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## But What if the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony<sup>1</sup>

*Peter Nicolas*<sup>2</sup>

Prior to 2004, it was fairly simple for the prosecution in a criminal case to overcome a Confrontation Clause objection when offering hearsay evidence against the accused. Under the United States Supreme Court's then-existing Confrontation Clause jurisprudence, so long as the hearsay statement at issue fell within a "firmly rooted"<sup>3</sup> exception to the hearsay rule or was shown by the prosecution to contain "particularized guarantees of trustworthiness," the Confrontation Clause posed no barrier to admissibility.<sup>4</sup>

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1. Copyright © 2010 Peter Nicolas.

2. Jeffrey & Susan Brotman Professor of Law, University of Washington School of Law. I wish to thank Professor Helen Anderson, Professor Jeffrey Fisher, Katherine Peters, and Professor Kathryn Watts for their extremely helpful comments and assistance.

3. Whether a hearsay exception was "firmly rooted" turned on its longevity and the extent to which it received widespread acceptance. *See, e.g.*, *Lilly v. Virginia*, 527 U.S. 116, 130 (1999) (relying on the fact that a particular application of the statement against interest exception to the hearsay rule is "of quite recent vintage" to conclude that it is not firmly rooted); *White v. Illinois*, 502 U.S. 346, 355 n.8 (1992) (using the fact that the hearsay exception for spontaneous declarations is over two centuries old and recognized in nearly eighty percent of the states, and the fact that the hearsay exception for statements made for purposes of medical diagnosis and treatment is widely accepted among the states to conclude that both are firmly rooted); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (asserting that the co-conspirator exception was firmly rooted as it was recognized by the Court 150 years earlier); *Coy v. Renico*, 414 F. Supp. 2d 744, 770 (E.D. Mich. 2006) (holding that "firmly rooted" refers to hearsay exceptions that have "long-standing and widespread use"); *Capano v. State*, 781 A.2d 556, 616 (Del. 2001) (noting that the finding that a hearsay exception is firmly rooted "depends in part on the longevity and widespread acceptance of the hearsay exception by courts and legislatures."); *State v. Ross*, 919 P.2d 1080, 1089 (N.M. 1996) ("[A] court should consider the exception's historical longevity and widespread acceptance to determine whether the exception is 'firmly rooted.'").

4. *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980). The pre-2004 approach also required a showing that the declarant was unavailable, *see id.* at 68, but the U.S. Supreme Court quickly narrowed the circumstances in which that requirement would be imposed. *United States v. Inadi*, 475 U.S. 387, 394 (1986) ("*Roberts* cannot fairly be read to stand for the radical

But in its watershed 2004 opinion in *Crawford v. Washington*,<sup>5</sup> the Supreme Court re-theorized the relationship between hearsay evidence and the Confrontation Clause and, in so doing, created a significant barrier to offering hearsay evidence against the accused in a criminal case. *Crawford* and its progeny divide hearsay into two categories: “testimonial” and “non-testimonial.”<sup>6</sup> If a statement is deemed non-testimonial, then the Confrontation Clause presents *no* barrier to admissibility.<sup>7</sup> However, if the statement is testimonial, it is, as a general rule,<sup>8</sup> *inadmissible* unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine her.<sup>9</sup> Accordingly, after *Crawford*, where testimonial hearsay is involved, the prosecution can no longer overcome a Confrontation Clause objection by merely pointing to the fact that the statement falls within an exception to the hearsay rule, firmly rooted or otherwise. For example, *Crawford* and its progeny have deemed inadmissible on Confrontation Clause grounds testimonial statements falling within the scope of the hearsay exceptions for statements against interest,<sup>10</sup> excited utterances,<sup>11</sup> and business or public records.<sup>12</sup> Moreover, as demonstrated by the Supreme Court’s most recent Confrontation Clause decision in *Melendez-Diaz v. Massachusetts*,<sup>13</sup> the Court has

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proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.”); *Roberts*, 448 U.S. at 65 n.7 (“A demonstration of unavailability, however, is not always required.”).

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

6. *Id.* at 68.

7. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007); *Davis v. Washington*, 547 U.S. 813, 824–25 (2006).

8. *Crawford* and its progeny have recognized four exceptions to this general rule. First, the prosecution can overcome a Confrontation Clause objection to admitting a testimonial hearsay statement if the declarant appears as a witness at trial and can be cross-examined about the statement. *Crawford*, 541 U.S. at 59 n.9. Second, a testimonial statement presents no Confrontation Clause problem when offered for some reason other than to prove the truth of the matter asserted. *See id.* Third, the accused can forfeit by wrongdoing his right to object on Confrontation Clause grounds. *Davis*, 547 U.S. at 833; *Crawford*, 541 U.S. at 62. *See Giles v. California*, 128 S. Ct. 2678 *passim* (2008). Finally, dying declarations, even if testimonial, fall within a sui generis exception to *Crawford*. *Crawford*, 541 U.S. at 56 n.6; Peter Nicolas, “*I’m Dying to Tell You What Happened*”: *The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS CONST. L.Q. 487, 491–492 (2010).

9. *Crawford*, 541 U.S. at 54, 59, 68.

10. *See id.* at 36.

11. *Davis*, 547 U.S. at 813–15, 820.

12. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539–40 (2009).

13. *Id.* at 2540–41.

thus far been unmoved by arguments regarding the practical consequences of such rulings for the prosecution in terms of requiring the production of numerous individuals to appear as witnesses at trial.

There is, however, one hearsay exception—former testimony—that, if applicable, satisfies the demands of the Confrontation Clause post-*Crawford* and thus provides a means of admitting testimonial hearsay statements.<sup>14</sup> Under *Crawford*, testimonial statements *are* admissible if the declarant is unavailable *and* the accused had a prior opportunity to cross-examine her.<sup>15</sup> Likewise, the hearsay exception for former testimony requires that the declarant be unavailable and that the party against whom the testimony is offered had a prior opportunity to develop the testimony through cross-examination or otherwise.<sup>16</sup> Thus, because the phrase “unavailable,” as used in the hearsay exception, is typically construed in the same way as it is used in Confrontation Clause jurisprudence,<sup>17</sup> former testimony falling

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14. See *United States v. Avants*, 367 F.3d 433, 445 (5th Cir. 2004) (“The qualities that made [the] testimony admissible under 804(b)(1) make it meet *Crawford*’s Confrontation Clause test: unavailability and prior opportunity for cross-examination. In this instance, *Crawford* did not alter the rule that evidence within the firmly rooted hearsay exception expressed in Rule 804(b)(1) satisfies the Confrontation Clause.”); *State v. Stephenson*, 195 S.W.3d 574, 590 (Tenn. 2006) (“With respect to testimonial statements, the Court held that ‘the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.’ Thus, *Crawford* placed restrictions similar to Rule 804(b)(1) on the admission of testimonial statements.” (quoting *Crawford*, 541 U.S. at 68)); *Flonnory v. State*, 893 A.2d 507, 533 (Del. 2006) (describing *Crawford*’s requirements and those of the state’s former testimony hearsay exception as “essentially the same”); *People v. Wilson*, 114 P.3d 758, 780 (Cal. 2005) (noting that California’s former testimony hearsay exception satisfies the requirements of *Crawford*).

15. *Crawford*, 541 U.S. at 54, 59, 68.

16. See, e.g., FED. R. EVID. 804(b)(1) (“The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . . Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”). Indeed, the hearsay exception has stricter requirements than the Confrontation Clause, requiring as well that the accused had a *similar motive* to develop the testimony at the earlier proceeding. See *State v. Henderson*, 136 P.3d 1005, 1010 (N.M. Ct. App. 2006); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 717 n.121 (2006).

17. The categories of unavailability recognized under the Federal Rules of Evidence track the forms of unavailability recognized under the Confrontation Clause. Compare FED. R. EVID. 804(a), with *California v. Green*, 399 U.S. 149, 165–68 (1970), and *Barber v. Page*, 390 U.S. 719, 724–25 (1968). Although *Green* and *Barber* antedate *Crawford*, both were

within the scope of the hearsay exception should automatically overcome a Confrontation Clause objection, even though the former testimony is clearly “testimonial” under *Crawford*.<sup>18</sup>

Yet, it is often the case that what counts as “former testimony” for both hearsay and Confrontation Clause purposes is but one layer in a hearsay “sandwich,” consisting of double, triple, or even quadruple hearsay. This is because the prosecution will often attempt to prove the person’s former testimony by means of a transcript produced by a court reporter (adding an additional layer of hearsay) and because the person’s former testimony may have consisted of hearsay statements made by third persons (adding still another layer or more of hearsay). The right to confront the person who gave testimony in the former trial may be satisfied by demonstrating her unavailability and the accused’s prior opportunity to cross-examine her. However, depending on the way in which the person’s prior testimony is proven and the content of that former testimony, there may exist other, hidden declarants that the accused has a right to confront.

In Part I of this Article, I will illustrate the hidden declarant issue through a series of hypotheticals that highlight both the hearsay and Confrontation Clause problems associated with proving former testimony. Next, in Part II, I will demonstrate that treating the hidden declarant’s statements as testimonial, and thus subject to exclusion on Confrontation Clause grounds, is consistent with *Crawford* and its progeny. I will then demonstrate, in Part III, that historically, in both England and the United States, the accused had the right to confront hidden declarants, and that the historical exception for former testimony does not extinguish the right of the accused to confront them. Finally, although such an interpretation of the Confrontation Clause raises significant practical problems akin to those raised by decisions like *Melendez-Diaz v. Massachusetts*, I will propose various practical solutions that are consistent with the Confrontation Clause in Part IV.

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cited with approval in *Crawford*. See *Crawford*, 541 U.S. at 57. Moreover, lower courts applying the definition of unavailability set forth in Federal Rule 804(a) typically will do so by reference to Confrontation Clause precedents dealing with that issue. See, e.g., *United States v. Kehm*, 799 F.2d 354, 360 (7th Cir. 1986).

18. *Crawford*, 541 U.S. at 68 (“Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial . . .”).

## I. THE HIDDEN DECLARANT PROBLEM

Hearsay is defined in pertinent part as “a statement, other than one made by the declarant<sup>19</sup> while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>20</sup> In turn, the term “statement” is defined to include “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”<sup>21</sup> Hearsay is inadmissible unless, *inter alia*, it falls within one of the exceptions to the hearsay rule.<sup>22</sup>

Traditionally, there are four risks associated with hearsay evidence, and thus four reasons why hearsay evidence is excluded: (1) faulty perception (the risk that the declarant may have inaccurately perceived the events at issue in her statement); (2) faulty memory (the risk that the declarant does not accurately recall the details of the events at issue in her statement); (3) faulty narration (the risk that the declarant may misspeak or be misunderstood); and (4) insincerity (the risk that the declarant is not being truthful when she speaks).<sup>23</sup> It is believed, for three reasons, that requiring the declarant to appear at trial and testify first-hand to what she observed will reduce these risks as compared with having a third party testify to what the declarant said: (1) the declarant is under oath (and thus to some extent more likely to speak truthfully); (2) the trier of fact is able to observe her demeanor; and (3) she is subject to cross-examination.<sup>24</sup>

Sometimes, a hearsay statement made by one declarant contains within it a hearsay statement made by another declarant. For

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19. The term “declarant” refers to the “person who makes a statement.” FED. R. EVID. 801(b).

20. FED. R. EVID. 801(c).

21. FED. R. EVID. 801(a).

22. FED. R. EVID. 802.

23. *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 232 (2d Cir. 1999); *State v. Sanchez*, 177 P.3d 444, 472 (Mont. 2008) (Nelson, J., dissenting) (citing *Schering*, 189 F.3d at 232); *Stoddard v. State*, 887 A.2d 564, 573 (Md. 2005); FED. R. EVID. art. VIII advisory committee’s introductory note; 4 CHRISTOPHER MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:3 (3d ed. 2007); 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6324 (1997); Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974); Edmund M. Morgan, *Hearsay Dangers and Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 185–88 (1948).

24. See FED. R. EVID. art. VIII advisory committee’s introductory note; KENNETH S. BROUN ET AL., 2 MCCORMICK ON EVIDENCE § 245, at 125–127 (6th ed. 2006).

example, suppose that David is on trial, charged with murdering Victor. The prosecution seeks to offer into evidence a police report written by Anna, a police officer, in which she indicates that Bob told her that he saw David shoot Victor. The police report is hearsay-within-hearsay, or double hearsay; it is Anna's (written) assertion that Bob (orally) asserted that David shot Victor. The hearsay rule requires the exclusion of hearsay-within-hearsay unless each layer of hearsay falls within an exception to the hearsay rule.<sup>25</sup> Thus, to overcome a hearsay objection, not only would Anna's written statement have to fall within an exception to the hearsay rule, but so too would Bob's statement to Anna.

Moreover, each layer of hearsay is also subject to scrutiny under the Confrontation Clause.<sup>26</sup> Accordingly, if any layer of hearsay is "testimonial" within the meaning of *Crawford* and its progeny, then the hearsay-within-hearsay statement is subject to exclusion on Confrontation Clause grounds unless every level of hearsay that is testimonial satisfies the requirements of *Crawford*, namely, showing that the declarant is unavailable and that the accused had a prior opportunity to cross-examine her.<sup>27</sup>

Sometimes, a statement is offered into evidence for some reason *other than* to prove the truth of the matter asserted therein. In such instances—in which a statement is significant merely because of the fact that it was *made*—it is not considered to be hearsay because it is not being offered to prove the *truth* of the assertion contained within the statement.<sup>28</sup>

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25. FED. R. EVID. 805.

26. *United States v. McKinney*, 707 F.2d 381, 383 n.2 (9th Cir. 1983); *United States v. Mills*, 446 F. Supp. 2d 1115, 1136 (C.D. Cal. 2006); *People v. Zapien*, 846 P.2d 704, 716 (Cal. 1993); *State v. Brown*, 173 P.3d 612, 627 (Kan. 2007); *State v. Bintz*, 650 N.W.2d 913, 920 (Wis. Ct. App. 2002).

27. *State v. Ennis*, 158 P.3d 510, 518 (Or. Ct. App. 2007) ("Nevertheless, it seems necessarily to follow from the United States Supreme Court's analysis in *Crawford*, that the rule of that case would apply to each level of hearsay. Consequently, the Confrontation Clause principle enunciated in *Crawford* is implicated only if one or more levels of multilevel hearsay involve both a testimonial statement and the unavailability of—and lack of prior opportunity to cross-examine—the declarant *of that statement*. Conversely, it is insufficient if, for example, an unavailable declarant makes a nontestimonial statement to another person, and that person then makes a testimonial statement regarding the former, but is available for cross-examination. Stated another way, in order for *Crawford* to apply to a multilevel hearsay statement, the two prerequisites to that application—a testimonial statement and an unavailable declarant—must coincide on at least one level.").

28. FED. R. EVID. 801(c) advisory committee's note.

For instance, in the above example, if Anna, the police officer, testified at trial that Bob told her that he saw David shoot Victor, that would be hearsay if offered to prove the truth of what Bob asserted (in other words, if it was offered by the prosecution to prove in a murder trial that David shot Victor). If, on the other hand, it was offered to prove that Bob had the physical ability to *speak*, or that he was capable of speaking English (in some case in which either of those propositions were somehow relevant), it would then be offered for some reason other than to prove the *truth* of what Bob asserted. Accordingly, it would not be deemed hearsay.<sup>29</sup>

Similarly, the mere *fact* that certain words were spoken can sometimes take on legal significance. For example, words of a contract, defamatory statements, or perjured statements, when offered into evidence in cases in which they are legally relevant simply because they were *made*, are not hearsay.<sup>30</sup>

A statement is likewise not hearsay if offered to show its effect on another person, such as the impact the statement had on the person's state of mind (e.g., his knowledge or the reasonableness of his taking particular actions).<sup>31</sup> For example, suppose that Anna was married to Victor and *Anna* was on trial for shooting David. Anna's testimony that Bob told her that David shot Victor might be offered into evidence in support of a diminished capacity defense (in other words, her belief that David shot her husband caused her to emotionally react in the way that she did, which, if a valid defense, would be relevant without regard to whether David in fact shot Victor).

In these instances—in which the statement is offered for some reason other than to prove the truth of the matter asserted—there is no hearsay problem as a theoretical matter because the probative value of the evidence does not depend on the *veracity* of the out-of-court witness. Thus, there is no concern that the statement was not made under oath, was not subject to cross-examination, and was not said in the presence of the trier of fact. The statement is relevant merely *because* it was made, without regard to whether or not the

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29. *United States v. Reynolds*, 715 F.2d 99, 102 (3d Cir. 1983).

30. See *BROUN ET AL.*, *supra* note 24, § 249, at 133; CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 8.16, at 729–31 (3d ed. 2003).

31. See *United States v. Peco*, 784 F.2d 798, 804 n.3 (7th Cir. 1986); MUELLER & KIRKPATRICK, *supra* note 30, § 8.18, at 732–33; *BROUN ET AL.*, *supra* note 24, § 249, at 134–37.

out-of-court declarant was speaking truthfully when she made the statement. The only question is whether the statement *was in fact* made, and that turns on the veracity of the in-court witness who is testifying to what he allegedly heard.

Moreover, according to *Crawford*, when a testimonial statement is offered by the prosecution for some reason other than to prove the truth of the matter asserted, not only are they able to overcome a hearsay objection, but they also overcome any objection on Confrontation Clause grounds: “The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”<sup>32</sup> In such circumstances, the relevant question is whether the statement was in fact *made*, and, thus, the only “witness against” the accused for Confrontation Clause purposes—and thus the only person they have the right to confront—is the individual recounting what the other individual allegedly said.<sup>33</sup>

Former testimony—which includes testimony given before a grand jury, at a preliminary hearing, in a deposition, or at a former trial—is a form of hearsay when it is offered to prove the truth of the matter asserted therein.<sup>34</sup> Despite the fact that such testimony is typically<sup>35</sup> given under oath and the witness is subject to cross-examination, it is treated as hearsay because one of the three advantages of live testimony—the opportunity for the jury in the *current* proceeding to observe the witness’s demeanor—is absent.<sup>36</sup>

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32. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

33. *Tennessee*, 471 U.S. at 414 (“The Clause’s fundamental role in protecting the right of cross-examination was satisfied by Sheriff Papantoniou’s presence on the stand. If respondent’s counsel doubted that Peele’s confession was accurately recounted, he was free to cross-examine the Sheriff. By cross-examination respondent’s counsel could also challenge Sheriff Papantoniou’s testimony that he did not read from Peele’s statement and direct respondent to say the same thing. In short, the State’s rebuttal witness against respondent was not Peele, but Sheriff Papantoniou.”).

34. This is so even though the prior statement was made in a court proceeding. See G. MICHAEL FENNER, *THE HEARSAY RULE 13–14* (2003) (“An out-of-court statement is one made at a time and place other than right now in this courtroom. . . . The declarant may have made the statement in some other courtroom, in some different proceeding, but not this courtroom during this proceeding.”).

35. In the case of grand jury testimony, the accused lacks an opportunity to cross-examine the witnesses. See *United States v. Clarke*, 2 F.3d 81, 83 (4th Cir. 1993).

36. FED. R. EVID. 804(b)(1) advisory committee’s note.

Nonetheless, if the person who testified previously is unavailable and the person against whom the testimony is now offered had both “an opportunity and a similar motive” to cross-examine her, then such testimony falls within the exception to the hearsay rule for former testimony.<sup>37</sup> If a person who was present at the earlier proceedings (such as a court reporter or other observer) came into court and testified to what the now-unavailable witness said, one would have just a single layer of hearsay (the former testimony), which would fall within the former testimony exception to the hearsay rule.<sup>38</sup> One would likewise have a single layer of hearsay that could be overcome with the former testimony exception if the person who was present at the earlier proceeding came into court and could not immediately recall precisely what the now-unavailable witness said, but his memory was refreshed through the use of a transcript or stenographic notes of the earlier proceeding.<sup>39</sup> And, under *Crawford*, such statements, despite their testimonial nature, overcome a Confrontation Clause objection for the same reasons that they satisfy the former testimony hearsay exception: the declarant is unavailable and the accused had a prior opportunity to cross-examine her.<sup>40</sup>

If either of these two methods of proving the witness’s former testimony is used, and if the witness’s former testimony is simply a recounting of her observations, then there exists only a single layer of hearsay, and the above analysis suffices to overcome both the hearsay and Confrontation Clause objections to admitting the testimony. Yet it is often the case, either because of the method of proof, the substance of the witness’s former testimony, or both, that what is involved is double hearsay, triple hearsay, or some even more complex form of multiple hearsay that requires additional analysis to

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37. FED. R. EVID. 804(b)(1).

38. See JACK B. WEINSTEIN & MARGARET A. BERGER, 5 WEINSTEIN’S FEDERAL EVIDENCE § 804.04[2] (Joseph M. McLaughlin ed., Mathew Bender 2d ed. 1997); CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 237, at 498–99 (1954); BROWN ET AL., *supra* note 24, § 307, at 359; CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 5 FEDERAL EVIDENCE § 8:117 (3d ed. 2007); Glen Weissenberger, *Federal Rules of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1094 (1987).

39. See WEINSTEIN & BERGER, *supra* note 38, § 804.04[2]; MCCORMICK, *supra* note 38, at 499 (1954); BROWN ET AL., *supra* note 24, § 307, at 360 (6th ed. 2006); MUELLER & KIRKPATRICK, *supra* note 38, § 8:117; Weissenberger, *supra* note 38, at 1094.

40. *Crawford v. Washington*, 541 U.S. 36, 54, 59, 68 (2004).

overcome both hearsay and Confrontation Clause challenges to admitting the testimony.

Although the former testimony of a witness can, as indicated above, be proven by the testimony of someone who heard it first-hand at the earlier proceeding, it is more typically the case that it will be proven by means of a *transcript* of the witness's testimony. In such an instance, one has hearsay-within-hearsay, with the inner layer being the witness's testimony in the earlier proceedings and the outer layer being the court reporter's written assertion as to what the witness said.<sup>41</sup> Furthermore, in some instances, the witness in the earlier proceeding will have testified to a statement made by some *other* person, adding yet another layer of hearsay.<sup>42</sup> What follows is a series of hypothetical scenarios that illustrates the layered hearsay and Confrontation Clause problems presented by such evidence.

Consider first the hearsay and Confrontation Clause problems raised by the outer layer of hearsay added through the use of a transcript to prove a witness's former testimony. As an initial example, consider a criminal prosecution in which the defendant is being re-tried on charges of murder after the jury in the first trial deadlocks. The prosecution seeks to offer into evidence a transcript

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41. See MUELLER & KIRKPATRICK, *supra* note 38, § 8:117 ("It is easy to overlook the fact that using a transcript to prove matters asserted in prior testimony involves two hearsay layers, and that an exception must be found for the transcript itself."); Weissenberger, *supra* note 38, at 1093; See also *Essex Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc.*, 282 F. App'x 406, 411–12 (6th Cir. 2008) (holding that privately produced transcripts of an interview present a "hearsay within hearsay" problem); *Woods v. Postal Telegraph Cable Co.*, 87 So. 681, 686 (Ala. 1920); *People v. Reed*, 914 P.2d 184, 189 (Cal. 1996); *Westernbank Puerto Rico v. Kachkar*, No. 07-1606, 2009 WL 530087, at \*1 (D.P.R. Jan. 7, 2009) (Judge's written record of testimony presents a hearsay within hearsay problem); *People v. Henry*, 167 Misc. 2d 1027, 1030 (N.Y. Dist. Ct. 1996); *State v. Silverman*, Nos. 05AP-837, 05AP-838, 05AP-839, 2006 WL 2075642, at \*16–17 (Ohio Ct. App. July 27, 2006); *State v. Mullins*, 132 Wash. App. 1027, 2006 WL 926442, at \*5 (Wash. Ct. App. 2006) (police transcript of tape-recorded statement "double hearsay"); *People v. Abarca*, 233 Cal. App. 3d 1347, 1350–51 (1991); *In re Cary*, 9 F. 754, 756–57 (S.D.N.Y. 1881).

42. See *Leighty v. State*, 981 So. 2d 484, 492 (Fla. Dist. Ct. App. 2008) (catching the middle and inner layers but not the transcript layer); *Robinson v. State*, 64 P.3d 743, 749 (Wyo. 2003) (same); *State v. Bintz*, 650 N.W.2d 913, 918–20 (Wis. Ct. App. 2002) (same); *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1311–12 (5th Cir. 1991) (same); *United States v. Groos*, 616 F. Supp. 2d 777, 791 n.8 (N.D. Ill. 2008); *People v. Nance*, No. 227349, 2002 WL 737790, at \*2 (Mich. Ct. App. Apr. 23, 2002); *State v. Baker*, 607 P.2d 61, 64 (Kan. 1980); see also *Hackley v. Roudebush*, 520 F.2d 108, 156 n.195 (D.C. Cir. 1975) (recognizing that a transcript of someone's testimony presents a double or triple hearsay problem); *Evinger v. McDaniel Title Co.*, 726 S.W.2d 468, 474 (Mo. Ct. App. 1987) (describing as triple hearsay a transcript containing testimony about what a third person said).

of the testimony of a witness who is now dead but who testified in the first trial that he saw the defendant shoot the victim. The transcript asserts (in writing) that the witness (orally) asserted that he saw the accused shoot the victim. Its relevancy turns on the veracity of both the unavailable witness *and* the court reporter, for the prosecution is almost certainly offering it to prove the truth of what they collectively assert, to wit, that the accused shot the victim.

As indicated above, hearsay and Confrontation Clause concerns regarding what the witness previously said are overcome by his unavailability and by the fact that the accused had an opportunity and similar motive to cross-examine the witness at the first trial. But what of the written statement by the court reporter as to what she allegedly heard the witness say at the first trial? Does the probative value of the transcript not turn on the *truth* of what the court reporter asserts therein, namely, that the witness *in fact* testified that he saw the defendant shoot the victim?<sup>43</sup>

Thus, this is not a situation in which the court reporter's statement is significant merely because it was *made* by the court reporter; for the purpose of determining whether or not the defendant killed the victim, the court reporter's statement is significant only if the court reporter accurately recounted the alleged eyewitness's testimony regarding what he saw. It may be the case that the court reporter either misheard or erred in transcribing the witness's testimony, or perhaps the court reporter is a bad actor who has it out for the defendant for some reason. Indeed, all of the risks associated with hearsay evidence are present on both levels:

When former testimony is sought to be proven by an official transcript made at the prior proceeding . . . a problem of multiple hearsay is presented. . . . The transcript is being offered to prove what the reporter heard the witness state. That is the first level of hearsay because it involves the perception, recollection, narration and sincerity of the court reporter. If the witness' words are also being offered for their truth, a second level of hearsay exists because this brings into play the perception, recollection, narration and sincerity of the witness.<sup>44</sup>

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43. *Cf.* Harrod v. State, 384 A.2d 753, 758 (Md. Ct. Spec. App. 1978) (“[C]ounsel was offering a document for its truth; he was proposing to ask the jury to accept as true the written statement of an out-of-court declarant (the transcriber) . . .”).

44. State v. Pinnell, 806 P.2d 110, 122 n.29 (Or. 1991).

Accordingly, in this instance, requiring the court reporter to be present would ensure that she could “be cross-examined . . . and the accuracy of the witness be tested.”<sup>45</sup>

Now perhaps in a fanciful situation, one could imagine a court reporter who is out to get a particular defendant, thus invoking the risk of insincerity (even if the particular court reporter does not personally know the defendant, he may have a bias against people of, say, the same race or gender as the defendant).<sup>46</sup> More likely, the court reporter may have erred in reporting what a particular witness said, either because of the risk of faulty perception or that of faulty narration. Indeed, studies have shown that, despite their high degree of training, the amount of human error introduced into the process of creating a verbatim record of court proceedings through the use of a court reporter is significant.<sup>47</sup> In the words of one court, “[s]tenographers are no more infallible than any other human beings, and while, as a rule, they may be accurate, intelligent, and honest, they are not always so . . . .”<sup>48</sup>

Perhaps a more striking example of the hearsay and Confrontation Clause problems raised by using a transcript to prove a witness’s testimony arises in the context of a prosecution for perjury. In this second example, assume that the defendant is on trial for committing perjury in an earlier proceeding, whether it is testimony before a grand jury or at an earlier trial. The prosecution seeks to offer into evidence a transcript of the defendant’s testimony at the earlier proceeding. Although, at first glance, this appears to be a hearsay-within-hearsay problem, it is not. What facially appears to be the inner layer of hearsay (what the defendant testified to in the earlier proceeding) is not hearsay at all, because it is not being offered to prove the truth of the matter asserted<sup>49</sup> (indeed, the

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45. See *Roth v. Smith*, 54 Ill. 431, 433 (Ill. 1870).

46. Although perhaps fanciful, it is not unusual for litigants to level such an accusation at a court reporter. See, e.g., *Rose v. Paterson*, 152 F. App’x 589, 590 (9th Cir. 2005); *United States v. Bradshaw*, No. 99-5724, 2000 WL 1434677, at \*1 (6th Cir. Sept. 22, 2000); *Kuehne v. Foley*, No. 3:09-cv-18, 2009 WL 1045897, at \*3 (S.D. Ohio Apr. 20, 2009).

47. See *In re Cary*, 9 F. 754, 757 (S.D. N.Y. 1881) (“Mistakes of more or less importance constantly occur in the notes of stenographers, even of those who are most experienced and trustworthy . . . .”). See Keith A. Gorgos, *Lost in Transcription: Why the Video Record is Actually Verbatim*, 57 BUFF. L. REV. 1057, *passim* (2009).

48. *Brice v. Miller*, 15 S.E. 272, 277 (S.C. 1892).

49. See MUELLER & KIRKPATRICK, *supra* note 30, § 8.16, at 730; MCCORMICK, *supra* note 38, § 230, at 481 n.11 (citing *State v. Wykert*, 199 N.W. 331 (Iowa 1924)).

matter is not true, which is why the defendant is on trial for perjury). Rather, the prior testimony was significant merely because it was made (making a false statement under oath gives rise to legal consequences). However, there still exists the outer layer of hearsay, the court reporter's assertion that the defendant so testified. That clearly raises hearsay and Confrontation Clause concerns, does it not? Its probative worth turns on whether it is true: if the accused did not actually so testify, then he did not commit perjury. Accordingly, should not the accused be able to confront the court reporter to test the accuracy of his claim that the accused so testified?

Few courts and commentators have taken note of the outer (transcript) layer of hearsay, but those that have addressed it have identified two hearsay exceptions that pave the way to admitting the testimony. First, if the court reporter appears at trial but cannot recall what the witness testified to, the transcript can be admitted under Federal Rule of Evidence 803(5) or its state law equivalent, the hearsay exception for a past recollection recorded.<sup>50</sup> Alternatively, it can be admitted under Federal Rule of Evidence 803(8), the hearsay exception for public records.<sup>51</sup> Furthermore, some jurisdictions have created specially tailored statutes to overcome the hearsay problem raised by the transcript.<sup>52</sup> Yet, even assuming the hearsay objection can be overcome, there remains a viable

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50. See *United States v. Arias*, 575 F.2d 253, 254–55 (9th Cir. 1978); *State v. Pinnell*, 806 P.2d 110, 122 n.29 (Or. 1991); WEINSTEIN & BERGER, *supra* note 38; MCCORMICK, *supra* note 38, at 499; BROUN ET AL., *supra* note 24, § 307, at 360.

51. See *Arias*, 575 F.2d at 254; *Hackley v. Roudebush*, 520 F.2d 108, 156 n.195 (D.C. Cir. 1975); *Pinnell*, 806 P.2d at 122 n.29; *People v. Reed*, 914 P.2d 184, 189 (Cal. 1996); *People v. Abarca*, 285 Cal. Rptr. 213, 215 (Cal. Ct. App. 1991); *State v. Silverman*, Nos. 05AP-837, 05AP-838, 05AP-839, 2006 WL 2075642, at \*16–17 (Ohio Ct. App. July 27, 2006); *People v. Henry*, 641 N.Y.S.2d 1003, 1003 (N.Y. Dist. Ct. 1996); Weissenberger, *supra* note 38, at 1093 & n.74.; WEINSTEIN & BERGER, *supra* note 38; MCCORMICK, *supra* note 38, at 499; BROUN ET AL., *supra* note 24, § 307, at 360; ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK 2D § 4:84, at 210–11 (2008). A few courts hold that it is likewise admissible under the hearsay exception for business records. See, e.g., *Henry*, 641 N.Y.S.2d at 1003; *Pinnell*, 806 P.2d at 122 n.29.

52. See PARK, *supra* note 51. On the federal level, where what is involved is a deposition as opposed to a former trial, resort is often made to Federal Rule of Civil Procedure 32(a)(4), which serves as an exception to the hearsay rule for the deposition testimony of an unavailable witness that is independent of Rule 804(b)(1). See *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 914 (9th Cir. 2008). That statute appears to encompass both layers of hearsay (the testimony plus the transcript), since it has a provision indicating that a party waives its right to object to errors in the transcription process if a motion to suppress is not appropriately made. See FED. R. CIV. P. 32(d)(4).

Confrontation Clause objection to admitting the court reporter's written assertion, which is examined in greater detail in Part II.

Consider next the hearsay and Confrontation Clause problems raised by the innermost layers of hearsay that can be found in transcripts of former testimony in which the witness in the earlier trial testifies as to what some third person said to him. For example, suppose that Defendant is on trial for the murder of Victim A and the attempted murder of Victim B. At that trial, Police Officer testifies that he arrived at the scene of the crime to find Victim A dead of a gunshot wound and Victim B on the verge of death. Before slipping into a coma, Victim B said to the officer, "It won't be long before I join Victim A in the afterworld. Be sure to tell the judge and the jury that Defendant shot us." The jury deadlocks, and Defendant is re-tried on the charges. Between the first trial and the second, Police Officer dies. The prosecution seeks to offer into evidence a transcript of Police Officer's testimony at the first trial.

In this example, the defense could validly raise a *triple* hearsay objection to the evidence. Here, we have the court reporter's (written) assertion that Police Officer (orally) asserted that Victim B asserted that Defendant shot both Victim A and Victim B, and it is being offered to prove the truth of that assertion. The above discussion has addressed ways of overcoming the outermost layer of hearsay (the transcript) and the middle layer (the former testimony), but one must still overcome hearsay and Confrontation Clause objections to the innermost layer of hearsay: Victim B's statement. In this example, the most likely solution would be to invoke the hearsay exception for dying declarations.<sup>53</sup>

Consider yet another example, in which Defendant is on trial for statutory rape. At the first trial, Witness testifies that Victim's Younger Sister told him that Victim was born in 1995, making her under eighteen years old at the time the incident occurred. The jury is deadlocked on whether to convict, and a new trial is ordered. By the time of the new trial, Witness has died, and the prosecution seeks to offer into evidence a transcript of Witness's testimony in the first trial. In this example, the defense could validly raise a *quadruple* hearsay objection to the evidence. Here, we have the court reporter's

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53. See FED. R. EVID. 804(b)(2). It is not entirely clear that the exception would apply in this instance, for, at common law, if A and B were shot at the same time by someone, B's declaration would not be admissible in a prosecution for A's murder. See 5 WIGMORE, EVIDENCE § 1433, at 281-82 (Chadbourn rev. 1974).

(written) assertion that Witness (orally) asserted that Victim's Younger Sister (orally) asserted that Victim was born in 1995. Why *quadruple* hearsay? Because Victim's Younger Sister is younger than Victim, she could not have first-hand knowledge of her sister's date of birth, and so she probably learned of it from reputation amongst her family members. Nonetheless, if Victim's Younger Sister is unavailable to testify, the hearsay exception for statements of personal or family history could be invoked,<sup>54</sup> and it would address the two innermost layers of hearsay.<sup>55</sup>

So far as these innermost layers of hearsay are involved, one might reasonably ask whether there is a valid basis for objecting to them on hearsay and Confrontation Clause grounds. After all, if the former testimony about these hearsay statements was admitted at the earlier trial, then either no objection was raised, or the objection was overcome. For two reasons, it would seem that this is no barrier to raising the objection on retrial. First, although the authorities are to some extent split, most hold that objections that are substantive in nature (which would include hearsay and Confrontation Clause objections) can be asserted for the first time on retrial.<sup>56</sup> Moreover, even if an objection was raised and was overcome, it may be that the predicate facts were different at the time. For example, both the hearsay exception for dying declarations and that for statements of personal or family history require a showing that the declarant is unavailable. It could be that the declarant was unavailable at the first trial but is now available.<sup>57</sup> For example, in the murder trial, it may

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54. See FED. R. EVID. 804(b)(4)(B).

55. See FED. R. EVID. 804(b)(4)(B) advisory committee's note.

56. See MCCORMICK, *supra* note 38, § 236, at 497 & n.4 (citing Aetna Ins. Co. v. Koonce, 171 So. 269 (Ala. 1936)); BROWN ET AL., *supra* note 24, § 306, at 358–59 (citing Aetna Ins. Co. v. Koonce, 171 So. 269 (Ala. 1936)). See also 1 GREENLEAF ON EVIDENCE § 163, at 234–35 (10th ed. 1860) (“But testimony thus offered is open to all the objections which might be taken, if the witness were personally present.”); Scribner v. Palmer, 156 P. 531, 532–33 (Wash. 1916) (noting that, arguably, any objection improperly overruled in the first trial could be raised again in the second trial); Calvert v. Cox, 1 Gill 95, 1843 WL 3016, at \*16 (Md. 1843) (“Reasons, almost without number, may be assigned, why a party not objecting to incompetent testimony on a first trial, should prefer his objections on the second. His omission or waiver of his rights in a first trial, do not impair or restrain his exertion of them in the second.”).

57. See Greiner v. Wells, 417 F.3d 305, 325–26 (2d Cir. 2005) (focusing on whether the declarant whose statement the witness testified to at the first trial was available at the time of the second trial).

be that Victim B awoke from his coma between the first trial and the second.

As the above examples demonstrate, former testimony raises complex hearsay issues when it is proven by means of a transcript, when it contains within it statements made by other people, or when both factors are present. In many instances, as demonstrated above, the hearsay objections can be overcome through resort to the many recognized exceptions to the hearsay rule. Yet, to overcome an objection on Confrontation Clause grounds post-*Crawford*, it is insufficient that a testimonial statement falls within the scope of a hearsay exception. Accordingly, the next part will examine the extent to which admitting into evidence the outermost (transcript) and innermost (statements by third persons) layers of hearsay found in transcripts of former testimony run afoul of the Confrontation Clause as set forth in *Crawford* and its progeny.

## II. THE HIDDEN DECLARANT PROBLEM POST-*CRAWFORD*

Prior to *Crawford*, a handful of lower court decisions addressed the latent Confrontation Clause problem posed by the outermost (transcript) layer of hearsay found in transcripts of former testimony, with some courts spotting the potential Confrontation Clause problem and others overlooking it.

For example, in a perjury prosecution in which a transcript of the defendant's perjured testimony was offered into evidence, one court held that there was no Confrontation Clause problem because it involved the accused's own words, as opposed to the words of another person.<sup>58</sup> Although the court was correct that the *inner layer* of hearsay (the defendant's former testimony) consisted of the accused's own words (and, thus, presented no Confrontation Clause problem, given that the courts have held that there is no right under the Sixth Amendment to confront one's self),<sup>59</sup> the court missed the fact that the transcript represented the words of another person,

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58. See *Smith v. State*, 259 S.W. 404, 405–06 (Ark. 1924); see also *State v. Hubert*, No. 99-0561, 2000 WL 1520051, at \*4 (Iowa Ct. App. Oct. 13, 2000) (holding that there is no problem because the person who made the statement, the accused, was in court and available to be cross-examined concerning the statement, missing the fact that the court reporter was a hearsay declarant too).

59. See *United States v. Nazemian*, 948 F.2d 522, 525–26 (9th Cir. 1991); *Johnson v. State*, 832 N.E.2d 985, 999 (Ind. Ct. App. 2005); *State v. Torres*, 121 P.3d 429, 438 (Kan. 2005); *State v. Konohia*, 107 P.3d 1190, 1199 n.11 (Haw. Ct. App. 2005).

namely, the stenographer. Other lower court decisions similarly erred, holding, for example, that no hearsay is involved (and thus that no Confrontation Clause problem exists) because the former testimony is not being offered to prove the truth of the matter asserted but is simply relevant because it was made.<sup>60</sup> Those holdings also missed the fact that the statement by the court reporter *is* being offered to prove the truth of the matter asserted, to wit, that the witness actually so testified at the former proceeding. In still another decision involving a transcript of a defendant's prior perjured testimony, a lower court again brushed aside the Confrontation Clause issue, using language akin to that typical of the pre-*Crawford* regime:

It is thoroughly settled and familiar that there are well-known and generally recognized exceptions to the rule grounded on constitutional guaranty that the accused has the right to be confronted with the witnesses against him. These exceptions find support in and are based upon principles of public policy, expediency, or necessity. Among the recognized exceptions that do not contravene the constitutional provision on which the general rule is founded, is proof of essentially documentary facts by documentary evidence, when the original record, or an officially authenticated copy, is made competent by statute.<sup>61</sup>

Yet, other lower court decisions recognized the lurking Confrontation Clause problem. For example, in a case in which the accused's confession was taken down by a stenographer who, by the time of trial, had died, the court held that it could not be admitted in the absence of the stenographer without undermining the accused's "rights of confrontation and cross-examination."<sup>62</sup> And, in a series of cases in which an effort was made to prove the defendant's testimony at a prior proceeding in which he (who spoke only Chinese) testified through an interpreter, courts rejected an effort by the prosecutor to offer into evidence the transcript of his testimony, or even the testimony of the court reporter alone. The courts held that it was necessary to bring the interpreter into court, since that

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60. See *United States v. Giles*, 58 M.J. 634, 638-39 (N.M. Ct. Crim. App. 2003); *Commonwealth v. Weitkamp*, 386 A.2d 1014, 1025-26 (Pa. Super. Ct. 1978). The *Weitkamp* case can be distinguished on the ground that in that case, witnesses from the first trial appeared and confirmed the accuracy of the transcript. See *id.* at 1026.

61. *Todd v. State*, 69 So. 325, 327 (Ala. Ct. App. 1915).

62. *State v. Harding*, 165 N.W.2d 723, 729 (Neb. 1969).

was the only person who actually knew what the defendant said.<sup>63</sup> In still another early case, a statute deemed admissible a transcript of a stenographer's notes without the need to produce the stenographer. However, the court, citing the Confrontation Clause, held that the statute could not be invoked against the accused in a criminal case:

[T]he defendant in a criminal cause is entitled to be confronted by the witnesses who testify against him . . . . Hence, when questions arise like the one now under consideration, where it becomes necessary to prove what the testimony of the accused was in another trial, to which he was not a party, this statute does not control; and the stenographer who took the testimony may be sworn as a witness, and after testifying to the fact that he took the testimony at the time it was given, that he correctly recorded it in shorthand, and that he has correctly transcribed the same into longhand, may read the testimony from either the shorthand notes or the longhand manuscript, and he will be subject to cross-examination as to the correctness of his notes, the accuracy of his system of stenography, the identity of party, and as to the matter contained in the notes or manuscript, as well as any other facts relating to the matter testified to by him.<sup>64</sup>

In any event, post-*Crawford*, the focus is on whether the statement is “testimonial” or not. Thus, layered hearsay presents a Confrontation Clause problem if one or more of the layers is “testimonial” and the declarant for that layer of hearsay is not present at trial to be confronted and the statement does not fall within one of the *Crawford* exceptions (e.g., unavailability and prior opportunity for cross-examination).<sup>65</sup> Therefore, one must consider whether the statements by the hidden declarants in the examples set

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63. See *People v. Lee Ah Yute*, 60 Cal. 95, 96 (1882); *People v. Lee Fat*, 54 Cal. 527, 531 (1880).

64. See *Cutter v. Territory*, 56 P. 861, 863 (Okla. 1899).

65. See *State v. Ennis*, 158 P.3d 510, 518 (Or. Ct. App. 2007) (“Nevertheless, it seems necessarily to follow from the United States Supreme Court’s analysis in *Crawford*, that the rule of that case would apply to each level of hearsay. Consequently, the Confrontation Clause principle enunciated in *Crawford* is implicated only if one or more levels of multilevel hearsay involve both a testimonial statement and the unavailability of—and lack of prior opportunity to cross-examine—the declarant of that statement. Conversely, it is insufficient if, for example, an unavailable declarant makes a nontestimonial statement to another person, and that person then makes a testimonial statement regarding the former, but is available for cross-examination. Stated another way, in order for *Crawford* to apply to a multilevel hearsay statement, the two prerequisites to that application—a testimonial statement and an unavailable declarant—must coincide on at least one level.”).

forth above are “testimonial” within the meaning of *Crawford*, and, if so, whether they fall within an express or implied exception to the command of the Confrontation Clause as construed in *Crawford* and its progeny.

In *Crawford*, the Court identified but did not specifically endorse any one formulation of the “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”;<sup>66</sup> (2) “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”;<sup>67</sup> 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.”<sup>68</sup> The *Crawford* Court, while “leav[ing] for another day any effort to spell out a comprehensive definition of ‘testimonial,’”<sup>69</sup> concluded that it applies, at the very least, to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>70</sup>

*Crawford* thus makes clear that the middle layer of our hearsay “sandwich”—the prior testimony itself—is “testimonial.” But what about the outer layer, the court reporter’s written statement—in the form of a transcript—regarding what the witness allegedly testified to? Is that written statement “testimonial” under *Crawford*? This requires a closer look at not only the language used in *Crawford* to define the term “testimonial,” but also the Court’s discussion of that issue in two post-*Crawford* decisions.

First, in *Davis v. Washington*,<sup>71</sup> the Court distinguished between testimonial and non-testimonial statements in the context of police interrogations as follows:

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66. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting Brief for Petitioner at 23).

67. *Id.* at 52–53 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

68. *Id.* at 52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)).

69. *Id.* at 68.

70. *Id.*

71. 547 U.S. 813 (2006).

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>72</sup>

The *Davis* court went on to note that statements made under official interrogation are testimonial when they “are an obvious substitute for live testimony” in that “they do precisely what a witness does on direct examination.”<sup>73</sup>

The Court built on this definition in its most recent decision, *Melendez-Diaz v. Massachusetts*.<sup>74</sup> In that case, the defendant was charged with trafficking in cocaine in an amount between 14 and 28 grams.<sup>75</sup> At trial, the prosecution offered into evidence certificates of analysis from state forensic analysts indicating the weight of the substance found on the accused’s person as well as a statement indicating that the substance was tested and was found to contain cocaine.<sup>76</sup>

The *Melendez-Diaz* Court held that the certificates of analysis fell within the “core class of testimonial statements” described in *Crawford*.<sup>77</sup> The Court viewed the certificates as “functionally identical to live, in-court testimony,”<sup>78</sup> and deemed them testimonial because, as in *Davis*, the statements made in the certificates do “precisely what a witness does on direct examination.”<sup>79</sup> The Court further noted that the statements were “made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial,”<sup>80</sup> and said that it

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72. *Id.* at 822.

73. *Id.* at 830 (emphasis omitted).

74. 129 S. Ct. 2527 (2009).

75. *Id.* at 2530.

76. *Id.* at 2531.

77. *Id.* at 2532 (quoting *City of Littleton, Colo. v. Z.J. Gifts, D-4, L.L.C.*, 541 U.S. 36, 51 (2004)).

78. *Id.*

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

80. *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)).

was safe to assume that the analysts were aware of that evidentiary purpose, since it was reprinted on the affidavits themselves.<sup>81</sup>

In *Melendez-Diaz*, the Court rejected an effort to limit the scope of the Confrontation Clause to so-called “conventional,” “typical,” or “ordinary” witnesses.<sup>82</sup> The Court thus held it irrelevant that the analysts “observe[d] neither the crime nor any human action related to it.”<sup>83</sup> The *Melendez-Diaz* Court also rejected an effort to distinguish “between testimony recounting historical events, which is ‘prone to distortion or manipulation,’” and the testimony at issue in the case, which was the “resul[t] of neutral, scientific testing.”<sup>84</sup> The Court disputed the characterization of forensic testing as “neutral scientific testing,” noting that it was not immune to the risk of manipulation by a fraudulent analyst.<sup>85</sup> The Court noted that “[l]ike the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.”<sup>86</sup> Moreover, the Court pointed out that the purpose of Confrontation is “to weed out not only the fraudulent analyst, but the incompetent one as well.”<sup>87</sup> The Court noted that cross-examination would permit the defendant to explore any weaknesses in the analyst’s training or judgment.<sup>88</sup>

The *Melendez-Diaz* Court then turned to the State’s contention that the affidavits should be admissible because they are “akin to the types of official and business records admissible at common law.”<sup>89</sup> The Court explained that, after *Crawford*, the fact that something falls within a particular category of hearsay does not exempt it from Confrontation Clause analysis; what matters is whether it is testimonial or not:

Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the

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81. *Id.*

82. *Id.* at 2534.

83. *Id.* at 2535.

84. *Id.* at 2536 (quoting Brief for Respondent at 29).

85. *Id.* at 2536–37.

86. *Id.* at 2537.

87. *Id.*

88. *Id.* at 2537–38.

89. *Id.* at 2538.

Confrontation Clause. As we stated in *Crawford*: “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.” Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts’ statements here—prepared specifically for use at petitioner’s trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.<sup>90</sup>

It is worth pausing here for a moment to consider the application of *Crawford*, *Davis*, and *Melendez-Diaz* to transcripts of former testimony produced by court reporters or stenographers. Is it not likely that court reporters know, or reasonably should know, that the transcripts they are producing are likely “to be used prosecutorially” or that they will “be available for use at a later trial”? The answer to this question may vary depending on the type of proceeding that is being transcribed. On one end of the spectrum is a deposition of a witness who is known with certainty to be unavailable to testify at trial. In this situation, the court reporter’s primary purpose in creating the transcript is for use at a later trial. On the other end of the spectrum is a transcript of trial testimony. While such a transcript *may* be used in a future trial (if, for example, the jury deadlocks or the conviction is overturned on appeal and a new trial is ordered), the *primary* purpose for creating the transcript is likely to preserve a record for appellate review. In between those two extremes are various other circumstances in which creating a transcript may serve multiple purposes. Accordingly, in deciding whether the court reporter’s statement is testimonial or not, one might, as in *Davis*, ask what the court reporter’s *primary* purpose was in making the transcript, deeming testimonial only those situations in which circumstances objectively indicate that the *primary* purpose in creating the transcript was for use at a future trial.<sup>91</sup>

Assuming that the court reporter’s primary purpose in creating the transcript was for use at a future trial, other statements by the

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90. *Id.* at 2539–40 (citations omitted).

91. *See Davis v. Washington*, 547 U.S. 813, 830 (2006).

Court in *Melendez-Diaz* and *Davis* suggest that the transcripts should be deemed testimonial. First, that the court reporter did not actually witness the crime itself is irrelevant under *Melendez-Diaz*, which eschews any effort to limit the definition of “witnesses” to those who observed the crime itself or any human action related to it (furthermore, when the crime charged is perjury at a former trial or proceeding, they actually *did* observe the crime itself). Moreover, court reporters are no less prone to dishonesty or incompetency than forensic analysts, traits that, the *Melendez-Diaz* Court notes, can be explored on cross-examination. Furthermore, since, in the absence of admitting the transcripts, the court reporters themselves would come into court and testify to what the witness said at the former proceeding, is not the transcript—in the words of the *Davis* Court—“an obvious substitute for live testimony” that does “precisely what a witness does on direct examination”?<sup>92</sup> Finally, although the transcript layer of former testimony—like the certificates of the forensic analysts at issue in *Melendez-Diaz*—is typically admissible as a business or official record, that does not, as *Melendez-Diaz* teaches, exempt it from scrutiny under the Confrontation Clause to the extent that it is testimonial.

Before concluding that the *Crawford-Davis-Melendez-Diaz* line of cases compels a conclusion that transcripts or stenographic notes admitted without calling the court reporter as a witness presents a Confrontation Clause problem, it is worth considering one wrinkle raised by the *Melendez-Diaz* dissent, coupled with the majority’s response.

The *Melendez-Diaz* dissent identified a line of lower court cases and a prior U.S. Supreme Court decision that it believed compelled a different outcome in the case. The line of cases involved what the dissent referred to as a “copyist,” that is, a government official who, for original records that could not be taken from the archive, would create by hand a copy of the same for use at trial. Drawing an analogy to the issue before the Court, the dissent wrote:

In that case, the copyist’s honesty and diligence are just as important as the analyst’s here. If the copyist falsifies a copy, or even misspells a name or transposes a date, those flaws could lead the jury to convict. Because so much depends on his or her honesty

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92. *See id.*

and diligence, the copyist often prepares an affidavit certifying that the copy is true and accurate.

Such a certificate is beyond question a testimonial statement under the Court's definition: It is a formal out-of-court statement offered for the truth of two matters (the copyist's honesty and the copy's accuracy), and it is prepared for a criminal prosecution.

During the Framers' era copyists' affidavits were accepted without hesitation by American courts.<sup>93</sup>

The majority described this historical exception as "narrowly circumscribed."<sup>94</sup> According to the majority, this line of cases permitted a clerk to certify the correctness of a copy of a record kept in his office but gave him no authority to furnish, as evidence for trial, his interpretation of what the record contained or showed, or to certify to its substance or effect.<sup>95</sup> In the Court's view, there was a distinction between *authenticating* or providing a copy of an otherwise admissible record and *creating* a record for the purpose of providing evidence against a defendant.<sup>96</sup> The dissent rightly pointed out that, in any event, drawing such fine distinctions was not consistent with the majority's otherwise stated view that the focus is on whether the evidence is testimonial rather than the category into which it falls.<sup>97</sup>

To be sure, there may have been a more persuasive way for the majority to reject the authorities cited by the dissent. The only federal case cited by the dissent was a *civil*, not a criminal, proceeding, and therefore the Confrontation Clause would not have been applicable.<sup>98</sup> And, although the dissent cited criminal cases, those were decisions from the 1870s that were decided in state courts,<sup>99</sup> and the Supreme Court did not hold the Confrontation Clause of the Sixth Amendment applicable to the states until 1965.<sup>100</sup>

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93. *Melendez-Diaz*, 129 S. Ct. at 2553 (Kennedy, J., dissenting).

94. *Id.* at 2539 (majority opinion).

95. *See id.* at 2538–39.

96. *Id.* at 2539.

97. *Id.* at 2553 (Kennedy, J., dissenting).

98. *See id.* (citing *United States v. Percheman*, 7 Pet. 51, 85 (1833)).

99. *See id.* (citing *Williams v. State*, 54 Ala. 131, 134–35 (1875); *State v. Potter*, 52 Vt. 33, 38 (1879)).

100. *See Pointer v. Texas*, 380 U.S. 400 (1965).

In any event, even accepting this historical exception, the majority did describe it as “narrowly circumscribed.” On the one hand, one could draw an analogy between the copyist and the transcriber: just as the copyist makes a physical copy of another written document and certifies to its correctness, so a stenographer makes a written copy of someone’s oral statements. Indeed, one case cited by the majority describes a copy as “a transcript of the original.”<sup>101</sup> On the other hand, this section of the majority’s opinion is mere dicta, and the dissent’s points about why this should be treated no differently under *Crawford* are far more compelling than the majority’s effort to distinguish it. Nonetheless, even accepting the dicta, given that the Court justifies this exception on historical grounds, the answer to whether transcripts or stenographic notes should be similarly treated turns on whether a historical exception existed for them, a topic taken up in Part III.

The dissent also cited the Court’s prior opinion in *Dowdell v. United States*.<sup>102</sup> In that case, the Court rejected a Confrontation Clause objection to a trial judge, trial court clerk, and court reporter certifying to the appellate court that the defendants were arraigned, whether they pleaded guilty or not guilty, and whether they were present during the trial.<sup>103</sup> While the dissent tried to argue that this case allowed for the admission of a testimonial certification by the officials,<sup>104</sup> the majority explained that they “were not witnesses for purposes of the Confrontation Clause because their statements concerned only the conduct of defendants’ prior trial, not any facts regarding defendants’ guilt or innocence.”<sup>105</sup> For this reason, the Court had previously, in *Davis v. Washington*, deemed the evidence at issue in *Dowdell* to be non-testimonial.<sup>106</sup>

*Dowdell*—as construed by *Davis* and *Melendez-Diaz*—is thus for two different reasons inapplicable to the situation in which a transcript or stenographic notes of former testimony is offered into evidence at a subsequent trial. First, while the certification by the

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101. *State v. Champion*, 21 S.E. 700, 701 (N.C. 1895).

102. 221 U.S. 325 (1911).

103. *Id.* at 326–31.

104. *Melendez-Diaz*, 129 S. Ct. at 2553.

105. *Id.* at 2539 n.8.

106. *See Davis v. Washington*, 547 U.S. 813, 825 (2006) (“[F]acts regarding conduct of prior trial certified to by the judge, the clerk of court, and the official reporter did not relate to defendants’ guilt or innocence and hence were not statements of ‘witnesses’ under the Confrontation Clause.”).

court reporter and other officials in *Dowdell* involved only a statement regarding the defendants' conduct at trial, the information contained in transcripts of former testimony will typically go directly to the defendant's guilt or innocence. Indeed, it is *because* it goes to the defendant's guilt or innocence that it is typically offered into evidence by the prosecution. Second—and perhaps more importantly—while the statement contained in a transcript or stenographic notes of former testimony is made to a jury (or, in a bench trial, to a judge) who is using that information to *make* a determination regarding the accused's guilt or innocence, the statement at issue in *Dowdell* was not made to a trier of fact who was *determining* the accused's guilt or innocence but was instead being made to an *appellate* court whose task is not to determine guilt or innocence but whose only function—in the words of the *Dowdell* Court “is to determine whether there is error in the record, to the prejudice of the accused.”<sup>107</sup>

The *Melendez-Diaz* majority then turned to what it described as a “[f]ar more probative” line of cases, those “in which the prosecution sought to admit into evidence a clerk’s certificate attesting to the fact that the clerk had searched for a particular record and failed to find it.”<sup>108</sup> The majority then used the logic of these cases to refute any notion that there was an official records exception to the Confrontation Clause:

Like the testimony of the analysts in this case, the clerk’s statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk’s certificate would qualify as an official record under respondent’s definition—it was prepared by a public officer in the regular course of his official duties—and although the clerk was certainly not a “conventional witness” under the dissent’s approach, the clerk was nonetheless subject to confrontation.<sup>109</sup>

Typically, the sort of evidence at issue in this line of cases cited by the *Melendez-Diaz* majority has been offered and admitted

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107. *See Dowdell*, 221 U.S. at 331. Indeed, it is because of this limited function of appellate courts that the *Dowdell* court held that the accused’s due process right to be present at every stage of the trial does not encompass a right to be present in appellate proceedings related to that trial. *See id.*

108. *Melendez-Diaz*, 129 S. Ct. at 2539.

109. *Id.*

pursuant to Federal Rule of Evidence 803(10) (or its state law analogues), which creates an exception to the hearsay rule under the following circumstances:

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.<sup>110</sup>

To get a sense of *Melendez-Diaz*'s sweeping nature, it is worth noting that, prior to the decision, lower courts were virtually unanimous in concluding that such certificates of non-existence of records were still admissible post-*Crawford*.<sup>111</sup> After *Melendez-Diaz*, of course, lower courts have held (or prosecutors have conceded) that they are testimonial.<sup>112</sup> In any event, the key point to get out of this part of *Melendez-Diaz* is this: if the Court is unwilling to create an exception for a simple statement by an official that a records search failed to turn up a particular document—in the belief that the statement is testimonial and that cross-examination might either expose the declarant's dishonesty or incompetence in searching for the document—then surely a detailed statement in the form of a transcript indicating everything that a witness said at a prior trial is no less testimonial and would benefit no less from cross-examination. Thus, unless, as a historical matter, the exception to the Confrontation Clause for the inner layer of hearsay—the former cross-examined testimony of an unavailable declarant—encompassed an exception for the outer layer of hearsay—the transcript—then the Court's recent Confrontation Clause decisions appear to compel the conclusion that the outer layer of hearsay involved in transcripts of former testimony will at least in some circumstances be deemed

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110. FED. R. EVID. 803(10).

111. See, e.g., *United States v. Urqhart*, 469 F.3d 745, 748–49 (8th Cir. 2006); *United States v. Cervantes-Flores*, 421 F.3d 825, 830–34 (9th Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005); *State v. Kirkpatrick*, 161 P.3d 990, 994–98 (Wash. 2007). *But see* *United States v. Earle*, 488 F.3d 537, 545 (1st Cir. 2007) (suggesting that they may be inadmissible post-*Crawford* but deciding the case on other grounds); *United States v. Salinas-Valenciano*, 220 F. App'x 879, 883–85 (10th Cir. 2007) (same).

112. See *United States v. Madarikan*, No. 08-5589-CR, 2009 WL 4826912, at \*2 & n.3 (2d Cir. Dec. 16, 2009); *Tabaka v. District of Columbia*, 976 A.2d 173, 175 (D.C. 2009); *Washington v. State*, 18 So. 3d 1221, 1224–25, 1224 n.1 (Fla. Dist. Ct. App. 2009).

testimonial. Consequently, the transcript cannot be offered in lieu of the court reporter's live presence at the subsequent trial in which the former testimony is being offered into evidence.

To be sure, one might contend that an interpretation of the Confrontation Clause that prefers the testimony of the court reporter (who is unlikely to have a clear recollection of what the witness testified to) over a transcript or stenographic notes that she produced contemporaneously with the testimony itself is foolhardy. After all, one policy rationale advanced in favor of holding that the hearsay rule should not keep out transcripts or stenographic notes is a belief that they, being written contemporaneously with the testimony given, are more reliable than having witnesses testify from their own memory.<sup>113</sup> Yet, although this may be sound so far as hearsay analysis is concerned, it is not a reason to interpret the Confrontation Clause to permit the transcript or stenographic notes to be introduced in the absence of the stenographer's presence. After all, as *Crawford* stresses in rejecting the *Roberts* test (which used reliability as the touchstone):

To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.<sup>114</sup>

Of course, if the court reporter appears at trial but cannot remember what the witness testified to, and the transcript is admitted as a past recollection recorded, the Confrontation Clause problem disappears. As *Crawford* emphasizes, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."<sup>115</sup> Because the hearsay exception for a past recollection recorded requires that the declarant appear at trial and testify to a lack of memory, she is subject to cross-examination within the

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113. *See* *Cutter v. Territory*, 56 P. 861 (Okla. 1899).

114. *Crawford v. Washington*, 541 U.S. 36, 61, 68–69 (2004).

115. *Id.* at 59 n.9.

meaning of *Crawford*.<sup>116</sup> And, under established Confrontation Clause jurisprudence, it suffices that the person appears at trial and willingly responds to questions; her inability to provide detailed responses due to a lack of memory does not create a problem.<sup>117</sup> Thus, admitting the transcript as a past recollection recorded has the virtue of getting before the trier of fact what is likely a more accurate memorialization of the former testimony while at the same time allowing the accused to confront the court reporter to explore bias, incompetence, or the like.

Before turning to the question whether a historical exception exists so far as the outermost (transcript) layer is concerned, it is worth considering for a moment the innermost layers of hearsay in situations in which a transcript reports testimony by a witness that in turn refers to hearsay statements by third persons. Whether an additional Confrontation Clause problem is posed by these innermost layers of hearsay turns on whether the specific statements by the third persons are testimonial, and, if so, whether they fall within any exceptions identified in *Crawford* or its progeny.

Consider first the example in which Defendant is being re-tried for the murder of Victim A and the attempted murder of Victim B, and the prosecution offers into evidence the transcript of Police Officer's testimony that Victim B said, "Be sure to tell the judge and the jury that Defendant shot us." The innermost layer of hearsay could not be more testimonial: the victim is telling a police officer to tell the judge and jury what happened. Thus, without question, it is something that Victim B would either "reasonably expect to be used prosecutorially" or that "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."<sup>118</sup>

Yet, because *Crawford* suggests, at least in dicta, that dying declarations (even if testimonial) fall within a historical exception to the Confrontation Clause,<sup>119</sup> the innermost layer of hearsay in this

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116. See *United States v. Garcia*, 282 F. App'x 14, 23–24 (2d Cir. 2008) (finding no Confrontation Clause problem where the exception for recorded recollections is invoked because of the declarant's presence at trial); *Abeny v. Commonwealth*, 657 S.E.2d 796, 802–03 (Va. 2008); *State v. Gorman*, 854 A.2d 1164, 1175–78 (Me. 2004).

117. See also *United States v. Owens*, 484 U.S. 554, 564 (1988) (explaining that Confrontation Clause satisfied even if declarant appears at trial but cannot recall what happened).

118. See *Crawford*, 541 U.S. at 51–52.

119. See *id.* at 56 n.6.

example may or may not present an additional Confrontation Clause problem. The determining factors include whether the historical exception applies if the declarant does not *actually* die and whether or not Victim B awakes from the coma (in which case he may no longer be “unavailable”).<sup>120</sup>

The innermost layers of hearsay in the second example— involving statements among and by family members regarding Victim’s age offered in a statutory rape prosecution—would clearly be non-testimonial. Not only is there no reason to believe that the statements were made under circumstances in which one would expect them to be used prosecutorially, but the Supreme Court has also suggested, post-*Crawford*, that statements made to friends, family members, neighbors, and other non-government actors or agents are, by definition, non-testimonial.<sup>121</sup>

### III. HISTORICAL PRACTICE IN THE UNITED STATES AND ENGLAND

Although unofficial court reporters have been in existence since the time of Socrates and in the United States since its inception, *officially* appointed court reporters responsible for creating verbatim transcripts of judicial proceedings did not appear in the United States until the late nineteenth century.<sup>122</sup> Indeed, until 1944, they did not exist in the federal court system.<sup>123</sup>

An examination of judicial decisions in the United States demonstrates that the practice of permitting a transcript or stenographic notes to be introduced without the court reporter’s presence was foreign to the common law and is of relatively recent vintage. When first confronted with this question, most courts identified only one appropriate method of proving witness testimony at an earlier trial: testimony from someone who was present at the earlier trial and could remember what the witness testified to.<sup>124</sup> As

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120. See Peter Nicolas, “I’m Dying to Tell You What Happened”: *The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS CONST. L.Q. 487 (2010).

121. See *Giles v. California*, 128 S. Ct. 2678, 2692–93 (2008).

122. See *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433 (1993) (citing Oswald M.T. Ratteray, *Verbatim Reporting Comes of Age*, 56 JUDICATURE 368, 368–69 (1973)); *Gonzalez v. State*, 878 A.2d 604, 609 n.4 (Md. 2005); Oswald M.T. Ratteray, *Verbatim Reporting Comes of Age*, 56 JUDICATURE 368 (1973).

123. *Antoine*, 508 U.S. at 433.

124. See, e.g., *Wilmoth v. Wheaton*, 105 P. 39, 39 (Kan. 1909) (“Prior to the [use of court stenographers], the only method of securing the evidence which had once been given in court by a witness, afterward deceased, was to call witnesses who had been present and heard

the use of stenographers to create verbatim transcripts evolved in the United States, courts began to hold that the stenographic notes or transcripts created by them were not themselves evidence admissible at the subsequent trial, but could only be used to refresh the memory of a stenographer who appeared on the stand at the subsequent trial to testify to what the witness testified to at the earlier proceedings.<sup>125</sup>

Over time, courts started to loosen this restriction, permitting the stenographic notes or transcript (or notes of a non-stenographer witness) to be admitted under the hearsay exception for past recollections recorded when the stenographer (or other person present at the first trial) appeared at the subsequent trial and could not remember what the witness testified to, even with the aid of their notes or the transcript.<sup>126</sup> Courts felt comfortable with so broadening the method of proving former testimony because, with the stenographer or court reporter on the stand, the “right to cross-examine the reporter . . . was preserved.”<sup>127</sup> But in no instance did these early decisions permit proof of the witness’s testimony in the absence of a person who was present at the first trial appearing as a witness at the subsequent trial.<sup>128</sup> Only in the twentieth century was there widespread acceptance of the practice of admitting the stenographic notes or transcript without requiring the stenographer to appear at trial, and typically only as a result of a statutory

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his testimony . . . .”); *Ecker v. McAllister*, 54 Md. 362, 371–72 (1880) (“The only proper mode of proving what a witness orally testified to on a former trial is to examine witnesses for that purpose who heard his evidence given.”).

125. See *Sneierson v. United States*, 264 F. 268, 275 (4th Cir. 1920); *McColgan v. Noble*, 29 S.W.2d 205, 206–07 (Mo. Ct. App. 1930); *Wilmoth*, 105 P. at 39–40; *Wright v. Wright*, 50 P. 444, 445–46 (Kan. 1897).

126. See *Ruch v. City of Rock Island*, 97 U.S. 693, 694–95 (1878); *Lueders v. United States*, 210 F. 419, 425 (9th Cir. 1914); *United States v. Wood*, 28 F. Cas. 754, 754–55 (E.D. Penn. 1818); *Wright*, 50 P. at 445–46; *Hair v. State*, 21 N.W. 464, 466–67 (Neb. 1884).

127. See *Hair*, 21 N.W. at 467.

128. See *Chi., St. Paul, M. & O. Ry. Co. v. Myers*, 80 F. 361, 365 (8th Cir. 1897) (holding stenographic report admissible to prove prior testimony “provided, always, that the stenographic report of his testimony is proven to the satisfaction of the trial court to be correct, by the person by whom it was reported”); *Eads v. State*, 170 S.W. 145, 146 (Tex. Crim. App. 1914) (“It appears that what is termed a stenographer’s report of the evidence of the witnesses was introduced, but the stenographer who took the testimony did not testify in the case, and no person testified that this in fact was the testimony of the gentlemen named. Some proof should have been made that this was in fact their testimony on the former trial before the evidence should have been admitted.”).

enactment providing for their admissibility.<sup>129</sup> Indeed, although Wigmore endorsed the practice “on principle,” he noted that courts as a general rule declined to permit it in the absence of statutory authorization.<sup>130</sup>

A series of Maryland cases is representative of the development over time in the United States of methods of proving former testimony. The first published Maryland decision to address the issue was decided in 1880 and held that “[t]he only proper mode of proving what a witness orally testified to on a former trial is to examine witnesses for that purpose who heard his evidence given.”<sup>131</sup> By the twentieth century, Maryland decisions held it permissible for the stenographer to use his stenographic notes to refresh his memory or, if he could not remember, to offer the stenographic notes or transcript under the hearsay exception for past recollection recorded.<sup>132</sup> Yet despite this broadening, one thing was clear in Maryland, even as late as 2005: “only the notes or transcript prepared by a person actually present and in a position to hear the testimony may be used, and then *only when authenticated or verified by a live witness subject to cross-examination.*”<sup>133</sup>

Moreover, the earliest U.S. Supreme Court decision addressing the admissibility of former testimony in the face of a Confrontation Clause claim recognized the hearsay-within-hearsay nature of using a transcript or stenographic notes to prove the former testimony, and also appeared to contemplate the presence of the stenographer at trial. In *Mattox v. United States*,<sup>134</sup> the U.S. Supreme Court, after

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129. See, e.g., *Wilmoth*, 105 P. at 39–40. See generally 5 WIGMORE, *supra* note 53, § 1669, at 786.

130. 5 WIGMORE, *supra* note 53, § 1669, at 786.

131. *Ecker v. McAllister*, 54 Md. 362, 371–72 (1880); accord *Herrick v. Swomley*, 56 Md. 439 (1881); see also *Gonzalez v. State*, 878 A.2d 604, 608 (Md. 2005) (discussing *Ecker* and *Herrick*); *Harrod v. State*, 384 A.2d 753, 759 (Md. 1978) (same).

132. See *Snyder v. Cearfoss*, 57 A.2d 786 (Md. 1948); *Holler v. Miller*, 9 A.2d 250, 251–52 (Md. 1939); *Mayor and City Council of Balt. v. State*, 103 A. 426, 428 (Md. 1918); see also *Gonzalez*, 878 A.2d at 609–10 (discussing these cases); *Harrod*, 384 A.2d at 759–60 (same).

133. *Harrod*, 384 A.2d at 759 (emphasis added); see also *Gonzalez*, 878 A.2d at 610–11 (citing *Harrod* and noting that the only methods recognized under Maryland law are firsthand testimony from unaided memory by an observer at the earlier trial, use of stenographic notes or a transcript to refresh the memory of an observer at the earlier trial (including a court reporter), or admitting the notes as a past recollection recorded).

134. 156 U.S. 237 (1895).

holding that admitting the former testimony of an unavailable witness does not violate the Confrontation Clause, went on to state:

We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness,—such as was produced in this case,—is competent evidence of what he said.<sup>135</sup>

Although these nineteenth and early twentieth century U.S. precedents are telling, in *Crawford* and its progeny, the Court's prime source for determining the meaning of the Confrontation Clause has been the common law extant in England in 1791, the year in which the Sixth Amendment was ratified.<sup>136</sup>

As indicated above, in *Crawford*, the Supreme Court identified one of the few instances in which, historically, a testimonial hearsay statement of a declarant who did not appear at trial was admissible: when the declarant is “unavailable to testify and the defendant had had a prior opportunity for cross-examination.”<sup>137</sup> In support of its conclusion, the Court examined English practice under the Marian bail and committal statutes.<sup>138</sup> The Marian committal statute required Justices of the Peace to examine suspects and witnesses<sup>139</sup> in

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135. *Id.* at 244.

136. *See* *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (“As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.”); *id.* at 54 n.5 (refusing to consider a source cited in the concurring opinion because it “was decided a half century earlier and cannot be taken as an accurate statement of the law in 1791 . . . .”); *id.* at 58 n.8 (“It is questionable whether testimonial statements would ever have been admissible on that ground in 1791 . . . .”); *Giles v. California*, 128 S. Ct. 2678, 2682–85 (2008).

137. *Crawford*, 541 U.S. at 53–54. The only other instances identified by the *Crawford* court in which testimonial statements of an absent declarant are admissible are dying declarations and when the defendant forfeits by wrongdoing his right to object on Confrontation Clause grounds. *Id.* at 56 n.6, 62; *accord Giles*, 128 S. Ct. at 2682–83.

138. *Crawford*, 541 U.S. at 43–44 (citing 1 & 2 Phil. & M., c. 13 (1554), 2 & 3 Phil. & M., c. 10 (1555)).

139. Neither the committal statute nor the bail statute used the word “witnesses,” but instead referred to those that “bring” the suspect to the Justice of the Peace, but it was common at the time for the arresting officer to be accompanied by complainants or witnesses, and in some instances, citizens themselves participated in the act of arresting suspects and bringing them to the Justice of the Peace. *See* JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* 11–12 (1974). The Acts did not require the Justice of the Peace to seek out and examine other witnesses of likely importance, although

felony or manslaughter cases, to record in writing any material statements made by the suspect or witnesses within two days of the examination, and to certify the same to the Assizes court, where the trial itself would take place.<sup>140</sup> In addition, the committal statute obligated Justices of the Peace to bind material witnesses to testify at trial.<sup>141</sup> The Marian bail statute required, in relevant part, that when a coroner's jury returned a verdict of murder, manslaughter, or accessory to the same, the coroner was to record in writing any material evidence given before the jury, to certify the same to the Assizes court, and to bind material witnesses to testify at trial.<sup>142</sup>

Although the original purpose of the Marian bail and committal statutes was not to produce evidence admissible at trial, they came to be used for that purpose.<sup>143</sup> Yet by 1791, when the Sixth Amendment was ratified, the use of evidence collected by Justices of the Peace pursuant to the Marian committal statute was admissible only if the witness was unavailable to testify,<sup>144</sup> and their testimony before the Justice of the Peace was subject to cross-examination by the defendant.<sup>145</sup> The *Crawford* Court cited this historical practice under the Marian committal statute in support of its conclusion that, subject only to the exceptions for dying declarations and forfeiture by wrongdoing, the Sixth Amendment prohibits the admission of testimonial hearsay statements of an absent declarant unless he is unavailable and the defendant had a prior opportunity to cross-examine him.<sup>146</sup>

Because of the *Crawford* Court's focus on English practice in general and practice under the Marian committal statute in particular, it would be important to know *how* the testimony of a witness examined by a Justice of the Peace under the Marian committal statute was admitted at a subsequent trial in which the witness was unavailable to testify. If a written record sufficed to

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in practice, Justices of the Peace did treat the statutes as though the word "witnesses" had been used. *See id.* at 12, 17 & n.31.

140. 2 & 3 Phil. & M., c. 10 (1555); *see* LANGBEIN, *supra* note 139, at 105–106.

141. 2 & 3 Phil. & M., c. 10 (1555).

142. 1 & 2 Phil. & M., c. 13 (1554). The bail statute also addressed imposed duties upon Justices of the Peace related to the granting of bail.

143. *Crawford*, 541 U.S. at 44.

144. *Id.* at 45 (citing Lord Morley's Case, 6 How. St. Tr. 769, 770–71 (H.L. 1666)).

145. *See id.* at 46–47 (citing King v. Dingler, 168 Eng. Rep. 383, 383–84 (1791); King v. Woodcock, 168 Eng. Rep. 352, 353 (1789)).

146. *See Crawford*, 541 U.S. at 53–56 & n.5.

prove what the witnesses had said when offered in the Assizes court, that would suggest that the historical exception for prior cross-examined testimony of an unavailable witness dispenses with any right to confront the person who created a written record of the witness's testimony. If, on the other hand, the Justice of the Peace had to appear at trial and testify to what the unavailable witness had said (or at least be available to be cross-examined regarding the same), that would suggest that the exception excused only the witness's absence. That witness's testimony would then be proven by the testimony of someone who had witnessed it and could be confronted as to his recollection of what he allegedly heard the witness testify.

An examination of historical sources, including both English judicial decisions and secondary sources, confirms that, in those instances in which testimony before a Justice of the Peace was admitted at trial due to the witness's unavailability, it was always the case that the Justice of the Peace or someone else present at the initial examination *appeared at trial and swore to the accuracy of the written record of the witness's testimony*.<sup>147</sup>

Thus, for example, in *Lord Morley's Case* (cited in *Crawford* for the proposition that former cross-examined testimony was admissible only if the declarant was unavailable, therein defined as being "dead, or unable to travel"), the court held that the prior testimony, given before a coroner, was admissible only if "the coroner first ma[de] oath that such examinations are the same which he took upon oath, without any addition or alteration whatsoever."<sup>148</sup>

Numerous secondary sources confirm the practice under the Marian bail and committal statutes of requiring the Justice of the Peace or other person present at the initial examination to appear before the Assizes court to confirm under oath the accuracy of the written record of the witness's testimony.

For example, William Hawkins, in his *Treatise on Pleas of the Crown* published in 1788, wrote as follows:

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147. See *Lord Morley's Case*, 6 How. St. Tr. 769, 770 (H.L. 1666); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 605 ch. 46, § 6 (1787); 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 283 (1736); J.S. COCKBURN, A HISTORY OF ENGLISH ASSIZES 102–03 (1972) (citing WILLIAM LAMBARDE, WILLIAM LAMBARDE AND LOCAL GOVERNMENT: HIS EPHEMERIS AND TWENTY-NINE CHARGES TO JURIES AND COMMISSIONS 23, 25 (Conyers Read ed., 1962)); LANGBEIN, *supra* note 139, at 22–25; 5 WIGMORE, *supra* note 53, § 1667, at 780.

148. *Lord Morley's Case*, 6 How. St. Tr. at 770.

It seems settled, that the Examination of an Informer taken upon Oath, and subscribed by him either before a Coroner upon an Inquisition of Death in pursuance of 1 & 2 Ph. & M. 13<sup>149</sup> or before Justices of Peace in Pursuance of 1 & 2 Ph. & M. 13. and 2 & 3 Ph. & M. 10.<sup>150</sup> upon a Bailment or Commitment for any Felony, may be given in Evidence at the Trial of such Inquisition, or of an Indictment for the same Felony, *if it be made out by Oath to the Satisfaction of the Court*, that such Informer is dead, or unable to Travel, or kept away by the Means or Procurement of the Prisoner, and *that the Examination offered in Evidence is the very same that was sworn before the Coroner or Justice, without any Alteration whatsoever.*<sup>151</sup>

Likewise, Matthew Hale, in his History of the Pleas of the Crown published in 1736, wrote:

By the statute 1 & 2 P. & M. cap. 13. and 2 & 3 P. & M. cap. 10. Justices of peace and coroners have power to take examinations of the party accused, and informations of the accusers and witnesses, (the examinations to be without oath, the informations to be upon oath,) and are to put the same in writing, and are to certify the same to the next gaol-delivery.<sup>152</sup>

These examinations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not.

But then, 1. *Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination.*<sup>153</sup>

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149. This is a reference to the Marian bail statute.

150. This is a reference to the Marian committal statute.

151. HAWKINS, *supra* note 147, at ch. 46, § 6 (emphasis added).

152. The phrase “gaol-delivery” refers to one of five commissions typically issued to the assize judges for their semiannual circuits. LANGBEIN, *supra* note 139, at 10.

153. HALE, *supra* note 147, at 283 (emphasis added); *see also id.* at 51 (“By the statute of 1 & 2 Ph. & Mar. cap. 13. They ought to take the examinations of felons (without oath,) and the information of accusers or witnesses (upon oath,) and return them to the justices of gaol-delivery. And these examinations may be read as evidence against the prisoner, and so may the informations of witnesses taken upon oath, if they are dead or not able to travel, for they are judges of record, and the statute enables and requires them to take these examinations; but then oath is to be made in court by the justice or his clerk, that these examinations and informations were truly taken.”); 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 586 (1736) (“[The justice of the peace] must take information of the prosecutor or witnesses

Cockburn, in his *History of English Assizes*, confirms the practice of requiring the Justice of the Peace to appear at Assizes:

After examination local magistrates were supposed to bind over suspects to quarter sessions or assizes or to commit them to gaol to await trial. Recognizances for appearance were also taken from prosecutors and witnesses, *and the examining magistrate himself attended the subsequent trial to certify pertinent evidence and supporting documentation.*<sup>154</sup>

One might fairly ask what the purpose was of the Justice of the Peace creating the written record if it was not admissible on its own to prove the witness's prior testimony. John Langbein, a historian whose work is cited by the Supreme Court in nearly all of its recent Confrontation Clause decisions,<sup>155</sup> has written that the purpose of the Marian bail and committal statutes was *not* to create a system of written evidence, in which the Justice of the Peace's written record of what the witnesses said was used as evidence against the accused.<sup>156</sup> Rather, according to Langbein, the purpose of the written record appears to have been primarily to refresh the memory of the Justice of the Peace when he testified at trial about what he heard the absent witnesses testify to.<sup>157</sup> In the words of Langbein:

[T]he examination document was principally intended to buttress the oral performance of the JP at trial. The examination record was to be a sort of file memorandum for the JP—a prompter, like the notes a modern policeman uses to refresh his memory.<sup>158</sup>

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in writing upon oath, and return or certify them at the next sessions or gaol-delivery, and these being upon the trial sworn to be truly taken by the justice or his clerk, & c. may be given in evidence against the prisoner, if the witnesses be dead or not able to travel.”); STARKIE, 2 LAW OF EVIDENCE Part IV, at 486 (1824) (“To warrant such evidence, it is essential to prove by the justice, coroner, or his clerk, & c. that the depositions contain the substance of the information on oath.”); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 130–32 & n.83 (2005) (citing Hale).

154. COCKBURN, *supra* note 147, at 102–03 (citing WILLIAM LAMBARDE, WILLIAM LAMBARDE AND LOCAL GOVERNMENT: HIS EPHEMERIS AND TWENTY-NINE CHARGES TO JURIES AND COMMISSIONS 23, 25 (Conyers Read ed., 1962)) (emphasis added).

155. See *Giles v. California*, 128 S. Ct. 2678, 2683 (2008); *Davis v. Washington*, 547 U.S. 813, 830 n.5 (2006); *Crawford v. Washington*, 541 U.S. 36, 44, 53 (2004).

156. LANGBEIN, *supra* note 139, at 22–24.

157. See *id.* at 31.

158. *Id.* at 35.

Langbein's explanation is corroborated by Wigmore, who wrote that, at least through the 1800s, it was "necessary to call the magistrate or the clerk, who verified the notes and thus used them as an aid to memory."<sup>159</sup>

In addition to these sources dealing directly with the Marian bail and committal statutes, English precedents around and after the ratification of the Sixth Amendment apply the same principle in other instances in which an effort is made to prove former testimony. For example, in *Mayor of Doncaster v. Day*,<sup>160</sup> the court held that:

what a witness, since dead, has sworn upon a trial between the same parties, may . . . be given in evidence, either from the Judge's notes, or from notes that have been taken by any other person, who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given.<sup>161</sup>

With respect to the use of the Judge's own notes, Greenleaf explained that this was so only in a "case of necessity," and only in the instance in which "both actions are tried before the *same* Judge."<sup>162</sup> Thus, in every instance recognized for proving former testimony at common law, the accused had some way of confronting the witness to the former testimony. If a witness was testifying based on his memory, he was required to appear at trial and swear to its accuracy. Similarly, notes taken by any person could be offered to prove the former testimony, but only if the person appeared at trial and swore to their accuracy. And, finally, the judge's own notes could be used in a case of necessity, but because this practice was limited to situations in which the same judge tried both actions, by necessity, the accused had the ability to confront the witness (here the judge) who created those notes.

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159. See WIGMORE, *supra* note 53, § 1667, at 780 (citing Lord Morley's Trial, 6 How. St. Tr. 770 (1666); Wakeman's Trial, 7 How. St. Tr. 591, 654 (1679); Earl of Stafford's Trial, 7 How. St. Tr. 1293 (1680); R. v. Howe, 1 Camp.462 (1808); R. v. Watkins, 4 Car. & P. 550 (1831)).

160. 128 Eng. Rep. 104 (1810).

161. *Id.*; *accord* 1 STARKIE ON EVIDENCE Sect. CVII, at 280 n.m (1830) ("The evidence of a witness upon the former trial may be proved either by the Judge's notes, or on oath, by the notes or recollection of any person who heard it.").

162. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 166, at 215 (4th ed. 1848) (emphasis added).

Accordingly, practice in England under the Marian bail and committal statutes as well as practice in England generally at the time the Sixth Amendment was ratified was consistent with early practice in the United States through the late nineteenth and early twentieth centuries: notes could be used to refresh the court reporter's (or Justice of the Peace's) memory, or could be admitted if she appeared at trial and testified to a lack of memory but swore that the notes were accurate when taken, but they could not be admitted without the court reporter or Justice of the Peace's personal appearance at trial. In all instances, the accused had the ability, in some way, to confront the person who created the written memorialization of former testimony being offered against him.

#### IV. PRACTICAL SOLUTIONS FOR DEALING WITH THE HIDDEN DECLARANT PROBLEM

The clear command of *Crawford*, as enunciated in *Melendez-Diaz*, when coupled with the absence of any evidence of a historical exception to the Confrontation right for transcripts or notes of former testimony, compels a conclusion that it will at least in some circumstances violate the Confrontation Clause for the prosecution to offer evidence of former testimony against the accused by means of a transcript or stenographic notes. This is true even if the evidence otherwise satisfies *Crawford* in that the person who gave the former testimony is now unavailable and the accused had an opportunity to cross-examine her. Thus, as a general matter, such transcripts or notes can be offered into evidence against the accused only if the prosecution calls the court reporter or stenographer as a witness at trial, thereby making them available to the accused to cross-examine.

To be sure, such an interpretation of the Confrontation Clause raises significant practical concerns for prosecutors, who would now be forced to call court reporters as witnesses whenever they seek to admit former testimony into evidence. Not only is this burdensome, but if the court reporter is dead or otherwise unavailable, such a rule may make it impossible to prove the former testimony, at least in the absence of other evidence of the former testimony, such as testimony by a person who was present at the earlier trial. Yet these practical concerns are no different in kind from those expressed by the dissent in *Melendez-Diaz*:

[T]he Court threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal

based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court's new constitutional designation as the analyst, simply does not or cannot appear.<sup>163</sup>

In response, the majority indicated that the Court "may not disregard [the Confrontation Clause] at [its] convenience" to accommodate practical concerns.<sup>164</sup>

As *Melendez-Diaz* holds, the Confrontation Clause cannot be ignored because it is inconvenient. I therefore propose four practical solutions that satisfy the Confrontation Clause while at the same time reducing the need to call court reporters as witnesses.

The first of these proposals was suggested by the Court in *Melendez-Diaz*. There, the Court indicated that one way states and the federal government could in many cases avoid the inconvenience of always being required to call the forensic analysts as witnesses was to enact so-called "notice-and-demand statutes."<sup>165</sup> The *Melendez-Diaz* Court approved, in dicta, of what it described as the "simplest form" of such statutes, which "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial."<sup>166</sup> Accordingly, in a like vein, after *Melendez-Diaz*, states could enact notice-and-demand statutes for transcripts of former testimony, requiring the accused to demand the presence of the court reporter by a particular point in time or waive the right to complain on Confrontation Clause grounds.

My second proposal involves eliminating the layered hearsay and Confrontation Clause problem altogether by having the witness adopt the transcript as his testimony by reading it over and signing

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163. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2549 (2009) (Kennedy, J., dissenting).

164. *Id.* at 2540.

165. *Id.* at 2541.

166. *Id.* Subsequent lower court decisions have relied on this language to uphold the constitutionality of state notice-and-demand statutes. *E.g.*, *State v. Steele*, 689 S.E.2d 155, 161 (N.C. Ct. App. 2010); *State v. Murphy*, 219 P.3d 1223, 1229–30 (Kan. Ct. App. 2009). The Court left open the question of whether statutes that impose a more onerous burden on the accused—such as those that "requir[e] defense counsel to subpoena the analyst, to show good cause for demanding the analyst's presence, or even to affirm under oath an intent to cross-examine the analyst"—would pass constitutional muster. *Melendez-Diaz*, 129 S. Ct. at 2541 n.12.

it. Under this approach, as Wigmore explains, any objection to not calling the court reporter or other official who made the transcript or report of the witness's testimony disappears:

If the report is *signed by the witness or the accused* . . . then it has become by adoption his own statement, and it is no longer merely the magistrate's report of what was testified; consequently, it may be put in as the witness' or accused's own statement, if his signature to it as read to him is proved . . . . It follows, when the document is used in this way, that the objection as to not calling the magistrate or his clerk disappears, since it is not put in as the officer's report.<sup>167</sup>

Indeed, some early U.S. case law holds that when so read over and signed, the document itself *becomes* the witness's testimony (as contrasted with their oral testimony). Thus, under the best evidence rule, the read over and signed document becomes the best evidence of the witness's former testimony, barring even testimony by others who witnessed him testify orally.<sup>168</sup>

Moreover, a number of late nineteenth century decisions that deemed stenographer's notes (in the absence of the stenographer) inadmissible to prove a witness's former testimony contrast the use of the stenographer's notes with the use of a transcript of testimony that is read over and signed by the witness.<sup>169</sup> Such a procedure, while not used with great frequency today, still exists in some jurisdictions.<sup>170</sup> Under this proposal, one would treat the read over and signed document *as* the witness's former testimony, and the same constitutional principles excusing the witness's failure to appear at the present trial to testify likewise should excuse his read over and adopted transcript of his prior testimony.

My third proposal likewise eliminates the layered hearsay and Confrontation Clause problems. Under this proposal, if the accused somehow adopted the transcript of the former testimony—either

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167. See WIGMORE, *supra* note 53, § 1667, at 782.

168. See *Matthews v. State*, 11 So. 203, 203–04 (Ala. 1892); *Kain v. Larkin*, 30 N.E. 105, 108 (N.Y. 1892).

169. See *Garazewski v. Wurm*, 169 N.W. 871, 873 (Mich. 1918); *Toohey v. Plummer*, 37 N.W. 297, 299–300 (Mich. 1888); *State v. Maynard*, 113 S.E. 682, 684 (N.C. 1922); *Smith v. Moore*, 62 S.E. 892, 896 (N.C. 1908).

170. See, e.g., Indiana Rules of Trial Procedure 30(E)(1) (“When the testimony is fully transcribed, the deposition shall be submitted to the witness for reading and signing and shall be read to or by him, unless such reading and signing have been waived by the witness and by each party.”).

expressly by, say, signing something indicating that it was a complete and accurate record of the witness's testimony, or implicitly, say by submitting it as part of the record on appeal of the earlier trial—the transcript would then become the accused's own statement of what the former testimony was. The transcript would then qualify as a non-hearsay admission of a party-opponent,<sup>171</sup> eliminating the outer layer Confrontation Clause problem, since the Clause does not provide the accused with a right to confront himself.<sup>172</sup>

My final proposal is to regularly audiotape or videotape testimony (as is done in some jurisdictions today),<sup>173</sup> and to offer into evidence that recording of the former testimony in lieu of a transcript of the same. This would eliminate a layer of hearsay, because machines, such as video or tape recorders do not count as “declarants” under the hearsay rule, which refers only to statements made by *people*:

Hear-say is understood to be “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) (emphasis added). “A declarant is a *person* who makes a statement.” Fed.R.Evid. 801(b) (emphasis added). And a “statement,” to repeat, is an “(1) oral or written assertion or (2) nonverbal conduct of a *person*, if it is intended by the person as an assertion.” Fed.R.Evid. 801(a) (emphasis added). Only a *person* may be a declarant and make a statement. Accordingly, “nothing ‘said’ by a machine . . . is hear-say.”<sup>174</sup>

This is consistent with the policies underlying the hearsay rule, since the hearsay risks associated with statements made by people, such as court reporters, do not apply to statements made by machines:

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171. See FED. R. EVID. 801(d)(2)(B) (“A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth . . .”).

172. See *United States v. Nazemian*, 948 F.2d 522, 525–26 (9th Cir. 1991); *State v. Konohia*, 107 P.3d 1190, 1199 n.11 (Haw. Ct. App. 2005); *Johnson v. State*, 832 N.E.2d 985, 999 (Ind. Ct. App. 2005); *State v. Torres*, 121 P.3d 429, 438 (Kan. 2005).

173. See MUELLER & KIRKPATRICK, *supra* note 38, § 8:117; Gorgos, *supra* note 47, at 1057; Georgi-Ann Oshagan, *Videotaped Trial Transcripts and Appellate Review: Are Some Courts Favoring Form Over Substance?*, 38 WAYNE L. REV. 1639 (1992).

174. *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007) (quoting 4 CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE, § 380, at 65 (2d ed. 1994)).

[I]t is axiomatic that an out-of-court statement must be made by a person or writing, not by an object such as a video camera. Hearsay evidence is inadmissible because it relies upon the credibility of someone other than the witness. In other words, hearsay evidence is considered untrustworthy because the declarant is not subject to cross-examination . . . . In the context of hearsay evidence, however, credibility and trustworthiness are characteristics peculiar to people or documents written or generated by people. Objects such as a video camera neither have nor lack credibility or trustworthiness. If properly operated, there is no reason to suspect that images received from a video camera and displayed on a video monitor are unreliable. As such, the underlying basis for excluding hearsay evidence does not apply to “out-of-court statements” made by a video camera.<sup>175</sup>

For like reasons, “statements” made by machines are not subject to Confrontation Clause analysis:

Nor is a machine a “witness against” anyone. If the readings are “statements” by a “witness against” the defendants, then the machine must be the declarant. Yet how could one cross-examine a gas chromatograph? Producing spectrographs, ovens, and centrifuges in court would serve no one’s interests.<sup>176</sup>

To be sure, these proposals will not eliminate all situations in which it will be necessary to call a court reporter to testify to the content of a witness’s former testimony. Collectively, however, they will reduce the number of instances in which it is necessary and thus the burden that such an interpretation of the Confrontation Clause will have on prosecutors.

## V. CONCLUSION

Not only do transcripts of former testimony present an interesting layered hearsay problem that has all the makings of a classic law school hypothetical, but, after *Crawford* and *Melendez-Diaz*, it is clear that they present a serious Confrontation Clause problem as well. *Crawford*’s historical exception to the command of the Confrontation Clause for former testimony of an unavailable declarant that the accused had an opportunity to cross-examine

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175. *People v. Tharpe-Williams*, 676 N.E.2d 717, 720 (Ill. App. Ct. 1997) (citations omitted).

176. *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008).

extends only to the former testimony itself, not to transcripts or other written memorializations of the testimony or to hearsay statements by other persons contained within the former testimony.

In such triple-layered hearsay scenarios, whether the innermost layer (hearsay statements by third persons) presents a Confrontation Clause problem depends on whether the particular statement at issue is testimonial or not, and, if so, whether it falls within an exception to *Crawford*. Yet, so far as the outermost layer (the transcript itself) is concerned, this Article has shown that—at least in some circumstances—it is clearly a testimonial statement by the court reporter within the meaning of *Crawford* and its progeny and that it does not fall within any historical exception to *Crawford*. Accordingly, absent legislative reform or changes to the way in which former testimony is memorialized, *Crawford* compels the court reporter to appear at trial and be subject to cross-examination by the accused if her transcript or stenographic notes are to be offered into evidence against the accused to prove an unavailable witness's former testimony.

Four different reforms are possible that would reduce the number of instances in which production of the court reporter is necessary. The first involves the expansion of notice-and-demand statutes to cover court reporters, requiring that the accused demand production of the court reporter by a certain date or waive her right to complain of the court reporter's absence on Confrontation Clause grounds.

The other three all involve, in one way or another, eliminating the outermost layer of hearsay creating the Confrontation Clause problem. The first involves establishing procedures whereby witnesses read over and sign transcripts of their testimony, thus adopting the transcript as their testimony, resulting in a single declarant—the witness—whose presence is already excused for the reasons permitting his former testimony to be admitted in the first instance. The second involves establishing procedures whereby the accused reads over and signs transcript of witness testimony in the initial proceedings, thereby converting the transcript into a non-hearsay adoptive admission by the accused, thus eliminating any Confrontation Clause claim given that the Clause does not give the accused a right to confront himself. The final reform involves eliminating human involvement in the process of memorializing former witness testimony through the use of video or audio

recording of witness testimony, as the Confrontation Clause encompasses only statements by people.

While these reforms will not in all instances eliminate the inconvenience of producing court reporters at trial, it must be remembered that the Confrontation Clause (like the other rights guaranteed to the accused in the Bill of Rights) is not designed to ensure efficient resolution of criminal trials. Rather, the Clause protects the accused against the risk of wrongful prosecution by giving him the right to test the reliability of evidence offered against him through the direct confrontation of those who testify, either orally or in writing, against him.

