's inability to confront his accuser. Lord Cobham, Raleigh's accuser, implicated him in letters. At trial, despite Cobham's absence, these were read to the jury. Raleigh objected to the use of these letters in Cobham's absence, and famously stated, "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face…." The Court refused and Sir Walter Raleigh was convicted and sentenced to death. *Raleigh's Case,* 2 How. St. Tr. 1, 15-16, 24 (1603).
[13] *Crawford,* 541 U.S. at 44.
[14] *See* VIRGINIA DECLARATION OF RIGHTS § VIII (1776); PENNSYLVANIA DECLARATION OF RIGHTS § IX (1776); DELAWARE DECLARATION OF RIGHTS § XIV (1776); MARYLAND DECLARATION OF RIGHTS § XIX (1776); NORTH CAROLINA DECLARATION OF RIGHTS § VII (1776); VERMONT DECLARATION OF RIGHTS CH. I, § X (1777); MASSACHUSETTS DECLARATION OF RIGHTS § XII (1780); NEW HAMPSHIRE BILL OF RIGHTS § XV (1783).

cross examining [of] witnesses, and generally before the triers of the facts in question....”[15] This right, therefore, became firmly rooted in American jurisprudence from its very inception. As an early North Carolina state decision noted, “[i]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.”[16]

While the Confrontation Clause is unquestionably one of the most important personal rights an accused has, the courts have continually wrangled with its scope and breadth. As the Court explained in *Crawford*, “[s]ome early cases went so far as to hold that prior testimony was inadmissible in criminal cases even if the accused had a previous opportunity to cross-examine.”[17] Additionally, the case law regarding the Confrontation Clause is lengthy, and often contradictory. Noting this historical confusion, the Court in *Crawford* attempted to finally establish a black letter rule explaining, “[o]ur cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”[18] The United States Constitution, and U.S. Supreme Court case law, therefore, establish the ability to confront an adversarial witness as a right held by all criminal defendants. Which witness the defendant enjoys the right to cross-examine, or confront, is often less clear. The proper witness must be established by the trier of fact, who will determine which person is truly offering “testimony.”

B. What Witnesses Must Be Constitutionally Confronted?

An initial reading of the Confrontation Clause, and the witnesses that must be confronted within its meaning, seems clear. The Sixth Amendment, however, like all statutory law, is open to interpretation. “One could plausibly read ‘witnesses against’ a defendant to mean those who actually testify at trial,[19] those whose statements are offered at trial,[20] or something in-

[15] *Crawford,* 541 U.S. at 49 (citing R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787)).
[16] State v. Webb, 2 N.C. 103, 103 (Super. L. & Eq. 1794) (per curiam).
[17] *Crawford,* 451 U.S. at 50 (citing Finn v. Commonwealth, 26 Va. 701, 708 (1827); *see also* State v. Atkins, 1 Tenn. 229 (Super. L. & Eq. 1807) (per curiam)).
[18] *Crawford*, 541 U.S. at 59.
[19] *Id.* at 42-43 (citing to Woodsides v. State, 3 Miss. 655, 664-65 (1837)).
[20] *Id.* (citing to 3 J. WIGMORE, EVIDENCE § 1397 (2d ed.1923)).

between."[21] The true "witness" who must be confronted is therefore, the subject of debate. Generally, the Court has found a "witness" is one who "bears testimony" against the accused.[22] Further, "[t]estimony...is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[23]

In determining the defendant's Sixth Amendment right of confrontation, the court must first established who the adversarial or "testimonial witness" is. Unquestionably, a witness to a crime who is testifying against the accused is the "testimonial witness" for purposes of the Sixth Amendment. The witness sitting on the stand is truly offering his own "testimonial" evidence and, as such, the defendant is guaranteed a right to confront this witness. Often, however, the identification of the testimonial witness is not always this clear.

The testimony of the witness on the stand must, therefore, be carefully reviewed prior to trial in order to determine if the witness is offering a summation of prior testimony, or their own original statements. Accordingly, if the witness on the stand is offering the "testimonial" statements of another, then the opponent has a valid Confrontation Clause argument. For example, while Sir Walter Raleigh may have been "perfectly free to confront those who read Cobham's confession in court," the readers of the letter, were not the true witnesses he had the right to confront. [24] The true testimony given to the jury was the content of the Cobham's letter accusing Raleigh of a crime. Confronting the reader, as opposed to the writer, did not, and should not, satisfy the Confrontation Clause.

Accordingly, if an expert is offering testimony based upon the testimony of others, is the defendant's ability to confront the expert enough to satisfy the Confrontation Clause? Or, is the expert merely a straw-man or conduit, for the testimony of the true "testimonial witness?" Unquestionably, *Crawford*, and its explication of the Confrontation Clause, inevitably leads to the question of whether the expert is truly the witness the opponent must be allowed to confront under the Sixth Amendment. If an expert interviewed or interrogated numerous other sources in forming the basis of his opinion, then the real testimonial witnesses are those who the expert gleaned his opinion from. In light of *Crawford*, the testimony of these expert witnesses, who are merely recounting the testimony of others, seem to run contrary to the Sixth Amendment.

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[21] *Id.* (citing to 3 J. WIGMORE, EVIDENCE § 1397 (2d ed.1923)).
[22] *Id.* at 51.
[23] *Id.* (quoting from the Webster American Dictionary of the English Language (1828)).
[24] *Id.*

C. Under Crawford, What Is Testimonial Evidence?

Expert witnesses commonly gain their opinions through summarizing the data or testimony of others. For example, if a "gang jargon" expert has become an expert after numerous interviews with former gang members, special law enforcement gang task forces, and other such sources, his testimony in court is not truly his own. His opinion and subsequent testimony is actually a summation of the testimony of others. Logically, this leads to the assumption the gang jargon expert is not the witness the defendant should have the right to confront. But does the defendant have the right to confront the numerous sources the expert interviewed in gathering his opinion? This issue may only be resolved by determining, under *Crawford*, what is "testimonial evidence."

Crawford has unquestionably changed the rules regarding out-of-court witness statements. The Court laid down a clear-cut test for such statements; if a statement is testimonial it is barred unless the declarant is unavailable and the defendant had the opportunity to cross-examine the declarant regarding such statement.[25] While this test may seem to impart a level of clarity to current jurisprudence, unfortunately the Court decided to save the precise meaning of testimonial "for another day."[26] Lower courts have considered evidence testimonial or communicative "when it reveals a person's subjective knowledge or thought processes."[27] "In order to be "testimonial" [or communicative], an accused's oral or written communication, or act, must itself, explicitly or implicitly, relate a factual assertion or disclose information."[28]

The Court, however, has never set out a definition for lower courts to use. This lack of clarity means lower courts must attempt to discern the meaning of testimonial, likely at their own peril. Even Chief Justice Rehnquist foresaw the problems with leaving this definition "for another day" stating:

> The Court grandly declares that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists . . . is covered by the new rule. They need them now,

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[25] *Id.* at 37, 53-54.
[26] *Id.* at 68.
[27] People v. Hager, 505 N.E.2d 237, 238 (N.Y. 1987) (per curiam).
[28] Doe v. United States, 487 U.S. 201, 201 (1988).

> not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.[29]

The Court provided clues to what testimonial means by offering historical definitions, terminological definitions, and even stating what is not testimonial. However, a true definition of "testimonial" was never offered.

The Court seems to suggest a review of the purpose of the statement may determine whether it was "testimonial." Also, circumstances in which the statement was made must be examined. If circumstances suggest the statement would have future relevance as testimony in a criminal prosecution, it is more likely to be testimonial. In 2006, the Court once again revisited this issue in *Davis v. Washington*.[30] The Court provided additional guidelines on identifying testimonial evidence. The Court noted the following:

> Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[31]

While *Davis* explicitly stated, "testimonial" statements could extend beyond police interrogations, it did not provide any direct guidance for use in other settings. *Davis* suggests looking at the "primary purpose" of the interrogation to determine whether the statement is testimonial.

If a gang member is interviewed by a "gang expert," solely for the primary purpose of deciphering gang jargon, then the gang member is basically "testifying" for the expert. If the expert then comes into court and attempts to repeat this information, isn't he simply relaying testimonial evidence of another? More importantly, he is offering evidence provided by a source the defendant has not been able to cross-examine.

Expert testimony, as discussed in greater detail later, may take on various forms. If an expert is simply testifying that the drug he tested was cocaine, he clearly could offer this testimony with little fear of awakening the Confrontation Clause despite the fact he did not

[29] *Id.* at 75-76 (Rehnquist, J., concurring in judgment).
[30] 547 U.S. 813 (2006).
[31] *Id.* at 822.

develop the original test used. However, if an expert is testifying to what he has been told by prior sources (who could likely be made available to the defendant), then the expert's testimony is not really his, but the testimonial evidence of others. A true definition of testimonial is necessary to make the ultimate determination as to when evidence should be admissible or when it should be barred. Therefore, Justice Scalia's decision in *Crawford*, to save the definition of "testimonial" for another day, has left prosecutors and criminal defense attorneys in the dark. Courts now have to blindly establish their own definition of "testimonial" until the Court comes down with an explicit and exhaustive definition.

D. Crawford and Hearsay testimony

With the adoption of the Federal Rules of Evidence (FRE) in 1975, the scope of expert testimony was expanded. "[FRE] Rule 703 expressly permits experts to base their testimony on evidence that would otherwise be inadmissible, so long as it is 'of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject.'"[32] Accordingly, the fact that an expert's opinion is based upon inadmissible hearsay, or that he cannot recall the basis of his opinion, has not traditionally raised a Confrontation Clause issue.[33] However, the trial court must review the basis of the expert's testimony to insure an expert witness is truly testifying as an expert, and not merely serving as a conduit through which hearsay is brought before the jury.[34]

FRE Rule 703 states that "[a]n expert must do more than merely rela[y] inadmissible hearsay to the jury. The expert's value as a witness must derive from his ability to apply his expertise to the facts and draw inferences from them."[35] Further, one federal court held that "[a]n expert's testimony that was based entirely on hearsay reports, while it might satisfy [FRE] Rule 703, would nevertheless violate a defendant's constitutional right to confront adverse witnesses."[36] In addition, "[t]he Government could not, for example, simply produce a witness

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[32] United States v. Lawson, 653 F.2d 299, 302 (7th Cir. 1981).
[33] *See* Delaware v. Fensterer, 474 U.S. 15 (1985).
[34] United States v. Cormier, 468 F.3d 63, 73 (1st Cir. 2006); *see also* United States v. Lundy, 809 F.2d 392, 395 (7th Cir. 1987).
[35] FED. R. EVID. 703 (quoting Advisory Opinion (8)).
[36] *Lawson,* 652 F.2d at 302 (citing WEINSTEIN'S EVIDENCE P 703(03) 703-18 (1980)). "In a criminal case, even though Rule 703 warrants the use of hearsay as a basis for an opinion, the constitutional right of confrontation may

who did nothing but summarize out-of-court statements made by others."[37] If an expert learned the true meaning of gang terms through interviews of others, and these interviews alone, his testimony seems to be nothing but a summary of "out-of-court statements made by others."[38]

An expert is deemed an expert for his ability to examine data and apply his expertise to this data. Interviewing gang members and then simply relaying to the jury the substance of the interviews is not "expert analysis." One does not need to be an expert to interview sources, and then relay the substance of the sources testimony at trial. As aforementioned, the Court in *Crawford* noted the witness who the Sixth Amendment guarantees the confrontation of may be the one "whose statements are offered at trial."[39]

An expert who is merely relaying the testimony of another is not the "true witness" to be confronted. The true witness, and the witness the defendant has the right to confront, is the source of the statement. Certainly an expert can properly rely on otherwise inadmissible hearsay evidence and, as what will be shown below, there are definite boundaries to that reliance. The varied rulings on an expert's use of inadmissible hearsay seem to run directly counter to the Court's Confrontation Clause analysis as laid out in *Crawford.* No longer should experts be allowed to simply regurgitate the words of others, without any additional thoughts or analysis of their own. *Crawford* requires expert witnesses, and the basis of their testimony, to be closely reviewed. Therefore, the Confrontation Clause has been given its spine back, and hopefully courts will begin to review the true nature of this right with regards to the expert witness.

III. ADMISSIBILITY OF EXPERT TESTIMONY

A. Daubert and Kumho: The Mighty Gatekeepers of Expert Testimony?

The trial court acts as a gatekeeper in determining when a witness may be deemed an expert. The effect of expert testimony on a jury can be so strong that the expert must stay within a specific, U.S. Supreme Court-established framework in order to be deemed an "expert." To aid

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require that the defendant have the opportunity to cross-examine the persons who prepared the underlying data on which the expert relies." *Id.*

[37] *Lawson*, 653 F.2d at 302 (citing United States v. Williams, 431 F.2d 1168, 1173 (5th Cir. 1970*), aff'd en banc,* 447 F.2d 1285 (5th Cir. 1971)).

[38] *Id.*

[39] Crawford v. Washington, 541 U.S. 36, 42-43 (2004) (citing 3 J. WIGMORE, EVIDENCE § 1397, 104 (2d ed.1923)).

in the exercise of this gate-keeping function, the Court set forth a non-exhaustive list of factors for trial courts to consider in the groundbreaking case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[40] The Court laid down the following test in determining if an expert is qualified to testify as such: (1) whether the theory or technique can be and has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, (4) the existence and maintenance of standards controlling the theory or technique's operation, and (5) whether the theory or technique has "general acceptance" within the scientific community.[41] *Daubert's* "gate keeping" obligation, requiring an inquiry into both relevance and reliability, applies not only to "scientific" testimony, but also to expert testimony.[42] The objective of the *Daubert* factors is to ensure the reliability and relevancy of expert testimony. These factors attempt to make certain an expert, whether basing testimony upon professional studies or personal experience, employs the same level of intellectual rigor in the courtroom that characterizes the practice of an expert in the relevant field.[43]

B. Is the Expert's Testimony Considered "Art" or "Science"?

Certainly there are experts in a vast variety of subjects, and it would be impossible to categorize them into neat little groups. There is a broad spectrum of areas where a person can claim the status of an expert. The two ends of this spectrum are usually considered as "hard" science on one side, all the way over to "soft" science on the other. Usual examples of the hard sciences include; testimony regarding the chemical make-up of tested materials, the ballistic trajectory of a bullet, and the prediction that the laws of gravity shall inevitably take over if you were to fall out of your chair. The "soft" sciences will usually encompass subjects like the interpretation of body language, gang jargon interpretations, and even psychological effects of childhood trauma. In essence, hard sciences are usually subjects that are mathematically provable within the realms of physics, chemistry, biology, and other empirical disciplines. Soft

[40] 509 U.S. 579, 593-94 (1993).
[41] *Id.*
[42] Kumho Tire Co., Ltd. V. Carmichael, 526 U.S. 137 (1999).
[43] *Id.* at 147-152.

sciences tend to lean more toward areas where logical thought or inference have proven themselves over time and are not otherwise provable by empirical means.

FRE 703 paints its definition of the sciences with broad strokes. The Court put forth good foundations to determine the eligibility of an expert in *Daubert* and *Khumo Tire Co., Ltd. V. Carmichaeal*. Hence, for the purposes of this article, and because we are not here to determine who is, or is not, qualified to be an expert, hard and soft sciences shall be considered the same. Throughout this Confrontation Clause analysis, the experts from both sciences used for examples can be considered to have fully met the standards of *Daubert* and *Khumo*.

IV. THE CHAOTIC STATE OF CURRENT JURISPRUDENCE

A. "DISCUSS"… and Other Crystalline Instructions

The use of the test instructions to "Discuss…," has always failed to provide much guidance to the test taker. The U.S. Supreme Court continued this great tradition of ambiguous statements, which provide no guidance to those who need it most, with its decision in *Crawford* . The key problem in understanding the implications of *Crawford* lie in the ambiguity of the word "testimonial." The Court's "refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo."[44] However, it is unclear if *Crawford*'s testimonial uncertainty is better than the *Ohio v. Roberts*[45] status quo.

As discussed above, the Court decided to, "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[46] Unfortunately, leaving this definition for another day has caused chaos in the courts. The following is a brief overview of how the Federal Circuit Courts of Appeals are dealing with the issue of testimonial evidence in a post-*Crawford* era.

B. Did Someone Stumble on the Solution Before Crawford?

United States v. Dukagjini[47] is a pre-*Crawford* case which dealt with the hearsay nature of data used by expert witnesses. While this case occurred one year before the *Crawford*

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[44] *Crawford*, 541 U.S. at 68 n.10 (acknowledging C.J. Rehnquist's concurring remarks).
[45] 448 U.S. 56 (1980) (providing a pre-*Crawford* Confrontation Clause interpretation).
[46] *Crawford*, 541 U.S. at 68.
[47] 326 F.3d 45 (2nd Cir. 2003).

decision, the Second Circuit reached a decision which foreshadowed a solution to the current problem of what is "testimonial."

The defendants in *Dukagjini* were convicted of a vast conspiracy to distribute heroin and cocaine. At their trial, the government produced an expert witness who testified as to the meanings of various telephone conversations between the conspirators which were recorded through legal wiretaps. The expert's testimony went beyond merely the contents of the conversations, but applied his own experience in the different slang and jargon used in the drug trade to interpret the different code words used during the conversations. Testimony by this expert offered "sweeping conclusions" and interpretations about the general meaning of conversations, but did so by relying on the expert's knowledge of the investigation and his own interviews with many DEA agent and members of the drug conspiracy.[48] His testimony went so far as to change the perception the court had of certain previously admitted drug jargon statements. Such testimony unquestionably had an impact on the trial, and the jury's verdict.

The expert testimony was allowed, even with the high degree of reliance upon hearsay. The court left it to the jury to assess the credibility of the opinion of the expert, who is presumed to "have the skill to properly evaluate the hearsay, and is, of course, available to be cross-examined."[49] By having the expert on the stand, and his methodology in the application of hearsay to his opinion, the court was satisfied the Confrontation Clause was met.

Ultimately, in this case, it was determined portions of the expert's testimony exceeded FRE 703 and the Confrontation Clause as they were merely a conduit for inadmissible hearsay instead of a "proper evaluation of hearsay" by the expert. Notwithstanding the result here, the rule set forth is a solid one. An expert should be able to testify, concerning inadmissible hearsay, so long as that testimony is filtered through the knowledge, experience, or specialized-training of the expert.

C. "Squawk"…. NO PARROTING ALLOWED

An expert must testify as to the opinions and reasonable inferences a similar expert in his field would draw from the evidence. This means when an expert gets on the stand, the court

[48] *Id.* at 50.
[49] *Id.* at 57.

must be careful not to let the expert go too far in relying on extrajudicial statements as the basis upon which they form their opinions. The key is to eliminate the incidents where an expert merely parrots the opinion of a different expert in his testimony. To allow an expert to serve as a conduit for inadmissible hearsay in this fashion violates the Confrontation clause.

For example, in *United States v. Buonsignore,*[50] the defendant was convicted for possession with intent to import heroin and importation of heroin, which resulted in a one-hundred fifty-one month sentence.[51] At his trial, a DEA agent qualified as an expert witness testified as to the value of the heroin seized. This testimony was not the result of an independent analysis by the expert witness but merely a restatement of current street values of heroin given to him by someone in Washington, D.C.

By applying a *Crawford* standard to the admissibility of the expert's testimonial evidence, the 11th Circuit ruled its admission violated the Confrontation Clause. The expert did nothing more than repeat what would have been the testimony of another expert while he was on the stand. The expert's value is derived from the application of their scientific, technical, or other specialized knowledge to the facts of the case. His testimony was not about the opinions or inferences he, in his own expert capacity, had drawn from the evidence before him and the court was correct to deem it inadmissible. The government should have produced the original expert who prepared the drug valuation figures and placed him on the stand to avoid a confrontation error. Thus, the wrong expert was on the stand.

In a later case, distinguishing itself from *Buonsignore*,[52] where the testifying expert was not offering his own opinion, the Eleventh Circuit upheld the conviction of a felon in possession of three firearms based on the testimony of an expert. This defendant in *United States v. Springer*,[53] argued that the testimony of the expert witness as a violation of the Confrontation Clause under *Crawford.* The expert supplied testimony establishing the interstate nexus requirement for the firearms charge and utilized numerous hearsay statements as the basis of his

[50] 131 F. App'x 252 (11th Cir. 2005), *cert denied,* 546 U.S. 911.
[51] *Id.* at 254.
[52] *Id.*
[53] 165 F. App'x 709 (11th Cir. 2006) (per curiam).

testimony. On appeal, the Eleventh Circuit disagreed with the defendant's characterization of the testimony.

In *Springer*, an expert for the government testified as to the meanings of the various markings, serial numbers, and other characteristics of three firearms found in defendant's possession. The opinion offered was based not only on the expert's education, experience, and training, but also through a review of reference materials. The expert reviewed books, records, and consulted with an unnamed individual at the National Firearms Tracing Center. Through a review of all these sources, as well as through his own expertise, the expert testified the firearms had moved through interstate commerce. This testimony was more than a mere repetition of the opinion of another expert; it was the opinion from the expert on the stand as to his own analysis of the facts before him. This testimony survived a *Crawford* challenge, as the defense was free to cross-examine the expert on the stand as to the basis and methodology of his opinion. However, this tactic could prove fatal to the defense. If the expert is crossed regarding the basis of his opinion, and his opinion is based on otherwise inadmissible hearsay, the expert's response will simply recite hearsay the prosecution otherwise could never enter into evidence. The defense, after all, opened the door for this testimony. The defense's cross could backfire miserably, and the prosecution would be given exactly what they hoped for.

In *Springer*, the court expressed the confusion which exists on this issue when it stated, "[a]s best as can be discerned, neither this court, the Supreme Court, nor any other circuit court has issued a published opinion regarding what otherwise inadmissible sources, testimonial or non-testimonial, an expert may rely upon when forming an opinion in light of *Crawford*."[54]

The purpose of FRE 703 is not to limit the evidence upon which the expert may rely. Rather, it is designed to limit the portions of the facts or data relied upon that can be disclosed to the jury. The Federal Rules of Evidence Advisory Committee's note provides further guidance by stating;

> "[t]he amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does

[54] *Id.* at 717.

the amendment prevent an expert from relying on information that is inadmissible for substantive purposes."[55]

A great example of the application of these doctrines occurred recently within a Texas District Court during the prosecution's case in *U.S. v. Holy Land Foundation for Relief and Development*.[56] Here, an expert was called to testify regarding how the Palestinian terrorist group, Hamas, is structured, how it operates, who the leaders are, and goals and objectives of this group. The expert was to further testify about the existence of fourteen "Zakat" committees that are an integral part of the Hamas structure. The expert had no personal knowledge of the case and was not involved in the investigation, but was intimately familiar with the workings of Hamas and this knowledge was relevant to the prosecution's case.

In its holding, the District Court crafted a rule which bars the expert from transmitting otherwise inadmissible testimonial hearsay under the guise of expert testimony, but left the door open to such testimony being presented to the jury. That door is to remain open only if the court finds such testimony to be sufficiently supported by facts and data upon which an expert would reasonably rely. The expert must first qualify as an expert under *Daubert* and *Kumho*. Further, his testimony must go beyond fact or data recitation without original thought or opinion.

D. Experts Must Add to the Testimonial Hearsay With Their Own Experience

The reason an expert is called is to explain difficult concepts to the court. This usefulness must be tempered with wisdom to insure basic concepts of fairness. It may be a difficult task to separate the opinion of an expert from the foundational knowledge he used to formulate the opinion. Several courts have looked at this issue recognizing a good place to start at determining whether the expert added his own experience, knowledge, and training to the testimony.

One example where courts look to this issue is the *Hernandez-Meijz* decision, which comes from the Defendant's Motion in Limine to exclude the testimony of an expert DEA

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[55] FED. R. EVID. 703 (Committee Notes on Rules, 2000 Amendment).
[56] This is included case not for its authoritative weight, coming from a District Court, but for the Court's excellent adoption of the *Buonsignore* and *Springer* reasoning. Further, this is a memorandum opinion and Order issued by the District Court in the Northern District of Texas. United States v. Holy Land Foundation for Relief and Development, No. 3:04-CR-240-G, 2007 WL 2059722 (N.D. Texas July 16, 2007) (mistrial was declared on October 22, 2007 on nearly all counts after a not guilty jury verdict).

witness regarding the use of drug terminology used by the defendants during the course of an investigation. The witness also sought to testify regarding drug valuations.[57] The defendant noted the expert's testimony is based partially on knowledge gained from hearsay, and as such should be inadmissible. However, the court correctly concluded FRE 703 expressly allows an expert to base his opinion on otherwise inadmissible testimony, but notes "the court must be cautious to ensure that a party is not using expert testimony as a vehicle to introduce otherwise inadmissible evidence."[58]

The court ruled that the DEA experts could not testify if such testimony was based solely on inadmissible hearsay. Testimony shown to be more than just a recitation of hearsay would, however, be admissible. The court distinguished this case from *Buonsignore*,[59] noting the expert was permitted to testify because his testimony was based on much more than a mere recitation of the statements of others. Accordingly, this holding is much closer to the holding in *Springer*[60] as both courts agreed *Buonsignore* was not factually similar, and thus did not apply.

The opinions in *Buonsignore*, *Springer*, and *Hernandez-Mejia* offer a good standard when read together to determine what expert testimony will violate the Confrontation Clause. An expert may rely upon testimonial hearsay in the formation of his opinion or inference, but may only testify when he has applied his experience, training, and knowledge those facts. An expert may review prior testimony and form an opinion, he may not, however, act merely as a conduit to provide a summary of otherwise inadmissible evidence.

This general methodology seems to also apply in the cases which would fall within soft sciences. The defendant in *United States v. Lombardozzi* was charged with various extortion counts which stem from his alleged membership in the Gambino crime family.[61] An expert was called by the prosecution to testify as to the structure of the organized crime family, and testified the defendant was a "soldier" or "made-man" in the Gambino family. This expert's opinion was based on conversations with confidential informants, as well as his own observation of the defendant. However, the ultimate opinion, as to the defendant's rank within the crime family,

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[57] No. CR 05-0469, 2007 WL 2219411 (D. N.M. Apr. 30, 2007).
[58] *Id.*
[59] United States v. Buonsignore, 131 F. App'x 252 (11th Cir. 2005).
[60] United States v. Springer, 165 F. App'x 709 (11th Cir. 2006) (per curiam).
[61] 491 F.3d 61, 65 (2nd Cir. 2007).

was based on the inadmissible hearsay statements of others, specifically the information given to him by informants.

Lombardozzi, in an application of pre-*Crawford* case law, stated *Dukagjini* "permits an expert to rely on hearsay evidence for the purposes of rendering an opinion based on his expertise."[62] An expert may not simply repeat "hearsay evidence without applying any expertise whatsoever" because it enables the government to put before the jury an "out-of-court declaration of another, not subject to cross-examination...for the truth of the matter asserted."[63] Again, the expert must apply his knowledge or experience to the out of court statements; otherwise, he is merely acting as a conduit for inadmissible hearsay.

E. Situations Where Crawford Does Not Apply

Stunningly, there are ways in which *Crawford* does not apply. The defendant in *United States v. Magallanez* was convicted of one count of conspiracy to possess with intent to distribute, and to distribute twelve-hundred grams of methamphetamine in violation of 21 U.S.C. § 846, 841(a)(1).[64] Magallanez appealed to the Tenth Circuit and claimed the admission of expert testimony, which relied upon inadmissible hearsay, was in violation of the Confrontation Clause and *Crawford*.[65] This case is one of the very first to raise the Confrontation Clause flag against expert testimony post-*Crawford*. Magallanez argued that the admission of the expert's testimony was impermissible as inadmissible hearsay. The court then stated that, "[law enforcement]'s reliance on numerous interviews and documents not introduced in court impermissibl[y] tainted the jury by indicating that the government had more evidence than they were presenting. The implication was further that such evidence proved the truth of their witnesses."[66] Notwithstanding the scope of the issue argued, the Tenth Circuit dismissed the Confrontation Clause claim because it could not find any instance where an out-of-court statement could be characterized as testimonial. The spectrum of confusion regarding the meaning of "testimonial" rears its ugly head yet again. The expert witnesses, who were investigating law enforcement

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[62] *Id.* at 72.
[63] *Id.* (quoting *Dukagjini*, 326 F.3d at 59).
[64] 408 F.3d 672, 676 (10th Cir. 2005).
[65] *Crawford* was decided twenty-six days after Magallanez was convicted. The Confrontation Clause issue was first raised in the Appellant Brief. Brief of Appellant, United States v. Magallanez, No. 04-8021 2004 WL 3552396 (July 31, 2004).
[66] *Id.* at 18.

agents, testified as to the general nature of their investigation and did not introduce any out-of-court statements from participants in the drug ring. The investigations of these agents was fueled and carried aloft by the various statements, incidents, and overt acts which they witnessed in the field. Such testimony would have constituted some form of hearsay and, absent a firmly rooted exception, were inadmissible. By limiting the extent of an expert's testimony using the rationale in *Crawford*, the court in Magallanez "avoided," or more properly stated ignored, a Confrontation Clause issue.

FRE 703 and *Crawford* are not mutually exclusive rules of law, but sometimes a court will put this idea forth. In *United States v. Diaz*, the defendants contended the expert's reliance on out-of-court statements violated their Confrontation Clause rights specifically citing *Crawford*.[67] The defendants further objected to the witnesses' use of hearsay to support the foundation of their expertise. The court stated that the expert's opinion may rely, in part, on prior interviews or, out-of-court statements, without violating the Confrontation Clause, *Crawford*, or the Federal Rules of Evidence regarding hearsay.[68] Moreover, the court found, under FRE 703, an expert may base his or her opinion at trial on inadmissible facts and data of a type "reasonably relied upon by experts in the particular field in forming opinions upon the subject."[69] The court found the expert's reliance on out-of-court statements would not impinge on the defendants' rights because the expert provided his own analysis, and not a summation of hearsay.

The *Diaz* case serves as an example of the possible application of FRE 703 without any regard for the implications of the Confrontation Clause. No discussion was given regarding the implications or scope of the expert's testimony, or to what degree the expert may rely upon inadmissible hearsay (as established in FRE 703). This, however, must be tempered with a view of the Confrontation Clause. A mere recitation of hearsay is not permitted. The expert must provide an opinion based upon his expertise, or at least show the jury how to properly draw an inference from the evidence. FRE 703 does not overrule the explicit constitutional requirements

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[67] No. CR 05-00167, 2006 WL 2699042, at *5 (N.D. CA 2006).
[68] *Id.* (citing *Magallanez*, 546 U.S. at 679).
[69] *Id.*

of *Crawford*, but when applied in concert with each other, it is possible to fulfill the requirements of both rules.

Another method of balancing FRE 703 and *Crawford* occurred in the trial of defendant in *United States v. Henry*.[70] An investigating detective gave testimony about the meaning of terms which were used by co-conspirators during the course of telephone conversations intercepted by law enforcement. The expert's testimony attempted to interpret seventy-three different code words which he heard the defendants use through hundreds of telephonic wire taps. Basing his interpretations on years of experience as a narcotics detective, he qualified as an expert in drug jargon and was admitted under FRE 703. His knowledge and skill allowed him to testify regarding the secret language of the drug trade. This specialized knowledge is what he applied to the meanings of various code words used by the defendants. It is important to note the original trial took place pre-*Crawford*. As such, the trial testimony was subject to the *Ohio v. Roberts*[71] standard. In *Henry*, the D.C. Circuit expressly excluded the FRE 703 issue from the *Crawford* analysis because *Crawford* "did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion."[72]

Ultimately when addressed by the U.S. Supreme Court, *Henry* did not rule on the Confrontation Clause issue, claiming that Henry's claim was waived for failure to raise the issue at trial or, on direct appeal.[73] However, the D.C. Circuit had read *Crawford* as being excluded from the FRE 703 analysis. Since *Crawford* did not mention expert testimony specifically, it must not have meant to include it in the confrontation analysis. Finding support in the text of FRE 703, the Court surmised that since the facts or data need not be admissible in evidence, the Confrontation Clause does not bar the admission of the opinion or inference drawn by the expert. This analysis is valid in as much as the Court failed to adequately define "testimonial." In October 1, 2007, the Court again declined to define what is, and is not, "testimonial" when it

[70] 472 F.3d 910 (D.C. Cir. 2007).
[71] 448 U.S. 56 (1980).
[72] *Henry,* 472 F.3d at 914.
[73] United States v. Henry, 128 S. Ct. 247, 248 (2007).

denied certiorari to this case.[74] Perhaps the denial of certiorari serves as the Court's affirmation FRE 703 hearsay is not subject to *Crawford*.

In July 2007, the California Supreme Court issued a very interesting decision which strikes a good balance between FRE 703 and *Crawford*. In *People v. Geier*, the testimony of a DNA expert was admissible, while the DNA report used by the expert was not.[75] The court found a DNA report prepared by an outside lab was clearly hearsay, thus inadmissible. Geier, nonetheless, was convicted of two counts of murder and one count of rape. The DNA evidence was collected from vaginal swabs and used to connect Geier to the crime. The state offered a DNA expert to testify his analysis or interpretation of the DNA report matched the defendant's DNA to the DNA found in the victim. Geier claimed the introduction of this report, without the ability to cross-examine the lab technician who processed the DNA samples, violated his Confrontation Clause rights. The California Supreme Court disagreed. After an extremely lengthy discussion of various post-*Crawford* decisions, the court ruled the DNA evidence offered by the expert was his own opinion. Further, the court found, although expert based his opinion on out-of-court documents, his testimony was his own and not a mere summation of the testimony of others. Citing *Crawford*, the court explained that, "the constitutional test reflects an 'especially acute concern with a specific type of out-of-court statement.'"[76] "Of course, in any *Crawford* analysis, the first question for the trial court is whether proffered hearsay would fall under a recognized state law hearsay exception. If it does not, the matter is resolved, and no further *Crawford* analysis is required."[77] The court finally determined the DNA report was itself a business record and thus, sidestepped the issue of Geier's right to confront the witness against him.

The DNA expert was not the ultimate witness against the defendant in this case. The DNA report stating the defendant was the perpetrator of the crime, being offered for the truth of his guilt, is really the witness against the defendant. While the expert can provide his opinion and interpret the findings of the report to better assist the jury, the confrontation error exists in Greier because the preparer of this report was not subject to cross-examination. The analyst who

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[74] *Id.*
[75] 161 P.3d 104 (Cal. 2007).
[76] *Id.* at 133.
[77] People v. Cage, 155 P.3d 205, 210 n.5 (Cal. 2007).

performed the test should have been called to the stand as he was the true witness against the defendant. This is a stellar example of the "principal evil" which the Sixth Amendment seeks to avoid. Geier, like Sir Walter Raleigh before him, was convicted by the admission of an out-of-court statement, offered to prove the truth of his guilt, without the opportunity to confront the witness. To further compound this error, an expert was allowed to take the stand and state his learned opinion, bringing to bear his impressive weight to corroborate the testimony of the DNA report. Geier may have been guilty of the crimes charged, but the admission of this report, and the expert's reliance upon it as the sole factor in his testimony, should not have been allowed because of its clear violation of the Confrontation Clause.[78]

V. PLAIN ERROR IS THE PROPER STANDARD OF REVIEW

"It is well established that violations of the Confrontation Clause, if preserved for appellate review, are subject to harmless error review, however, and *Crawford* does not suggest otherwise."[79] "[A] valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt."[80] Given the significance of the Confrontation Clause a review, under the easily met standard of "harmless error," is unreasonable. An expert's testimony will, undoubtedly, sway a jury. Accordingly, such admission should never be deemed "harmless error." To find the admission of such evidence harmless, the court must be able to conclude that the evidence was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."[81]

Plain error[82] seems to be the more appropriate standard to use in this situation. The testimony of an expert has a pronounced effect upon the weight given to all evidence in a trial. Far from the simple balancing of evidence performed in the deliberation room, an expert's opinion is given extra weight of authority. It is impossible to determine the effect of such

[78] As of the time of this writing, no petition for Habeas Corpus relief has been filed in a U.S. District Court. *Geier,* 171 P.3d 104.
[79] United States v. McClain, 377 F.3d 219, 222 (2nd Cir. 2004); *see also* Coy v. Iowa, 487 U.S. 1012, 1021 (1988), (holding denial of face-to-face confrontation is subject to harmless error review).
[80] Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).
[81] Yates v. Evatt, 500 U.S. 391, 403 (1991).
[82] FED. R. CRIM. P. 52(b).

testimony on jurors, as no one is privy to the deliberative process within the jury room. While the rules have yet to be clearly delineated, admitting expert testimony which is merely a repetition of hearsay is a violation of the Confrontation Clause. Therefore, if such prohibited testimony is admitted, it may be deemed plain or obvious error. Defendants hold no rights as closely as the right of confrontation. Accordingly, a violation of this right is an affront to the Constitution itself, and not merely the defendant.

The right of confrontation has been repeatedly found to be a fundamental right by the Supreme Court. The Sixth Amendment includes rights which are "now considered fundamental to the fair administration of American Justice."[83] The right of cross-examination is an "essential and fundamental requirement for the kind of fair trail which is this country's constitutional goal."[84] The admission of inadmissible hearsay evidence, through the mouthpiece of an expert, is a violation of the Confrontation Clause and unfairly deprives the defendant of an opportunity to have a fair trial. By depriving a defendant the ability to cross-examine a witness against him, his opportunity to present a complete defense is also denied.[85] Such a violation must be reviewed under the plain error doctrine as it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[86]

VI. SOLVING THE CONFUSION.

The confusion over what is "testimonial" continues to plague the courts. This confusion will continue until the U.S. Supreme Court provides a workable definition of "testimonial." While a comprehensive definition of "testimonial" goes beyond the scope of our discussion here, it is possible to craft a set of general post-*Crawford* guidelines. The expert must testify to his own opinions and inferences drawn from his own synthesis of the underlying data. While this will inevitably include inadmissible hearsay, the addition of the expert's knowledge and experience serves as a filter. The defense attorney must request a *Daubert* hearing for every expert witness offered by the government even if solely for the opportunity to cross-examine the

[83] Faretta v. California, 422 U.S. 806, 818 (1975).
[84] Delaware v. Van Arsdall, 475 U.S. 673, 687 (1986) (*quoting* Pointer v. Texas, 380 U.S. 400, 405 (1965)).
[85] California v. Trombetta, 467 U.S. 479, 485 (1984) (stating ("under the Due process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.").
[86] United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

expert. Pre-trial motions for discovery regarding the testimony of the prosecution's witnesses should also be propounded. Specifically, the courts should require that a written summary of the witness's opinions, the bases and reasons for those opinions, and the witnesses' qualifications must be provided upon request by the defense. As such, it is critically important to scrutinize the contents of this written summary to determine if the expert is adding his own experience to the opinion, or if he is merely reciting hearsay or the opinion of a different expert. The trial court, and defense counsel must determine who the "true" witness is - the expert on the stand or his sources. The Sixth Amendment requires the witness who provided the testimony be on the stand and subject to cross-examination under the standards put forth in *Crawford.* If these requirements are not met, the testimony is inadmissible.

Crawford may have muddied the waters of what is, and is not, "testimonial" evidence. To fit within the current jurisprudence, an expert may rely on inadmissible hearsay in forming his opinion. However, his testimony may not simply be a recitation of hearsay without any original thoughts or analysis.