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Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After *Crawford v. Washington*

ROSS ANDREW OLIVER*

INTRODUCTION

In contrast to criminal procedure in civil law countries, and in response to abusive prosecutions based primarily on hearsay, common law courts by the late eighteenth century had established a rule that evidence against a criminal defendant should be given by a witness with personal knowledge and should be tested for reliability by adversarial cross-examination. Ratified in 1791, the Sixth Amendment embodies this rule in its Confrontation Clause, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Over time, U.S. law developed other rules for testing the reliability of evidence against the criminally accused, including allowing a judge to balance factors bearing on the "particular guarantees of trustworthiness" of a hearsay statement. In 2004, the Supreme Court disapproved such methods and returned to a rule reflecting its understanding of the Framers' intent behind the Confrontation Clause: testimonial statements against a criminal defendant must be tested by cross-examination in order to be admissible.

Another facet of the early common law was its general distaste for testimony based on "mere opinion" rather than first-hand knowledge. Historically, though, common law courts allowed experts to testify regarding their opinions in an effort to assist the fact-finder understand the evidence before it. An expert traditionally was permitted to form an opinion only from facts either that would be received into evidence or

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1. U.S. Const. amend. VI.
that were personally known to the expert. The Federal Rules of Evidence and similar state rules depart from the common law and allow an expert to base opinion testimony on facts not in evidence, including inadmissible hearsay, if the hearsay is a type of information that experts in the particular field reasonably rely upon in forming opinions. The Federal Rules further allow an expert to disclose to the jury the bases of an opinion, including inadmissible facts, if their probative value in assisting the jury evaluate the expert's conclusions significantly outweighs their potential for unfair prejudice.

Although inadmissible facts upon which an expert may base an opinion are not substantive evidence, permitting an expert to form an opinion from such facts creates a danger that a jury will accept them as substantive evidence when presented in the form of an expert opinion. This danger is particularly acute when an expert's opinion echoes or is strikingly similar to the inadmissible facts. Although the Federal Rules of Evidence may allow such an opinion, a Confrontation Clause violation may arise when an expert forms an opinion on testimonial statements if the defendant has not had a prior opportunity to cross-examine the declarant. Most courts have concluded that the Confrontation Clause is satisfied if the defendant has an opportunity to cross-examine the expert because his opinion is in evidence—not the underlying facts. Some courts have also found comfort in admitting an expert's opinion by actively assessing the reasonableness of the expert's reliance on certain facts and concluding that if an expert in the field reasonably relied on the facts, they bear particularized guarantees of trustworthiness.

Following the Supreme Court's emphasis on the Framers' intent behind the Confrontation Clause (which it deduced by examining the state of the common law at the time the Sixth Amendment was adopted), there are two reasons why these conclusions should be re-examined. First, the Federal Rules depart from the traditional common law by allowing an expert witness to form an opinion from inadmissible facts. Second, in the absence of an opportunity to cross-examine the declarant, a court may no longer admit testimonial evidence against a criminal defendant merely because the statement is particularly reliable. A common law court in 1791 would not have admitted testimonial hearsay into evidence without a showing of unavailability and cross-examination and similarly would not have allowed an expert to base an opinion on testimonial hearsay. While Congress may change by statute the acceptable bases for an expert's opinion, a statute may not abrogate a defendant's constitutional right to confrontation. A court therefore must prohibit an expert from testifying to an opinion in those cases where the opinion relies upon testimonial hearsay to such an extent that it substantially transmits to the jury the content of the hearsay, unless the defendant has an opportunity to test the hearsay by cross-examination.
I. THE CONFRONTATION CLAUSE

A. THE CRAWFORD RULE

On August 5, 1999, Michael Crawford and his wife, Sylvia, went looking for Kenneth Lee, a man who allegedly had tried to rape Mrs. Crawford on an earlier occasion. The Crawfords found Mr. Lee at his apartment, and a fight broke out resulting in a stab wound to Mr. Lee’s torso and a cut in Mr. Crawford’s hand. Later that night, the police interrogated both Mr. Crawford and his wife. Based on their investigation, the police arrested Mr. Crawford, and the state of Washington charged him with assault and attempted murder. Mr. Crawford claimed that he acted in self-defense.

To rebut Mr. Crawford’s claim that Mr. Lee reached for a weapon before the altercation, the state offered into evidence Mrs. Crawford’s tape-recorded statements that she made to the police following the incident. In these statements, Mrs. Crawford told the police that she saw nothing, such as a weapon, in the victim’s hands when Mr. Crawford attacked him. Mrs. Crawford did not testify personally at trial because Mr. Crawford invoked Washington’s marital privilege, which allowed him to bar his spouse from testifying at trial without his consent but did not allow him to exclude her out-of-court statements if they satisfied an exception to the hearsay rule. The trial court received Mrs. Crawford’s statements into evidence as statements against penal interest, noting that Mrs. Crawford had admitted to the police that she led Mr. Crawford to Mr. Lee’s apartment and thus facilitated the assault.

Mr. Crawford argued that, “state law notwithstanding,” admitting his wife’s tape-recorded statements to the police into evidence violated his Sixth Amendment right to confront witnesses against him. Applying the rule of Ohio v. Roberts, the Washington Supreme Court upheld Mr.

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3. Id.
4. Id. at 1358.
5. Id. at 1357.
6. Id. at 1357-58. The Federal Rules of Evidence define “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Fed. R. Evid. 801(c). The “hearsay rule” provides that “[h]earsay is not admissible except as provided by [the Federal Rules of Evidence] or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” Fed. R. Evid. 802. Washington has a similar definition of hearsay, Wash. R. Evid. 801(c), and a similar hearsay rule, id. 802.
7. Crawford, 124 S. Ct. at 1358.
8. Id.
9. 448 U.S. 56, 65-66 (1980) (concluding that the Confrontation Clause bars hearsay if the declarant is unavailable for cross-examination, unless the statement bears adequate “indicia of reliability,” which can be inferred if “the evidence falls within a firmly rooted hearsay exception” or exhibits “particularized guarantees of trustworthiness”).
Crawford's conviction. It concluded that, although Mrs. Crawford's statements did not fall under a firmly rooted hearsay exception, they bore guarantees of trustworthiness: her account of the incident was virtually identical to and therefore "'interlock[ed] with'" the defendant's confession such that it could be deemed reliable.

The Supreme Court reversed, holding that the trial court violated the Confrontation Clause when it admitted Mrs. Crawford's statements into evidence. In the process, the Court abandoned the Roberts rule, concluding that an open-ended balancing test directing a judge to admit hearsay if he or she finds particularized guarantees of trustworthiness fundamentally conflicts with the Confrontation Clause's design to constrain judicial discretion.

Justice Scalia, writing for the Court, distinguished "testimonial" from "nontestimonial" statements and, while not comprehensively defining "testimonial," concluded that it at least includes the product of police interrogation, such as Mrs. Crawford's "recorded statement[s], knowingly given in response to structured police questioning." The opinion concludes that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." The Court in Crawford replaced the Roberts rule with one that more closely reflects the Court's understanding of the Framers' intent: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-

11. Oddly, the Washington court concluded that Mr. and Mrs. Crawford's stories were identical in the sense that they were both ambiguous regarding whether the victim had a weapon during the assault. See id. ("[B]oth of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how [Mr. Crawford] received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap."). The Supreme Court noted in its opinion that "[t]he prosecutor obviously did not share the court's view that [Mrs. Crawford's] statement was ambiguous—he called it 'damning evidence' that 'completely refutes [Mr. Crawford's] claim of self-defense.'" Crawford, 124 S. Ct. at 1373 (quoting the trial transcript).
13. Id. at 1374.
14. Id. at 1373.
15. Id. ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.").
16. Id. at 1365 n.4. ("We use the term 'interrogation' in its colloquial, rather than any technical legal, sense. Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case. [Mrs. Crawford's] recorded statement . . . qualifies under any conceivable definition." (citation omitted)).
17. Id. at 1374.
In Mr. Crawford's case, his wife was "unavailable" because Mr. Crawford invoked his marital privilege and prevented his wife from testifying against him.\footnote{18} While the Court recognized the rule of forfeiture by wrongdoing,\footnote{20} it did not express an opinion whether Mr. Crawford forfeited his confrontation right by invoking the marital privilege, as the issue was not before the Court.\footnote{21} Although unavailable as a witness, Mrs. Crawford's hearsay statements were inadmissible under the Court's newly announced rule because Mr. Crawford had no opportunity to test the reliability of her statement by cross-examination before or during trial.\footnote{22}

B. "Testimonial" Statements

The critical factor bearing on the inadmissibility of Mrs. Crawford's statements was the conclusion that they were "testimonial."\footnote{23} The Court in \textit{Crawford} identified this element as determinative of whether the Confrontation Clause applies to a hearsay statement after tracing the Clause's roots and examining the state of the common law in 1791.\footnote{24} Justice Scalia's opinion for the Court attempts to discern the original meaning of the Clause and arrives at two conclusions:

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of \textit{ex parte} examinations as evidence against the accused. It was...
these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried.

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. [T]he 'right... to be confronted with the witnesses against him,' is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.27

The Court noted that not all hearsay implicates the Sixth Amendment's core concerns.28 The Confrontation Clause's text applies to "witnesses" against the accused, which the Court defined as "those who 'bear testimony.'" 29 "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."30 "An 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."31

25. See The Trial of Sir Walter Raleigh, Knt. at Winchester, for High Treason: 1 James I. 17th of November, A.D. 1603, reprinted in 2 Cobbett's Complete Collection of State Trials 1 (Thomas Bayley Howell ed., R. Bagshaw 1809). Justice Scalia's opinion for the Court in Crawford described Raleigh's case:

Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[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 judges refused, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.

Crawford, 124 S. Ct. at 1360 (citations omitted).

26. See 1 & 2 Phil. & M., c. 13 (1554) (Eng.); 2 & 3 Phil. & M., c. 10 (1555). These bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and certify the results to the court. Such examinations came to be used as evidence in some cases, resulting in an adoption of civil law criminal procedure (which condones examination of witnesses in private by judicial officers) rather than common law procedure (which uses live testimony in court subject to adversarial testing). See also Crawford, 124 S. Ct. at 1359-60.

27. Id. at 1363, 1365 (quoting U.S. CONST. amend. VI) (internal footnotes added).

28. Crawford, 124 S. Ct. at 1364.

29. Id. (quoting 1 N. Webster, An American Dictionary of the English Language (1828)).

30. Id. (alteration in original). But see id. at 1375 (Rehnquist, C.J., joined by O'Connor, J., concurring in the judgment) (disagreeing with the Court's inclusion of unsworn testimonial statements). Chief Justice Rehnquist noted that the 1828 definition of "Testimony" was "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. Such affirmation in judicial proceedings, may be verbal or written, but must be under oath." Id. (quoting 1 N. Webster, An American Dictionary of the English Language (1828) (emphasis added)).

31. Id. at 1364.
The Court listed three formulations of this core class of “testimonial” statements: (1) “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,”32 (2) “extrajudicial statements... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,”33 and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”34

While not articulating a comprehensive definition of “testimonial,”35 the Court concluded that “some statements qualify under any definition—for example, ex parte testimony at a preliminary hearing” and “[s]tatements taken by police officers in the course of interrogations.”36 The Court further concluded that Mrs. Crawford’s statements during her interrogation were “testimonial under any definition.”37

The Court recognized that the common law had established several exceptions to the hearsay rule by 1791 but noted that, with the exception of dying declarations, there was little evidence that hearsay exceptions were used to admit testimonial statements against the accused in a criminal case.38 “Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.”39 The Court did not decide whether the Sixth Amendment incorporates an exception for testimonial dying declarations but stated that “[i]f this exception must be accepted on historical grounds, it is sui generis.”40

32. Id. (quoting Brief for Petitioner at 23, Crawford v. Washington, 124 S. Ct. 1354 (2004) (No. 02-9410)).
33. Id. (alteration in original) (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment)).
35. See supra note 15.
36. Crawford, 124 S. Ct. at 1364; see also supra note 16 (explaining the Court’s use of the word “interrogation”).
37. Crawford, 124 S. Ct. at 1370.
38. Id. at 1367 & n.6.
39. Id. at 1367.
40. Id. at 1367 n.6.
II. EXPERT OPINION EVIDENCE

A. THE COMMON LAW

1. Testimonial Capacity Founded on Personal Knowledge

Early in the common law's history, a principle developed that required witnesses to testify from personal observation: "Witnesses must testify to nothing except what they are certain of, that is what they have seen or heard." Lord Coke's 1622 statement that "[i]t is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself,'" reflects the common law's insistence on the most reliable forms of evidence, rather than testimony based on conjecture or hearsay. Chief Baron Gilbert reiterated this sentiment in the early eighteenth century:

The attestation of the witness must be to what he knows, and not to that only which he hath heard, for a mere hearsay is no evidence; for it is his knowledge that must direct the Court and jury on the judgment of the fact, and not his mere credulity, which is very uncertain and various in several persons; for testimony being but an appeal to the knowledge of another, if indeed he doth not know he can be no evidence.

By the beginning of the nineteenth century, the common law had firmly established the principle that "[a] witness who states the facts ought to state those only of which he has personal knowledge." Federal Rule of Evidence 602 reflects this traditional rule:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

While Rule 602 states the traditional rule requiring a witness to testify from personal knowledge, it specifically carves out an exception for expert witnesses.

2. The Opinion Rule

Lord Mansfield stated the rule against opinion testimony in 1766 when he concluded that a witness's testimony was "mere opinion, which is not evidence." On its face, this rule would appear to bar any

41. 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 657(a), at 889 (James H. Chadbourn ed., 1979) (quoting Thorpe, C.J., in Y.B. 23 Ass., pl. 11 (1359)).
43. 2 WIGMORE, supra note 41, § 657(a), at 889-90 (quoting CHIEF BARON GILBERT, EVIDENCE 152 (ca. 1726)).
44. 2 id. § 656, at 888 (quoting THOMAS STARKIE, EVIDENCE 79, 127 (1824)).
45. FED. R. EVID. 602.
46. 7 WIGMORE, supra note 42, § 1917, at 7 (quoting Carter v. Boehm, 3 Burr. 1905, 1918 (1766))
testimony deemed "opinion" as opposed to "fact." However, in Lord Mansfield's day, the term "opinion" had the primary meaning of 'notion' or 'persuasion of the mind without proof or certain knowledge.' The expression carried an implication of lack of grounds, which is absent from the contemporary meaning...."47 Thus, Lord Mansfield's sentiment is best understood as a disapproval of unreliable testimony from witnesses who lacked personal knowledge.48

By the mid-nineteenth century, however, U.S. courts had expanded the traditional opinion rule and attempted to limit witnesses' testifying only to "facts" rather than "opinions":

The general rule requires, that witnesses should depose only to facts, and such facts too as come within their knowledge. The expression of opinions, the belief of the witness, or deductions from the facts, however honestly made, are not proper evidence as coming from the witness; and when such deductions are made by the witness, the prerogative of the jury is invaded.49

The opinion rule was more easily stated than practiced, though, as it rests on the faulty assumption that "facts" and "opinions" are identifiable and distinguishable.50 "Any conceivable statement, no matter how specific, detailed, and 'factual,' is in some measure the product of inference as well as observation and memory."51 "[T]he distinction between statements of fact and opinion is, at best, one of degree."52

Federal Rule of Evidence 701 dispenses with the traditional opinion rule and allows a lay witness to testify "in the form of opinions or inferences... limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."53

3. The Exception for Scientific Experts

Although the common law rejected testimony of witnesses who lacked personal knowledge of the facts — and therefore testified to "mere opinion" — courts traditionally allowed an exception "where there was a matter of skill or science to be decided," recognizing that "the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits."54

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48. Id.
50. 1 McCormick, supra note 47, § 11, at 45.
51. Id.
54. 7 Wigmore, supra note 42, § 1917, at 7 (quoting Beckwith v. Sydebotham, 1 Camp. 116, 117
In early times, and before trial by jury was much developed, there seem to have been two modes of using what expert knowledge there was: first, to select as jurymen such persons as were by experience especially fitted to know the class of facts which were before them, and second, to call to the aid of the court skilled persons whose opinion it might adopt or not as it pleased.\(^5\)

A third method of using experts, calling skilled persons as witnesses before the jury, later developed.\(^6\) For example, in 1665 in *The Witches' Case*, one Dr. Brown gave his opinion that the accused were witches based on his scientific explanation of the fits to which they were subject.\(^7\) Another early example of expert witnesses is *Rex v. Pembroke*, a 1678 murder trial in which both the prosecution and the prisoner called physicians as witnesses to testify regarding the cause of certain symptoms observed during an autopsy and whether a person could die of wounds without a fever.\(^8\) Similarly, in the 1679 case of *Rex v. Green*, the prosecution called a physician to testify that the deceased could not have died from certain wounds upon his body but must have died from strangulation.\(^9\)

By the eighteenth century, the practice of calling expert witnesses was well established in the English common law.\(^6\) Expert opinion testimony at common law was limited, however:

The expert witness could testify only if necessary to provide information that was beyond the ken of the average juror, could testify only in response to a hypothetical question, could not assume anything that was not already in evidence, and could not offer an opinion on the ultimate issue before the jury.\(^6\)

Experts at common law were likewise limited in the information upon which they could base their opinion to personally known facts or facts in evidence presented in the expert's presence or through a hypothetical question: "The traditional view has been that an expert may state an opinion based on his firsthand knowledge of the facts, resting on facts in the record at the time he states his opinion, or based partly on

\(^{(1807)}\) (Ellenborough, L.C.J.).


\(^{56}\) Id.

\(^{57}\) Id. at 46 (citing The Witches' Case, 6 Howell, State Trials, 697 (1665)).

\(^{58}\) Id. (citing Rex v. Pembroke, ib. 1337–38, 1340–41 (1678)).

\(^{59}\) Id. (citing Rex v. Green, 7 Howell, State Trials, 185–86 (1679)).

\(^{60}\) Id. at 47 n. 1 (citing English cases from 1701 through 1776 in which expert witnesses testified).

\(^{61}\) Roger C. Park et al., *Evidence Law* § 10.01, at 473 (1998); see also Hand, supra note 55, at 48 (describing Lord Mansfield's direction in *Rex v. Ferrers*, 19 Howell, State Trials, 942–44 (1760), that the prisoner's counsel may not ask a physician whether, based on all the facts, the prisoner was insane, but that he must specify the precise facts, already in evidence, upon which he wished the surgeon to base his opinion).
firsthand knowledge and partly on the facts of the record.”

B. THE FEDERAL RULES OF EVIDENCE

I. Departure from the Common Law

Unlike the common law, which significantly curtailed the potential scope of an expert's testimony at trial, the Federal Rules of Evidence tolerate expert opinion evidence more frequently and to a far greater extent. First, Rule 702 lowers the threshold when deciding if expert opinion testimony is appropriate from only those cases where it is "necessary to provide information... beyond the ken of the average juror" to situations in which it would merely "assist the trier of fact to understand the evidence or to determine a fact in issue." Also, the Federal Rules abandon the hypothetical question—generally accompanied by a lengthy recitation of the facts in evidence—as the sole method through which an expert may express an opinion. The Rules now allow the expert to state on direct examination an opinion and the reasons for it without prior disclosure of the underlying facts or data. The Federal Rules likewise depart from common law tradition and allow experts to express opinions that embrace the ultimate issue in the case. Finally, Rule 703 significantly increases the sources of information which an expert may tap to find facts that may serve as the basis of an opinion.


A witness, who qualifies as an expert because of his knowledge, skill, experience, training, or education, may testify in the form of an opinion regarding scientific, technical, or other specialized knowledge. Expert testimony must be based upon sufficient facts or data and must be the product of reliable principles and methods, which must be reliably...
applied to the facts of the case. 71

An expert may base his opinion on facts or data perceived by him or made known to him before or during the hearing. 72 Federal Rule of Evidence 703 permits an expert to base his opinion on facts that are inadmissible in evidence, if they are of a type reasonably relied upon by experts in the particular field to form opinions on the subject matter. 73 As amended in 2000, Rule 703 allows the party offering the expert's opinion to disclose to the jury inadmissible facts that the expert considered only if the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. 74

The Advisory Committee on Evidence Rules explains that by allowing an expert to derive his opinion from facts or data presented to him outside of court or by a means other than his own perception, Rule 703 was designed to depart from the common law "and to bring the judicial practice into line with the practice of the experts themselves when not in court." 75 The Advisory Committee's Note to Rule 703 cites as an example a physician who likely "in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays." The Advisory Committee concludes that "[t]he physician makes life-and-death decisions in reliance upon [such facts and data]. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes." 76

In its Note accompanying the 2000 amendment to Rule 703, the Advisory Committee explains that the rule was "amended to emphasize

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72. FED. R. EVID. 703. An expert's "minor premise" relates to the particular facts of the case, to which the expert applies a major premise to arrive at a conclusion. Imwinkelried, supra note 71, at 2.

73. FED. R. EVID. 703. Many states similarly allow an expert to base an opinion on inadmissible evidence, if such information is reasonably relied upon by experts in the field. E.g., CAL. EVID. CODE § 801(b) (Deering 2004); FLA. STAT. ch. 90.704 (2004); People v. Sugden, 323 N.E.2d 169, 172 (N.Y. 1974) (recognizing such a rule in New York but noting that in a proper case, it must yield to a defendant's right to confront the witnesses against him). But see Mich. R. EVID. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.").

74. FED. R. EVID. 703; see also CAL. EVID. CODE § 802 ("A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter . . . upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion.").

75. FED. R. EVID. 703 advisory committee's note.

76. Id.
that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted."  

Rule 703 creates "a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." Nevertheless, "[t]he information may be disclosed to the jury, upon objection, [but] only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect." The Advisory Committee instructs a trial judge to give a limiting instruction upon request, informing the jury that otherwise inadmissible underlying facts must not be used for substantive purposes and adds that "the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances."

Although the rule, as amended, does not allow inadmissible facts to come into evidence, the rule may permit the proponent of the opinion to disclose to the jury inadmissible facts and data, provided the balancing test described above is satisfied. Rule 703 also does not in any way prohibit an expert from using inadmissible facts or data to arrive at an opinion:

The 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 the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Some of the information that may be disclosed to the jury or used by an expert in forming his opinion may, if offered into evidence, violate not only the Federal Rules of Evidence but also the Confrontation Clause of the Sixth Amendment because the information may be testimonial in nature and the defendant may not have had a prior opportunity to cross-examine the declarant.

77. Prior to the 2000 amendment, commentators disagreed whether courts should admit into evidence the facts or data upon which experts relied in forming an opinion. Compare Ronald L. Carlson, Essay, Policing the Bases of Modern Expert Testimony, 39 Vand. L. Rev. 577, 584-86 (1986) (arguing that admission of unauthenticated background data violates the hearsay rule and impinges a criminal defendant's Confrontation Clause rights) with Paul R. Rice, Essay, Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson, 40 Vand. L. Rev. 583, 584 (1987) (arguing that with appropriate precautions, admission of background material does not violate the spirit of the hearsay rule or cause Confrontation Clause problems).

78. Fed. R. Evid. 703 advisory committee's note.

79. Id.

80. Id.

81. Id.
III. EXPERT OPINION EVIDENCE AS AN UNOFFICIAL HEARSAY EXCEPTION

As discussed above, Federal Rule of Evidence 703 is not an exception to the hearsay rule because it does not allow into evidence the facts upon which an expert witness bases his opinion. The expert's opinion is in evidence, but the underlying facts may not be. For members of the jury, however, untying an expert's opinion from its underlying facts may prove difficult:

[O]n the one hand, the jury may consider the facts or data upon which the expert based her opinion to assess the weight to be given to that opinion. Yet, on the other hand, the jury, when deciding whether to arrive at the same conclusion, cannot accept what the expert relied upon as true.

...

...

[O]ne cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion.

Because Rule 703 allows an expert to testify to an opinion based on inadmissible evidence—including testimonial hearsay—which may be disclosed to the jury (and which the jury may unwittingly accept for the truth of the matter asserted), some have recognized that "for some but not all practical purposes, Rule 703 operates as the equivalent of an additional exception to the rule against hearsay." 83

As a limit on the type of information that experts may use to form their opinions, Rule 703 requires that inadmissible background facts be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." 84 A judge decides as a preliminary question under Federal Rule of Evidence 104(a) 85 whether an expert opinion is based on information reasonably relied upon by experts in the field "in a manner that will 'prevent inadmissible evidence from being suggested to the jury.'" 86 Courts differ, though, in their approach to determining what information satisfies Rule 703's "reasonably relied upon" requirement.

82. Rice, supra note 77, at 584–85.


84. Fed. R. Evid. 703.

85. See Fed. R. Evid. 104(a) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court....").

86. PARK ET AL., supra note 61, § 10.08, at 493 (quoting Fed. R. Evid. 103(c)); see also In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1243 (E.D.N.Y. 1985) ("The trial court must decide whether [the] data is of a type reasonably relied upon by experts in the field." (citing Fed. R. Evid. 104(a)), aff'd, 818 F.2d 187 (2d Cir. 1987); 1 MCCORMICK, supra note 47, § 15, at n. 16 ("Plainly, the judge must make the finding of fact as to what the experts' practice is and then determine whether it is objectively reasonable.").
A. THE LIBERAL APPROACH TO ACCEPTING EXPERT OPINION EVIDENCE

"Those following the liberal approach hold that the courts may not independently determine whether experts in the field reasonably rely on a given type of data."87 For example, courts following this approach instruct that "the trial court should defer to the expert's opinion of what data they find reasonably reliable."88 Following this theory, when a judge finds that it is customary practice for experts in the particular field to consider a certain type of report, "the judge's hands are tied; the judge must allow the expert to rely on that type of report," regardless of how unreasonable it may appear.89

A court following the liberal approach may allow an expert to testify to an opinion that largely echoes inadmissible hearsay: "The difficulty with the liberal approach is that a party can employ an expert witness to place untrustworthy facts, data, or opinions before the jury—a sort of 'backdoor' hearsay exception."90 Beyond merely unreliable facts, data, or opinions, a court, under Rule 703, could permit an expert to testify to an opinion against a criminal defendant that essentially channels testimonial hearsay to the jury.

B. THE RESTRICTIVE APPROACH TO ACCEPTING EXPERT OPINION EVIDENCE

Many courts and commentators take a different view toward a court's role in determining the appropriateness of information that an expert may use as a basis for his opinion. Those following the "restrictive" approach contend that courts must make an independent assessment of the reliability of underlying facts and determine whether it was reasonable for an expert to rely on them.91 For these courts, "if the

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87. JoAnne A. Epps, Clarifying the Meaning of Federal Rule of Evidence 703, 36 B.C. L. REV. 53, 75-76 (1994); see also 1 MCCORMICK, supra note 47, § 15, at 74 ("The liberal approach is that the judge must accept the experts' view in deciding whether the rule is met at least in matters in which the judge is not equipped to 'second guess' the expert.").
88. Petet v. Dow Chemical Co., 868 F.2d 1428, 1432 (5th Cir. 1989); see also Indian Coffee Corp. v. Procter & Gamble Co., 752 F.2d 891, 897 (3d Cir. 1985) ("A court may not substitute its judgment for that of experts in the field... as to what... data an expert should rely upon in reaching an opinion, for in doing so it invades the province of the jury."); Mannino v. Int'l Mfg. Co., 650 F.2d 846, 853 (6th Cir. 1981) ("Great liberality is allowed the expert in determining the basis of his opinions under Rule 703. Whether an opinion should be accepted is not for the trial judge. That is for the finder of fact.").
89. 1 MCCORMICK, supra note 47, § 15, at 74.
90. Id.; see also Ronald L. Carlson, Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony, 76 MINN. L. REV. 859, 868 (1992) ("Although there are a growing number of opinions leading in the proper direction, some courts endorse the passive approach that allows wholesale admission of underlying documents.").
91. See, e.g., Head v. Lithonia Corp., 881 F.2d 941, 944 (10th Cir. 1989) (recognizing that experts are given wide latitude to testify on facts otherwise not admissible in evidence but that the district courts must decide if the bases meet minimum standards of reliability as a condition of admissibility); Viterbo v. Dow Chemical Co., 826 F.2d 420, 422 (5th Cir. 1987) (recognizing that generally questions relating to the sources of an expert's opinion affect its weight, not its admissibility but that in some
data would have been or was excluded from the record as hearsay and lacks any circumstantial guarantees of trustworthiness comparable to an exception to the hearsay rule, the standard of Rule 703 is not met. For example, one district court has described Rule 703’s protection against introduction of unreliable hearsay as follows:

Rule 703 permits experts to rely upon hearsay. The guarantee of trustworthiness is that it be of the kind normally employed by experts in the field. The expert is assumed, if he meets the test of Rule 702, to have the skill to properly evaluate the hearsay, giving it probative force appropriate to the circumstances.

Similarly, one commentator has argued that courts may admit into evidence the facts underlying experts’ opinions under the residual hearsay exception of Federal Rule of Evidence 807: “[i]f courts properly scrutinize expert testimony to ensure that each expert has used her special talents in screening the facts upon which she has relied.” Likewise, prior to the Crawford decision, a Confrontation Clause violation would not occur provided the hearsay statement “[bore] sufficient indicia of reliability.” After Crawford, though, “particularized guarantees of trustworthiness” no longer satisfy the strictures of the Sixth

cases, “the source upon which an expert’s opinion relies is of such little weight that the jury should not be permitted to receive that opinion”); Shatkin v. McDonnell Douglas Corp., 727 F.2d 202, 208 (2d Cir. 1984) (concluding that the district court has the discretionary right under Rule 703 to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony); Agent Orange, 611 F. Supp. at 1245 (“If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.”); 1 McCormick, supra note 47, §15, at 74–75 (“In the main, the restrictive approach is preferable both as a matter of policy and as a question of statutory construction.”); Epps, supra note 87, at 76 (arguing that “Rule 703 imposes an active obligation on courts to determine the reasonableness of an expert’s reliance on otherwise inadmissible facts or data”); L.L. Plotkin, Recent Development, Brock v. Merrell Dow Pharmaceuticals, Inc.: What Is the Court’s Role in Evaluating Expert Testimony?, 64 Tul. L. Rev. 1263, 1269–70 (1990) (arguing that active judicial review of expert testimony will lead to more accurate jury verdicts and allow trial courts to monitor experts and ensure that they are acting as unbiased witnesses).

92. 1 McCormick, supra note 47, §15 at 74.
93. Agent Orange, 611 F. Supp. at 1245.
94. Fed. R. Evid. 807 provides the following:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

95. Rice, supra note 77, at 591.
96. Id. at 595; see Barrett v. Acevedo, 169 F.3d 1155, 1163 (8th Cir. 1999) (concluding that although “Rule 703 evidence is . . . never admitted for the truth of the matter asserted, but simply to show a basis for an expert’s opinion,” even if it were admitted for the truth of the matter asserted, it would not violate the Confrontation Clause because it exhibits particularized guarantees of trustworthiness “shown by the testifying expert’s reliance on the material in forming his opinion”); see also supra note 9.
Amendment. Therefore, a risk exists—even in those courts following a restrictive approach to admissibility of expert testimony—that a prosecutor may use an expert to communicate testimonial hearsay to the jury in violation of the Confrontation Clause.

IV. THE INTERSECTION OF THE CONFRONTATION CLAUSE AND EXPERT OPINION EVIDENCE

A. CURRENT LAW

Courts generally hold that if a defendant has an opportunity to cross-examine an expert witness who testifies against the defendant, the Confrontation Clause is satisfied, even if the expert relied on hearsay to form the basis of his opinion. This derives from the concept that the expert’s opinion—not the facts that the expert considered—is in evidence, and the defendant has a full opportunity to test the soundness of that evidence by cross-examining the expert. Under Rule 703, inadmissible facts upon which an expert relied may be disclosed to the jury, not for their truth, but to “assist[] the jury to evaluate the expert’s opinion.” The Supreme Court in Crawford noted that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted, which appears to reinforce the majority rule regarding the Confrontation Clause and expert opinion evidence. A potential confrontation problem arises, however, if a jury accepts testimonial hearsay—presented either under Rule 703 to assist in evaluating the expert’s opinion or through an expert “opinion” which essentially consists of recitation of hearsay—for its truth.

B. EXAMPLES OF EXPERT OPINION BASED ON TESTIMONIAL HEARSAY

Prosecutors use expert testimony extensively in criminal trials. Experts, for example, frequently express opinions about whether a defendant suffers from mental disease or defect, how criminal

97. See supra Part I.A.
98. See, e.g., Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (“The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.”); United States v. Abbas, 74 F.3d 506, 512 (4th Cir. 1996) (“[W]e recognize that the right to confrontation is not violated by an expert’s reliance on out-of-court sources where the utility of trial confrontation would be remote and of little value to either the jury or the defendant.”); United States v. Locascio, 6 F.3d 924, 938 (2d Cir. 1993) (noting that an expert’s reliance on information provided by others does not violate the Sixth Amendment if the expert is available for cross examination) (citing Reardon v. Manson, 806 F.2d 39, 42 (2d Cir. 1986)).
enterprises operate, and the results of fingerprint, handwriting, or DNA analyses. Sometimes, the facts upon which an expert bases an opinion amount to testimonial hearsay and present a risk of violating a defendant's constitutional right to confrontation.

One example is United States v. Brown. The defendant in Brown was traveling from Jamaica to Bermuda through Miami when U.S. Customs officers discovered cocaine base (the form of the drug from which powdered cocaine is derived) in the metal frames of her luggage carts. The government indicted the defendant with importation of a substance containing cocaine and possession with intent to distribute. The defendant, in her defense, claimed to have no knowledge that the substance was in her luggage carts. The government responded with evidence that the wholesale value in Bermuda of the cocaine base was approximately $217,000 and argued that an unknowing innocent would not have been entrusted with such valuable contraband.

To prove the value of the cocaine base in the Brown trial, the government relied primarily on the testimony of a DEA agent, qualified as an expert in the field of drug valuation. Although the expert witness had substantial personal experience investigating narcotics smuggling, he explained on cross-examination that he could not have offered his testimony on the value of the cocaine base without information he received from an agent in another DEA office, who herself had conferred with authorities in Bermuda to arrive at an estimated value. Although the Eleventh Circuit recognized that the expert's testimony "clearly constituted hearsay" because the testimony related statements of another DEA officer and Bermudan authorities to prove the truth of the matter asserted (i.e., the price of drugs in Bermuda), the court nevertheless concluded that the trial court properly admitted the expert testimony into evidence:

We have no trouble concluding that Rule 703 encompasses hearsay statements in a context such as the instant one, where the government expert specifically testified that his opinion was based on his

102. See, e.g., Locascio, 6 F.3d at 938 (structure and operating rules of organized crime families); United States v. Cruz, 797 F.2d 90, 96 (2d Cir. 1986) (operation of narcotics dealers).
104. 290 F.3d 1252 (11th Cir. 2002), vacated by 538 U.S. 1010 (2003), reinstated by 342 F.3d 1245, 1246 (11th Cir. 2003).
105. Id. at 1254.
106. Id.
107. Id.
108. Id. at 1255.
109. Id.
110. Id. at 1256.
111. Id. at 1256 n.2.
experience and expertise, in conjunction with the information he received from a DEA intelligence agent and Bermudan authorities, and that such sources of information were regularly relied upon in valuating narcotics.\textsuperscript{113}

Regarding the Confrontation Clause, the \textit{Brown} court relied on the first prong of the rule in \textit{Ohio v. Roberts}\textsuperscript{113} and ruled as follows:

Given Federal Rule of Evidence 703 and long-established circuit precedent, we hold that hearsay evidence relied upon by an expert in forming his opinion, as long as it is of a type regularly relied upon by experts in that field, is a “firmly rooted” exception to the general rule of exclusion of hearsay statements, and therefore is not violative of a criminal defendant’s confrontation rights.\textsuperscript{114}

This ruling exhibits several apparent problems. First, the circuit precedent upon which the court relied, \textit{United States v. Williams},\textsuperscript{115} predates the 2000 amendment to Rule 703, which emphasized that Rule 703 is not an exception to the hearsay rule.\textsuperscript{116} Also, the court in \textit{Williams} concluded that the expert opinion offered there was not “offered for the purpose of establishing the truth”\textsuperscript{117} of the underlying facts; this conflicts with the Eleventh Circuit’s conclusion in \textit{Brown} that the DEA expert’s testimony was “clearly” offered to prove the truth of the matter asserted by the expert’s sources.\textsuperscript{118} Finally, at common law, hearsay was not an acceptable basis for expert testimony,\textsuperscript{119} so although a court in 1971 considered expert testimony an exception to the hearsay rule, it is doubtful that it was “firmly rooted” as a hearsay exception in 1791.

The \textit{Brown} ruling may present even more problems when considering the rule announced in \textit{Crawford}. The statements upon which the expert witness based his opinion regarding the value of the cocaine base—statements from another DEA agent and Bermudan authorities—were clearly made “under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.”\textsuperscript{120} Therefore, the statements appear to fit the Supreme Court’s definition of “testimonial” hearsay. Moreover, because the defendant had no opportunity to cross-examine the hearsay declarants and because the expert witness essentially repeated what

\textsuperscript{112} \textit{Id.} at 1257.

\textsuperscript{113} \textit{See supra} note 9.

\textsuperscript{114} \textit{Brown}, 299 F.3d at 1258.

\textsuperscript{115} 447 F.2d 1285 (5th Cir. 1971) (en banc). (Note that decisions of the former Fifth Circuit issued before October 1, 1981 are binding as precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).)

\textsuperscript{116} \textit{See supra} Part II.B.2.

\textsuperscript{117} \textit{Williams}, 447 F.2d at 1291 (quoting \textit{H. & H. Supply Co. v. United States}, 194 F.2d 553, 555 (10th Cir. 1952)).

\textsuperscript{118} \textit{See supra} note 111 and accompanying text.

\textsuperscript{119} \textit{See supra} Part II.A.3.

hearsay declarants told him while adding little expertise of his own (the Eleventh Circuit concluded that the expert’s testimony sought to prove the truth of the underlying statements), a strong argument exists that the defendant’s confrontation rights were violated.

Other cases exist where courts have allowed prosecution experts to testify to opinions based on testimonial hearsay. In People v. Gardeley, for example, a police detective testified that the defendants had committed a “gang related” crime under California law, based in part on an interview that he conducted with a third suspect, who pled guilty and was not on trial. Over a hearsay objection, the trial court allowed the detective to disclose to the jury the contents of the interview but instructed the jury not to consider the hearsay for its truth but only as it gave rise to the detective’s expert opinion. The detective also based his opinion on “conversations with the defendants and with other [gang] members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies.” Because “[s]tatements taken by police officers in the course of interrogations” are testimonial, the court in this case allowed an expert police witness to directly relate testimonial hearsay to the jury. Some of the other information that the expert relied upon may also have been testimonial, such as information gathered from other law enforcement officers (as in Brown). Some of the information upon which the detective relied, however, such as the statements made by the defendants themselves and results of personal investigations of other crimes, would most likely not present Confrontation Clause issues. In a case where an expert forms an opinion from many sources, including his own experience, rather than simply relating testimonial hearsay to the jury, there is less risk of a Confrontation Clause violation.

Sometimes courts recognize that an expert witness may go too far in conveying hearsay to the jury, thereby violating a criminal defendant’s confrontation rights. An example is United States v. Dukagjini. Dukagjini was a federal drug prosecution in which a DEA agent assigned to the case testified as the prosecution’s expert witness regarding the use

121. 927 P.2d 713, 717 (Cal. 1996).
122. Id.
123. Id. at 722.
124. Crawford, 124 S. Ct. at 1364.
125. See id. at 1369 n.9 (“The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.”).
126. Cf United States v. Williams, 431 F.2d 1168, 1172 (5th Cir. 1970) (“When . . . the witness has gone to many sources—although some or all be hearsay in nature—and rather than introducing mere summaries of each source he uses them all, along with his own professional experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as an attempt to introduce hearsay in disguise.”).
127. 326 F.3d 45 (2d Cir. 2002).
of code words in narcotics conversations. The agent "recited as the basis for his conclusions both his prior law enforcement experience and his 'knowledge of the investigation' from the wire-tapped conversations and his personal conversations with the other agents, witnesses, and co-conspirators." The Second Circuit commented that the agent's "conclusions appear[ed] to have been drawn largely from his knowledge of the case file and upon his conversations with co-conspirators, rather than upon his extensive general experience with the drug industry."

While wire-tapped conversations between co-conspirators would generally not constitute testimonial hearsay, conversations between an investigating agent and other agents, witnesses, and co-conspirators appear to be similar to the type of testimonial hearsay that the Supreme Court identified in Crawford.

The court in Dukagjini warned that allowing a case agent or a fact witness to also testify as an expert presents a risk that inadmissible and prejudicial testimony will be proffered:

As the testimony of the case agent moves from interpreting individual code words to providing an overall conclusion of criminal conduct, the process tends to more closely resemble the grand jury practice, improper at trial, of a single agent simply summarizing an investigation by others that is not part of the record.

The court similarly recognized a significant risk that if the witness digresses from his expertise, he will be improperly relying upon hearsay evidence and may convey hearsay to the jury. The court therefore held that "an expert witness may rely on hearsay evidence while reliably applying expertise to that hearsay evidence, but may not rely on hearsay for any other aspect of his testimony" because such testimony "violates Rule 703, the hearsay rule, and the Confrontation Clause."

The Second Circuit concluded that the DEA agent in Dukagjini "plainly was not translating drug jargon, applying expert methodology, or relying on his general experience in law enforcement. Rather, he was relying on his conversations with non-testifying witnesses and co-

128. Id. at 49–50.
129. Id. at 50.
130. Id. at 55.
132. This conclusion is dependent upon a finding that the "conversations" involved amounted to police "interrogations" (for example, statements knowingly given in response to structured police questioning). See supra note 16 and accompanying text.
133. Dukagjini, 326 F.3d at 54; see also United States v. Lawson, 653 F.2d 299, 302 (7th Cir. 1981) (noting that it would violate the Confrontation Clause if the government "simply produce[d] a witness who did nothing but summarize out-of-court statements made by others").
134. Dukagjini, 326 F.3d at 59.
135. Id. at 58.
defendants in order to prove 'the truth of the matter asserted' about the meaning of the drug conversations." Consequently, the Second Circuit held that the district court erred in permitting the agent’s testimony in violation of the hearsay rule and the Confrontation Clause because rather than “rely[ing] on hearsay evidence for the purposes of rendering an opinion based on his expertise ... the expert was repeating hearsay evidence without applying any expertise whatsoever, thereby enabling the government to circumvent the rules prohibiting hearsay.”

C. Summary

These cases demonstrate that there is a continuum of situations in the analysis of whether an expert opinion based on testimonial hearsay violates the Confrontation Clause. On one end of the spectrum are experts who base their opinions almost solely on testimonial hearsay and merely recount to the jury what others have said. This type of expert opinion is almost surely a violation of the Confrontation Clause if the defendant cannot test the reliability of the expert’s testimony by cross-examining the declarants of the underlying statements. On the other end of the spectrum exist cases where an expert has relied on a number of sources and types of data and has added significant expertise to interpret and analyze them. In these circumstances, a confrontation violation likely will not exist because the expert’s opinion is truly original and a product of his special knowledge or experience, and the defendant can test its reliability by cross-examination of the expert.

Conclusion

Prior to Crawford v. Washington, admission of particularly trustworthy hearsay against a criminal defendant was thought to be acceptable under the Confrontation Clause. After the Supreme Court’s return to the Framers’ intent behind the Confrontation Clause in Crawford, though, “particularly trustworthy” is no longer sufficient; defendants must have an opportunity to cross-examine the declarants of all testimonial statements used against them.

The Federal Rules of Evidence lifted the common law’s restrictions on the facts and data that an expert witness may permissibly consider in forming an opinion. Experts may now rely on—and disclose to the jury—inadmissible hearsay that forms the basis of their opinions. Such hearsay, though, must be a type reasonably relied upon by similar experts in the field, which leads some courts to consider it particularly trustworthy. This Note has attempted to highlight that because “particularly trustworthy” is no longer sufficient for the Confrontation Clause, a risk exists that

136. Id. at 59 (quoting Fed. R. Evid. 801(c)).
137. Id. The court nevertheless concluded that the Confrontation Clause violation was not “plain error” and that the hearsay violation was “harmless error.” Id. at 61–62.
expert testimony will violate a criminal defendant's constitutional rights when an expert—particularly a police expert who also has investigated the crime—relies too heavily on testimonial hearsay. This may happen when the opinion merely restates the facts, rather than adding substantial expertise and analysis. Because members of the jury may have difficulty accepting an expert's opinion without accepting the truth of the facts upon which he relied, courts should consider whether an expert's opinion that relies on testimonial hearsay violates the defendant's right to confront the witnesses against him.
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