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Protecting Criminal Defendants' Rights When the Government Adduces Scientific Evidence: The Confrontation Clause and Other Alternatives—A Response to Professor Giannelli

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PROTECTING CRIMINAL DEFENDANTS' RIGHTS WHEN THE GOVERNMENT ADDUCES SCIENTIFIC EVIDENCE: THE CONFRONTATION CLAUSE AND OTHER ALTERNATIVES–A RESPONSE TO PROFESSOR GIANNELLI

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In his article Professor Giannelli articulates quite clearly the confrontation issues that arise when the government seeks to introduce scientific evidence testimony in a criminal case.[1] His work is helpful to our understanding of the problems that develop in the limited contexts of expert testimony and laboratory reports. It also provides valuable insights into the relationship between the Confrontation Clause and the hearsay rules. However, perhaps most important is the contribution that he makes to our understanding of the right of confrontation and our attempts to define that right and its limitations. While I find myself to be in general agreement with Professor Giannelli, some of his conclusions do, in my opinion, deserve comment.

I. BASES OF EXPERT TESTIMONY

Recent changes in the law of evidence have brought to the fore the confrontation issues that arise when the government adduces scientific evidence in a criminal case. These changes have, to a great extent, relaxed the evidentiary restrictions on the admissibility of such evidence. With the adoption of Rule 702 of the Federal Rules of Evidence, we have seen a movement away from the restrictive *Frye* test,[2] and a greater willingness to admit expert testimony in new areas.[3] There also appears to be a greater inclination to accept the

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1. Paul C. Giannelli, *Expert Testimony and the Confrontation Clause*, 22 CAP. U. L. REV. 45 1993).

2. This test is based on the District of Columbia Circuit's decision in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

3. For an excellent discussion of these issues and the relationship between the *Frye* test and Rule 702, see Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 876-85 (1992). *See also* David L. Faigman, *Commentary on Professor Carlson's Article: Struggling to Stop the Flood of Unreliable Expert Testimony*, 76 MINN. (*continued*)

qualifications of experts tendered to the court.[4] However, as Professor Giannelli notes, the most dramatic changes have resulted from the adoption of Rule 703 of the Federal Rules of Evidence.[5]

Rule 703 permits an expert to testify as to facts or data not otherwise admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming inferences or opinions upon the subject".[6] Thus an expert is at liberty to take the stand and relate hearsay and other inadmissible evidence so long as the facts or data are "of a type reasonably relied upon" by experts in the field. The introduction of such evidence has led to several concerns.

The adoption of Rule 703 has resulted in the use of "funnel experts" or "summary experts" who have had extensive experience on the witness stand, but have little personal knowledge of the case. These experts are called as witnesses to give testimony based, to a great extent, on the observations and conclusions of others.[7] Although they have little knowledge of the case at issue, these "experts" are adept at parrying attacks by cross-examiners and forcefully and

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L. REV. 877, 884 (1992). Concerns regarding these developments have led the Advisory Committee on Civil Rules to propose amendments to Rule 702. *See Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 156 (1991).

4. *See* Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859, 871-72 (1992). *See also* Becker & Orenstein, *supra* note 3, at 883-84. This increased inclination to accept experts' qualifications has also led to concerns regarding increased use of "hucksterism" and false science. *Id.* at 879, 883.

5. Giannelli, *supra* note 1, at 54-56.

6. FED. R. EVID. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Id.

7. *Id. See* United States v. Wright, 783 F.2d 1091, 1100-01 (D.C. Cir. 1986) (noting that Rule 703 can be misused to bring otherwise inadmissible evidence before the jury without the opportunity for effective cross-examination); *see also* Carlson, *supra* note 4, at 867-68. These concerns are compounded by the increased risk of "hucksterism" and false science presented under the terms of Rule 702 of the Federal Rules of Evidence. Becker & Orenstein, *supra* note 3, at 879, 883.

effectively presenting the opinions favorable to their position. It is an unfortunate reality of our existence that these experts who are experienced in the theater of the courtroom may have greater effect upon a jury than a more qualified expert with limited experience on the witness stand.

Another less obvious effect of Rule 703 is the impact that it has had upon cross-examination. As Professor Giannelli notes, the use of "funnel experts" or "summary experts" can effectively deny the cross-examiner the chance to confront and question the person who actually performed the test, observed the item, reached conclusions, or otherwise engaged in the activities upon which the expert's opinion is based.[8] In some cases the criminal defense attorney may be denied the opportunity to examine the person who made determinations that are critical to the guilt or innocence of the defendant.[9]

The enactment of Rule 703 has led to a lively debate regarding its general application, and that debate will no doubt continue.[10] However, the effect of the Rule is of particular concern where the government adduces expert testimony in a criminal case. There, the denial of the opportunity to cross-examine raises an issue of constitutional proportion—whether the defendant has been deprived of

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8. Giannelli, *supra* note 1, at 61-65 and authorities cited therein at nn. 69-83. *See also Wright*, 783 F.2d at 1100-01 (noting that Rule 703 can be misused to bring otherwise inadmissible evidence before the jury without the opportunity for effective cross-examination); Carlson, *supra* note 4, at 868-70 and authorities cited therein.

9. As Professor Giannelli notes in his discussion, the case of Reardon v. Manson, 806 F.2d 39, 42 (2d Cir. 1986), *cert. denied*, 481 U.S. 1020 (1987), involved a situation where an expert witness who testified in court was "supervising" fifty cases a day in a situation where the tests were actually performed by less qualified technicians and the tests that were administered were suspect. Since *Reardon* involved alleged possession and sale of narcotics, the guilt or innocence of the defendant would depend upon the test results. As Professor Giannelli also notes, the inadequacy of the discovery rules may prevent the defendant from finding out the nature of the procedures employed by the laboratory in time to prepare for cross-examination or deprive the defendant of the opportunity to subpoena the person who actually performed the tests. Giannelli, *supra* note 1, at 56-62 and authorities cited therein at nn. 48-72.

10. *See, e.g.*, Carlson, *supra* note 4; Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986); Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234 (1984); Faigman, *supra* note 3; Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987).

his or her Sixth Amendment right of confrontation.[11] In *Delaware v. Fensterer*[12] the United States Supreme Court held that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination,"[13] and that the requirements of the Clause are "generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities through cross-examination."[14] The question then becomes what constitutes "an opportunity for effective cross-examination" and when is "the defense given a full and fair opportunity to probe and expose . . . infirmities through cross-examination."

Professor Giannelli argues convincingly that the application of Rule 703 can lead to situations where a criminal defendant is effectively denied the opportunity for effective cross-examination.[15] The fact that one well-qualified toxicologist can be called as the court witness regarding the activities of a large number of less qualified technicians is a matter of concern. However, it is particularly disturbing when the toxicologist's involvement in the testing was minimal and there is a serious question as to the validity of the tests.[16] In such situations the criminal defense counsel clearly does not have an adequate opportunity to inquire as to the procedures employed, the chain of custody, the qualifications of the person who performed the test, the basis of the conclusions, and other matters of great importance. These concerns are compounded when we consider the critical nature of expert testimony in most criminal cases,[17] the frequency of incorrect results reported in proficiency tests conducted at laboratories,[18] the fact that the expert may not have prepared a

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11. *See* Stevens v. Bordenkircher, 746 F.2d 342, 348-49 (6th Cir. 1984) (noting that evidence admitted under the hearsay rule must be analyzed separately to determine if its admission would violate the Confrontation Clause); United States v. Lawson, 653 F.2d 299, 302-03 (7th Cir. 1981) (noting that evidence admissible under Rule 703 could nonetheless constitute a violation of the Confrontation Clause); Carlson, *supra* note 4, at 864-66; Giannelli, *supra* note 1, 53-56.

12. Delaware v. Fensterer, 474 U.S. 15 (1985) (per curiam).

13. *Id.* at 20.

14. *Id.* at 22.

15. Giannelli, *supra* note 1, at 54-56.

16. *Id.* at 56-62 (discussing Reardon v. Manson, 806 F.2d 39 (2d Cir. 1986), *cert. denied*, 481 U.S. 1020 (1987)).

17. *See supra* note 9.

18. Professor Giannelli notes that proficiency tests at laboratories revealed that 71% of the crime laboratories tested provided unacceptable results in a blood test, 51.4% made errors in matching paint samples, 35.5% erred in soil examination, and 28.2% made mistakes in firearms identifications. Another review of five handwriting comparison proficiency tests revealed that at best

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written report,[19] and the unfortunate abuses sometimes associated with the use of expert testimony.[20]

I share Professor Giannelli's view that the failure to provide adequate pretrial discovery regarding an expert witness could, along with other factors, result in violation of the Confrontation Clause in a particular case.[21] However, I am not convinced that we should constitutionalize the discovery process in all cases or find a confrontation violation in every case where sufficient discovery has not been provided. The extension of the protection of the Confrontation Clause to pretrial discovery in all cases involving government expert testimony could raise difficult problems, both in defining the confrontation right and in determining the limits of its protection. Would this extension give rise to a federal constitutional basis for all discovery in criminal cases? Would the right of confrontation then apply to other pretrial matters and proceedings as well and, if so, to which will it apply and under what circumstances? Will it be left to the United States Supreme Court to define the parameters of this pretrial right on both the federal and state level, and how will those parameters be determined?[22]

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the document examiners were incorrect 43% of the time. Giannelli, *supra* note 1, at 80-81 and authorities cited therein at nn. 156-158.

19. See Professor Giannelli's discussion of the Wayne Williams prosecution where a prosecution fiber expert who examined fiber and hair samples for eleven days testified only from personal notes. He did not prepare a written report and the Georgia Supreme Court ruled that the defense was not entitled to discovery. Giannelli, *supra* note 1, at 64-65 and authorities cited therein at notes 80-85.

20. Professor Giannelli discusses a number of possible abuses in laboratory reporting practices including: (1) "preparation of reports containing minimal information in order not to give the 'other side' ammunition for cross-examination"; (2) "reporting findings without an interpretation on the assumption that if an interpretation is required it can be provided from the witness box"; and (3) "[o]mitting some significant point from a report to trap an unsuspecting cross-examiner." Giannelli, *supra* note 1, at 51, (quoting Douglas Lucas, *The Ethical Responsibilities of the Forensic Scientist: Exploring the Limits*, 34 J. FORENSIC SCI. 719, 724 (1989)).

21. Giannelli, *supra* note 1, at 51-52.

22. The United States Supreme Court has recognized these problems. In Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) (plurality opinion), the Court specifically declined to extend the Confrontation Clause to pretrial discovery in all cases:

> Ritchie argues that the failure to disclose information that might have made cross-examination more effective undermines the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process

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More important, this extension of the right of confrontation may be unnecessary. The rights of criminal defendants can, in most cases, be adequately protected by the adoption of measures that are less dramatic and less problematic. As Professor Giannelli has noted, providing adequate pretrial discovery would, in most cases, eliminate these concerns.[23] Given sufficient notice of the nature of the government's expert testimony, the tests employed, the results of those tests, and the possible use of a "funnel" or "summary" expert, the defense attorney will usually be able to ensure that the defendant's rights are protected. Arrangements can be made for a defense expert and additional testing, the defense attorney will have ample opportunity to prepare for cross-examination, and, if necessary, the technician who actually performed the test can be subpoenaed. Thus, a provision for adequate discovery would, in most cases, guarantee the criminal defendant "an opportunity for effective cross-examination."[24] Rule 703 of the Federal Rules of Evidence and

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> at trial . . . . *If we were to accept this broad interpretation of Davis [referring to Davis v. Alaska, 415 U.S. 308 (1974)] the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view.* The opinions of this court show that the right to confrontation is a *trial* right designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination . . . . The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses.

Id. at 52 (emphasis added) (footnote and citations omitted). The Court did however reconfirm that a criminal defendant's right to certain discovery is protected by the Due Process Clause. *Id.* at 53 n.9, 56-58.

23. Giannelli, *supra* note 1, at 49-51, 54-55, 68-69.

24. *Ritchie*, 480 U.S. at 65 (Blackmun, J., concurring) (noting that the procedure for disclosure of material information on remand adequately addressed any confrontation problem); Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (noting that information obtained by defense expert from the prosecution's expert and the testimony of the defense expert eliminated any confrontation problems); Reardon v. Manson, 806 F.2d 39, 42 (2d Cir. 1986), *cert. denied*, 481 U.S. 1020 (1987) (stating that confrontation concerns are lessened where the defendant has access to the same sources of information as the government and the defendant can subpoena those sources); United States v. Lawson, 653 F.2d 299, 302-03 (7th Cir. 1981) (finding no confrontation violation where the defendant had sufficient access to the information relied upon by the government expert). Professor Giannelli has proposed the adoption

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analogous state rules of evidence could also be amended to limit experts' recitation of hearsay and the introduction of other inadmissible evidence that give rise to confrontation concerns.[25] Such amendments are already in effect in at least one jurisdiction.[26] In fact, federal courts may now have authority to examine evidence adduced under Rule 703 and exclude that which is unreliable.[27]

In the particular case where, considering the totality of the circumstances, the defendant has been denied the opportunity to effectively cross-examine, relief can be afforded on a constitutional basis. In making this determination the court should consider a variety of factors including the discovery that has been provided to the defendant,[28] the nature of the expert's testimony,[29] the extent of the

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of discovery measures that would significantly reduce the confrontation concerns that arise when the government adduces scientific evidence. *See infra* note 63.

25. Carlson, *supra* note 4, at 871-75.

26. MINN. R. EVID. 703. *See also* Carlson, *supra* note 4, at 871-75.

27. Carlson, *supra* note 10, at 581-83, 586-90; Faigman, *supra* note 3, at 881-85.

28. Pennsylvania v. Ritchie, 480 U.S. 39, 65 (1987) (Blackmun, J., concurring) (expressing the opinion that the procedure for disclosure of material information on remand adequately addressed any confrontation problem); Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (noting that information obtained by defense expert from the prosecution's expert and the testimony of the defense expert eliminated any confrontation problems); *Reardon*, 806 F.2d at 42 (stating that confrontation concerns are lessened where the defendant has access to the same sources of information as the government and can subpoena those sources); United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (finding no confrontation violation where the defendant had access to the information relied upon by the government's expert); United States v. Lawson, 653 F.2d 299, 302-03 (7th Cir. 1981) (finding no confrontation violation where the defendant had sufficient access to the information relied upon by the government expert).

29. *Reardon*, 806 F.2d at 41 (stating that the Confrontation Clause may not be violated where the utility of trial confrontation would be remote and of little value); United States v. Oates, 560 F.2d 45, 82-84 (2d Cir. 1977) (noting in a case involving introduction of a chemist's report through another chemist that the cruciality of the evidence could be a factor in determining whether a confrontation violation has occurred). *See* Manocchio v. Moran, 919 F.2d 770, 784 (1st Cir. 1990) (noting that different types of information in an autopsy report may raise different confrontation concerns), *cert. denied*, 111 S. Ct. 1695 (1991); Pickett v. Bowen, 798 F.2d 1385, 1387 (11th Cir. 1986) (per curiam) (finding a confrontation violation where an admitted medical report was crucial rather than peripheral); United States v. Bernard S., 795 F.2d 749, 755-56 (9th Cir. 1986) (finding no confrontation violation where the medical records were only of peripheral significance), *cert. denied*, 488 U.S. 927 (1988); Stevens v.

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testifying expert's participation in the process,[30] the trustworthiness of the testimony,[31] the presence or absence of subsidiary issues such as chain of custody,[32] and whether the defendant has interposed an objection.[33] If the court, after considering all of these factors, determines that the defendant has been denied the opportunity to effectively cross-examine, a finding of a violation of the right of

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Bordenkircher, 746 F.2d 342, 348-49 (6th Cir. 1984) (finding a confrontation violation where the death certificate set out matters critical to the government's case); United States v. McClintock, 748 F.2d 1278, 1291-92 (9th Cir. 1984) (finding a confrontation violation where laboratory reports admitted in evidence were crucial to the prosecution and devastating to the defense), *cert. denied*, 474 U.S. 822 (1985); United States *ex rel.* Lurry v. Johnson, 378 F. Supp. 818, 821-23 (E.D. Pa. 1974) (in determining whether admission of a report would result in a confrontation violation the court must consider the nature of the evidence sought to be introduced), *aff'd without opinion*, 510 F.2d 971 (3d Cir. 1975).

30. *Reardon*, 806 F.2d at 41-43 (noting that the expert who testified in court supervised the testing process); *Oates*, 560 F.2d at 80-84 (noting that use of testimony of a chemist who did not perform the tests to introduce the results of tests performed by another chemist could result in a violation of the Confrontation Clause). It should be noted that the government's establishing the unavailability of the person who actually performed the tests may not eliminate the confrontation concerns. Even if the government does establish that the person is unavailable, the defendant will still be deprived of the opportunity to adequately cross-examine and inquire as to the validity of the results.

31. *Reardon*, 806 F.2d at 43 (noting that the reliability of the tests eliminated any confrontation concerns). *See Manocchio*, 919 F.2d at 778-84 (noting that the trustworthiness of an autopsy report rendered the report admissible); *Bordenkircher*, 746 F.2d at 348-49 (finding a confrontation violation where information contained in an admitted death certificate could have been deceptive); *Lurry*, 378 F. Supp. at 821-23 (in determining whether admission of a report would result in a confrontation violation the court must consider the trustworthiness of the proffered evidence).

32. *See Oates*, 560 F.2d at 65 (noting that alterations to exhibits raised issues with regard to the chain of custody). However, in most cases defendants will be alerted to such problems only if they have the opportunity to cross-examine the person who actually performed the test.

33. *See Manocchio*, 919 F.2d at 782 (noting that the defendant had never requested redaction of an autopsy report). It may develop that, as a tactical matter, the defendant may decide not to call the person who performed the tests and instead attempt to impeach the court expert on the basis of his or her lack of knowledge. The defendant would then be free to argue that lack of knowledge to the jury. *Reardon*, 806 F.2d at 42-43 (noting that it was likely that the defendant chose not to call the persons who performed the tests as witnesses because he knew that their testimony would be adverse to his interests).

confrontation is appropriate.[34] The court could also find a due process violation, particularly in cases where the defendant has been denied adequate discovery.[35]

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34. United States v. Lawson, 653 F.2d 299, 302 (7th Cir. 1981) (noting that an expert's testimony that was based entirely upon hearsay reports would violate a defendant's right of confrontation); *Oates*, 560 F.2d at 80-84 (noting that use of testimony of a chemist who did not perform the tests to introduce the results of tests performed by another chemist could result in a violation of the Confrontation Clause); Stewart v. Cowan, 528 F.2d 79, 85 (6th Cir. 1976) (finding a violation of the Confrontation Clause where the government introduced a ballistics report prepared by the FBI through a local police officer). *See* Pickett v. Bowen, 798 F.2d 1385, 1386-87 (11th Cir. 1986) (per curiam) (finding a confrontation violation resulting from the introduction of a medical report). *Contra Reardon*, 806 F.2d at 43-44 (holding that the testimony of an expert based upon tests performed by others did not violate the Confrontation Clause); United States v. Wright, 783 F.2d 1091, 1100-01 (D.C. Cir. 1986) (finding no confrontation violation where a government psychiatrist's testimony was based in part on hearsay); United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (finding no confrontation violation where the government's expert relied upon hearsay); *Lawson*, 653 F.2d at 302-03 (finding no confrontation violation where a government psychiatrist relied upon hearsay information); United States v. Williams, 447 F.2d 1285, 1289-90 (5th Cir. 1971) (appraiser's reliance upon data not in evidence did not constitute confrontation violation), *cert. denied*, 405 U.S. 954 (1972).

35. In his concurring opinion in *White*, Justice Thomas, joined by Justice Scalia, stated: "Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them." White v. Illinois, 112 S. Ct. 736, 747 (1992) (Thomas, J., concurring, joined by Scalia, J.). Similarly in Pennsylvania v. Ritchie, 480 U.S. 39, 52-53, 56-58 (1987) (plurality opinion), the Court, while holding that the Confrontation Clause is not a constitutionally compelled rule of pretrial discovery, noted that due process affords criminal defendants rights with regard to the discovery process. It may be noted that historically the Due Process Clause has been used to protect defendants' rights relating to another constitutional principle. *See* Rochin v. California, 342 U.S. 165 (1952) (due process used to protect the defendant from an unreasonable search and seizure).

II. ADMISSIBILITY OF LABORATORY REPORTS

In the second part of his article Professor Giannelli examines the confrontation issues that arise when the government seeks to introduce a laboratory report in a criminal case. His discussion is directed only to the constitutional issues that arise if the report is otherwise admissible under the business records exception or the public records exception to the hearsay rule.[36]

It would appear that, if the laboratory report is otherwise admissible in evidence, the United States Supreme Court would not find a violation of the defendant's right of confrontation. Under the Court's decisions in *Roberts*,[37] *Wright*,[38] *Bourjaily*,[39] and *White*,[40] the admission of a hearsay statement does not violate the Confrontation Clause if it either (1) falls within a firmly rooted hearsay exception or (2) possesses "particularized guarantees of trustworthiness". Since it appears that both the business records exception and the public records exception are "firmly rooted" exceptions to the hearsay rule, the Court would probably find that the admission of the report presents no confrontation issues.[41] Nor would the government be required to demonstrate the unavailability of the declarant. In *White*[42] the Court made it clear that the "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial statement."[43]

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36. Giannelli, *supra* note 1, at n.106.

37. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

38. Idaho v. Wright, 497 U.S. 805, 814 (1990).

39. Bourjaily v. United States, 483 U.S. 171, 183 (1987).

40. White v. Illinois, 112 S. Ct. 736, 743 (1992).

41. As Professor Giannelli points out, in *Roberts*, 448 U.S. at 66, the Court stated that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection,'" and in an accompanying footnote the Court cites the business and public records exceptions as examples. Giannelli, *supra* note 1, at Part II, B. *See also* United States v. Baker, 855 F.2d 1353, 1359-60 (8th Cir. 1988) (holding that laboratory reports were admissible under the business records exception and their admission did not violate the Confrontation Clause), *cert. denied*, 490 U.S. 1069 (1989); United States v. DeWater, 846 F.2d 528, 529-30 (9th Cir. 1968) (holding that the admission of intoxilyzer test results under the public records exception to the hearsay rule did not violate the defendant's right of confrontation).

42. *White*, 112 S. Ct. at 736.

43. *Id.* at 741. It should be noted, however, that even if the government establishes the unavailability of the declarant, the confrontation concerns are not

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The fact that the Court may not find a violation of the Confrontation Clause does not eliminate the concerns raised by the admission of laboratory reports. To the contrary, I agree with Professor Giannelli that serious questions as to the reliability of such reports raise issues of constitutional dimension.[44] Proficiency evaluations revealing that laboratories may be in error in over fifty percent of their tests would be disturbing under any circumstances,[45] but these revelations give rise to monumental concerns when the outcome of the test will determine the guilt or innocence of the criminal defendant.[46] The admission of laboratory reports raises other concerns as well. Whether introduced without a sponsor or through a "funnel expert", the cross-examiner is effectively deprived of the opportunity to inquire as to the qualifications of the person who performed the test, the chain of custody, the validity of the tests, the procedures employed, the method of analysis, or the manner in which the conclusions were reached.[47]

I share Professor Giannelli's concerns regarding both the general admissibility of laboratory reports and the position taken by the United States Supreme Court. As he and others have pointed out, the Court has essentially deconstitutionalized these issues by holding that there is no confrontation problem if the evidence falls within a "firmly rooted" hearsay exception.[48] I also agree with Professor Swift

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eliminated. The defendant will still be deprived of the opportunity to adequately cross-examine the declarant and test the validity of the matters set out in the reports.

44. Giannelli, *supra* note 1, at 83.

45. *See supra* note 18 and accompanying text.

46. *See supra* note 9.

47. *See supra* notes 15-20 and accompanying text.

48. Giannelli, *supra* note 1, at 77. In his concurring opinion in *White*, Justice Thomas, joined by Justice Scalia, is also critical of the Court's constitutionalization of the hearsay rule:

> Neither the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions. Although the Court repeatedly has disavowed any intent to cause that result, I fear that our decisions have edged ever further in that direction.

White v. Illinois, 112 S. Ct. 736, 748 (1992) (Thomas, J., concurring, joined by Scalia, J.) (citations omitted). *See also* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model,* 76 MINN. L. REV. 557 (1992); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988).

that in criminal cases, even if the evidence falls within such an exception, there is a separate confrontation component that requires independent examination.[49] However, I am not convinced that such concerns should lead to a finding of a violation of the Confrontation Clause in every case where the government seeks to introduce a laboratory report into evidence.

Here again, the availability of less dramatic alternatives may render the constitutional analysis unnecessary in most cases. Laboratory reports will generally be offered under either the business records exception or the public records exception to the hearsay rule, and in jurisdictions that have adopted the Federal Rules of Evidence the defendant's rights can be protected by enforcing the trustworthiness requirement found in Rules 803(6),(7), and (8).[50]

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49. Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in* White v. Illinois *Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145 (1993). *See also* Randolph N. Jonakait, *supra* note 48, at 605-06.

50. FED. R. EVID. 803 provides in pertinent part

The following are not excluded by the hearsay rule, even though the declarant is unavailable as a witness:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, *unless the source of the information or the method of circumstances of preparation indicate lack of trustworthiness*. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, *unless the sources of information or other circumstances indicate lack of trustworthiness.*

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the (A) activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police

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Providing adequate discovery will also serve to reduce or eliminate many of the confrontation problems associated with the introduction of laboratory reports.[51]

In the particular case where, considering the totality of the circumstances, the defendant has been denied an opportunity to effectively cross-examine, a constitutional remedy is appropriate.[52]

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officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, *unless the sources of information or other circumstances indicate lack of trustworthiness.*

Id. (emphasis added.)

The courts have, on the basis of these provisions, excluded otherwise admissible business records and public records due to their lack of trustworthiness. *See, e.g.*, McNeese v. Reading & Bates Drilling Co., 749 F.2d 270, 275 (5th Cir. 1985) (affirming exclusion of report on the basis of its lack of trustworthiness); Lloyd v. Professional Realty Servs., 734 F.2d 1428, 1433 (11th Cir. 1984) (holding that the district court properly excluded as untrustworthy draft minutes of a corporate secretary), *cert. denied*, 469 U.S. 1159 (1985). *See also* United States v. Kim, 595 F.2d 755, 762-63 (D.C. Cir. 1979) (affirming decision of the district court to exclude a business record based in part on the lack of trustworthiness of the record).

51. Pennsylvania v. Ritchie, 480 U.S. 39, 65 (1987) (Blackmun, J., concurring) (noting that the procedure for disclosure of material information on remand adequately addressed any confrontation problem); Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (noting that information obtained by defense expert from the prosecution's expert and the testimony of the defense expert eliminated any confrontation problems). *See* Reardon v. Manson, 806 F.2d 39, 42 (2d Cir. 1986) (stating that confrontation concerns are lessened where the defendant has access to the same sources of information as the government and the defendant can subpoena those sources), *cert. denied,* 481 U.S. 1020 (1987). Professor Giannelli has proposed the adoption of discovery measures that would significantly reduce the confrontation concerns that arise when the government adduces scientific evidence. *See infra* note 63.

52. Stevens v. Bordenkircher, 746 F.2d 342, 348-49 (6th Cir. 1984) (finding a confrontation violation where death certificate was admitted in evidence), *cert. denied*, 474 U.S. 822 (1985); United States v. McClintock, 748 F.2d 1278, 1291-92 (9th Cir. 1984) (finding a confrontation violation where laboratory reports admitted in evidence); Stewart v. Cowan, 528 F.2d 79, 85 (6th Cir. 1976) (finding a violation of the Confrontation Clause where the government introduced a ballistics report prepared by the FBI through a local police officer). *Contra* Manocchio v. Moran, 919 F.2d 770, 784 (1st Cir. 1990) (holding that the admission of an autopsy report did not violate the Confrontation Clause), *cert. denied*, 111 S. Ct. 1695 (1991); United States v. Baker, 855 F.2d 1353, 1360 (8th Cir. 1988) (holding that the admission of laboratory reports identifying

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In making this determination the court should, once again, consider a variety of factors including the nature of the laboratory report,[53] the evidence that the government seeks to adduce from the report,[54] the trustworthiness of that evidence,[55] the presence or absence of

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controlled substances did not violate the Confrontation Clause); United States v. DeWater, 846 F.2d 528, 529-30 (9th Cir. 1988) (holding that the admission of intoxilyzer test results admitted under the public records exception to the hearsay rule did not violate the defendant's right of confrontation); United States v. Bernard S., 795 F.2d 749, 755-56 (9th Cir. 1986) (finding no confrontation violation where medical records admitted in evidence were only of peripheral significance even though the government failed to demonstrate unavailability); United States *ex rel* Lurry v. Johnson, 378 F. Supp. 818, 821-23 (E.D. Pa. 1974) (introduction of medical records through the custodian of the records did not violate the Confrontation Clause), *aff'd without opinion*, 510 F.2d 971 (3d Cir. 1975).

53. Pickett v. Bowen, 798 F.2d 1385, 1387 (11th Cir. 1986) (per curiam) (finding a confrontation violation where an admitted medical report was crucial rather than peripheral); *Bernard S.*, 795 F.2d at 755-56 (finding no confrontation violation where the medical records were only of peripheral significance); *Bordenkircher*, 746 F.2d at 348-49 (finding a confrontation violation where the death certificate set out matters critical to the government's case); *McClintock*, 748 F.2d at 1291-92 (finding a confrontation violation where admitted laboratory reports were crucial to the prosecution and devastating to the defense); *Lurry*, 378 F. Supp. at 821-23 (in determining whether admission of a report would result in a confrontation violation the court must consider the nature of the evidence sought to be introduced). *See Reardon*, 806 F.2d at 41 (stating that the Confrontation Clause may not be violated where the utility of trial confrontation would be remote and of little value); *Oates*, 560 F.2d at 82-84 (noting in a case involving introduction of a chemist's report through another chemist that the cruciality of the evidence could be a factor in determining whether a confrontation violation has occurred).

54. *Manocchio*, 919 F.2d at 784 (noting that different types of information in an autopsy report may raise different confrontation concerns); *Bordenkircher*, 746 F.2d at 348-49 (finding a confrontation violation where the death certificate set out matters critical to the government's case); *Lurry*, 378 F. Supp. at 821 (in determining whether a confrontation violation has occurred particular emphasis must be placed on the portions of the report to be read into evidence). *See Oates*, 560 F.2d at 82-84 (noting in a case involving introduction of a chemist's report through another chemist that the cruciality of the evidence could be a factor in determining whether a confrontation violation has occurred).

55. *Bordenkircher*, 746 F.2d at 348-49 (finding a confrontation violation where information contained in an admitted death certificate could have been deceptive); *Lurry*, 378 F. Supp. at 821-23 (in determining whether admission of a report would result in a confrontation violation the court must consider the trustworthiness of the proffered evidence). *See Reardon*, 806 F.2d at 43 (noting that the reliability of the tests eliminated any confrontation concerns).

subsidiary issues such as chain of custody,[56] the discovery that was afforded to the defendant,[57] the availability of the person who prepared the report[58], the presence or absence of the person who actually performed the tests,[59] and whether the defendant has objected to the introduction of the evidence.[60] In the appropriate case the court can,

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56. *See Oates*, 560 F.2d at 65 (noting that alterations to exhibits raised issues with regard to the chain of custody). However, in most cases defendants will be alerted to such problems only if they have the opportunity to cross-examine the person who prepared the report.

57. *Ritchie*, 480 U.S. at 65 (Blackmun, J., concurring) (expressing the opinion that the procedure for disclosure of material information on remand adequately addressed any confrontation problem); Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (noting that information obtained by defense expert from the prosecution's expert and the testimony of the defense expert eliminated any confrontation problems). *See Reardon*, 806 F.2d at 42 (stating that confrontation concerns are lessened where the defendant has access to the same sources of information as the government and can subpoena those sources); United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (finding no confrontation violation where the defendant had access to the information relied upon by the government's expert); United States v. Lawson, 653 F.2d 299, 302-03 (7th Cir. 1981) (finding no confrontation violation where the defendant had sufficient access to the information relied upon by the government expert).

58. *Reardon*, 806 F.2d at 42 (stating that confrontation concerns are lessened where the defendant has access to the same sources of information as the government and can subpoena those sources); Pickett v. Bowen, 798 F.2d 1385, 1386-87 (11th Cir. 1986) (per curiam) (noting that the government failed to establish the unavailability of the declarant); *Bernard S.*, 795 F.2d at 755-56 (finding no confrontation violation where the medical records were only of peripheral significance even though the government failed to demonstrate unavailability); *Bordenkircher*, 746 F.2d at 348-49 (finding a confrontation violation where the government failed to establish the unavailability of physician who prepared the death certificate); *McClintock*, 748 F.2d at 1291-92 (finding a confrontation violation where the government failed to establish the unavailability of the preparers of laboratory reports); Stewart v. Cowan, 528 F.2d 79, 85 (6th Cir. 1976) (finding a violation of the Confrontation Clause where the government failed to demonstrate the unavailability of preparer of a ballistics report).

59. *See Reardon*, 806 F.2d at 42 (stating that confrontation concerns are lessened where the defendant has access to the same sources of information as the government and can subpoena those persons who performed the tests); *Oates*, 560 F.2d at 80-84 (noting that failure of the government to demonstrate the unavailability of a chemist who actually performed the analysis could result in a violation of the Confrontation Clause).

60. *See Manocchio*, 919 F.2d at 782 (noting that the defendant had never requested redaction of an autopsy report). It may develop that as a tactical matter the defendant may decide not to call the person who performed the tests

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based on a consideration of all of these factors, find a violation of the defendant's right of confrontation[61] or a due process violation.[62]

CONCLUSION

Professor Giannelli's excellent article presents quite clearly the confrontation issues that arise when the government seeks to adduce scientific evidence in a criminal case. The government's introduction of expert testimony under Rule 703 of the Federal Rules of Evidence and laboratory reports under the hearsay exceptions raise serious confrontation problems, and I endorse the policies embodied in the reforms suggested by Professor Giannelli.[63]

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and, instead, attempt to impeach the court expert on the basis of his or her lack of knowledge. This will leave the defendant free to argue that lack of personal knowledge to the jury. *See Reardon*, 806 F.2d at 42-43 (noting that it was likely that the defendant chose not to call the persons who performed the tests as witnesses because he knew that their testimony would be adverse to his interests).

61. *Pickett*, 798 F.2d at 1386-87 (finding a confrontation violation resulting from the introduction of a medical report); *Bordenkircher*, 746 F.2d at 348-49 (finding a confrontation violation where death certificate was admitted in evidence); *McClintock*, 748 F.2d at 1291-92 (finding a confrontation violation where laboratory reports were admitted in evidence); *Cowan*, 528 F.2d at 85 (finding a violation of the Confrontation Clause where the government introduced a ballistics report prepared by the FBI through a local police officer). *Contra Manocchio*, 919 F.2d at 784 (holding that the admission of an autopsy report did not violate the Confrontation Clause); United States v. Baker, 855 F.2d 1353, 1360 (8th Cir. 1988) (holding that the admission of laboratory reports identifying controlled substances did not violate the Confrontation Clause); United States v. DeWater, 846 F.2d 528, 529-30 (9th Cir. 1988) (holding that the admission of intoxilyzer test results under the public records exception to the hearsay rule did not violate the defendant's right of confrontation); *Bernard S.*, 795 F.2d at 755-56 (finding no confrontation violation where admitted medical records were only of peripheral significance even though the government failed to demonstrate unavailability); *Lurry*, 378 F. Supp. at 821-23 (introduction of medical records through the custodian of records did not violate the Confrontation Clause).

62. *See supra* note 35 and authorities cited therein.

63. Professor Giannelli proposes three reforms to protect defendant's rights where the government seeks to introduce scientific evidence:

> 1. Adoption of the following amendment to Rule 16 of the Federal Rules of Criminal Procedure:
>
> (E) EXPERT WITNESSES. At the defendant's request, the government must disclose to the defendant a written summary of

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While constitutional remedies are appropriate in certain situations, other approaches, such as providing adequate discovery and exclusion of unreliable evidence on other grounds, will in most cases insure that the rights of the defendant are adequately protected. Rather than venturing into the uncharted and sometimes perilous waters of expanding constitutional principles, we may first want to explore these other remedies that render constitutional analysis unnecessary. In cases where these remedies are inadequate, protection can and should be afforded under either the Confrontation Clause or the Due Process Clause.[64]

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testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence-in-chief at trial. This summary must describe the opinions of the witnesses, the bases and the reasons therefore, and the witnesses' qualifications.

2. Adoption of "notice and demand" statutes which would permit the admission of laboratory reports without a sponsor if (1) the defense has been served with a copy of the report and (2) the defense does not demand the presence of the person signing the report.

3. Requiring proficiency testing of crime laboratories and the publication of the results of the tests.

Giannelli, *supra* note 1, at 84.

The adoption of these and similar measures would significantly reduce the confrontation concerns that arise when the government adduces scientific evidence.

64. *See supra* notes 34-35, 61 and accompanying text.