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## Another Can of "Crawford" Worms: Certificates of Nonexistence of Public Record and the Confrontation Clause

Keith Hollingshead-Cook

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# Another Can of *Crawford* Worms: Certificates of Nonexistence of Public Record and the Confrontation Clause

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## I. INTRODUCTION

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused

shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>1</sup> When the Supreme Court decided *Crawford v. Washington* in 2004, it established a new standard for assessing the scope of this right and determining when hearsay is admissible as trial evidence against a criminal defendant.<sup>2</sup> Rather than basing decisions regarding a defendant’s right to confrontation on a judicial inquiry into the reliability of a particular statement, an approach typified by the Court’s earlier decision of *Ohio v. Roberts*,<sup>3</sup> the *Crawford* Court decided that all “testimonial” statements required confrontation at trial, with two exceptions: (1) when the accused has an opportunity to cross-examine the declarant at a prior proceeding, and (2) for hearsay exceptions in existence at the time of founding, namely the dying declaration exception.<sup>4</sup> Although the Court made “testimonial” the touchstone for assessing hearsay statements in relation to the Confrontation Clause, it failed to define this term.<sup>5</sup> Instead, the Court relied on a few vague descriptions of “testimonial” statements, asserting that such statements were made in a context that would lead to the reasonable belief that the government would use the statements in a later criminal prosecution.<sup>6</sup>

In the years since the Supreme Court decided *Crawford*, lower courts have struggled to apply the new “testimonial” test, leading to divergent case law on a number of common hearsay situations. The Court has already revisited the issue multiple times in cases such as *Davis v. Washington*<sup>7</sup> and *Melendez-Diaz v. Massachusetts*.<sup>8</sup> These cases, however, did little to resolve the confusion that still exists in the lower courts on a number of issues. Worse still, the cases arguably created even more confusion than existed before. For instance, dictum in *Melendez-Diaz* suggested that a certified statement used to prove the absence of a public record and thereby the nonoccurrence or nonexistence of a matter, which is the common exception to the hearsay rule addressed in Federal Rule of Evidence 803(10),<sup>9</sup> is

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1. U.S. CONST. amend. VI.

2. 541 U.S. 36, 68 (2004).

3. 448 U.S. 56, 63–64 (1980).

4. *Crawford*, 541 U.S. at 53–56, 56 n.6.

5. *Id.* at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

6. *Id.* at 52.

7. 547 U.S. 813, 817 (2006) (addressing the nontestimonial nature of statements made to police during an existing emergency situation).

8. 129 S. Ct. 2527, 2529 (2009) (addressing the testimonial nature of technicians’ lab reports used to prove a substance as contraband).

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

testimonial in nature and therefore requires confrontation at trial.<sup>10</sup> This dictum is directly contrary to settled practice even after *Crawford*, which allowed these sorts of certified statements, although they were hearsay, to be admitted as evidence at trial without confrontation of the declarant.<sup>11</sup>

The *Melendez-Diaz* dictum, if followed by lower courts, will have wide-ranging implications due to the great number of cases it will affect. Prosecutors use certificates of nonexistence of public record any time they need to prove that a defendant did not do some act that is normally memorialized in a public records database. The idea is that the absence of a record in the database proves that the defendant did not, in fact, perform the act. A simple example of the use of a certificate of nonexistence of public record is the prosecution of the offense of driving without a driver's license. The attorney prosecuting such a case would request that a clerk at the state office that keeps driver's license records search the records to determine if the defendant had a proper driver's license at the time of the offense. If the defendant did have a driver's license at that time, the clerk would discover a record of the defendant applying to receive a license and passing any requisite tests. But if the defendant did not have a driver's license, the clerk would not discover the record. And because the office keeps records of all people who do in fact have driver's licenses, the fact that no record exists for the defendant indicates that the defendant did not have a driver's license. The prosecutor would then use the clerk's certificate of nonexistence of public record, or in other words, a statement attesting to the fact that the clerk searched the database that tracks the issuance of driver's licenses and did not find a record for the defendant, to prove that the defendant did not have a driver's license.

Although the offense of driving without a proper driver's license is arguably quite trivial and mundane, prosecutors rely on certificates of nonexistence of public record in proving many more serious crimes. For example, in federal prosecutions, the government uses this kind of evidence to establish violations of firearms laws by proving that the firearm in question was not properly registered, meaning that the defendant was not authorized to possess it.<sup>12</sup>

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10. 129 S. Ct. 2527, 2539 (2009).

11. See *infra* text accompanying notes 44–50.

12. *E.g.*, *United States v. Giambro*, 544 F.3d 26, 31 (1st Cir. 2008) (certificate of nonexistence of public record used to show failure to register firearm in violation of 26 U.S.C. § 5861(d) (2006)); *United States v. Vance*, 216 F. App'x 360, 361–62 (4th Cir. 2007) (certificate of nonexistence of public record used to establish absence of rights restoration in felon in possession of a firearm case, a violation of 18 U.S.C. § 922(g)(1)).

Additionally, in immigration cases, the United States uses this evidence to prove illegal entry into the country by showing that the defendant did not have proper authorization to enter the United States.<sup>13</sup> These two categories of cases alone represent a hefty portion of the federal criminal docket. Between October 2005 and September 2006, a weapons offense was the most serious charge against a criminal defendant in 9,207 cases.<sup>14</sup> For immigration offenses, the number rises to 17,237.<sup>15</sup> These two categories of cases, which do not include the many cases in which weapons or immigration offenses were not the most serious charge against the defendant, accounted for a staggering 30.2 percent of the entire federal criminal docket.<sup>16</sup> In addition to affecting prosecutors' ability to prove these crimes, the dictum in *Melendez-Diaz* would result in a huge imposition on government records custodians. Classifying certificates of nonexistence of public record as testimonial would require a custodian who performed a fruitless record search to testify at trial in order to satisfy the Confrontation Clause. This would necessitate that these custodians be in court on a regular basis in order to testify for every one of these cases that goes to trial. In short, this dictum has the potential to significantly affect thousands of federal criminal cases and countless state trials throughout the country every year.<sup>17</sup>

This Note argues that certificates of nonexistence of public record should be considered nontestimonial evidence under *Crawford* but that criminal defendants should still be able to cross-examine records clerks under circumstances casting doubt on the reliability of such certificates. Part II traces the shift in the Court's Confrontation Clause jurisprudence and then explains the interests protected by this Clause. Part III analyzes certified statements of nonexistence of public record according to the Court's slim precedent on its new "testimonial"

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13. *E.g.*, *United States v. Lopez-Montanez*, 146 F. App'x. 180, 180 (9th Cir. 2005) (certificate of nonexistence of public record used to prove that defendant charged with illegal reentry after deportation under 8 U.S.C. § 1326 did not seek permission from Attorney General); *United States v. Cervantes-Flores*, 421 F.3d 825, 830–34 (9th Cir. 2005) (same); *United States v. Mendoza-Orellana*, 133 F. App'x. 68, 70 (4th Cir. 2005) (per curiam) (certificate of nonexistence of public record used to prove the illegal alien status of individuals the defendant transported within the United States in violation of 8 U.S.C. § 1324(a)(1)(A)(ii)); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005) (per curiam) (certificate of nonexistence of public record used to prove that defendant charged with illegal reentry after deportation under 8 U.S.C. § 1326 did not seek permission from Attorney General).

14. BUREAU OF JUSTICE, FEDERAL JUSTICE STATISTICS 2006, tbl.4.1 available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=980>.

15. *Id.*

16. *Id.*

17. Of course not every one of these cases would go to trial or rely on certificates of nonexistence of public record, but they are undoubtedly common in these contexts.

test and to the risks they pose to a criminal defendant's right of confrontation. Part III.A examines the similarities between such certificates and business records, as well as certificates of authenticity, and considers the public policy ramifications of the *Melendez-Diaz* dictum. Part III.B demonstrates that admitting certificates of nonexistence of public record without confrontation does not threaten the interests protected by the Confrontation Clause and that classifying certificates of nonexistence of public record as testimonial does not further these interests. Finally, Part IV advocates a solution that would provide for the cross-examination of records clerks when there is reason to doubt the certificate's reliability, either by applying the *Roberts* reliability test to nontestimonial hearsay or through a statutory framework creating procedural rules for these certificates.

## II. BACKGROUND: REPLACING "RELIABLE" WITH "TESTIMONIAL"

*Crawford* constituted a sea change in Confrontation Clause analysis, altering the inquiry courts had applied for years. This Part considers this shift, examining the previous reliability test under *Ohio v. Roberts*, the *Crawford* testimonial test, and the continuing development of the *Crawford* rule in *Melendez-Diaz v. Massachusetts*. Additionally, this Part introduces the interests that the Confrontation Clause protects after *Crawford* cast the right to confrontation as a procedural right to cross-examine a witness.

### A. Recent Evolution of the Confrontation Clause

#### 1. *Ohio v. Roberts*: Connecting the Confrontation Clause to the Hearsay Rule of Reliability

Before *Crawford*, the leading Supreme Court precedent on the Confrontation Clause was *Ohio v. Roberts*. *Roberts* addressed the issue of whether a criminal defendant's Sixth Amendment confrontation right had been violated when the testimony of a witness taken at a preliminary hearing was admitted against the defendant at trial, and when the same witness did not testify at trial.<sup>18</sup> In holding that no violation of the Confrontation Clause occurred, the Court interpreted the Clause as simply a preference for live testimony at trial so that the defendant could test the reliability and trustworthiness of the

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18. 448 U.S. 56, 58 (1980).

testimony through cross-examination.<sup>19</sup> Despite the general rule requiring live testimony, the Court acknowledged exceptions for situations in which both the witness was unavailable at trial and the prior testimony presented sufficient "indicia of reliability."<sup>20</sup>

In the process, the *Roberts* Court entwined the Sixth Amendment's confrontation right with hearsay law.<sup>21</sup> The Court acknowledged that the purpose of the Confrontation Clause, the need to ensure sufficient reliability of testimony in the absence of an ability to cross-examine a declarant, also underlies the many exceptions to the hearsay rule.<sup>22</sup> Finally, the Court ruled that the satisfaction of most exceptions to the hearsay rule also constituted the satisfaction of the confrontation right.<sup>23</sup> In *Roberts*, the preliminary hearing testimony bore sufficient indicia of reliability because it complied with the hearsay exception for prior testimony.<sup>24</sup> Therefore, the testimony was held admissible at the later trial because its admission did not violate the Confrontation Clause.<sup>25</sup>

Applying the *Roberts* reliability test before *Crawford*, lower courts routinely found certificates of nonexistence of public record admissible without confrontation at trial. Essentially, as long as the certificate satisfied the hearsay exception for the absence of public record or entry, contained in Federal Rule of Evidence 803(10), then it would bear sufficient "indicia of reliability" to be admissible without violating the Confrontation Clause. For example, in *United States v. Regner*, the Ninth Circuit rejected the defendant's Confrontation Clause challenge to the admission of a certificate of nonexistence of public record.<sup>26</sup> Because the certificate met the requirements of the hearsay exception under Federal Rule of Evidence 803(10) and because the defendant could not show any reason to doubt the reliability of the certificate, the court found no Confrontation Clause violation.<sup>27</sup>

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19. *Id.* at 65.

20. *Id.* at 66 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)).

21. *Id.* at 64–66; see also 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 252, at 158 (6th ed. 2006) ("In . . . *Ohio v. Roberts*, the Supreme Court created an extremely close linkage between hearsay exceptions and statements that satisfy the Confrontation Clause.").

22. *Roberts*, 448 U.S. at 65–66.

23. *Id.* at 66.

24. *Id.* at 72–73.

25. *Id.*

26. 677 F.2d 754, 758–59 (9th Cir. 1982).

27. *Id.*; see also *United States v. Hale*, 978 F.2d 1016, 1021 (8th Cir. 1992) (rejecting a Confrontation Clause challenge to admission of certificate of nonexistence of public record in context of weapons registration, relying on *Roberts*' reliability test); *United States v. Metzger*, 778 F.2d 1195, 1200–02 (6th Cir. 1985), cert. denied, 477 U.S. 906 (1986) (similar).

## 2. *Crawford v. Washington*: Creating the Testimonial Test

In 2004, the Supreme Court's holding in *Crawford v. Washington* disconnected the Confrontation Clause from hearsay law.<sup>28</sup> In *Crawford*, the Court considered whether a wife's statement to a police officer investigating her husband's alleged criminal act was admissible at trial when the wife was unavailable to testify due to the marital privilege.<sup>29</sup> The lower court applied the *Roberts* test and found that the statement bore adequate indicia of reliability for admission without confrontation.<sup>30</sup> The Supreme Court reversed, holding that the admission of this statement at trial without an opportunity to cross-examine the declarant was a violation of the Confrontation Clause.<sup>31</sup> In doing so, the Court reformulated the standard for assessing a defendant's right to confrontation.

The Court found that the Confrontation Clause was motivated not merely by a desire to ensure the reliability of testimony, but also by the founders' distrust of ex parte proceedings that collected evidence against the accused for use during prosecution.<sup>32</sup> Under this interpretation, the Court asserted that the only means of testing the reliability of a statement was cross-examination.<sup>33</sup> Thus, fulfilling the requirements of a hearsay exception alone would no longer satisfy the Confrontation Clause.<sup>34</sup> The Court explained that this right to confrontation, and therefore cross-examination, applies to "testimonial" statements.<sup>35</sup> The *Crawford* Court recognized only two exceptions: (1) when the witness is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness<sup>36</sup> and (2) for statements that, although testimonial, qualified under founding-era exceptions to the Confrontation Clause, namely dying declarations.<sup>37</sup>

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28. 541 U.S. 36, 61 (2004) ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence.").

29. *Id.* at 40. As the Court explains, the marital privilege generally prevents one spouse from testifying without the other's consent. *Id.*

30. *Id.* at 38.

31. *Id.* at 68–69.

32. *Id.* at 50–53.

33. *Id.* at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

34. *Id.*

35. *Id.*

36. *Id.* at 53–56.

37. *Id.* at 56 n.6. The Court singles out the dying declarations exception as "[t]he one deviation we have found" from the rule and historical practice that testimonial evidence is not



Despite creating a new standard for assessing the admissibility of out-of-court statements, the Court's opinion did little to clarify what exactly constitutes a "testimonial" statement. Although it purposefully chose to elaborate the term through later cases rather than explicitly defining the term,<sup>38</sup> the Court did provide some general descriptions of testimonial statements. Essentially, a testimonial statement is one "made for the purpose of establishing or proving some fact,"<sup>39</sup> including "*ex parte* in court testimony or its functional equivalent."<sup>40</sup> The Court described a "core class" of testimonial statements that the declarant reasonably would expect to be used at trial: "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"<sup>41</sup> Importantly, the Court placed nontestimonial hearsay outside the scope of the Confrontation Clause, expressly leaving such evidence as business records and statements made in furtherance of a conspiracy to be governed instead by hearsay and evidence law.<sup>42</sup> The Court avoided overruling *Roberts* outright and suggested that it still may have some application in these other contexts.<sup>43</sup>

After *Crawford* established this new testimonial test, lower courts still routinely found certificates of nonexistence of public record to be admissible without confrontation at trial. For example, multiple circuits have ruled that certificates of nonexistence of public record are admissible without confrontation, primarily in cases involving the unlawful possession of firearms<sup>44</sup> or illegal aliens,<sup>45</sup> which together constitute a substantial number of cases nationwide.<sup>46</sup> These courts

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admissible without confrontation. *Id.* As such, it seems unlikely that any other hearsay exceptions could bypass the requirements of *Crawford* based on a founding era practice.

38. *Id.* at 68 (Acknowledging the confusion that was to result in the lower courts without more guidance, the Court nevertheless declared, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'")

39. *Id.* at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

40. *Id.* at 51.

41. *Id.* at 51–52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

42. *Id.* at 56.

43. *Id.* at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.")

44. See cases cited *supra* note 12.

45. See cases cited *supra* note 13.

46. See *supra* text accompanying notes 14–16. Certificates of nonexistence of public record are commonly used in other scenarios as well. See, e.g., *United States v. Sandles*, 469 F.3d 508, 511 (6th Cir. 2006) (FDIC affidavit in bank robbery prosecution that bank's insured status had not been terminated based on nonexistence of public record).

have held that certificates of nonexistence of public record were not testimonial, and therefore did not implicate the Confrontation Clause. In *Millard v. United States*, for instance, the District of Columbia Court of Appeals upheld the admission at trial of certificates of nonexistence of public record used to prove that the defendant did not have a license to carry a firearm and that the defendant possessed an unregistered firearm.<sup>47</sup> Even though the defendant had no opportunity to confront the records clerk at trial, the court found the certificates to be nontestimonial because they were not a substitute for live testimony at trial.<sup>48</sup> Instead, the certificates of nonexistence of public record were merely a substitute “for carting in the entire set of [government] files memorializing the issuance of firearm registration certificates and licenses, so that the jury could determine whether a registration certificate and license had been issued in [the defendant]’s name.”<sup>49</sup> Because the certificates were not testimonial, their admission at trial without an opportunity to confront the records clerk did not violate the Confrontation Clause.<sup>50</sup>

### 3. *Melendez-Diaz v. Massachusetts*: Implications for Certificates of Nonexistence of Public Record

As the *Crawford* opinion anticipated,<sup>51</sup> lower courts have struggled to apply the new testimonial standard, forcing the Supreme Court to revisit the standard and the scope of the Confrontation Clause multiple times since *Crawford* was decided in 2004.<sup>52</sup> Most recently, the Court decided *Melendez-Diaz v. Massachusetts*, which addressed whether a chemist’s sworn certificate of analysis finding a substance to be contraband was a testimonial statement requiring

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47. 967 A.2d 155, 161–62 (D.C. 2009).

48. *Id.* at 162.

49. *Id.*

50. *Id.*; see also *United States v. Burgos*, 539 F.3d 641, 645 (7th Cir. 2008); *United States v. Provencio-Sandoval*, 272 F. App’x 683, 685 (10th Cir. 2008); *United States v. Urqhart*, 469 F.3d 745, 749 (8th Cir. 2006); *United States v. Salazar-Gonzalez*, 458 F.3d 851, 854 (9th Cir. 2006); *United States v. Cervantes-Flores*, 421 F.3d 825, 825 (9th Cir. 2005); *United States v. Mendoza-Orellana*, 133 F. App’x 68, 70 (4th Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005). Many state courts also ruled certificates of nonexistence of public record to be nontestimonial after *Crawford*. See, e.g., *Dickens v. Commonwealth*, 663 S.E.2d 548, 550 (Va. 2008) (certification of failure to register as a sex offender); *Michels v. Commonwealth*, 624 S.E.2d 675, 676 (Va. 2006) (certifications of no record of license to operate as an LLC); *State v. Kirkpatrick*, 161 P.3d 990, 991 (Wash. 2007) (certification of no record of driver’s license).

51. *Crawford v. Washington*, 541 U.S. 36, 68 n.10 (2004) (“We acknowledge . . . that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty.”)

52. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Briscoe v. Virginia*, 129 S. Ct. 2858 (2009); *Davis v. Washington*, 547 U.S. 813 (2006).

confrontation at trial when the analyst was available for trial and the defendant had no prior opportunity for cross-examination.<sup>53</sup> A bare five-member majority of the Court held that confrontation is required, as the chemist's sworn certificate is no different from *Crawford's* affidavit example, which is "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact."<sup>54</sup>

In so holding, the Court rejected the government's attempt to distinguish the chemist's certificate from other, more clearly testimonial statements. The government argued, for example, that the chemist's certificate was analogous to a public or business record and therefore was not testimonial.<sup>55</sup> The Court rejected this argument on the ground that the certificates were "'calculated for use essentially in the court, not in the business,'" to prove a fact against the defendant.<sup>56</sup> As in *Crawford*, the Court held that mere satisfaction of a hearsay exception would not, by itself, satisfy the Confrontation Clause. According to the majority, even if the certificates were documents that were kept in the regular course of business and therefore qualified for the hearsay exception for business records under Federal Rule of Evidence 803(6), because the certificate was testimonial (created for "the purpose of establishing or proving some fact at trial" instead of for "the administration of an entity's affairs," as are most business records), it fell within the scope of the Confrontation Clause.<sup>57</sup>

In further discussion, the Court considered any document prepared for use at trial to be testimonial, with perhaps one narrow exception pointed out by the dissent: a clerk's certificate authenticating an official record to be used as evidence would be admissible at trial without confrontation of the clerk.<sup>58</sup> In other words, a record is admissible if a records clerk attaches a certified statement to the record declaring it to be authentic. However, if the clerk were to interpret a record in some way or create a record for the sole purpose of providing evidence against the defendant, similar to what the laboratory chemist in *Melendez-Diaz* did in a certified analysis of the contraband, then the statement would be testimonial and would require confrontation.<sup>59</sup> In dictum, the Court elaborated on this

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53. 129 S. Ct. 2527 (2009).

54. *Id.* at 2532 (quoting *Crawford*, 541 U.S. at 51) (internal quotation marks omitted).

55. *Id.* at 2538.

56. *Id.* (quoting *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943)).

57. *Id.* at 2539–40.

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

59. *Id.* at 2538–39 (majority opinion).

reasoning by considering the common situation of a clerk who searches for a particular record relevant to a defendant's guilt or innocence, fails to find the record, and then creates a certified statement attesting to its nonexistence.<sup>60</sup> This, the Court suggested, would be a testimonial statement because it was prepared for trial and "would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched."<sup>61</sup> Therefore, even if the clerk's certificate of nonexistence of public record were to qualify for a hearsay exception to the rules of evidence, it would nevertheless require confrontation at trial, unlike a clerk's certificate of authenticity of a record.<sup>62</sup>

The distinction between a clerk's certificate of authenticity and certificate of nonexistence of public record is directly contrary to lower courts' practice, even after *Crawford*.<sup>63</sup> However, there are early signs that the Supreme Court will follow the *Melendez-Diaz* dictum concerning the testimonial nature of a clerk's certificate of nonexistence of public record. In *United States v. Norwood*, the Court vacated the Ninth Circuit's judgment deeming nontestimonial a clerk's certified statement that no record existed of any reported income for the defendant.<sup>64</sup> The Court remanded the case to the Ninth Circuit for reconsideration in light of *Melendez-Diaz*.<sup>65</sup> On remand, the government conceded that the admission of the certificate was a violation of the Confrontation Clause after *Melendez-Diaz*.<sup>66</sup> Additionally, in *United States v. Martinez-Rios*, the Fifth Circuit followed the *Melendez-Diaz* dictum to overturn prior circuit precedent and hold that certificates of nonexistence of public record are

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60. *Id.* at 2539.

61. *Id.*

62. *Id.*

63. *See supra* text accompanying notes 44–50.

64. 555 F.3d 1061, 1064 (9th Cir. 2009), *vacated*, 130 S. Ct. 491 (2009). The prosecution used the certificate at trial to suggest that the large amount of cash found on the defendant at the time of arrest was not the result of any legal activity, such as employment, but rather the defendant's alleged drug dealing. *Id.* The Ninth Circuit analogized the certificate of nonexistence of public record at issue to a business record in order to find it nontestimonial, and therefore not a violation of the Confrontation Clause under *Crawford*. *Id.* at 1066.

65. *Norwood v. United States*, 130 S. Ct. 491 (2009).

66. *United States v. Norwood*, 595 F.3d 1025, 1030 (9th Cir. 2010). The court nevertheless did not reverse the conviction for a new trial because the error was harmless. *Id.* The Ninth Circuit later reached the same result in another case, *United States v. Orozco-Acosta*. 607 F.3d 1156 (9th Cir. 2010). There, the trial court admitted a certificate of nonexistence of public record to prove that the defendant charged with illegal reentry after deportation under 8 U.S.C. § 1326 did not seek permission from the Attorney General. *Id.* at 1159–60. On appeal, the government conceded that the admission of the certificate of nonexistence of public record was a violation of the Confrontation Clause, just as it did in *Norwood*. *Id.* at 1161. The Ninth Circuit again found the error harmless. *Id.* at 1161–62.

testimonial and therefore require confrontation.<sup>67</sup> The court reasoned that such a certificate is testimonial because it is created for use at trial and not in the ordinary course of business, unlike a business record.<sup>68</sup> Similarly, in *Tabaka v. District of Columbia*, the District of Columbia Court of Appeals also followed the *Melendez-Diaz* dictum to reverse a conviction for operating a motor vehicle without a permit. The court based its decision on a finding that the admission at trial of a certificate of nonexistence of public record, to prove that the defendant did not have a permit, violated the Confrontation Clause.<sup>69</sup> Considering the large number of criminal cases the *Melendez-Diaz* dictum affects, its suggestion that certificates of nonexistence of public record require confrontation at trial could have a substantial impact on future criminal prosecutions.<sup>70</sup>

### *B. The Interests Protected by the Confrontation Clause*

Because *Crawford* interpreted the right guaranteed in the Confrontation Clause to be essentially a procedural right to cross-examine witnesses, it linked the interests protected by the Confrontation Clause to the interests protected by in-court cross-examination.<sup>71</sup> These interests revolve around the truth-seeking function of the jury trial. They include (1) the provision to the defendant of an ability to test the truth, accuracy, and completeness of adverse testimony, (2) the requirement that a witness be in the presence of the defendant when he makes the statements, (3) the requirement that the witness make the statements under oath, and (4)

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67. 595 F.3d 581, 585–86 (5th Cir. 2010).

68. *Id.* at 586.

69. 976 A.2d 173, 175 (D.C. 2009).

70. In spite of, and perhaps because of, this large potential for drastic alteration of the status quo, some members of the Court seemed willing to at least reconsider *Melendez-Diaz*—if not overrule it—only months after it was decided. On January 11, 2009, the Court heard oral arguments in *Briscoe v. Virginia*, a case that the Court granted certiorari four days after *Melendez-Diaz* was decided. *Briscoe v. Virginia*, 129 S. Ct. 2858 (2009); Lyle Denniston, *A Limit on Confrontation Rights?*, SCOTUSBLOG (Jan. 8, 2010, 4:43 PM) <http://www.scotusblog.com/?p=14516>. The issue was whether a state statute that provides for cross-examination by allowing the defense to call a lab analyst, the certificate of whom the prosecution relies on as evidence at trial, satisfies the defendant's confrontation right. *Briscoe*, 129 S. Ct. at 2858. Obviously, this provided the Court with an immediate opportunity to curtail or modify its holding in *Melendez-Diaz*. However, *Briscoe* was eventually vacated and remanded in a one-sentence per curiam opinion. See *infra* notes 121–30 and accompanying text for further discussion of *Briscoe*.

71. BROUN ET AL., *supra* note 21, § 19, at 109–10.

the provision to the jury of an opportunity to observe the witness and assess his trustworthiness.<sup>72</sup>

The ability of cross-examination to accomplish the most important of these interests, the testing of adverse testimony, is the reason that Professor Wigmore considered cross-examination to be “the greatest legal engine ever invented for the discovery of truth.”<sup>73</sup> Not only does cross-examination allow the defendant to expose a bald-faced lie as such, it also allows the defendant to tease out the weaknesses of the testimony of a more scrupled witness. These weaknesses commonly include problems associated with misperception, faulty memory, and faulty narration.<sup>74</sup>

The other interests are all somewhat secondary to the interest of testing the adverse testimony. Nevertheless, they are each important in their own right. The requirement that the witness be in the defendant’s presence emphasizes the great importance of the witness’s testimony and the need to tell the truth, as the witness must face the person whose life could be dramatically affected by the testimony.<sup>75</sup> Similarly, the requirement of the oath reminds the witness of the formality and gravity of the proceedings, in addition to the possibility of prosecution for perjury should the witness lie.<sup>76</sup> Finally, in-court cross-examination allows the jury to better assess the credibility of a witness by providing an opportunity to observe the witness’s demeanor during interrogation.<sup>77</sup> Presumably, if a witness became uncomfortable and fidgety when faced with cross-examination, the jury observing the witness’s demeanor would be able to draw inferences regarding the veracity of the witness’s testimony.

### III. ANALYSIS: CERTIFICATES OF NONEXISTENCE OF PUBLIC RECORD AND THE CONFRONTATION CLAUSE

Following *Melendez-Diaz*’s distinction, albeit in dictum, between a clerk’s certificate of authenticity and a clerk’s certificate of nonexistence of public record, the question becomes whether the

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72. *Id.* § 31, at 140; JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL § 14.01 (7th ed. 2005); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022–26 (1998); Miguel A. Mendez, *Crawford v. Washington: A Critique*, 57 STAN. L. REV. 569, 573–75 (2004); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 514 (2005).

73. 5 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1367 (Chadbourn rev. 1974).

74. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 107–08 (6th ed. 2008).

75. WEINSTEIN & BERGER, *supra* note 72, § 14.01.

76. *Id.*

77. *Id.*

underlying purposes of the Confrontation Clause support such a distinction. This Note asserts that there is no rational distinction between a certificate of authenticity and a certificate of nonexistence of public record. As a result, certificates of nonexistence of public record, just like certificates of authenticity, simply are not testimonial. Furthermore, certificates of nonexistence of public record do not pose a meaningful risk to the interests protected by the Confrontation Clause. All of these interests are linked to the factfinding mission of an adversarial jury trial, including an ability to test the truth and accuracy of adverse testimony, to require the witness to be in the presence of the defendant when he makes the statements, to require the witness to make the statements under oath, and to allow the jury an opportunity to observe the witness and to assess his trustworthiness.<sup>78</sup> As a nontestimonial statement, a certificate of nonexistence of public record should not be subject to the requirements of confrontation under the *Crawford* analysis.

*A. Certificates of Nonexistence of Public Record Should Not Be Considered Testimonial*

Certificates of nonexistence of public record provide an interesting lens through which to examine the testimonial standard because, at first glance, they seem to straddle the definitional line the Court set out in *Crawford*. On the one hand, they are statements prepared in anticipation of use at trial to prove a fact against the defendant. Thus, they seem to be a part of the “core class” of testimonial statements the Court described in *Crawford*: “‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’”<sup>79</sup> As such, they would require confrontation, as the *Melendez-Diaz* majority asserted.<sup>80</sup> As discussed in this Part, however, certificates of nonexistence of public record are more properly analogized to other types of evidence, such as business records and certificates of authenticity.

Certificates of nonexistence of public record should not be considered testimonial for several reasons. First, certificates of nonexistence of public record are much like business records, which are nontestimonial under *Crawford*.<sup>81</sup> These certificates only attest to

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78. See sources cited *supra* note 72.

79. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

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

81. *Crawford*, 541 U.S. at 56.

the content of a body of public records, which was created before prosecution for reasons that had nothing to do with prosecution. Second, certificates of nonexistence of public record are not materially distinct from certificates of authenticity, which the Supreme Court accepted as nontestimonial in *Melendez-Diaz*.<sup>82</sup> Finally, classifying certificates of nonexistence of public record as testimonial, and thus requiring confrontation at trial of the clerk, would have numerous adverse public policy effects.<sup>83</sup>

### 1. Comparison to Business Records

Certificates of nonexistence of public record are substantially similar to business records, which are not testimonial and do not implicate the Confrontation Clause.<sup>84</sup> As *Crawford* and *Melendez-Diaz* made clear, business records generally are not testimonial because they are created not for the purpose of proving a fact at trial but for some other purpose related to business activity.<sup>85</sup> This is a result of the requirements of the business record hearsay exception. This exception, codified in Federal Rule of Evidence 803(6), requires the report to be made in the “regular course of a regularly conducted business activity” proximately to the event reported, based on information provided by a person with knowledge of the event reported.<sup>86</sup> As the Advisory Committee Notes to the Federal Rules of Evidence discuss, business records derive their reliability from various sources, including “systematic checking,” “regularity and continuity

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82. *Melendez-Diaz*, 129 S. Ct. at 2538–39.

83. Arguably these sorts of public policy considerations have no relevance for a consideration of whether a statement is testimonial. See, e.g., Brief of Petitioners, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191). Nevertheless, they are relevant to an evaluation of the testimonial standard itself, as wide-ranging negative effects of classifying certain statements as testimonial, with little countervailing benefits, suggest reasons to modify the testimonial standard. See, e.g., Michael H. Graham, *Justice Scalia’s Fundamentally Flawed Confrontation Clause Analysis Continues in Melendez-Diaz: It’s Time to Begin All Over Again*, 45 CRIM. L. BULL. 1052, 1058 (2009) (“From whatever vantage point one assumes, whether the interests of the criminal defendant, the search for fairness in the criminal justice system, through analysis of testimonial and hearsay risks, balancing of probative value versus trial concerns, effectiveness of cross-examination of the in court witness testifying as to the out-of-court statement, etc., the current state of the Confrontation Clause . . . is theoretically unsound, inconsistent, confused, and illogical.”).

84. *Crawford*, 541 U.S. at 56.

85. *Id.*; *Melendez-Diaz*, 129 S. Ct. at 2539–40. When, however, the business record is created for the purpose of proving a fact in anticipated litigation, it is testimonial and requires confrontation. See *Melendez-Diaz*, 129 S. Ct. at 2538 (finding that documents kept in the regular course of business but “calculated for use essentially in the court, not in the business” do not qualify as business documents to be admitted at trial despite their hearsay status).

86. FED. R. EVID. 803(6).



which produce habits of precision,” “actual experience of business in relying upon them,” and from the “duty to make an accurate record as part of a continuing job or occupation.”<sup>87</sup> The Court seems to allow a business record as nontestimonial evidence as long as the record was created without any anticipation of use at trial and without the bias that accompanies such use. This decision is only bolstered by the general reliability of these records.

Applying this rationale for the nontestimonial nature of business records, it is apparent that the absence of public records is also nontestimonial and should not be subject to the requirements of the Confrontation Clause. Perhaps most importantly, even though certificates of nonexistence of public record are created for use at trial, the sorts of public records databases that lend themselves to certificates of nonexistence of public record are maintained for purposes unrelated to proving facts at trials.<sup>88</sup> Instead, they are maintained for the official purpose of administering comprehensive government policies.

Consider, for example, the two common situations in which certificates of nonexistence of public record are used at trial: firearms offenses and immigration offenses. Firearms records, at the federal level, are kept in accordance with the official purpose of preventing certain kinds of dangerous weapons from existing in the marketplace.<sup>89</sup> At the state level, firearms records are often kept for the purpose of ensuring that certain dangerous members of society do not have access to firearms through, for instance, databases of concealed handgun carry permits.<sup>90</sup> Similarly, in the immigration context, the federal government maintains records to pursue, for example, a comprehensive immigration policy to ensure that aliens with certain criminal convictions do not enter the United States.<sup>91</sup> Although criminal prosecution is one means of enforcing some of these government policies, it is by no means the only method. Nor is it the chosen method in a sufficient number of cases to conclude that the entire purpose for the database is to prove a fact at trial against

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87. FED. R. EVID. 803(6) advisory committee’s note (citing *BROUN ET AL.*, *supra* note 21, §§ 281, 286–87); Charles V. Laughlin, *Business Entries and the Like*, 46 IOWA L. REV. 276 (1961).

88. However, when a record in the official database would be considered testimonial, so should the certificate of nonexistence of public record. This Note’s argument only applies to the sorts of records that are not testimonial in nature by virtue of the fact that they are kept for purposes unrelated to prosecution.

89. 26 U.S.C. § 5841 (2006).

90. *See, e.g.*, TENN. CODE ANN. § 39-17-1351 (2010) (requiring registration for handgun carry permit).

91. *See, e.g.*, 8 U.S.C. § 1326 (requiring certain aliens to seek permission from the U.S. Attorney General to enter the country).

someone accused of violating these government policies. Therefore, while the actual certificate of nonexistence of public record is, in fact, created for the purpose of proving a fact at trial, it is based entirely on a database of records that is kept for other purposes.

Additionally, the record databases exist prior to prosecution, or any thought of prosecution, against a particular defendant. Unlike, for instance, a police investigation report that is created *after* the commission of a crime for the sole purpose of proving facts against a defendant, certificates of nonexistence of public record are based on records that were in existence *before* the alleged crime occurred. Therefore, these certificates should not be subject to any suspicion of bias that undergirds the Court's decision to consider even some business records testimonial.<sup>92</sup> The database simply could not be kept in a manner that would prejudice a particular defendant against whom the certificate of nonexistence of public record is admitted because the database is administered without a view to any particular case. Additionally, the particular defendant is entirely unknown to the clerks during the record-keeping process, making it nearly impossible for clerks to act in a way that would prejudice the defendant, *precisely because* of the lack of any record for the defendant.

In addition to the lack of anticipated use of official records at trial and the bias accompanying it, official records exhibit the same level of reliability, and for the same reasons, as business records. The Advisory Committee Notes for Federal Rule of Evidence 803(8), which governs the admissibility of hearsay through official records, specifically state that the sources of reliability are the same as for business records.<sup>93</sup> The Notes assert that official records may even be more reliable than normal business records, as there is an "assumption that a public official will perform his duty properly" and an "unlikelihood that he will remember details independently of the record."<sup>94</sup>

Certificates of nonexistence of public record, therefore, are analogous to business records because they are based on databases kept for purposes unrelated to trial and are equally reliable, if not more reliable, so as to warrant their classification as nontestimonial and therefore outside the scope of the Confrontation Clause.

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92. See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2538 (2009) (finding that documents kept in the regular course of business but "calculated for use essentially in the court, not in the business" do not qualify as business documents to be admitted at trial despite hearsay status).

93. FED. R. EVID. 803(8) advisory committee's note.

94. *Id.*

## 2. Analogy to Certificates of Authenticity

Certificates of nonexistence of public record are also not distinguishable for purposes of Confrontation Clause analysis from certificates of authenticity, which the Supreme Court accepted as nontestimonial in *Melendez-Diaz*.<sup>95</sup> For certificates of authenticity, the clerk is merely “certify[ing] to the correctness of a copy of a record kept in his office,” and not “furnish[ing], as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or . . . its substance or effect.”<sup>96</sup> Thus, as long as the clerk does not create a document interpreting the record and only states that the document is an accurate copy of the official record, the statement is not testimonial according to the *Melendez-Diaz* Court.

Following this logic, no basis exists for distinguishing a statement that a record was found and was accurate from a statement that no record was found. Just like a certificate of authentication, a certificate of nonexistence of public record merely confirms the contents of the records as a whole in relation to a particular defendant.<sup>97</sup> The only difference is that the latter states that no record exists for a particular defendant, while the former states that one does exist. A clerk, then, could evade whatever distinction the Court seems to suggest is present here by simply attaching a blank sheet of paper to the certificate of authenticity and declaring that the blank sheet of paper is the authentic record that exists in the database. Surely the Court and the Confrontation Clause would not require such a ridiculous measure as an alternative to a simple certificate stating that no record exists in the database.

Additionally, the distinction cannot rest on any difference in the actual confrontation that would result in the case of a certificate of nonexistence of public record relative to a certificate of authenticity. The cross-examination of a clerk who did in fact retrieve a document

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95. *Melendez-Diaz*, 129 S. Ct. at 2538–39.

96. *Id.* at 2539 (quoting *State v. Wilson*, 75 So. 95, 97 (La. 1917)) (internal quotation marks omitted).

97. Arguably, a certificate of authenticity states much more about the record and its relation to the defendant than a certificate of nonexistence of public record does. For instance, Federal Rule of Evidence 902(11), which provides for the authentication of business records through certification, requires that the certifying custodian assert that the record is not only authentic but also fulfills the requirements of the hearsay exception for business records (that the record was made at the appropriate time by the appropriate person, was kept in the course of regularly conducted activity, and was made as a regular practice). FED. R. EVID. 902(11). Contrastingly, a certificate of nonexistence of public record asserts none of these facts. Unconfronted certificates of nonexistence of public record, therefore, pose a less significant threat to defendants' confrontation rights than certificates of authenticity, at least of business records.

(in the case of a certificate of authenticity) would be exactly the same as the cross-examination of a clerk who failed to retrieve a document (in the case of a certificate of nonexistence of public record). In both cases, because the clerk is unlikely to remember the particular circumstances of any single search,<sup>98</sup> he could testify to nothing more than the process by which he routinely searches for a document and reports the result, which would be either the presence or absence of a record. The truth-seeking process is identical in both situations. Therefore, there is no reason under the Confrontation Clause to require cross-examination in the one scenario but not in the other.

### 3. Public Policy: The Consequences of Requiring Confrontation

Requiring confrontation of certificates of nonexistence of public record would have substantial practical implications that support classifying them as nontestimonial.<sup>99</sup> As Chief Justice Rehnquist pointed out in his concurring opinion in *Crawford*, policy considerations support the admission of business and public records without requiring them to be subject to confrontation.<sup>100</sup> These same policy considerations apply with equal force to certificates of nonexistence of public record. Specifically, Rehnquist's opinion mentions a desire to avoid the inconvenience and inefficiency suffered by both the parties and the judicial system of "requir[ing] numerous additional witnesses without any apparent gain in the truth-seeking process."<sup>101</sup>

These negative effects, in the case of certificates of nonexistence of public record, would largely manifest themselves by hauling countless record-keepers into courts across the country. The record-keepers would wait around to testify about an issue that is not likely to be seriously disputed. Furthermore, their testimony would be exactly the same in every case, as they would testify to nothing more than the routine process by which they search the records database.

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98. FED. R. EVID. 803(8) advisory committee's note.

99. Confrontation is a procedural constitutional right that should not be denied any defendant simply due to the cost of providing the right, especially when a statement is clearly testimonial. Nevertheless, such public policy costs should be considered in hard questions of whether a statement is testimonial or nontestimonial to begin with, as is the case with certificates of nonexistence of public record.

100. *Crawford v. Washington*, 541 U.S. 36, 76 (2004) (Rehnquist, C.J., concurring in the judgment).

101. *Id.* Justice Kennedy echoed these sentiments in his dissenting opinion in *Melendez-Diaz*: "The Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to the truth-finding process." 129 S. Ct. 2527, 2550 (2009) (Kennedy, J., dissenting).

Not only would this waste the courts' and parties' time, it also would disrupt the efficient functioning of government, as these record-keepers would spend much of their time in court rather than fulfilling their official duties. This would result in the multiplication of the number of record-keepers needed in order to ensure that official duties are performed despite the clerks' many court appearances. Furthermore, the current level of records expertise that clerks maintain would be diluted, as the task would become increasingly decentralized.<sup>102</sup> For all these reasons, certificates of nonexistence of public record should be considered nontestimonial statements that do not require confrontation under the Constitution.

*B. Certificates of Nonexistence of Public Record Do Not Pose a Threat to the Interests Protected by the Confrontation Clause*

The Supreme Court has interpreted the right guaranteed in the Confrontation Clause to be essentially an opportunity to cross-examine a witness.<sup>103</sup> Thus, it makes sense to assess the value of labeling a certificate of nonexistence of public record as testimonial, and thereby the value of requiring confrontation at trial, according to the purposes of cross-examination. These purposes of cross-examination are linked to the role a jury trial plays as the principal factfinding mechanism in the criminal justice system. They include (1) the provision to the parties of an ability to test the truth and accuracy of adverse testimony, (2) the requirement that a witness be in the presence of the defendant when he makes the statements, (3) the requirement that the witness make the statements under oath, and (4) the provision to the jury of an opportunity to observe the witness and assess his trustworthiness.<sup>104</sup> Considering each of these purposes in turn, it becomes apparent that admitting certificates of nonexistence of public record without confrontation does not threaten these interests. In fact, cross-examination would add very little, if anything,

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102. Other more incidental effects are possible: the defendant could have more leverage in plea bargaining (because the government will have the additional burden and cost of bringing the clerk to court to prove its case), and the requirement that the clerk be present to testify could interfere with the right to a speedy trial (because coordinating the presence of one more witness could pose scheduling delays). See Amber N. Gremillion, Note, *I'll Be Seeing You in Court: Melendez-Diaz v. Massachusetts' Flawed Decision and Its Impact on Louisiana*, 37 S.U. L. REV. 255, 273-75 (2010) (discussing the practical effects of the *Melendez-Diaz* holding for Louisiana courts).

103. *Crawford*, 541 U.S. at 68-69 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

104. See *supra* Part II.B.

to the defendant's ability to make his case in court when a certificate of nonexistence of public record is at issue.

First, the cross-examination of a clerk who certifies the nonexistence of a public record would not provide a substantial opportunity to test the truth and accuracy of the statement that the public record does not exist. A clerk's testimony will consist of little more than a description of the general process used to search the records database, as the clerk is unlikely to remember the specific act of searching the database for the particular defendant's records. As the Tenth Circuit stated when it rejected a confrontation challenge to the admission of a certificate of nonexistence of public record, "If the essence of cross-examination is that the declarant's memory, perception, bias, and narration will be tested, there is little likely benefit from cross-examination of an inspector who was hired for his skills and ability to perform the job of inspecting the . . . database."<sup>105</sup> At best, defense counsel could hope to uncover some kind of systemic problems in the method by which the records are kept or searched. Nevertheless, this does not necessarily require confrontation at trial and could be discovered just as easily by requiring the clerk to include with his certificate a description of the record-keeping and record-searching processes.<sup>106</sup>

Second, the requirement that a witness be in the presence of the defendant when he makes the statements is irrelevant to the scenario in which a records clerk testifies as to what the record contains. Typically, this requirement is important to discourage a witness from lying or otherwise falsifying his testimony by making sure the witness will face the defendant, who will bear whatever negative effects arise from the witness's testimony.<sup>107</sup> In light of the fact that a clerk's testimony concerning the nonexistence of public record concerns the clerk's official duties and nothing more, it is highly unlikely that the clerk would either falsify his testimony or feel reticent about discussing his record-keeping activities as a result of seeing the defendant in the courtroom. This is also true because the

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105. *United States v. Rith*, 164 F.3d 1323, 1336 (10th Cir. 1999).

106. Even if the certificate of nonexistence of public record is found to be nontestimonial, there still could be circumstances under which the defendant would have an opportunity to cross-examine the clerk. In cases where the certificate is dubious or otherwise unreliable, a court may require confrontation under the *Roberts* test, which arguably still applies to nontestimonial statements. See *infra* Part IV; see also Jerome C. Latimer, *Confrontation After Crawford: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327, 415-19 (2006).

107. See WEINSTEIN & BERGER, *supra* note 72, § 14.01.

clerk is not likely to know the defendant on a personal level outside of the context of the criminal proceeding.

Third, requiring a witness to make his statement under oath adds little support for classifying a certificate of nonexistence of public record as testimonial. The oath requirement, much like the requirement that the witness see the defendant in court while he testifies, is designed to emphasize for the witness the formality of the proceeding and the gravity of the outcome for the parties.<sup>108</sup> Again, this will not have much influence on a records clerk because he will only testify to his official activities in regard to the records database, with little chance for manipulation of the truth. Furthermore, the certification process fulfills the same function as the oath because it requires the records clerk to formally declare that no record was found, similarly impressing upon the clerk the importance of the statement.

Fourth, compelling confrontation in order to allow the jury an opportunity to observe the clerk and to assess his trustworthiness does not support classifying certificates of nonexistence of public record as testimonial. This purpose of cross-examination is linked to the function of the jury as the ultimate fact-finder in a trial. The jury must choose which facts to believe, which is necessarily related to its determination of the credibility of the person who relates those facts.<sup>109</sup> By virtue of a clerk's office alone, the jury is likely to afford a clerk's testimony such credibility that it would not be influenced by an opportunity to view him. Additionally, the clerk would be testifying to facts that involve no interpretations or inferences, so his credibility is not likely to be a real issue at trial.

#### IV. SOLUTION: REINING IN THE TESTIMONIAL TEST

At least two alternative solutions for dealing with certificates of nonexistence of public record are possible while still accommodating the *Melendez-Diaz* Court's concerns for these statements. First, if certificates of nonexistence of public record are classified as nontestimonial, they could still be subject to *Roberts* reliability review, which would provide defendants who want to challenge the certificates a means of presenting that challenge to the court. Second, statutory procedural rules could allow the defendant to call the clerk as a witness in his own case or to require the prosecution to call the clerk as a witness if the defendant so values the opportunity to confront the

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108. *Id.*

109. *Id.*

clerk. Both of these solutions accommodate the concern the Court expressed in *Melendez-Diaz* that clerks' statements would be entirely untested, while at the same time avoiding the significant negative effects that would result from classifying certificates of nonexistence of public record as testimonial and requiring the clerk to testify at every trial.

The easiest and best solution is to classify certificates of nonexistence of public record as nontestimonial and to continue applying the *Roberts* reliability test to such certificates. *Crawford* avoided overruling *Roberts* outright, and the majority opinion even suggested that *Roberts* may continue to apply to nontestimonial hearsay, declaring, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."<sup>110</sup> Some state courts have read this language as an open door to allow all nontestimonial statements, regardless of whether they satisfy the *Roberts* reliability test.<sup>111</sup>

This approach, which some states have at least flirted with adopting,<sup>112</sup> provides some Confrontation Clause protection, compelling the prosecution to produce the witness in those cases where confrontation is most necessary, that is, when the hearsay statement is potentially unreliable. This ensures that defendants are

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110. *Crawford v. Washington*, 541 U.S. 36, 68 (2004); see also Latimer, *supra* note 106, at 415–16. *Crawford* left open whether the Confrontation Clause applies at all to nontestimonial statements. See, e.g., WEINSTEIN & BERGER, *supra* note 72, § 14.03[4]. The Court resolved this question in *Davis v. Washington*, where it made clear that the Confrontation Clause only applies to testimonial statements. 547 U.S. 813, 821 (2006) ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."). So if *Roberts* were to continue to apply to nontestimonial statements, it would do so not because the Confrontation Clause also applies to nontestimonial statements but rather because the *Roberts* reliability test is a means of assessing reliability under general hearsay and evidence law.

111. Latimer, *supra* note 106, at 418 n.461.

112. The Tennessee Supreme Court, for example, adopted this approach after *Crawford* in the case *State v. Maclin*. 183 S.W.3d 335, 351 (Tenn. 2006) ("If the statement is nontestimonial, the Confrontation Clause analysis does not end. Instead, consistent with *Ohio v. Roberts*, the court must determine whether the out-of-court statement bears adequate indicia of reliability . . ." (citing *Crawford*, 541 U.S. at 68 (stating that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*"))). Tennessee turned its back on this approach, however, when *Davis v. Washington* exempted nontestimonial hearsay from Confrontation Clause analysis entirely. See *State v. Lewis*, 235 S.W.3d 136, 143 (Tenn. 2007) ("[T]he ruling in *Davis* that the Confrontation Clause is inapplicable to nontestimonial hearsay conflicts with our interpretation in *Maclin* that the *Roberts* test should be used to determine the admissibility of nontestimonial hearsay").



able to press the court for confrontation when they have reason to question the reliability of the statement, rather than simply admitting without challenging all manner of nontestimonial hearsay. For example, if a particular clerk's office or database were known, or even just suspected, to operate with high rates of error, the defendant could present this argument to the court and possibly cross-examine the records clerk in front of the jury. This possibility for cross-examination exists because the *Roberts* Court emphasized, above all else, the need for hearsay testimony to bear sufficient indicia of reliability. The determinative issue for the *Roberts* Court was not whether the testimony fit a hearsay exception, but whether the testimony was sufficiently reliable. When there is some value to confrontation and cross-examination, the defendant should have an opportunity to convince the court to allow him to confront and cross-examine the declarant. This provides some measure of ensuring that the statements admitted under the hearsay exceptions continue to be reliable, which is of course the underlying assumption of *Roberts* and the hearsay rules.<sup>113</sup>

Additionally, this approach relies on an inquiry that is familiar to courts, as *Roberts* was the touchstone Confrontation Clause opinion for more than two decades. As such, courts are well equipped to decide the reliability of nontestimonial hearsay based on the familiar inquiry and the decades of precedent that the opinion generated.

The continued viability of *Roberts*, however, also depends on some reconciliation between the Court and the many criticisms it expressed in *Crawford* of the *Roberts* reliability approach. For example, the Court criticized *Roberts* for the fact that the reliability test was amorphous, overly subjective, and unpredictable, leading to disparate results in similar cases due to the lack of solid standards in determining the reliability of a hearsay statement.<sup>114</sup> But the main criticism that *Crawford* had for *Roberts*—that it allowed testimonial hearsay to go without confrontation<sup>115</sup>—is not a concern here because certificates of nonexistence of public record should be deemed nontestimonial.

By applying the *Roberts* reliability test to certificates of nonexistence of public record, there will be no need for confrontation in the vast majority of cases. Confrontation will only be necessary

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113. *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980).

114. *Crawford*, 541 U.S. at 63–64.

115. *Id.* at 63 (“The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”).

when there are particular reasons to doubt the reliability of the clerk's records or the clerk's process in searching the records.

An alternative solution would be to create a statutory framework with a default presumption that the prosecution is allowed to present its evidence through certification. There are at least two possible versions of this statutory framework: so-called "burden-shifting" statutes, and "notice-and-demand" statutes.<sup>116</sup> Burden-shifting statutes, as the name implies, shift the burden of subpoenaing and examining the prosecution's witness from the prosecution to the defense. Absent these actions by the defense, the prosecution can present its evidence through certification.<sup>117</sup> Notice-and-demand statutes require the prosecution to provide the defense with notice of an intent to present evidence through certification. The defense then can elect either to object and demand the witness's presence for trial or to waive the right to confront the witness.<sup>118</sup>

Almost all states have, or until recently had, some version of these types of statutes applicable in various trial contexts.<sup>119</sup> Nevertheless, the continued constitutionality of these statutes is suspect after *Melendez-Diaz*. For example, the Court in *Melendez-Diaz* roundly criticized burden-shifting statutes:

[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.<sup>120</sup>

Despite this seemingly clear language, the Court granted certiorari in *Briscoe v. Virginia*, only days after deciding *Melendez-Diaz*, to review the constitutionality of Virginia's burden-shifting statute.<sup>121</sup> The Virginia statute required the prosecution to provide

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116. See Gremillion, *supra* note 102, at 281–85 (discussing these various types of statutes and their continued viability after *Melendez-Diaz*); see also Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 481–85 (2006) (discussing these kinds of statutes in the specific context of forensic science certificates using similar terminology).

117. Gremillion, *supra* note 102, at 281–82.

118. *Id.* at 282–83.

119. See Metzger, *supra* note 116, at 478 & nn.9–10 (listing the forty-five jurisdictions with and the six jurisdictions without such statutes in the context of forensic certificates).

120. 129 S. Ct. 2527, 2540 (2009). For further discussion of the criticisms of burden-shifting statutes in the context of forensic evidence, see Metzger, *supra* note 116. For example, Metzger criticizes these statutes for eviscerating the state's burden of presenting proof and "creat[ing] 'default waivers' of fundamental constitutional rights" that "convert the State's partisan allegations into incontrovertible and unconstitutional presumptions." *Id.* at 481.

121. *Briscoe v. Virginia*, 657 S.E.2d 113, *cert. granted*, 129 S. Ct. 2858 (2009); see also Denniston, *supra* note 70 (discussing the context of the Court's grant of certiorari and Virginia's statutory scheme).

notice of an intent to use a certificate as evidence, but it also required the defense to subpoena the witness if it desired confrontation, thereby placing the burden of producing the witness on the defense.<sup>122</sup> Defendant Briscoe was convicted of drug trafficking charges based in part on a certificate from the state's laboratory analyst confirming the substance found in the defendant's possession was a narcotic.<sup>123</sup> The statute, of course, permitted the prosecution to introduce the certificate as evidence, and the defendant raised the claim that this violated his right to confrontation, especially after *Melendez-Diaz*.<sup>124</sup> In response, the prosecution argued that the defendant waived his confrontation right when he failed to respond to the prosecution's notice that it would present the evidence through certificate, primarily because he did not call the analyst as a witness during his own presentation of proof.<sup>125</sup>

In large part, the dispute in *Briscoe* boiled down to the question of who has the burden of calling a witness that must be confronted in court under *Crawford's* interpretation of the Confrontation Clause. Briscoe argued that requiring the defense to call the prosecution's witness upset a long-established trial practice, forcing the defense to cross-examine a prosecution witness without knowing what he might say and providing the prosecution an opportunity to interrogate a friendly witness in the middle of the defense case.<sup>126</sup> Furthermore, it could allow a wide range of criminal trials through affidavits without any live testimony.<sup>127</sup> Virginia, and the many amici who supported her position,<sup>128</sup> contended that the Confrontation Clause only requires an opportunity to cross-examine the witness, and the statute adequately preserves that opportunity for the defendant, as there is no constitutionally required order of proof in a criminal trial.<sup>129</sup> The Court, somewhat enigmatically after granting certiorari and hearing

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122. VA. CODE ANN. § 19.2-187 (2010); see also Brief of Petitioners, *supra* note 83, at 3; Denniston, *supra* note 70 (discussing Virginia's statutory scheme).

123. Brief of Petitioners, *supra* note 83, at 4.

124. *Id.* at 3-4.

125. Brief of the Respondent at 13, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191).

126. Brief of Petitioners, *supra* note 83, at 8, 16-24.

127. *Id.* at 9.

128. The United States filed a brief supporting Virginia, Brief for the United States as Amicus Curiae Supporting Respondent, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191), as did the states of Indiana, Massachusetts, Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Iowa, Kansas, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming, and the District of Columbia, Brief of the States of Indiana et al. as Amici Curiae in Support of Respondent, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191).

129. Brief of the Respondent, *supra* note 125, at 35-36.

oral argument, issued a one-sentence per curiam opinion vacating the Virginia Supreme Court's decision upholding the statute and remanded the case for further proceedings "not inconsistent with the opinion in *Melendez-Diaz*."<sup>130</sup>

Burden-shifting statutes, therefore, appear to be unconstitutional as they pertain to testimonial evidence. Nevertheless, if certificates of nonexistence of public record are deemed nontestimonial, then burden-shifting statutes concerning such evidence are possibly still a permissible solution because the Confrontation Clause, according to the *Crawford* doctrine, only applies to testimonial hearsay.<sup>131</sup>

Even assuming that burden-shifting statutes are constitutional as they apply to nontestimonial evidence, some criticisms of this approach are apparent. One is that this statutory arrangement forces the defense to bear the practical aspects of the burden of calling a witness whom it is not well suited to call. The defense is not likely as intimately acquainted with the government's vast law enforcement bureaucracy, so it is less capable than the prosecution of contacting, or even knowing how to contact, particular government officials such as records clerks. This problem could be easily ameliorated by requiring the prosecution to provide the defense with the contact information of those declarants whose affidavits and certified statements the prosecution intends to use at trial. The disclosure of contact information could occur either at the discovery stage or when the prosecution submits its notification to the defense that it will be relying on affidavits and certified statements rather than live testimony.

Another criticism is that this approach requires the defense to bear the monetary costs associated with calling the government official to trial because the defense must pay for a prosecution witness to testify. One remedy to this criticism is simply to require by statute that the government pay these expenses if the defense wants to call the government witness.<sup>132</sup> But then again, the elimination of all the barriers to calling the records clerk would leave no reason for the

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130. *Briscoe v. Virginia*, 130 S. Ct. 1316, 1316 (2010). For a discussion of the confusion surrounding the Court's action in *Briscoe*, see Lisa McElroy, *The Last Two Days in Plain English*, SCOTUSBLOG (Jan. 27, 2010 3:59 PM), <http://www.scotusblog.com/blog/2010/01/the-last-two-days-in-plain-english/>.

131. See *Davis v. Washington*, 547 U.S. 813, 821 (2006) ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.").

132. In fact, the Virginia statute at issue in *Briscoe v. Virginia* requires the government to do just this. VA. CODE ANN. § 19.2-187 (2010); Denniston, *supra* note 70.

defense not to call the records clerk even when the defense has little reason to do so. Essentially, this would open the possibility that defense attorneys would strategically decide to call the records clerks in all of their cases, perhaps in the hope of overwhelming the government and its records clerks so that the clerks would not appear in court for all the cases, especially the less important ones. Of course, this strategic practice would lead to many of the practical problems associated with the *Melendez-Diaz* dictum requiring confrontation of records clerks in all cases.

Contrary to the Court's condemnation of burden-shifting statutes, the Court condones notice-and-demand statutes. These statutes, according to the Court, do not shift onto the defendant any additional burden; the defendant always has the burden to object or otherwise affirmatively assert the confrontation right.<sup>133</sup> Notice-and-demand statutes simply govern the time period in which the defendant can permissibly assert this right and demand that the prosecution call the witness at trial.<sup>134</sup> Therefore, while burden-shifting statutes appear to be unconstitutional after *Melendez-Diaz* and *Briscoe* (at least as they pertain to testimonial hearsay), notice-and-demand statutes are likely constitutional.

This kind of "notice-and-demand" statutory compromise provides an effective solution to the problem of how best to deal with borderline cases such as certificates of nonexistence of public record under the testimonial standard. In fact, this could be a viable solution even if certificates of nonexistence of public record are later deemed testimonial, consistent with the *Melendez-Diaz* dictum and contrary to this Note's argument. When the defendant finds sufficient value in cross-examining the declarant of a certified statement, he can exercise his right to confrontation by demanding the declarant's presence. This prevents the inefficiencies that result from requiring live testimony in every case and adequately preserves the defendant's right to confront the witnesses against him.

Just as in the case of burden-shifting statutes, however, defendants could easily bypass this statutory attempt to avoid the practical problems of the *Melendez-Diaz* dictum by always demanding that the government's witness testify. Although the defense does not incur any additional burden, the defense still has the opportunity to make each trial more costly for the prosecution. For this reason, both of these statutory schemes are inferior to an application of the *Roberts* reliability test to nontestimonial evidence.

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

134. *Id.*

All of these potential solutions—applying the *Roberts* reliability test, creating a burden-shifting statutory framework (if certificates of nonexistence of public record are classified as nontestimonial), or creating a notice-and-demand statutory framework that regulates the time period in which the defendant can assert the confrontation right—are preferable to *Melendez-Diaz*'s default requirement of presenting live testimony instead of a certificate of nonexistence of public record. These solutions allow the defendant to weigh the value of confronting and cross-examining a records clerk, and they minimize the amount of time government clerks spend in courtrooms testifying in the thousands of cases annually that rely on certificates of nonexistence of public record.

## V. CONCLUSION

*Crawford*'s modification of Confrontation Clause analysis has changed much of how lower courts treat hearsay statements. It should not, however, alter the treatment of certificates of nonexistence of public record, despite *Melendez-Diaz*'s assertion otherwise. These certificates should not be considered testimonial. Under the "testimonial" test, certificates of nonexistence of public record, while made in preparation for trial, are distinguishable from other testimonial statements because they are made on the basis of records *not* kept for the purpose of trial. Essentially, they only restate an assertion that the records themselves contain, much like a business record would. Additionally, these records are similar to certified authentications of public records, and the Court has not yet declared those to be testimonial when there is no element of interpretation or inference on the part of the declarant. Assessing the *Melendez-Diaz* dictum according to the right of confrontation reveals that cross-examination of the public records custodian who certifies that no public record exists results in few of the benefits or safeguards that undergird the Confrontation Clause, including (1) the provision to the defendant of an ability to test the truth and accuracy of adverse testimony, (2) the requirement that a witness be in the presence of the defendant when he makes the statements, (3) the requirement that the witness make the statements under oath, and (4) the provision to the jury of an opportunity to observe the witness and assess his trustworthiness.

Although certificates of nonexistence of public record should be considered nontestimonial, there still should be some means of ensuring their reliability and allowing the defendant an opportunity to confront the record keeper in certain circumstances. Possible means of

accommodating these interests include, first, continuing to apply the *Roberts* reliability test to nontestimonial hearsay, and second, a statutory compromise that allows the prosecution to present the certificate at trial without confrontation unless the defendant desires to confront the declarant. If the defendant does wish to confront the declarant, under a statutory compromise, the defendant can call the declarant as a defense witness (in the case of a burden-shifting statute) or demand that the prosecution call him (in the case of a notice-and-demand statute). Regardless of how courts accommodate these interests, certificates of nonexistence of public record should be classified as nontestimonial, despite the *Melendez-Diaz* dictum. Classifying these certificates as nontestimonial best serves the principles underlying the Confrontation Clause while still promoting fairness in the courtroom and governmental efficiency.

*Keith Hollingshead-Cook\**

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