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# Confronting Scientific Reports Under Crawford v. Washington

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# Confronting Scientific Reports Under *Crawford v. Washington*

Bennett L. Gershman\*

## I.

In *People v. Rawlins* and *People v. Meekins*,<sup>1</sup> the New York Court of Appeals addressed, for the first time, the admissibility of scientific reports prepared by non-testifying forensic experts for use by the prosecution in a criminal trial under the Sixth Amendment's Confrontation Clause.<sup>2</sup> *Rawlins* involved a fingerprint comparison report prepared by a police forensic expert,<sup>3</sup> and *Meekins* involved a DNA profile prepared by a technician in a private laboratory.<sup>4</sup> The constitutional issue in both cases was whether these reports were "testimonial" statements within the meaning of the Confrontation Clause, as interpreted by the Supreme Court in *Crawford v. Washington*,<sup>5</sup> and should not have been admitted into evidence unless the defendants had an opportunity to cross-examine the experts who prepared the reports.<sup>6</sup>

### A. *People v. Rawlins*

Defendant Michael Rawlins was convicted of six counts of third-degree burglary relating to six commercial establishments in Manhattan.<sup>7</sup> Latent fingerprints were found at the locations

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1. 884 N.E.2d 1019 (N.Y. 2008). *Rawlins* and *Meekins* were consolidated on appeal before the New York Court of Appeals. *See id.* at 1022.

2. *Id.* The Sixth Amendment of the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI. The New York State Constitution provides the same protection. *See* N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him or her.").

3. 884 N.E.2d at 1023.

4. *Id.* at 1024.

5. 541 U.S. 36 (2004).

6. *Rawlins*, 884 N.E.2d at 1022.

7. *Rawlins*, 884 N.E.2d at 1022.

and lifted by forensic investigators who compared the prints with the defendant's prints, determined that the defendant's prints matched the latent prints, and prepared fingerprint comparison reports for each burglary that identified the defendant as the perpetrator.<sup>8</sup> Two of these comparison reports were prepared by a police fingerprint expert, Detective Eric Laschke, who testified at Rawlins's trial, but two other reports were prepared by a police fingerprint expert, Detective Artis Beatty, who did not testify at Rawlins's trial.<sup>9</sup> However, another fingerprint examiner, Detective Arthur Connolly, testified that he independently compared all of the latent prints with the defendant's fingerprints and determined a match in every case with "one hundred percent certainty."<sup>10</sup>

Rawlins did not challenge the admissibility of the reports prepared by Officer Laschke as a violation of his confrontation rights.<sup>11</sup> He did, however, challenge the admissibility of the reports prepared by Officer Beatty, claiming that these reports were "testimonial" statements against him, as defined by the Supreme Court in *Crawford*, and that his inability to cross-examine the expert who prepared the reports violated his Sixth Amendment right of confrontation.<sup>12</sup> The trial court rejected Rawlins's claim and admitted all four reports into evidence as business records.<sup>13</sup> The Appellate Division affirmed the conviction,<sup>14</sup> finding that although Detective Beatty did not testify, his reports qualified as non-testimonial business records.<sup>15</sup> The court also held that even if Beatty's reports were testimonial under *Crawford*, the error was harmless because Detective Connolly, who was subject to cross-examination, made his own in-

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8. *Id.* at 1022-23.

9. *Id.* at 1023.

10. *Id.*

11. *Id.*

12. *Id.* Rawlins also challenged the admission of the Beatty reports "on the ground that the People failed to establish the contemporaneity requirement of the business records exception" to the hearsay rule. *Id.*

13. *Id.* See also *People v. Guidice*, 634 N.E.2d 951, 953 (N.Y. 1994) (holding that law enforcement agencies are "businesses" for purposes of the business records exception to the hearsay rule).

14. *People v. Rawlins*, 829 N.Y.S.2d 79, 80 (App. Div. 2007).

15. *Id.* at 81.

dependent comparison of the same fingerprints tested by Beatty and reached the same conclusion.<sup>16</sup>

#### B. People v. Meekins

Defendant Dwain Meekins was convicted, after a jury trial, of sodomy, sexual abuse, and robbery.<sup>17</sup> At his trial, the prosecution introduced a DNA testing report, prepared by an independent private laboratory, on samples gathered from the complainant's rape kit.<sup>18</sup> The report was introduced through the expert testimony of Judith Floyd, an employee of the private laboratory, and Kyra Keblish, an employee of the New York Office of the Chief Medical Examiner.<sup>19</sup> Neither witness personally performed the actual DNA tests.<sup>20</sup>

Floyd explained in detail the process her laboratory used in performing the DNA tests.<sup>21</sup> She testified that she supervised the technicians who performed the tests, ensured that the technicians followed established protocols, and reviewed the final results.<sup>22</sup> She stated that the lab report did not make any comparisons; it merely generated raw data indicating that a DNA profile from semen in the rape kit originated from a specific male donor.<sup>23</sup> The actual comparison between the DNA from the complainant's rape kit and Meekins's DNA was made by Keblish.<sup>24</sup> Keblish testified that her laboratory analyzed the raw data, distinguished the DNA profile of the complainant from the donor's DNA profile, and after being notified by the Division of Criminal Justice Services that the semen donor bore the same DNA profile as Meekins, concluded that the DNA profile from the rape kit matched the DNA of Meekins.<sup>25</sup> Keblish

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16. *Id.*

17. *Rawlins*, 884 N.E.2d at 1024.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1024 n.5. Floyd explained that a forensic examiner removes DNA from the sample in question and then subjects the sample to an amplification procedure called polymerase chain reaction (PCR) to evaluate and obtain a genetic profile. *Id.* According to Floyd, the PCR process is "widely used across the country in every laboratory." *Id.*

22. *Id.* at 1024.

23. *Id.*

24. *Id.* at 1025.

25. *Id.*

opined that the probability that the DNA originated from a person other than Meekins was one in one trillion.<sup>26</sup>

Over the defendant's objection, the trial court admitted both the lab reports from the private laboratory and the Medical Examiner's Office as business records, finding that both were prepared and maintained by those entities in the regular course of business.<sup>27</sup> The Appellate Division affirmed the conviction,<sup>28</sup> finding that Keblish's testimony was sufficient to lay the foundation for the introduction of the private laboratory's DNA report as a business record and that the admission of that report did not violate the defendant's confrontation rights because business records are "by their nature . . . not testimonial."<sup>29</sup>

### C. *Court of Appeals' Holding*

In *Rawlins*, the Court of Appeals granted leave to resolve this issue of first impression: whether a latent fingerprint comparison report and a DNA report prepared by two non-testifying experts are "testimonial" statements pursuant to *Crawford*.<sup>30</sup> First, the court analyzed *Crawford* to ascertain the Supreme Court's meaning of the term "testimonial" under the Sixth Amendment's Confrontation Clause.<sup>31</sup> Next, the court examined whether "testimonial" statements, as defined by *Crawford*, include not only statements of live witnesses, but also statements contained in business records.<sup>32</sup> The court determined that some business records might be viewed as "testimonial" statements under *Crawford*, particularly scientific reports prepared by non-testifying experts for later use at a criminal trial, and provided an analytical framework to make that determination.<sup>33</sup> Finally, the court applied this framework to the latent fingerprint comparison report in *Rawlins* and the DNA

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26. *Id.*

27. *Id.*

28. *People v. Meekins*, 828 N.Y.S.2d 83 (App. Div. 2006).

29. *Id.* at 85 (alteration in original) (quoting *Crawford v. Washington*, 541 U.S. 36, 56 (2004)).

30. 884 N.E.2d at 1022.

31. *See infra* Part II.

32. *See infra* Part III.

33. *See infra* Part IV.

report in *Meekins* and held that the fingerprint report was testimonial and that the DNA report was not.<sup>34</sup>

## II. “Testimonial” Statements Under *Crawford*

The Court of Appeals initially examined the Supreme Court’s decision in *Crawford* to discern its understanding of the Confrontation Clause as it applies to out-of-court statements offered by the prosecution against an accused.<sup>35</sup> Prior to *Crawford*, the Supreme Court, under the test articulated in *Ohio v. Roberts*,<sup>36</sup> reviewed the admissibility of out-of-court statements by determining whether the statements possessed “adequate ‘indicia of reliability’”<sup>37</sup> or fell within “a firmly rooted hearsay exception.”<sup>38</sup> In *Crawford*, the Court emphatically rejected this approach as unfaithful to the original meaning of the Confrontation Clause.<sup>39</sup> The Court explained that “the principal evil at which the *Confrontation Clause* was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>40</sup>

In *Crawford*, the Court provided several examples of *ex parte* statements: affidavits, depositions, custodial examinations, confessions, prior testimony, and other extrajudicial declarations “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.”<sup>41</sup> The “common nucleus” to these several formulations,<sup>42</sup> according to the Court, is the use of out-of-court statements that “bear testimony” against an accused.<sup>43</sup> The Court stated that testimony “is typically ‘[a] solemn declaration or affirmation made for the

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34. See *infra* Part IV.A-B.

35. *Rawlins*, 884 N.E.2d at 1025-29.

36. 448 U.S. 56 (1980).

37. *Id.* at 66.

38. *Id.*

39. See *Crawford v. Washington*, 541 U.S. 36, 60, 68-69 (2004). The Supreme Court stated that constitutional concerns do “not evaporate when testimony happens to fall within some broad, modern hearsay exception.” *Id.* at 56 n.7.

40. *Id.* at 50.

41. *Id.* at 51-52 (quoting Brief for Nat’l Ass’n of Criminal Def. Lawyers et al. as Amici Curiae in Support of Petitioners, at 3, *Crawford*, 541 U.S. 36 (No. 02-9410)).

42. *Id.* at 52.

43. *Id.* at 51.

purpose of establishing or proving some fact.”<sup>44</sup> And if a statement is testimonial, the Confrontation Clause bars the use by the prosecution of such statements “unless [the witness] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”<sup>45</sup>

As the Court of Appeals observed, the Supreme Court did not define the term “testimonial,” but it offered several clues as to its meaning.<sup>46</sup> The Court of Appeals noted *Crawford*'s concern with the “inquisitorial practices and their modern analogs”<sup>47</sup> exemplified by a witness's prior testimony and police interrogations. Specifically, the *Crawford* Court stated that “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.”<sup>48</sup> Thus, the Court of Appeals concluded that “‘when the government is involved in the statements’ production, and when the statements describe past events,’ they ‘implicate the core concerns of the old *ex parte* affidavit practice.’”<sup>49</sup> The court also interpreted *Crawford* as finding that when determining whether a statement is testimonial, the formality of an out-of-court statement may be a relevant consideration.<sup>50</sup> For example, the *Crawford* Court stated that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>51</sup>

In *Davis v. Washington*,<sup>52</sup> the Supreme Court amplified the meaning of “testimonial” in the context of police interrogations

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44. *Id.* (alteration in original) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

45. *Id.* at 54.

46. *People v. Rawlins*, 884 N.E.2d 1019, 1026 (N.Y. 2008).

47. *Id.* (quoting 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 252, at 158 (6th ed. 2006)). *See also Crawford*, 541 U.S. at 68 (“These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”).

48. 541 U.S. at 56 n.7. *See also Rawlins*, 884 N.E.2d at 1026 (quoting same).

49. *Rawlins*, 884 N.E.2d at 1026 (quoting *Lilly v. Virginia*, 527 U.S. 116, 137 (1999)).

50. *Id.* (citing *Crawford*, 541 U.S. at 51-52).

51. 541 U.S. at 51. *See also Rawlins*, 884 N.E.2d at 1026 (quoting same). In *Crawford*, the police interrogated and recorded statements made by the defendant's wife while she was in police custody, after having been given *Miranda* warnings as a possible suspect herself. 541 U.S. at 38.

52. 547 U.S. 813 (2006).

of witnesses under differing circumstances.<sup>53</sup> *Davis* involved statements made during a 911 call by a victim of domestic violence who, in response to questions from the 911 police operator, described the assault as it was happening and identified her assailant.<sup>54</sup> The victim did not appear at trial, and her statements to the police were admitted to prove the assault and the identity of the perpetrator.<sup>55</sup> The Court held that these statements were not testimonial because “the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency. . . . [and not] to establish or prove past events potentially relevant to later criminal prosecution.”<sup>56</sup> As the Court of Appeals noted, *Davis* suggests that even though an out-of-court statement is generated by police interrogation and is accusatory, it is critical to determine whether the purpose of the statement is accusatory (i.e., accuses a perpetrator of a crime, which is “precisely *what a witness does* on direct examination,” or serves some other purpose, such as dealing with an ongoing emergency).<sup>57</sup>

The companion case to *Davis*, *Hammon v. Indiana*, involved a statement from the defendant’s wife taken by the police who had come to the couple’s home after a report of a domestic disturbance.<sup>58</sup> Finding the situation calm when they arrived, the police escorted the wife to a separate room, kept her husband away, and obtained a detailed account of what her husband had done.<sup>59</sup> The wife did not appear at her husband’s trial, and her statements were introduced through a police witness to prove the assault and the identity of her assailant.<sup>60</sup> In contrast to the statements in *Davis*, the Court held that the

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53. *See id.* at 817.

54. *Id.*

55. *Id.* at 818-19.

56. *Id.* at 822.

57. *People v. Rawlins*, 884 N.E.2d 1019, 1027 (N.Y. 2008) (quoting *Davis*, 547 U.S. at 830). After *Davis*, the New York Court of Appeals has considered this issue in two cases. *See People v. Nieves-Andino*, 872 N.E.2d 1188, 1191 (N.Y. 2007) (holding that statements elicited from a victim are not testimonial where police officers reasonably assumed that there was an ongoing emergency); *People v. Bradley*, 862 N.E.2d 79, 81 (N.Y. 2006) (same).

58. 547 U.S. at 819-20. *Davis* and *Hammon* were consolidated on appeal to the Supreme Court. *See id.* at 817.

59. *Id.* at 819-20.

60. *Id.* at 820.



wife's statements to the police were testimonial and that the admission of these statements at trial violated the defendant's confrontation rights.<sup>61</sup> According to the Court, the interrogation of the wife took place well after the events described were over and was part of an investigation into potentially past criminal conduct by her husband.<sup>62</sup> In other words, there was no ongoing emergency, as was the case in *Davis*.<sup>63</sup> The Court reasoned that "[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial."<sup>64</sup>

### III. Applying *Crawford* to Business Records

In *Crawford*, the Court emphasized that not all hearsay evidence is necessarily "testimonial,"<sup>65</sup> and *Davis*, by exempting the declarant's hearsay statements in response to police interrogation to deal with an ongoing emergency, reinforced that proposition.<sup>66</sup> As the *Crawford* Court observed, hearsay evidence that bears "little resemblance to the civil-law abuses" does not implicate Sixth Amendment concerns.<sup>67</sup> Indeed, "[m]ost of the hearsay exceptions [at common law] covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."<sup>68</sup> Moreover, a business record is not typically created for investigative or prosecutorial purposes, but rather encompasses the "routine

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61. *Id.* at 834.

62. *Id.* at 830.

63. *See id.* at 828.

64. *Id.* at 830.

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

66. *See Davis*, 547 U.S. at 828.

67. *See Crawford*, 541 U.S. at 51. On this point, the Court further stated that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.* at 68.

68. *Id.* at 56. The Court also suggested that dying declarations may be a *sui generis* example of testimonial hearsay that was admissible at common law. *See id.* at 56 n.6 ("The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. . . . We need not decide in this case whether the *Sixth Amendment* incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*." (citations omitted)).

reflections of day-to-day operations” of an enterprise and is intended to be a truthful and accurate recounting of these routine operations to enable the enterprise to conduct itself properly and efficiently.<sup>69</sup> *Crawford*’s apparent exclusion of business records from the “testimonial” category of hearsay was dicta,<sup>70</sup> however, and lower courts have reached different conclusions as to whether official reports that meet the definition of a business record are exempt from the Confrontation Clause, even though the official who prepared the report did not testify and therefore could not be cross-examined.<sup>71</sup>

As the *Rawlins* court observed, several lower courts, relying on this dicta in *Crawford*, have established a bright line rule that business records “by their nature [are] not testimonial.”<sup>72</sup>

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69. *People v. Rawlins*, 884 N.E.2d 1019, 1028 (N.Y. 2008).

70. *See* *U.S. v. Feliz*, 467 F.3d 227, 233 (2d Cir. 2006), *cert. denied*, 549 U.S. 1238 (2007) (“[W]e acknowledge that several courts have rejected arguments similar to the Government’s, characterizing *Crawford*’s reference to business records as dicta . . .” (citing *State v. Crager*, 844 N.E.2d 390, 398-99 (Ohio Ct. App. 2005); *People v. Mitchell*, 32 Cal. Rptr. 3d 613, 621 (Ct. App. 2005))).

71. *See* cases cited *infra* note 72 (noting cases holding that business records are not testimonial). In contrast, courts have found that evidence classifiable as business records may, in fact, be “testimonial.” *See, e.g.*, *Shiver v. State*, 900 So. 2d 615, 618 (Fla. Dist. Ct. App. 2005) (holding that an affidavit confirming a breathalyzer’s maintenance, prepared by the arresting officer who did not perform said maintenance, was testimonial evidence); *People v. Lonsby*, 707 N.W.2d 610, 618 (Mich. Ct. App. 2005) (finding testimony as to the substance and conclusion of a lab report testimonial hearsay); *State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006) (“The report conforms to the types of statements about which the Court in *Crawford* expressed concern—affidavits and similar documents admitted in lieu of present testimony at trial.”); *State v. Renshaw*, 915 A.2d 1081, 1088 (N.J. Sup. Ct. App. Div. 2007) (holding that a report detailing the procedures followed in drawing the defendant’s blood was testimonial). *Crawford*’s apparent exemption of business records—and possibly official records—from the category of testimonial hearsay was specifically cited with approval by Chief Justice Rehnquist, who observed: “To its credit, the Court’s analysis of ‘testimony’ excludes at least some hearsay exceptions, such as business records and official records.” *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).

72. *Rawlins*, 884 N.E.2d at 1028 (quoting *Crawford*, 541 U.S. at 56). *See, e.g.*, *Feliz*, 467 F.3d at 233-34 (“[Business records] cannot be testimonial because [they are] fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristic of testimonial evidence.”); *People v. Grogan*, 816 N.Y.S.2d 93, 95 (App. Div.), *appeal denied*, 854 N.E.2d 1283 (N.Y. 2006) (holding that DNA reports are business records that are “by their nature . . . not testimonial”); *People v. Durio*, 794 N.Y.S.2d 863, 867 (Sup. Ct. 2005) (“Under *Crawford* business records are specifically exempted from challenge because they are outside the ‘core testimonial statements that the Confrontation Clause plainly meant to exclude.”); *State v. Forte*, 629 S.E.2d 137, 143 (N.C.), *cert. denied*, 549 U.S. 1021

According to this approach, a business record is not a testimonial statement because the admission of such evidence does not implicate the kinds of ex parte abuses at which, under *Crawford*, the Confrontation Clause was directed.<sup>73</sup> Moreover, business records do not resemble the examples of testimonial evidence the *Crawford* Court identified, such as affidavits, custodial interrogations, depositions, prior testimony, and confessions.<sup>74</sup> Indeed, under the traditional hearsay exception for business records, a document must have been created and retained in the regular course of a business activity and must not have been created in anticipation of litigation, as the examples of ex parte statements in *Crawford* surely were.<sup>75</sup>

In *Rawlins*, the Court of Appeals rejected the mechanical, bright line approach of those courts that have interpreted *Crawford* as automatically classifying business records as non-testimonial.<sup>76</sup> The court found it plausible that some business records are created, to use one of *Crawford*'s formulations of "testimonial" statements, "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."<sup>77</sup> Notwithstanding the inherent reliability of business records and the fact that such records encompass a "firmly rooted" hearsay exception, the Court of Appeals pointed out that under *Crawford*, these considerations are no longer relevant; "the real inquiry concerns whether a statement is 'testimonial' as that term is now understood after *Crawford* and *Davis*."<sup>78</sup> The Court of Appeals observed that constitutional concerns do "not evaporate

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(2006) ("The distinction between business records and testimonial evidence is readily seen. Among other attributes, business records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse."); *State v. Norman*, 125 P.3d 15 (Or. Ct. App. 2005), *appeal denied*, 132 P.3d 28 (Or. 2006) ("[T]he certifications of the accuracy of an Intoxilyzer machine in Oregon are more akin to hearsay statements that were not considered testimonial in nature at common law, such as public or business records.").

73. See *Feliz*, 467 F.3d at 234; *People v. Geier*, 161 P.3d 104, 136 (Cal. 2007).

74. See, e.g., *Feliz*, 467 F.3d at 232-34.

75. See *id.* at 234.

76. *Rawlins*, 884 N.E.2d at 1028. ("[A] bright line rule could run afoul of either our Federal or State Constitutions, and most especially in certain types of police business records.").

77. *Id.* at 1026 (emphasis omitted) (quoting *Crawford*, 541 U.S. at 51-52).

78. *Id.* at 1028.

when testimony happens to fall within some broad, modern hearsay exception.”<sup>79</sup> The critical inquiry for a court is to evaluate case-by-case, and under a “multifaceted prism that properly reflects the ‘core’ evil the Confrontation Clause was designed to prevent . . . [,] whether a statement is properly viewed as a surrogate for accusatory in-court testimony.”<sup>80</sup>

The Court of Appeals also rejected a bright line approach that would mechanically denominate as “testimonial” any record that was prepared by a person who might reasonably expect that such a record would be available at trial.<sup>81</sup> For example, a forensic expert who analyzes a blood sample, identifies a substance as cocaine, performs a ballistic test on a bullet, analyzes the results of a breathalyzer test, or performs an autopsy might reasonably expect that the ensuing report would be available for use at a subsequent criminal trial.<sup>82</sup> However, as *Davis* confirms, that expectation is merely one factor in the analysis of whether a statement is testimonial.<sup>83</sup> The *Rawlins* court noted that the victim in *Davis* could reasonably have expected that her statements to the police would be available as evidence against her attacker at trial.<sup>84</sup> However, as the court stated, the critical inquiry should focus not merely on the declarant’s reasonable expectations, but rather on the circumstances under which the statement was made and “must account for various indicia of testimoniality beyond the declarant’s reasonable expectations.”<sup>85</sup>

#### IV. Applying *Crawford* to Records of Scientific Tests

Finally, the Court of Appeals addressed the critical inquiry in *Rawlins* and *Meekins*: assuming that records of scientific

79. *Id.* (quoting *Crawford*, 541 U.S. at 56 n.7).

80. *Id.* at 1029.

81. *Id.* (“[W]e decline to adopt the approach by other courts to hinge our determination on the expectation that a statement will be available at trial . . .”). *See also id.* (“Following *Davis*, it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially.” (quoting *State v. O’Maley*, 932 A.2d 1, 10 (N.H. 2007))).

82. *See id.* at 1030-31.

83. *See id.* at 1029 (citing *Davis v. Washington*, 547 U.S. 813, 826-29 (2006)).

84. *See id.* (“[S]he could well have expected her statements to be used against defendant later at trial.” (citing *Davis*, 547 U.S. 813)).

85. *Id.*

tests may constitute “testimonial” statements under *Crawford*, are the fingerprint comparison report in *Rawlins* and the DNA laboratory report in *Meekins* “testimonial” statements within the meaning of *Crawford*?<sup>86</sup> In order to answer this question, the court explained, it must consider various factors, not all of which are equally important in every case.<sup>87</sup> While “facts and context are essential,”<sup>88</sup> two other factors “play an especially important role in this determination: first, whether the statement was prepared in a manner resembling ex parte examination and second, whether the statement accuses defendant of criminal wrongdoing.”<sup>89</sup> The purpose of making or generating the statement, and the declarant’s motive for doing so, inform these considerations.<sup>90</sup> The court applied this framework to the fingerprint and DNA reports, concluding that the former was testimonial and that the latter was not.<sup>91</sup>

#### A. *Rawlins Fingerprint Report*

The Court of Appeals found that the fingerprint reports prepared by Beatty were “clearly testimonial,”<sup>92</sup> first, because Beatty, a police detective, prepared his reports exclusively for the prosecutorial purpose of “apprehend[ing] a perpetrator,”<sup>93</sup> and, second, because the reports were “inherently accusatory” in that they established the perpetrator’s identity.<sup>94</sup> Moreover, Beatty’s gathering of evidence of a past crime—the latent prints found at the crime scene—and comparing that evidence with known prints was done for the exclusive purpose of solving a crime.<sup>95</sup> According to the court, this type of evidence “fit the classic definition of ‘a weaker substitute for live testimony’” at

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86. *See id.* at 1022, 1033, 1044.

87. *Id.* at 1031-32. The court cited three cases as containing “instructive” insights and reasoning. *Id.* at 1030-32 (citing *People v. Geier*, 161 P.3d 104 (Cal. 2007); *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005); *State v. Crager*, 879 N.E.2d 745 (Ohio 2007)).

88. *Id.* at 1033.

89. *Id.*

90. *Id.*

91. *Id.* at 1033-36.

92. *Id.* at 1033.

93. *Id.*

94. *Id.*

95. *Id.*

trial.<sup>96</sup> Through his reports, Beatty effectively “testified” that the defendant was the same person who committed the burglaries.<sup>97</sup> Had Beatty witnessed the commission of the crime, the court noted, “he would have testified in like fashion.”<sup>98</sup> Moreover, Beatty’s fingerprint comparison methodology—“an admittedly inexact science”<sup>99</sup>—and his rendering of a plainly “controvertible opinion”<sup>100</sup> were admitted into evidence without the defendant being able to confront Beatty’s accusatory conclusions through cross-examination.<sup>101</sup>

#### B. Meekins *DNA Test*

In contrast to the *Rawlins* fingerprint report, the Court of Appeals concluded that the private laboratory’s DNA report was not a testimonial record.<sup>102</sup> To be sure, as the court stated, the laboratory report arguably could be considered testimonial under one of the *Crawford* formulations of “testimonial” (i.e., when a declarant reasonably expects that the results of the testing could potentially be used to prosecute the individual ultimately identified).<sup>103</sup> However, the fact that the lab technicians knew that their tests might be used in a subsequent criminal prosecution of someone was “of no moment.”<sup>104</sup> The court reasoned that “[n]either the prosecution nor law enforcement could have influenced the outcome; the government’s involvement is inconsequential.”<sup>105</sup>

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96. *Id.* at 1033 (quoting *Davis v. Washington*, 547 U.S. 813, 828 (2006)).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.* at 1023. The court, nevertheless, found the error in admitting the Beatty reports to be harmless. *Id.* at 1034. Detective Connolly, an expert who did testify, reached the same conclusion as Beatty after comparing the latent prints with Rawlins’s prints, and therefore Beatty’s reports were “cumulative.” *Id.* The court rejected the defendant’s argument that he needed to confront Beatty directly because different experts may disagree as to number and quality of points of identity necessary to make a fingerprint comparison, finding that “where the jury heard defendant’s questioning of Connolly and Laschke, we are satisfied beyond a reasonable doubt that Beatty’s improperly admitted reports did not influence the outcome.” *Id.*

102. *Id.* at 1034.

103. *Id.*

104. *Id.* at 1035.

105. *Id.*

Also, in marked contrast to the fingerprint reports, the DNA records prepared by the lab technicians were not accusatory since no technician performed any forensic testing that could remotely be described as “bear[ing] witness.”<sup>106</sup> The lab report contained only “raw data” in the form of a DNA profile of an unknown male obtained from semen in a rape kit.<sup>107</sup> In contrast with the fingerprint report, this “graphical” information was neutral rather than accusatory.<sup>108</sup> The DNA report “standing alone, shed no light on the guilt of the accused in the absence of an expert’s opinion that the results genetically match a known sample.”<sup>109</sup> The data contained in the lab report, according to the court, was “not the kind of ex parte testimony the Confrontation Clause was designed to protect against.”<sup>110</sup>

Additionally, unlike the fingerprint report, the DNA testing procedures employed by the lab technicians involved neither discretion nor opinion, and they did not “concern the exercise of fallible human judgment over questions of cause and effect.”<sup>111</sup> The technicians performed well-recognized, objective scientific tests and contemporaneously recorded the procedures employed and the results obtained.<sup>112</sup> Reviewers could verify their work, as the supervising witness confirmed in her testimony about the laboratory’s protocols and procedures.<sup>113</sup> Further, even though the lab technicians were aware that they were performing work for law enforcement, the government’s involvement, if any, could not have influenced the outcome.<sup>114</sup> And to the extent that errors could have been made during the testing process, those errors, according to the court, “are not the product of ‘testimony’ as we understand the term.”<sup>115</sup> It was left to the testifying witnesses to draw inferences from this raw data and make comparisons that directly linked the defendant to the crime.<sup>116</sup>

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106. *Id.* at 1032.

107. *Id.* at 1034.

108. *Id.*

109. *Id.* at 1035.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

## V. Conclusion

The extent to which scientific reports are “testimonial” statements within the meaning of *Crawford* has been addressed by several federal and state courts in the context of various scientific reports, such as DNA, blood, fingerprint, breathalyzer, autopsy, drugs, and other forensic tests.<sup>117</sup> In *People v. Rawlins* and *People v. Meekins*, the New York Court of Appeals examined the issue in the context of fingerprint comparison reports and DNA tests.<sup>118</sup> Noting the absence of any consensus from the federal and state courts and rejecting the bright-line approach adopted by some courts, the Court of Appeals formulated a multifaceted framework to analyze whether scientific reports are “testimonial” statements under *Crawford*.<sup>119</sup>

In making this determination, according to the court, the facts and context of each case are critical, and no one factor is necessarily dispositive.<sup>120</sup> The extent to which a scientific report resembles ex parte testimony and “bears witness” is a starting point.<sup>121</sup> As the Supreme Court observed in *Davis*, determining whether a statement is “testimonial” necessitates an inquiry into the purpose of the statement.<sup>122</sup> A report is more likely to be deemed “testimonial” if the purpose of the report is accusatory, as the fingerprint report in *Rawlins* surely was.<sup>123</sup> A report is less likely to be deemed “testimonial” if the purpose of the report is not to make an identification of any particular suspect but merely to analyze neutral data objectively, as did the lab technicians in conducting DNA tests in *Meekins*.<sup>124</sup> Moreover, the extent to which a report contains an expert’s subjective judgments and opinions is also an important consideration in suggesting the need for confrontation and cross-examination in order to expose any fallible and defective conclusions the expert may have made.<sup>125</sup> Thus, the expert’s fingerprint comparisons in *Rawlins* involved subjective opinions and

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117. *See id.* at 1033. *See also* cases cited *supra* notes 71 and 72.

118. *See Rawlins*, 884 N.E.2d at 1022.

119. *See id.* at 1030-33.

120. *Id.* at 1033.

121. *Id.* at 1032-33.

122. *Id.* at 1027 (citing *Davis v. Washington*, 547 U.S. 813, 828, 830 (2006)).

123. *See id.*

124. *See id.* at 1032, 1034-35.

125. *See id.* at 1031, 1033, 1035.



judgments that required confrontation and cross-examination to evaluate the reliability of those opinions.<sup>126</sup> By contrast, the expert's DNA conclusions in *Meekins* involved objective descriptions and measurements of raw data in order to generate a DNA profile of a male donor.<sup>127</sup> Confrontation and cross-examination in such a case would be neither necessary nor productive in terms of determining the reliability of the test and the accuracy of the results.<sup>128</sup>

In conclusion, there is still considerable room for discussion and disagreement over the extent to which *Crawford* applies to hearsay exceptions such as business and public records. To be sure, after *Crawford*, the interpretation of the Sixth Amendment's Confrontation Clause has been radically transformed. Further elucidation by the Supreme Court will be needed to clarify the meaning and scope of the Confrontation Clause. In *People v. Rawlins*, the New York Court of Appeals has produced a careful and well-reasoned decision that aids this process.

#### Postscript

On June 25, 2009, the U.S. Supreme Court decided *Melendez-Diaz v. Massachusetts*,<sup>129</sup> ruling that a scientific report prepared by a state forensic laboratory certifying that a substance submitted by police for chemical testing contained cocaine constitutes a testimonial statement within the meaning of the Confrontation Clause under *Crawford v. Washington*. In a 5-4 decision authored by Justice Antonin Scalia, the Court wrote: "There is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements'" covered by the Confrontation Clause.<sup>130</sup> As the Court observed, the documents were denominated "certificates," but they were "plainly affidavits" that contained sworn factual assertions that were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"<sup>131</sup> Moreover, the "sole purpose" of the certificates was to provide the

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126. *See id.* at 1033.

127. *See id.* at 1034-35.

128. *See id.* at 1035.

129. No. 07-391, 2009 WL 1789468 (U.S. June 25, 2009).

130. *Id.* at \*3.

131. *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)).

prosecution with “prima facie evidence of the composition, quality, and net weight” of the analyzed substances, and the analysts were presumably aware of this purpose.<sup>132</sup> Absent a showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, the defendant “was entitled to ‘be confronted with’ the analysts at trial.”<sup>133</sup>

Under *Melendez-Diaz*, the decision by the New York Court of Appeals in *Rawlins* and *Meekins* appears to be a correct understanding of the Confrontation Clause as interpreted by the Supreme Court in *Crawford v. Washington*. Thus, the Court of Appeals correctly determined that the fingerprint report in *Rawlins* was “clearly testimonial” under *Crawford*, and that the DNA laboratory report in *Meekins* was not a testimonial record under *Crawford*.

Initially, several preliminary points should be noted. First, that the lab certificates in *Melendez-Diaz* were denominated by the Court as “affidavits” suggests that any scientific report that contains a certification by an analyst that a scientific test was done properly, in accordance with accepted protocols and procedures, and that the results are accurate, may as a threshold matter constitute a testimonial statement under the Confrontation Clause. Under *Melendez-Diaz*, this conclusion would always seem to be the case where the report appears to be functionally identical to live, in-court testimony establishing a critical element of the government’s case. To be sure, the Court of Appeals in *Rawlins* did not discuss whether the fingerprint and DNA reports were sworn to or certified; it considered these reports within the context of the business records exception to the hearsay rule, as did the Appellate Division. But it would be illogical to hold that a scientific report that is sworn to or certified is a testimonial statement within the Confrontation Clause, but that a report that is neither sworn to or certified is not a testimonial statement. Surely the result in *Melendez-Diaz* would have been the same in the absence of any requirement that the reports be sworn to or certified.

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132. *Id.* at \*4.

133. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

Additionally, the question of whether official or business records are within or exempt from the Confrontation Clause—an issue that was discussed at length in *Rawlins* and served as the basis for the decisions by the Appellate Division—was mentioned briefly by the Court in *Melendez-Diaz*. The Court observed that under the traditional hearsay exception, if a document is kept in the regular course of business, it may be admitted at trial despite its hearsay status. But, the Court cautioned, “that is not the case if the regularly conducted business activity is the production of evidence for use at trial.”<sup>134</sup> By way of contrast, the Court also pointed out that some documents that are offered in evidence at a criminal trial that are prepared by an entity, for example, “in the regular course of equipment maintenance may well qualify as nontestimonial records.”<sup>135</sup>

Under *Melendez-Diaz*, the fingerprint report in *Rawlins*, as the New York Court of Appeals concluded, would clearly appear to be a testimonial statement under *Crawford*. As in *Melendez-Diaz*, the fingerprint report was clearly an accusatory statement; indeed, it was even more accusatory than the lab report in *Melendez-Diaz*. Just as the lab report in *Melendez-Diaz* provided testimony against petitioner by proving an essential fact necessary for conviction—that the substance possessed by defendant was cocaine—the fingerprint report in *Rawlins* established circumstantially the perpetrator’s identity. In addition, just as the sole purpose of the lab report in *Melendez-Diaz* was to provide prima facie evidence of the incriminating nature of the substance, the sole purpose of the fingerprint report, as the Court of Appeals noted, was to “apprehend a perpetrator.”<sup>136</sup> Finally, just as the Court in *Melendez-Diaz* noted as a critical reason for cross-examination of a forensic expert the widely documented concerns over manipulation, subjectivity, and bias in forensic testing,<sup>137</sup> the Court of Appeals in *Rawlins* similarly observed that fingerprint comparison methodology is “an admit-

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134. *Id.* at \*10. For this principle, the Court cited the leading case of *Palmer v. Hoffman*, 318 U.S. 109 (1943).

135. *Melendez-Diaz*, 2009 WL 1789468, at \*4 n.1.

136. *Rawlins*, 884 N.E.2d at 1033.

137. *Melendez-Diaz*, 2009 WL 1789468, at \*8-9.

tedly inexact science”<sup>138</sup> that produces a “controvertible opinion.”<sup>139</sup>

The correctness of the Court of Appeals’ conclusion in *Meekins* that the DNA lab report is not a testimonial statement under *Crawford* is a somewhat closer question, but from the language in *Melendez-Diaz*, there appears to be a sound justification for that conclusion. First, in contrast to the lab report in *Melendez-Diaz* and the fingerprint report in *Rawlins*, the lab report in *Meekins* was in no sense accusatory. The lab technicians merely performed an analysis of a substance to determine the existence of a DNA profile; the report contained only “raw data” that was neutral rather than accusatory. Standing alone, it shed no light on the guilt of the accused. Indeed, the lab report would be more akin to a police investigator’s dusting and lifting of the fingerprints in *Rawlins*, and there is no suggestion in *Melendez-Diaz* that such a report of the existence of a fingerprint “bears witness” against the accused of the kind that the Confrontation Clause is designed to protect against.

Moreover, in contrast to the certificates prepared by the analyst in *Melendez-Diaz*, the “sole purpose” of the analyst’s lab report in *Meekins*, as the Court of Appeals observed, was to generate “raw data” for another expert to make a comparison.<sup>140</sup> To be sure, the lab technician in *Meekins* presumably was aware that the results of the test—i.e., the generation of a DNA profile—could potentially be used to prosecute an individual. However, that type of awareness seems more like the knowledge of an investigator who lifts a fingerprint from a crime scene, which fingerprint will be relied on by the live testimony of an expert, who has made a comparison with the defendant’s fingerprints, or a live witness who gives expert testimony that the DNA profile matches a defendant’s DNA, as was the case in *Meekins*.

Finally, the Court in *Melendez-Diaz* tempered the most extreme concerns of critics over the scope of its ruling by appearing to exempt from the scope of *Crawford*’s coverage the suggestion that “everyone who laid hands on the evidence” must be called as a witness.<sup>141</sup> The Court pointed out that many per-

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138. *Rawlins*, 884 N.E.2d at 1033.

139. *Id.*

140. *Id.* at 1034.

141. *Melendez-Diaz*, 2009 WL 1789468, at \*4 n.1.

sons who are involved in the scientific testing do not necessarily provide testimony within the meaning of *Crawford*. There is no basis to suggest that “anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must appear in person as part of the prosecution’s case.”<sup>142</sup> The prosecution has discretion to decide what evidence needs to be produced without necessarily calling live witnesses, such as proving the reliability of a fingerprint comparison without calling the investigator who lifted the fingerprints in *Rawlins*, or proving the reliability of the DNA comparison in *Meekins* without introducing the analyst who prepared the DNA profile. In other words, gaps in the chain of custody, authenticity of the sample, and accuracy of the testing device “normally go to the weight of the evidence rather than its admissibility.”<sup>143</sup>

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142. *Id.*

143. *Id.*