Call My Accuser Before My Face: The Constitutional Right to Confront Government Physicians and Chemists in Criminal Cases

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Cite as 68 ATENEO L.J. 492 (2023).

I. INTRODUCTION

In 2019, the Supreme Court issued A.M. No. 19-08-15-SC, a Resolution approving the 2019 Proposed Amendments to the Revised Rules on Evidence dated 8 October 2019.[1] The Court amended the Rules on Evidence "to ensure that the [R]ules are responsive to the needs of all court users and stakeholders, adapt to technological advancements, and properly address problems that may come up."[2] The amendments were comprehensive; they covered most of the sections of the Rules, including the section on hearsay. The Rules now provide a definition of hearsay and have substantively modified some of the hearsay exceptions,[3] such as the business records exception and declarations against interest.[4] The Rules have also converted what had been previously known as the Dead Man's Statute to a hearsay exception.[5] A catch-all provision (the residual exception) has, likewise, been added.[6] Other exceptions, such as the *res gestae* exception and co-conspirator's admissions, have undergone formal or stylistic changes.[7] These changes are welcome. The Court, however, missed an opportunity to amend the Official Records exception or, as it is referred to in the Rules, the "Entries in Official Records."

Hearsay is "a statement[,] other than one made by the declarant while testifying at a trial or hearing, offered to prove the truth of the facts asserted therein."[8] The hearsay exceptions allow the introduction of out-of-court statements to prove the truth of the facts asserted in such statements. Among

1. 2019 Proposed Amendments to the Revised Rules on Evidence, A.M. No. 19-08-15-SC, whereas cl. para. 7 (May 1, 2020).
2. SUPREME COURT, PRIMER ON THE 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE 4 (2020) [hereinafter PRIMER ON THE 2019 AMENDMENTS].
3. *See* 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, §§ 1, 37, & 38-51.
4. *See id.* §§ 45 & 40.
5. *Id.* § 39. *See* PRIMER ON THE 2019 AMENDMENTS, at 3.
6. *See* 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 50.
7. *See id.* rule 130, §§ 42 & 30. *Cf.* 1989 REVISED RULES ON EVIDENCE, rule 130, §§ 44 & 31.
8. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 37.

the out-of-court statements that the Court has declared to be admissible under the Official Records exception are the reports of chemists (in drug cases) and medico legal reports (usually in rape cases).[9]

The constitutionality of the Official Records exception is taken for granted in criminal cases. This is not surprising considering that the rule can be traced all the way back to Act No. 190, a law enacted by the United States (U.S.) Congress in August 1901.[10] Also, more than a century ago, in *Antillon v. Barcelon*,[11] the Court had occasion to observe that without an "exception for official statements, hosts of officials would be found devoting the greater part of their time to attending as witnesses in court or delivering their depositions before an officer."[12] It further noted that "[t]he law reposes a particular confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity."[13] While *Antillon* involved the issue of whether a notarized document could be admitted without further proof of its authenticity and due execution, the bases for treating a public document as self-authenticating (i.e., necessity and reliability) are the very same bases for admitting the truth of the facts asserted in entries in Official Records.[14] It must be pointed out, however, that the matter of authentication is distinct from the matter of hearsay.

Despite the long history of the Official Records exception, there is a need to consider the constitutionality of its application in criminal cases when offered against the accused. Hearsay exceptions trench upon a fundamental right — the right to confrontation. No less than the Constitution guarantees to a criminal defendant the right to "meet the witnesses face[-]to[-]face."[15] In fact, a year before the enactment of Act No. 190, Military Governor Elwell Stephen Otis issued General Order No. 58, which conferred on a defendant in a criminal prosecution the right "[t]o be confronted at the trial and cross-

9. *See id*. rule 130, § 45. *Cf*. 1989 REVISED RULES ON EVIDENCE, rule 130, § 43.

10. *See generally* An Act Providing a Code of Procedure in Civil Actions and Special Proceedings in the Philippine Islands, Act No. 190 (1901) (U.S.).

11. Antillon v. Barcelon, 37 Phil. 148 (1917).

12. *Id*. at 151.

13. *Id*. at 152.

14. *See* Manalo v. Robles Transportation Company, Inc., 99 Phil. 729, 730 (1956) (citing *Antillon*, 37 Phil. at 150) (This is a civil case where the Court, citing *Antillon*, held to be admissible the contents of a sheriff's return certifying to the insolvency of a party despite the sheriff not taking the witness stand.).

15. PHIL. CONST. art. III, § 14 (2).

examine the witnesses against him."[16] Hearsay exceptions, including the Official Records exception, deprive a criminal defendant of his or her right to meet the witnesses face-to-face.

How, then, should the constitutional right to confrontation and the Rules providing for hearsay exceptions, specifically, the Official Records exception, be reconciled?

II. HEARSAY

The Confrontation Clause and the Hearsay Rule are related, "both being based[,] more or less[,] upon the same conceptions."[17]

The Rules define hearsay as follows —

> Section 37. Hearsay. — Hearsay is a statement other than one made by the declarant while testifying at a trial or hearing, offered to prove the truth of the facts asserted therein. A statement is (1) an oral or written assertion or (2) a non-verbal conduct of a person, if it is intended by him or her as an assertion. Hearsay evidence is inadmissible except as otherwise provided in these Rules.
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> A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with the declarant's testimony, and was given under oath[,] subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; (b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or (c) one of identification of a person made after perceiving him or her.[18]

Evidence that is hearsay, whether it be oral or written, is not admissible. The reason for excluding hearsay evidence is that the person making the assertion is not on the witness stand, and hence, cannot be cross-examined by the accused. As explained by the Court in *D.M. Consunji, Inc. v. Court of Appeals*[19] —

> The theory of the [H]earsay [R]ule is that the many possible deficiencies, suppressions, sources of error[,] and untrustworthiness, which lie underneath

16. Office of the U.S. Military Governor on the Philippine Islands, Criminal Procedure 1900, General Order No. 58, § 15 (5) (1900) (superseded in 1940).

17. U.S. v. Virrey, 37 Phil. 618, 624 (1918).

18. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 37.

19. D.M. Consunji v. Court of Appeals, G.R. No. 137873, 357 SCRA 249 (2001).

> the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examination. The [H]earsay [R]ule, therefore, excludes evidence that cannot be tested by cross-examination.[20]

The witness on the stand must have personal knowledge of the disputed fact. The general rule is that a witness is not allowed to testify on what he or she has heard or learned from someone else.[21] It would be useless to cross-examine a witness who derived his or her knowledge of a disputed fact from another person. As observed by the Court —

> It is apparent, too, that a person who relates a hearsay is not obliged to enter into any particular, to answer any question, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; and that she entrenches herself in the simple assertion that she was told so, and leaves the burden entirely upon the dead or absent author.[22]

The inability of an accused to meaningfully cross-examine a witness who has no personal knowledge of the disputed fact renders the testimony of such a witness unreliable.[23]

The Hearsay Rule seeks to ensure that only reliable evidence is presented in court, as does the Confrontation Clause.

III. HEARSAY EXCEPTIONS; ENTRIES IN OFFICIAL RECORDS

There are, however, several exceptions to the Hearsay Rule. These exceptions allow the introduction of otherwise inadmissible evidence. The one thing these exceptions have in common is that the person making the assertion is not available on the witness stand to be cross-examined or even if the declarant is on the witness stand, the statements sought to be introduced for their truth were made by the declarant outside of court and not subjected to cross-examination at the time they were made.[24]

There are at least three types of hearsay exceptions. The first are those found under the heading of "Admissions and Confessions."[25] These are: party

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20. *Id.* at 254.

21. Malayan Insurance Co., Inc. v. Alberto, G.R. No. 194320, 664 SCRA 791, 798 (2012).

22. People v. Estibal, G.R. No. 208749, 743 SCRA 215, 247-48 (2014) (citing Patula v. People, G.R. No. 164457, 669 SCRA 135, 152-53 (2012)).

23. *Id.*

24. *See generally* 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, §§ 38-50.

25. *See id.* rule 130, §§ 27-34.

admissions, admissions by co-partner or agent, admissions by conspirator, admissions by privies, admissions by silence, and confessions.[26] These admissions and confessions fit the definition of hearsay; they are out-of-court statements, and are offered to prove the facts asserted in the statements (i.e., admissions or confessions).[27]

The second are those that are, by definition, not hearsay. These are found under Rule 130, Section 37, Paragraph 2 —

> A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; (b) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication[,] improper influence[,] or motive; or (c) one of identification of a person made after perceiving him or her.[28]

The prior inconsistent statement under Subsection (a), the prior consistent statement under Subsection (b), and the identification under Subsection (c) are all out-of-court statements, and offered for the truth of the assertions therein, but are excluded from the operation of the Hearsay Rule by definitional fiat if they comply with the requisites of Section 7.[29]

The third type are those explicitly denominated as hearsay exceptions, namely: dying declarations, statements of a decedent or a person of unsound mind, declarations against interest, acts or declarations about pedigree, family reputation or tradition regarding pedigree, common reputation, *res gestae*, records of regularly conducted business activity, entries in Official Records, commercial lists, learned treatises, testimony or deposition at a former proceeding, and a catch-all residual exception.[30]

These hearsay exceptions have, in common, the characteristics of reliability (trustworthiness) and/or necessity.

The focus and concern of this Article is principally on the Official Records exception, which is set forth under Rule 130, Section 46 —

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26. *Id*.

27. *See generally id*.

28. *Id*. § 37, para. 2.

29. *See generally id*.

30. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, §§ 38-50.

> Section 46. *Entries in* [O]*fficial* [R]*ecords*. – Entries in [O]fficial [R]ecords made in the performance of his or her duty by a public officer of the Philippines, or by a person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts therein stated.[31]

Interestingly, there is a similar rule under Part B (Authentication and Proof of Documents) of Rule 132, which governs the "Presentation of Evidence."[32] Included in the sections on the authentication and proof of documents is a section on "public documents as evidence[.]"[33] Section 23 of Rule 132 provides —

> Section 23. *Public* [D]*ocuments as* [E]*vidence*. – Documents consisting of entries in public records made in the performance of a duty by a public officer are *prima facie* evidence of the facts therein stated. All other public documents are evidence, even against a third person, of the fact which gave rise to their execution[,] and of the date of the latter.[34]

Section 23 describes the effect of a public document, rather than the manner of authentication. The bottom line of Section 23 is the same (or at least it has come to be construed as the same) as that of Section 46 of Rule 130 — both allow the admission of hearsay evidence.[35] The out-of-court entries of a public officer are accepted, albeit presumptively, even without presenting the public officer for cross-examination, which is the very definition of hearsay.

This provision was first introduced in Act 190, "An Act Providing a Code of Procedure in Civil Actions and Special Proceedings in the Philippine Islands," which was passed by the U.S. Congress in 1901.[36] Act No. 190 contained a chapter on the Rules of Evidence (Chapter X). Included under Chapter X were sections on hearsay and its exceptions, sections on authentication of public and private documents, the manner of authenticating them, and the "effects" of certain judicial documents (e.g., *res judicata*).[37] The rule on "Entries in Official Book" was found in Section 315. It provides —

> Section 315. *Entries in Official Book*. — Entries in public or other official books or records, made in the performance of his duty by a public officer of

31. *Id.* § 46.

32. *Cf. Id.* rule 132, § 23.

33. *Id.*

34. *Id.*

35. *See id.* rule 130, § 46. *Cf. Id.*

36. Act No. 190, § 313.

37. *Id.* §§ 276-283.

> the Philippine Islands; or by another person in these Islands in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts therein stated.[38]

As can be seen from the text of Section 315, its substance is identical to the current Rule 130, Section 46, and Rule 132, Section 23.[39] Notably, Section 315 was not found in the cluster of sections on hearsay exceptions, but rather, under the cluster of sections on authentication of documents (Act No. 190 did not contain topical headings).[40]

Under the 1940 Rules of Court, the rule under Section 315 was treated as a hearsay exception (Rule 123, Section 35) and grouped together with the other hearsay exceptions.[41] There was a separate section under the 1940 Rules on "Public Documents as Evidence," which provided that "[p]ublic instruments are evidence, even against a third person, of the fact which gave rise to their execution[,] and of date of the latter."[42]

The 1964 Rules of Court adopted, *verbatim*, the Official Records exception (Rule 130, Section 38) and the section on "Public Documents as Evidence" (Rule 132, Section 24), with the only difference being that this time around, the Official Records exception was placed under the heading "Exceptions to the Hearsay Rule," while the section on "Public Documents as Evidence" was placed under the heading "Authentication and Proof of Documents."[43]

The 1989 Rules of Court adopted the same Official Records exception (Rule 130, Section 44), which was still under the heading "Exceptions to the Hearsay Rule[,]" but it modified the section on "Public Documents as Evidence" to read —

> Section. 23. *Public* [*D*]*ocuments as* [*E*]*vidence*.— Documents consisting of entries in public records made in the performance of a duty by a public officer are *prima facie* evidence of the facts therein stated. All other public

38. *Id*. § 315.

39. *Id*. *Cf*. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 46, rule 132, § 23.

40. *See generally* Act No. 190, Chapter X.

41. 1940 RULES OF COURT, rule 123, § 35 (superseded in 1964).

42. *Id*. § 39.

43. 1964 RULES OF COURT, rule 130, § 39 & rule 132, § 24 (superseded in 1989).

> documents are evidence, even against a third person, of the fact which gave rise to their execution[,] and of the date of the latter.[44]

The 1989 Rules on Evidence added the first sentence, i.e., "[d]ocuments consisting of entries in public records made in the performance of a duty by a public officer are *prima facie* evidence of the facts therein stated."[45] The implication is that the public officer need not take the stand to prove the truth of his or her entries in an official document. As for the second sentence, it modified but retained the essence of the previous section on "Public Documents as Evidence." Despite the addition of what is essentially a hearsay exception rule, this section on "Public Documents as Evidence" remains under the heading of "Authentication and Proof of Documents."[46] There is, thus, a conflation of the distinct concepts of authentication and hearsay.

The 2019 revisions to the Rules on Evidence left untouched the text of the Official Records exception and the section on "Public Documents as Evidence."[47] To fall under the Official Records exception, the following requisites must be present:

> (a) that the entry was made by a public officer, or by another person specially enjoined by law to do so;
> (b) that it was made by the public officer in the performance of his duties, or by such other person in the performance of a duty specially enjoined by law; and
> (c) that the public officer or other person had sufficient knowledge of the facts by him stated, which must have been acquired by him personally or through official information.[48]

Facts acquired "through official information" means that the persons who relayed the facts to the public officer "not only must have personal knowledge of the facts stated[ ] but must have the duty to give such statements for record."[49]

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44. 1989 RULES OF COURT, rule 132, § 23 (superseded in 2019).

45. *Id.*

46. *See id.*

47. *See* 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 132, § 23.

48. Spouses Africa v. Caltex (Phil.), Inc., G.R. No. L-12986, 16 SCRA 448, 452 (1966) (citing 3 MANUEL V. MORAN, COMMENTS ON THE RULES OF COURT 383 (1957)).

49. *Id.* at 453.

If the above three requisites are satisfied, the officer who made the entries need not testify in court.[50] "Precisely, as an exception to the Hearsay Rule, Rule 130, Section 44 [(now 46)] does away with the need for presenting as witness the public officer or person performing a duty specially enjoined by law who made the entry."[51] Entries in Official Records are admissible, regardless whether the person who made the entry is available to testify or not.[52] A party may opt not to present the person who made the entries, even if such person is available to testify. Instead, a party may prove the entries, either "by the production of the books or records themselves or by a copy certified by the legal keeper thereof."[53]

The entries in Official Records will be treated as *prima facie* evidence of the facts stated therein.[54] "*Prima facie* evidence is evidence which, standing alone unexplained or uncontroverted, is sufficient to maintain the proposition affirmed. It is evidence sufficient to establish a fact, and if not rebutted, remains sufficient for that purpose."[55] In other words, even if the entries were made out of court, and the person who made them is not presented on the witness

50. The hearsay exceptions fall under two categories: (i) those that are admissible regardless whether the declarants are available or not, and (ii) those where the statements of the declarant are admissible only if the declarant is unavailable. The public or Official Records exception falls under the first category.

51. DST Movers Corp. v. People's General Insurance Corp., G.R. No. 198627, 780 SCRA 498, 513 (2016). *See also* Malayan Insurance Co., Inc. v. Alberto, G.R. No. 194320, 664 SCRA 791, 799 (2012). "Notably, the presentation of the police report itself is admissible as an exception to the Hearsay Rule, even if the police investigator who prepared it was not presented in court, as long as the above requisites could be adequately proved." *Malayan Insurance Co.*, 664 SCRA at 799.

52. *See* People v. Jalosjos, G.R. Nos. 132875-76, 369 SCRA 179, 212 (2000) ("It is not necessary to show that the person making the entry is unavailable by reason of death, absence, etc., in order that the entry may be admissible in evidence, for his being excused from appearing in court in order that public business be not deranged, is one of the reasons for this exception to the hearsay rule.").

53. *Id*.

54. *See* 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 132, § 46.

55. Santiago Lighterage Corporation v. Court of Appeals, G.R. No. 139629, 432 SCRA 492, 501 (2004) (citing Republic v. Sandiganbayan, G.R. No. 112708-09, 255 SCRA 438, 471 (1996) (citing Dodson v. Watson, 220 S.W. 771, 772 (1920) (U.S.) & Gilmore v. Modern Brotherhood of America, 171, S.W. 629, 632 (1914) (U.S.))).

stand (and therefore cannot be cross-examined), they will nonetheless be admitted as (rebuttable) proof of the truth of the facts asserted in the entries.[56]

The justification for admitting entries in Official Records is the same justification for other hearsay exceptions — necessity and trustworthiness. It is necessary to dispense with the presentation of the public officer since a contrary rule would take the public officer away from his or her duties, to the detriment of the public. As explained by the Court,

> [n]ecessity consists in the inconvenience and difficulty of requiring the official's attendance as a witness to testify to the innumerable transactions in the course of his duty. *A public officer is excused from appearing in court in order that public business may not be interrupted, hampered*[,] *or delayed*. Where there is no exception for official statements, hosts of officials would be found devoting the greater part of their time attending as witnesses in court, delivering their deposition before an officer.[57]

As for the matter of trustworthiness, the testimony of the public officer can be dispensed with since his or her entries are presumably accurate, there being a duty on the part of the public officer to state only the truth, and there being a disincentive for him or her to lie, given the routine nature of making the entries and the public character of the record.

> Trustworthiness is a reason because of the presumption of regularity of performance of official duty. The law reposes a particular confidence in public officers that it presumes that they will discharge their several trusts with accuracy and fidelity; and therefore, whatever acts they do in the discharge of their public duty may be given in evidence[,] and shall be taken to be true under such a degree of caution as the nature and circumstances of each case may appear to require. Thus, '[t]he trustworthiness of public documents and the value given to the entries made therein could be grounded on: (1) the sense of official duty in the preparation of the statement made, (2) the penalty which is usually affixed to a breach of that duty, (3) the routine and disinterested origin of most such statements, and (4) the

56. *See* Fullero v. People, G.R. No. 170583, 533 SCRA 97, 119 (2007). "[O]fficial entries are admissible in evidence regardless of whether the officer or person who made them was presented and testified in court, since these entries are considered *prima facie* evidence of the facts stated therein." *Id*.

57. In Re: Production of Court Records and Documents and the Attendance of Court Officials & Employees as Witnesses Under the Subpoenas of February 10, 2012 and the Various Letters for the Impeachment Prosecution Panel Dated January 19 and 25, 2012, at 22 (2012) (Notice).

> publicity of record which makes more likely the prior exposure of such errors as might have occurred.'[58]

The Court has adopted a broad interpretation of the meaning of record or "register" for purposes of applying the Official Records exception.

> In order for a book to classify as an official register[,] and [be] admissible in evidence, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable; it is sufficient that it be directed by the proper authority to be kept. Thus, official registers, though not required by law, kept as convenient and appropriate modes of discharging official duties, are admissible.[59]

IV. VARIOUS TYPES OF PUBLIC DOCUMENTS

For purposes of authentication, the Rules distinguish between two types of documents, i.e., private documents and public documents.[60] To authenticate means that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[61] One set of authentication rules applies to public documents, while another set applies to private documents. Public documents are self-authenticating, i.e., "they require no extrinsic evidence of authenticity to be admitted."[62]

Notably, though, under the heading "Authentication and Proof of Documents," there is a provision that is not related to the issue of authentication, but to the issue of hearsay. This is Rule 132, Section 23, which provides —

> Section 23. *Public* [*D*]*ocuments as* [*E*]*vidence*. — Documents consisting of entries in public records made in the performance of a duty by a public officer are *prima facie* evidence of the facts therein stated. All other public

58. *Id*. (citing 2 VICENTE J. FRANCISCO, EVIDENCE 620 (1997) & Tecson v. Commission on Elections, G.R. Nos. 161434, 161634, & 161824, 424 SCRA 227, 336 (2004)) (emphasis omitted).

59. *Jalosjos*, 369 SCRA at 212.

60. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 132, § 19.

61. FEDERAL RULES OF EVIDENCE, rule 901 (a) (U.S.).

62 . *Id*. rule 902. Incidentally, under the FRE, there are some private documents that are considered as self-authenticating.

> documents are evidence, even against a third person, of the fact which gave rise to their execution[,] and of the date of the latter.[63]

It is similar to, if not a reiteration of, the Official Records hearsay exception found under Rule 130, Section 46.[64]

Aside from the matter of authentication, private and public documents can be distinguished from each other in relation to the Hearsay Rule. Entries in Official Records are admissible as *prima facie* evidence of the facts stated therein, even if the person making the entry is not presented as a witness.[65] In contrast, entries in private documents are not admissible if the person making the entry is not made available for cross-examination, unless the entries or statements in a private document fall under a hearsay exception (e.g., business entry).[66]

There are as many types of public documents as there are agencies issuing them. Examples of public documents are: birth certificates,[67] marriage contracts,[68] death certificates,[69] BID certifications,[70] cadastral maps,[71] subdivision plans issued by the Bureau of Lands, Professional Regulation Commission Certifications,[72] transcript of stenographic notes of court proceedings,[73] certifications of the PNP Firearms and Explosives Division,[74] POEA Certifications,[75] Primary Entry Book of the Register of Deeds,[76]

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63. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 132, § 23.

64. *Id.* rule 130, § 46.

65. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 46.

66. *Spouses Africa*, 16 SCRA at 453 (citing MORAN, *supra* note 48).

67. Bernardo v. Fernando, G.R. Nos. 211034 & 211076, 963 SCRA 327, 347 (2020).

68. Diaz-Salgado v. Anson, G.R. No. 204494, 798 SCRA 541, 557 (2016).

69. Tecson v. Commission on Elections, G.R. Nos. 161434, 161634, & 161824, 424 SCRA 277, 336 (2004).

70. Isenhardt v. Real, A.C. No. 8254, 666 SCRA 20, 26 (2012).

71. Dimaguila v. Spouses Monteiro, G.R. No. 201011, 714 SCRA 565, 582 (2014).

72. *Fullero*, 533 SCRA at 119-20.

73. *Id.* at 120.

74. Valeroso v. People, G.R. No. 164815, 546 SCRA 450, 463 (2008).

75. People v. Bautista, G.R. No. 218582, 949 SCRA 179, 206-07 (2020).

76. Heirs of Bagaygay v. Heirs of Paciente, G.R. No. 212126, Aug. 4, 2021, at 9, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67611 (last accessed Oct. 31, 2023).

minutes of the meeting of the GSIS Board of Trustees prepared by the Deputy Corporate Secretary,[77] certificates issued by the Philippine Coast Guard ("Coast Guard") and the Maritime Industry Authority,[78] appraisal of mortgage values of lots by officers of the Philippine National Bank,[79] and sheriff's returns.[80]

Common to all public records is the fact that they are prepared by public officials. Thus, they share the characteristics of necessity and reliability or trustworthiness. Not all public records, however, are prepared under the same circumstances.

There are two types of public documents that are of special concern of this Article, namely: medico-legal reports and chemistry reports.

In an early case, *U.S. v. Lorenzana*,[81] the Court found inadmissible the autopsy report of a provincial medical officer.[82] The accused in *Lorenzana* were charged with, and convicted of, homicide.[83] The trial court admitted an autopsy report prepared by the provincial medical officer.[84] The Court held that the admission of the autopsy report was erroneous.[85] It distinguished between the authentication of an official document and the admissibility of the contents of the official document when offered as proof of the truth of the contents' assertions.[86] The ruling reads —

> We agree with counsel for the appellants that the trial court erroneously admitted Exhibit A of the prosecution, which purports to be a certificate of the results of an autopsy practiced upon the deceased by the provincial medical officer. The trial court appears to have admitted this document upon the theory that it was one of the official documents which, in accordance with the provisions of [S]ubsection 6 of [S]ection 313 of the Code of Civil Procedure, may be proved 'by the original, or by copy certified by the legal

77. People v. Dumlao y Castiliano, G.R. No. 168918, 580 SCRA 409, 428 (2009).

78. Santiago Lighterage Corp. v. Court of Appeals, G.R. No. 139629, 432 SCRA 492, 501 (2004).

79. Borromeo v. Court of Appeals, G.R. Nos. L-31342 & L-31740, 70 SCRA 329, 345 (1976).

80. *Manalo*, 99 Phil. at 732.

81. U.S. v. Lorenzana, 12 Phil. 64 (1908)

82. *Id*. at 70.

83. *Id*. at 65.

84. *Id*. at 70.

85. *Id*.

86. *Id*.

> keeper thereof.' *But, without considering whether the certificate in question is an official document of the class mentioned in that section, it is clear that* [*S*]*ubsection 6 of* [*S*]*ection 313 is not intended to relieve the person offering such a document of the necessity of proving the contents thereof in a case where the truth of the facts set out in the document are drawn in question, but merely to relieve the party offering such document of the necessity of proving that the document itself is the official document which it purports to be*. The defendant was entitled to call to the witness stand the medical officer who executed the certificate, and cross-examine him as to the truth and accuracy of the statements made therein, for without such examination the accused would be deprived of his right to confront and examine the witnesses against him.[87]

Many decades later, the Court would hold that the contents of medico-legal reports (and chemistry reports) are admissible despite the non-presentation of the person who conducted the medical examination or the chemical analysis.[88]

A. Medico-Legal Reports

The now prevailing jurisprudence is that the contents of a medico-legal report, prepared by a public official, are admissible as *prima facie* evidence of their truth.

In the recent case of *People v. XXX*,[89] the accused was charged with rape.[90] At one of the hearings, the prosecution and the defense stipulated on the due execution of the Medico-Legal Report prepared by Police Chief Inspector Editha Martinez, prompting the prosecution to dispense with the presentation of PCI Martinez.[91] The Medico-Legal Report stated that the "healing contusion at the middle third of the right thigh" was "clear evidence of a

87. *Lorenzana*, 12 Phil. at 70 (emphasis supplied).

88. People v. Tuyor y Banderas, G.R. No. 241780, Oct. 12, 2020, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66533 (last accessed Oct. 31, 2023) (citing Republic v. Unabia, G.R. No. 213346, 892 SCRA 270, 286 (2019)) (emphasis supplied) & People of the Philippines v. Donald Datu, G.R. No. 254378, Sept. 7, 2022, at 7, *available at* https://sc.judiciary.gov.ph/254378-people-of-the-philippines-vs-donald-datu-y-dimalanta (last accessed Oct. 31, 2023)).

89. People v. XXX, G.R. No. 259221, Sept. 28, 2022, *available at* https://sc.judiciary.gov.ph/259221-people-of-the-philippines-vs-xxx (last accessed Oct. 31, 2023).

90. *Id.* at 1.

91. *Id.* at 8.

blunt, penetrating trauma to the hymen."[92] The trial court found the accused guilty as charged.[93] The Court of Appeals affirmed the conviction.[94] On appeal to the Court, the accused argued that while the Medico-Legal Report is admissible, since it as an exception to the Hearsay Rule, the person who prepared it should have nonetheless been presented to prove her qualifications as an expert witness.[95] The Court rejected this argument.[96]

After noting that the parties had stipulated on the due execution of the document, it proceeded to hold as follows —

> Second, the Medico-Legal Report is admissible inasmuch as it had probative weight. True, the report is admissible because entries in Official Records are recognized exceptions to the [H]earsay [R]ule. However, accused-appellant is mistaken in [ ] arguing that the report should not be given weight for failure to present its issuing officer[,] and to qualify such as an expert witness. The Court has held that 'a medico-legal report shall be given weight and credence, even if the physician who examined and prepared it was not presented in court.' The medico-legal report must be accorded probative weight because as a public document consisting of entries in public records, it is already *prima facie* evidence of the facts stated therein.[97]

In addition to citing *People v. Tuyor y Banderas*, it cited its prior ruling in *Republic v. Unabia*[98] —

> Petitioner questions the *Medical Certificate* issued by Dr. Labis, Medical Officer III of the Northern Mindanao Medical Center under the Department of Health, claiming that it failed to include a certification that respondent 'has not undergone sex change or sex transplant[,]' as required by Section 5 of [R.A. No.] 9048 as amended, *and that Dr. Labis was not presented in court in order that his qualifications may be established*[,] *and so that he may identify and authenticate the medical certificate. However, the said Medical Certificate is a public document, the same having been issued by a public officer in the performance of official duty; as such, it constitutes prima facie evidence of the facts therein stated.* Under Section 23, Rule 132 of the Rules of Court '[d]ocuments consisting of entries in public records made in the performance of a duty by a public officer are *prima facie* evidence of the facts therein stated. All other public

92. *Id.* at 3.

93. *Id.* at 4.

94. *Id.* at 5.

95. *People v. XXX*, G.R. No. 259221, at 8.

96. *Id.*

97. *People v. XXX*, G.R. No. 259221, at 8-9 (citing *Tuyor*, G.R. No. 241780).

98. Republic v. Unabia, G.R. No. 213346, 892 SCRA 270 (2019).

> documents are evidence, even against a third person, of the fact which gave rise to their execution[,] and of the date of the latter.'
>
> *There was therefore no need to further identify and authenticate Dr. Labis' Medical Certificate*. 'A public document, by virtue of its official or sovereign character, or because it has been acknowledged before a notary public (except a notarial will) or a competent public official with the formalities required by law, or because it is a public record of a private writing authorized by law, *is self-authenticating and requires no further authentication in order to be presented as evidence in court*.'[99]

Notably, the accused did not challenge the admissibility of the contents of the Medico-Legal Report. In fact, he conceded that it qualified as an Official Records exception. His objection was directed at the qualifications of the government physician who conducted the physical examination of the offended party.[100] The response of the Court was to say that the entries in the Medico-Legal Report were *prima facie* evidence of the facts in therein, citing Rule 132, Section 23 (which, while under the heading of "Authentication and Proof of Documents," is actually a Hearsay Rule since it permits dispensing with the presentation of the public officer).[101] In other words, the presumption under Section 23 is that the government physician possessed the necessary qualifications in conducting the physical examination since the Rules state the entries are *prima facie* evidence of the facts therein stated. There is a logic to the ruling of the Court. If the truth of the entries is *prima facie* to be accepted, it must be because the physician is (presumptively) qualified.[102]

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99. People v. *XXX*, G.R. No. 259221, at 9 (citing *Tuyor*, G.R. No. 241780 (citing Republic v. Unabia, G.R. No. 213346, 892 SCRA 270, 286 (2019))) (emphases supplied).

100. *Unabia*, 892 SCRA at 286.

101. *Id.*

102. *But see* People v. Turco, Jr., G.R. No. 137757, 337 SCRA 714, 730-31 (2000) (citing People v. Bernaldez, G.R. No. 109780, 294 SCRA 317, 334 (1996)).

> In *People vs. Bernaldez* [ ], the court a quo erred in giving weight to the medical certificate issued by the examining physician despite the failure of the latter to testify. While the certificate could be admitted as an exception to the Hearsay Rule since entries in Official Records (under Section 44, Rule 130, Rules of Court) constitute exceptions to the hearsay evidence rule, since it involved an opinion of one who must first be established as an expert witness, it could not be given weight or credit unless the doctor who issued it is presented in court to show his qualifications. We place emphasis on the distinction between admissibility of evidence and the probative value thereof.

The truth of the contents of the medico-legal report, as well as the professional competence of the government physician, are accepted despite the non-presentation of the government physician. Because the entries are only *prima facie* evidence of the truth therein stated, the defendant is free to present countervailing evidence, in this case, countervailing evidence of the qualifications — or lack thereof — of the government physician. But Section 23 has already worked its mischief; the accused (assuming he timely asserts his right) is denied the opportunity to cross-examine the physician as to his qualifications, among other matters. It need not be pointed out that the competence (or lack thereof) of the physician can affect the results of his or examination.

In *People v. Datu*,[103] also a recent case, the accused was convicted of rape with homicide.[104] One of the pieces of evidence presented by the prosecution was a medico-legal report prepared by Police Chief Inspector Dr. Jude L. Doble.[105] Based on Dr. Doble's report, the injuries sustained by the victim were consistent with sexual abuse.[106] It can be inferred from the case that Dr. Doble did not take the stand.[107] The Court, nonetheless, held the medico-legal report to be admissible.[108] It advanced three arguments in support of its holding.

First, "Dr. Doble, a government doctor, is competent to examine persons and issue medico-legal reports. It must be noted that public officers enjoy the presumption of regularity in the discharge of one's official duties and

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...

> Withal, although the medical certificate is an exception to the hearsay rule, hence admissible as evidence, it has very little probative value due to the absence of the examining physician.

Id.

103. People of the Philippines v. Donald Datu, G.R. No. 254378, Sept. 7, 2022, *available at* https://sc.judiciary.gov.ph/254378-people-of-the-philippines-vs-donald-datu-y-dimalanta (last accessed Oct. 31, 2023).

104. *Id.* at 1.

105. *Id.* at 2.

106. *Id.*

107. *Id.* The Court did not point to any testimony of Dr. Doble. Instead, it cited the medico-legal report. Moreover, the Court noted that "Dr. Doble was not able to identify the Medico-Legal Report in open court."

108. *Id.* at 7.

functions. Thus, in the absence of evidence to the contrary, such presumption must stand."[109]

Second, "the Medico-Legal Report is a public document. Hence, in the absence of evidence to the contrary, Dr. Doble's conclusion that the findings were compatible with sexual abuse, is conclusive. This is sanctioned by Section 23, Rule 132 of the Revised Rules on Evidence[ ] ... ."[110]

Third, the Medico-Legal report "falls under one of the exceptions to the [H]earsay [R]ule[,]" i.e., Rule 130, Section 46.[111]

On the basis of this reasoning, the Court concluded that "the Medico-Legal report issued by Dr. Doble is *prima facie* proof of sexual abuse" and that "[i]t was incumbent upon Datu to present countervailing evidence to overthrow this presumption. Datu failed to do so."[112]

For its third argument, apart from citing Rule 130, Section 46, the Court also cited *People v. Banderas*.[113]

The Court does not identify the specific issues raised by the accused on appeal. It simply defined the issue as — "[w]as the guilt of Datu proven beyond reasonable doubt?" But in its third argument, the Court stated that the Medico-Legal Report "falls under one of the exceptions to the [H]earsay [R]ule."[114] Presumably, then, the accused raised a hearsay objection.

The second and third arguments are related, if not overlapping. Both Rule 130, Section 46 and Rule 132, Section 23, have been cited as basis to admit out-of-court statements despite the non-presentation of the public officer who made the statement. The proper basis for justifying the non-presentation of a public officer should be the Official Records exception under Rule 130, Section 46, with Rule 132, Section 23, merely conferring a rebuttable

109. *Datu*, G.R. No. 254378, at 7.

110. *Id.*

111. *Id.*

112. *Id.* at 8.

113. *Datu*, G.R. No. 254378, at 8 (citing People v. Banderas, G.R. No. 241780, Oct. 12, 2020, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66533 (last accessed Oct. 31, 2023)).

114. *Datu*, G.R. No. 254378, at 4 & 7.

presumption of truth on the entries, but this distinction has been virtually erased with the conflation of the two concepts.[115]

The Court in *Datu* admitted the truth of the contents of the Medico-Legal report without giving the accused the opportunity to cross-examine the government physician, both as to his competence and his findings of sexual abuse (i.e., the soundness of his of physician's opinion), as well as on his possible biases.[116]

In *People v. Tuyor y Banderas*, decided in 2020, the accused was charged with rape.[117] The prosecution offered, among other documentary evidence, the Medico-Legal Report prepared by Dr. Irene Baluyut, a doctor at the Philippine General Hospital (PGH), a government hospital.[118] However, instead of presenting Dr. Baluyut, the prosecution opted to present Dr. Bernadette Madrid of the Child Protection Unit of the PGH.[119] Dr. Madrid identified the signature of Dr. Baluyut and interpreted the findings in Dr. Baluyut's Medico-Legal Report.[120] The trial court convicted the accused of rape, and the Court of Appeals affirmed the conviction.[121] On appeal to the Court, the accused challenged the admissibility of the Medico-Legal report for being hearsay, pointing out that Dr. Madrid was not present when Dr. Baluyut examined the victim, or when Dr. Baluyut prepared the report.[122] The Court rejected the argument.[123]

Citing Rule 130, Section 44 (now 46), it held that "Dr. Baluyut's issuance of the medico-legal report falls under one of the exceptions to the [H]earsay [R]ule."[124] It then proceeded to state that

> Dr. Baluyut, a government doctor, and who[,] by actual practice and by virtue of her oath as civil service official, is competent to examine persons and issue medico-legal reports. There is a presumption of regularity in the performance of Dr. Baluyut's functions and duties when she issued the

115. *See generally* 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 46 & rule 132, § 23.

116. *Datu*, G.R. No. 254378, Sept. 7, 2022, at 7.

117. *Tuyor*, G.R. No. 241780.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Tuyor*, G.R. No. 241780.

124. *Id.*

> medico-legal reports. In the absence of evidence proving the contrary, Dr. Baluyut's finding that AAA had sexual intercourse with Tuyor, and was seven weeks pregnant when she was examined, are conclusive.[125]

The Court next stated that Dr. Madrid was familiar with the signature of Dr. Baluyut and was able to identify Dr. Baluyut's signature on the Medico-Legal Report.[126] But this issue is an issue of authentication, not of hearsay. Incidentally, there was no need for Dr. Madrid to give an opinion on the signature of Dr. Baluyut as the Medico-Legal Report is a public document.[127]

The Court then stated that Dr. Madrid was an expert witness, and therefore, her "interpretation of the entries made by Dr. Baluyut in the medico-legal report is admissible as expert testimony."[128] Whether Dr. Madrid is an expert, and could give expert testimony, does not address the hearsay objection raised by accused with respect to the admission of the contents of the Medico-Legal report prepared by Dr. Baluyut.

Notably, in these three cases (*People v. XXX*, *People v. Datu*, and *People v. Tuyor*) — (1) There is a conflation of the issues of authentication, hearsay, and expert testimony; (2) While there is a discussion on the Official Records exception, there is no discussion of the right to confrontation; and (3) The Court takes for granted the constitutionality of Rule 130, Section 44 (now 46), and Rule 132, Section 23, in criminal cases.

Moreover, in *Datu*, the Court held that "[i]t was incumbent upon Datu to present countervailing evidence to overthrow this presumption."[129] But, why should the accused be limited to "present[ing] countervailing evidence to overthrow this presumption"?[130] The Constitution guarantees to the accused the right to confront the witnesses against him without qualification.[131] The Confrontation Clause makes no distinction between a witness who is private individual, and a witness who is a public officer.[132]

Incidentally, in contrast to the medical report of a government physician, the medical report of a private physician is not admissible for being hearsay, at

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Datu*, G.R. No. 254378, Sept. 7, 2022, at 8.

130. *Id.*

131. PHIL. CONST. art. III, § 14 (2).

132. *See generally* PHIL. CONST. art. III, § 14 (2).

least it was not admissible up until the revision of the Rules of Evidence in 2019.[133]

In *De Guia v. Manila Electric Railroad and Light Co.*,[134] which involved the out-of-court written statements of private physicians, the trial court admitted the written statements of the physicians over the objection of the defendant.[135] The Court held the written statements to be inadmissible for being hearsay.[136] The out-of-court medical findings of a non-government physician received a different treatment than the out-of-court findings of a government physician.[137] Under the current 2019 Rules of Evidence, however, such out-of-court diagnosis of private physicians may now be introduced under the revised business entry exception.[138]

B. Chemistry Reports

Similar to medico-legal reports, the Court has declared chemistry reports to be admissible despite the non-presentation of the government chemist who conducted the chemical analysis and prepared the report.

In *People v. Uy*,[139] which was decided in 2000, the accused was charged with the illegal sale and possession of shabu.[140] The NBI Forensic Division conducted an examination of the seized substance, and the results confirmed that the substance was shabu.[141] The trial court found the accused guilty of the crimes as charged.[142] On appeal to the Court, the accused raised the argument that without the testimony of the NBI forensic analyst, the case against him would "fall [ ] to pieces."[143] The Court found the argument to be without merit.[144] It pointed out that the accused failed to object to the

133. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 132, § 20.

134. Guia v. Manila Electric Railroad & Light Company, 40 Phil. 708 (1920).

135. *Id.* at 716.

136. *Id.*

137. *Id.*

138. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 45.

139. People v. Uy, G.R. No. 128046, 327 SCRA 335 (2000).

140. *Id.* at 339.

141. *Id.* at 342.

142. *Id.* at 345.

143. *Id.* at 347.

144. *Id.* at 349.

prosecution's offer of the chemist's preliminary and final reports and that, furthermore, he failed to raise, before the trial court, the issue of the non-presentation of the chemist.[145] The Court, then, added —

> Finally, as to the reports of Forensic Chemist Bravo, it must be stressed that as an NBI Forensic Chemist, Bravo is a public officer, and his report carries the presumption of regularity in the performance of his function and duty. Besides, by virtue of Section 44, Rule 130, entries in official records made in the performance of office duty, as in the case of the reports of Bravo, are *prima facie* evidence of the facts therein stated. We are also aware that 'the test conducted for the presence of 'shabu' (infrared test) is a relatively simple test which can be performed by an average or regular chemistry graduate' and where 'there is no evidence ... to show that the positive results for the presence of methamphetamine hydrochloride ('shabu') are erroneous ...[,] coupled with the undisputed presumption that official duty has been regularly performed, said results may 'adequately establish' that the specimens submitted were indeed shabu.'[146]

The Court merely cited Rule 130, Section 44 (now 46).[147] It did not cite any precedent in support of its holding that the report of government chemist is *prima facie* evidence of the fact that the substance that was tested was shabu and that, therefore, the presentation of the government chemist could be dispensed with.[148] Nor did it discuss the issue of hearsay in relation to the Confrontation Clause.[149] It can, of course, be argued that the holding on this point is *obiter* since the accused had failed to object to the evidence and, consequently, waived his right to confront the chemist. But this holding would be adopted in later cases.

Notably, the Court found significant the fact that the test to determine whether a substance is shabu is a "relatively simple test."[150] The implication is that, if a test is simple, the person who conducted the test need not be cross-examined. But should the simplicity of a test be the basis for denying an accused his or her right to confrontation? Should the presentation of the police officer be dispensed with on the ground that what he witnessed was a simple buy-bust operation where a prohibited drug is delivered in exchange for a sum of money?

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145. *Uy*, 327 SCRA at 355.

146. *Id.* at 357-58.

147. *Id.*

148. *See id.*

149. *See generally id.*

150. *Id.*

In *People v. Razul*,[151] decided two years after *Uy*, the accused were charged with the unlawful sale of shabu.[152] The substance seized from the accused underwent a chemistry examination at the PNP Crime Laboratory, and the result showed that the substance was shabu.[153] The trial court found the accused guilty of illegal sale of shabu.[154] The accused appealed to the Court, raising the issue of the non-presentation of the chemist who conducted the test.[155] They argued that the substance was not identified due to the failure of the chemist to take the stand.[156]

The Court found that the parties had stipulated on the chemistry report (the "documents," together with the sachets of shabu, were "admitted" by the prosecution and the defense), and that "both parties likewise agreed that the testimony of the forensic chemist would be dispensed with."[157] The Court also found that the accused raised the issue of the non-presentation of the forensic analyst only on appeal.[158] It, however, did not end its analysis with these findings. The Court went on to hold —

> It must also be stressed that as a PNP forensic analyst, Guinanao is a public officer, and his report carries the presumption of regularity in the performance of official functions. Besides, entries in [O]fficial [R]ecords made in the performance of official duty, as in the case of his reports, are *prima facie* evidence of the facts therein stated.[159]

It cited *Uy* and Rule 130, Section 44 (now 46).[160] The accused raised an issue of authentication, but the Court responded by citing the hearsay exception of entries in Official Records.

The Court handed down similar rulings in *People v. Bandang*, and *People v. Quebral*; both are drug cases.

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151. People v. Razul, G.R. No. 146470, 392 SCRA 553 (2002).

152. *Id.* at 556.

153. *Id.*

154. *Id.*

155. *Id.* at 577.

156. *Id.*

157. *Razul*, 392 SCRA at 578.

158. *Id.*

159. *Id.* at 578-79.

160. *Razul*, 392 SCRA 579 (citing *Uy*, 327 SCRA at 357).

In *People v. Bandang*,[161] the Court held that it was a "*non sequitur*" for the accused to argue that the non-presentation of the chemist rendered the laboratory report and chemistry reports (which confirmed the seized substance to be shabu) hearsay.[162] It again cited the principle of regularity in the performance of duties and Rule 130, Section 44 (now 46), as well as *Uy*, in justifying the admission of the laboratory and chemistry reports, notwithstanding the failure of the chemist to take the stand.[163] While the holding in *Bandang* is a mere reiteration of the holding in *Uy*, *Bandang* is significant in that the accused squarely raised the issue of hearsay.[164] The holding that the prosecution can prove the contents of a chemistry report without presenting government chemist, thus, assumes the status of binding precedent, and not mere *obiter dicta*.

In *People v. Quebral*,[165] the accused argued that the prosecution failed to establish the "*corpus delicti*" of the offense since the chemist was not presented in court.[166] In rejecting the argument, the Court pointed out that it had already previously held that "the non-presentation of the forensic chemist in illegal drug cases is an insufficient cause for acquittal."[167] According to the Court, "[t]he *corpus delicti* in dangerous drugs cases constitutes the dangerous drug itself[,]" and that "[t]his means that proof beyond doubt of the identity of the prohibited drug is essential."[168] It then proceeded to state that "the report of an official forensic chemist regarding a recovered prohibited drug enjoys the presumption of regularity in its preparation[,]" and that "corollarily, under Section 44 of Rule 130, Revised Rules of Court, entries in official records made in the performance of official duty are *prima facie* evidence of the facts they state."[169] It further held that the chemistry report "is conclusive in the absence of evidence proving the contrary."[170] The Court cited *Uy* and. *Bandang*. The Court equates *corpus delicti* in drug cases to the "identity" of the

161. People v. Bandang, G.R. No. 151314, 430 SCRA 570 (2004).

162. *Id*. at 586.

163. *Bandang*, 430 SCRA at 586 (citing 1997 RULES OF COURT, rule 130, § 44 (superseded in 2019) & *Uy*, 327 SCRA at 357).

164. *See generally Bandang*, 430 SCRA at 586-89.

165. People v. Quebral, G.R. No. 185379, 606 SCRA 247 (2009).

166. *Id*. at 255.

167. *Quebral*, 606 SCRA at 255 (citing People v. Cervantes, G.R. No. 181494, 581 SCRA 762, 781 (2009) & *Bandang*, 553 SCRA at 586-87)

168. *Id*.

169. *Id*.

170. *Id*.

drugs, that is, that the substance presented in court is the same substance presented in court — an issue of authentication.[171] But, this is only partly correct. The *corpus delicti* in drug cases is the "drug itself," meaning that the substance seized from the accused, and presented in court, must be a prohibited drug.[172] Proof of the nature of the substance invariably comes in the form of a chemistry report. Thus, the issue of *corpus delicti* is not only an issue of authentication but is likewise an issue of hearsay if the contents of the chemistry report are being offered to prove the fact that the substance seized from the accused is a prohibited drug.

The Court would reiterate, in *People v. Cerdon*,[173] its holding in *Quebral*.[174] But, the issue raised by the accused in *Cerdon* pertained to the issue of authentication (i.e., that the substance seized is the same substance presented in court), and not hearsay.[175] The accused argued that the prosecution failed to establish the links in the chain of custody since the chemist, who is a link in the chain, did not take the stand.[176] To the extent, however, that the chemistry report indicates the person from whom the chemist received the substance to be tested, and the person to whom the chemist delivered the substance after it was tested, and to the extent that the prosecution if offering these entries to prove the chain of custody, then it implicates the Hearsay Rule. But the Court cited the Official Records exception as proof that the substance was shabu, and not as proof of the circumstances of the receipt and transfer of the drugs.[177]

In *People v. Fundales, Jr.*,[178] the accused appealed to the Court his conviction for illegal sale of shabu.[179] The Court summarized the argument of the accused as follows —

> Appellant insists that the prosecution failed to establish his guilt beyond reasonable doubt. He argues that the prosecution's failure to present the forensic chemist during trial was fatal to its cause. According to the appellant,

171. *Quebral*, 606 SCRA at 255.

172. *Id*.

173. People v. Cerdon, G.R. No. 201111, 732 SCRA 335 (2014)

174. *See Cerdon*, 732 SCRA at 348 (citing *Quebral*, 606 SCRA at 255).

175. *Id*.

176. *Id*. at 341.

177. *Cerdon*, 732 SCRA at 348 (citing 1989 REVISED RULES OF COURT, rule 130, § 44 (superseded in 2019)).

178. People v. Fundales, Jr., G.R. No. 184606, 680 SCRA 181 (2012).

179. *Id*. at 184.

> the laboratory report has no probative value since the forensic chemist did not attest to the report's authenticity. In view of this, he points out that the prosecution failed to establish the *corpus delicti*.[180]

Parenthetically, from the Court's summary of the accused's arguments, it appears that the accused is confusing the issue of authentication and hearsay. The certifying chemist need not testify on the authenticity of his report. A public document is self-authenticating.[181] Failure to establish the "*corpus delicti*" is a separate issue. The *corpus delicti* in the illegal possession or sale of prohibited drugs is the prohibited "drug itself."[182] Establishing the *corpus delicti* requires the prosecution to establish that the substance seized from the accused is a prohibited drug (although, as discussed, the Court has come to equate *corpus delicti* with chain of custody).[183] Absent proof of the prohibited drug, there is no crime to speak of. The proof that the substance is a prohibited drug often comes in the form of a chemist's report. When the contents of this report are offered in evidence without presenting the government chemist who conducted the analysis and prepared the report, the issue is one of hearsay.[184]

Citing *Quebral*, the Court then proceeded to hold —

> Thus, it is of no moment that Forensic Chemical Officer Mangalip was not presented as witness. The non-presentation as witnesses of other persons who had custody of the illegal drugs is not a crucial point against the prosecution. 'It is the prosecution which has the discretion as to how to present its case and it has the right to choose whom it wishes to present as witnesses.' What is important is that the integrity and evidentiary value of the seized drugs are properly preserved as it had been so in this case.[185]

When the Court speaks of "integrity" of the seized drugs, it has in mind the issue of whether the drugs that were seized were the same as the drugs that were presented in court (an issue of authentication). Thus, for example, in *People v. Catentay*,[186] it held —

> The *integrity* of the seized articles would remain even if PO1 Quimson coursed their transmittal to the crime laboratory through the investigator-

180. *Id.* at 191.

181. *See People v. XXX*, G.R. No. 259221, at 9 (citing *Tuyor*, G.R. No. 241780 (citing *Unabia*, 892 SCRA at 286)).

182. *Fundales*, 680 SCRA at 191 (citing *Quebral*, 606 SCRA at 255).

183. *Id.* at 192.

184. *Id.* at 191.

185. *Fundales*, 680 SCRA at 192 (citing *Quebral*, 606 SCRA at 255).

186. People v. Catentay, G.R. No. 183101, 624 SCRA 206 (2010).

> on-case since they had been sealed and marked. It does not matter that another person, probably a police courier[,] would eventually deliver the sealed substances by hand to the crime laboratory. But, unfortunately, because the prosecution did not present the forensic chemist who opened the sachets and examined the substances in them, the latter was unable to attest to the fact that *the substances presented in court were the same substances he found positive for shabu*.[187]

It added in *Catentay* —

> In this case, although the plastic sachets that the forensic chemist received were heat-sealed and authenticated by the police officer with his personal markings, the forensic chemist broke the seal, opened the plastic sachet, and took out some of the substances for chemical analysis. No evidence had been adduced to show that the forensic chemist properly closed and resealed the plastic sachets with adhesive and placed his own markings on the resealed plastic to preserve the *integrity* of their contents until they were brought to court. Nor was any stipulation made to this effect. The plastic sachets apparently showed up at the pre-trial, not bearing the forensic chemist's seal, and was brought from the crime laboratory by someone who did not care to testify how he came to be in possession of the same. The evidence did not establish the unbroken chain of custody.[188]

The issue of the "integrity and evidentiary value" of the seized drugs is certainly important. But, it is not correct to say that "it is of no moment that Forensic Chemical Officer Mangalip was not presented as witness."[189] The non-presentation of Forensic Chemical Officer Mangalip means that the accused was not given the opportunity to cross-examine the finding of Mangalip — that the seized substance was shabu (an issue of hearsay). This denial of the right of the accused to meet, face-to-face, the witnesses against him is of great moment.[190]

In *People v. Cervantes*,[191] the accused was convicted of illegal sale of shabu.[192] On appeal before the Court of Appeals, he argued that the "forensic chemist who actually conducted the laboratory examination on the specimens allegedly recovered from the accused was not presented in court [...] [and] hence, there was no clear identification of the contents of the confiscated

187. *Id*. at 211-12 (emphases supplied).

188. *Id*. at 214 (emphasis supplied).

189. *Fundales, Jr.*, 680 SCRA at 192.

190. *See* PHIL. CONST. art. III, § 14 (2).

191. People v. Cervantes, G.R. No. 181494, 581 SCRA 762 (2009)

192. *Id*. at 767.

sachets."[193] The person who prepared the report was a certain Chief Inspector (C/I) Mary Jean Geronimo.[194] The person whom the prosecution presented in court to identify the chemistry report was P/Sr. Inspector Lorna Tria, who was a forensic chemical officer in the same Regional Crime Laboratory Office.[195]

The Court of Appeals affirmed his conviction.[196]

The Court overturned the conviction and acquitted the accused.[197] The Court's focus was on the issue of whether the substance seized from the accused was the same as the one presented in court.[198] In its words,

> [t]here can be no such crime when nagging doubts persist on whether the specimen submitted for examination and presented in court was what was recovered from, or sold by, the accused. Essential, therefore, in appropriate cases is that the identity of the prohibited drug be established with moral certainty.[199]

It looked into whether the prosecution had managed to properly observe the chain of custody, a "mode of authenticating evidence."[200] It found that "Inspector Tria was really not part of the custodial chain. And she did not[,] as she could not, even if she wanted to, testify on whether or not the specimen turned over for analysis and eventually offered in court as exhibit was the same substance received from Arguson."[201] It noted that "no physical inventory was made and no photograph taken nor markings made on the seized articles at the crime scene," contrary to the directive of the law.[202]

The Court then proceeded to hold —

> Adding a negative dimension to the prosecution's case is the non-presentation of C/I Geronimo and the presentation in her stead of Inspector Tria to testify on the chemical report C/I Geronimo prepared. While Inspector Tria can plausibly testify on the fact that C/I Geronimo prepared

193. *Id.* at 771.

194. *Id.* at 769.

195. *Id.* at 768.

196. *Id.* at 767.

197. *Cervantes*, 581 SCRA at 773.

198. *Id.* at 774.

199. *Id.* at 776.

200. *Id.* at 777.

201. *Id.* at 779.

202. *Id.* at 780.

> the chemical report in the regular course of her duties, *she, Inspector Tria, was incompetent to state that the specimen her former colleague analyzed was in fact shabu* and was the same specimen delivered to the laboratory for chemical analysis.[203]

From the issue of authentication, the Court shifted to a different "dimension," i.e., the dimension of hearsay. It does not explicitly refer to the Hearsay Rule, but the issue of whether the specimen analyzed was in fact shabu is an issue of hearsay if the report of C/I Geronimo is being offered to prove the truth of the entry stating that the substance is shabu.[204] (This is in contrast to the issue of whether the substance seized from the accused is the same substance tested by the chemist and presented in court, which is an issue of authentication. The issue of whether the report was prepared and signed by a government chemist is similarly an issue of authentication.).

The Court, then, distinguished this case (*Cervantes*) from the case of *Bandang*, as follows —

> It should be pointed out, however, that the *Bandang* ruling was cast against a different backdrop where: (1) the seized crystalline substance was the same item examined and tested positive for shabu and presented in court, implying that the identity and integrity of prohibited drug was safeguarded throughout, a circumstance not obtaining in this case; (2) there was a compelling reason for not presenting the examining forensic chemist, i.e., the parties stipulated that the confiscated seven plastic bags have been identified and examined and that the chemist stated in his report that the substance is positive for shabu. In this case, C/I Geronimo's resignation from the service is not, standing alone, a justifying factor for the prosecution to dispense with her testimony; and (3) accused Bandang, et al. did not raise any objection to the chemical report during trial, unlike here where accused-appellant objected to Inspector Tria's competency to testify on the Geronimo chemical report.[205]

It is not clear if the Court is making the distinction between the two cases to show the failure to establish the chain of custody or to establish that the substance was shabu. But after distinguishing this case from *Bandang*, the Court, then, discussed anew the issue of "chain of custody."

> At any rate, Inspector Tria's testimony on, and the presentation of, the chemistry report in question only established, at best, the existence, due execution, and authenticity of the results of the chemistry analysis. It does

203. *Cervantes*, 581 SCRA at 781 (emphasis supplied).

204. *Id.*

205. *Id.* at 782.

> not prove compliance with the requisite chain of custody over the confiscated substance from the time of seizure of the evidence.[206]

At the same time, however, the Court likewise speaks of the "authenticity of the results" of the chemistry analysis.[207] By authenticity of results, does the Court mean that Inspector Tria was able to establish that the substance was shabu (an issue of hearsay and, therefore, implicating the Confrontation Clause)? Or is the Court referring to the authenticity of the chemistry report that contains the results, meaning that the report itself (as distinguished from the truth of its contents), as prepared by C/I Geronimo, was authenticated by Inspector Tria? It is not clear what the Court meant.

Four years after *Cervantes*, the Court, in *People v. Laba*,[208] citing *Quebral*, *Cervantes*, *Bandang*, and *Mallillin v. People*, reiterated that the non-presentation of the chemist will not affect the admissibility of the chemist's report.

> Neither will the non-presentation in court of Police Senior Inspector Ebuen, the forensic chemist who conducted the laboratory examination on the confiscated substance, operate to acquit appellant. The matter of presentation of witnesses by the prosecution is not for the court to decide. It has the discretion as to how to present its case and it has the right to choose whom it wishes to present as witnesses. Besides, *corpus delicti* has nothing to do with the testimony of the chemical analyst, and the report of an official forensic chemist regarding a recovered prohibited drug enjoys the presumption of regularity in its preparation. Corollarily, under Sec[tion] 44 of Rule 130, Revised Rules of Court, entries in official records made in the performance of official duty are *prima facie* evidence of the facts they state.[209]

There is no indication in the case that the accused objected to the chemist's report on the ground of hearsay, but the Court cites Rule 130, Section 44, the Official Records exception.[210]

Contrary to the Court's declaration that *corpus delicti* has nothing to do with the testimony of the chemical analyst, the testimony of the chemical analyst has everything to do with the *corpus delicti*.[211]

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206. *Id.*

207. *Id.*

208. People v. Laba, G.R. No. 199938, 689 SCRA 367 (2013).

209. *Laba*, 689 SCRA at 376 (citing *Quebral*, 606 SCRA at 255 (2009); *Cervantes*, 581 SCRA at 781; *Bandang*, 430 SCRA at 586-87; & Mallillin v. People, G.R. No. 172953, 553 SCRA 619 & 631-32 (2008)).

210. 1989 REVISED RULES ON EVIDENCE, rule 130, § 44 (superseded in 2019).

211. People v. Oliva, G.R. No. 122110, 341 SCRA 78, 86 (2000).

> *Corpus delicti* is the body or substance of the crime. It refers to the fact that a crime has been actually committed. *Corpus delicti* is the fact of the commission of the crime that may be proved by the testimonies of witnesses. In murder, the fact of death is the *corpus delicti*. In arson, the *corpus delicti* rule is satisfied by proof of the bare occurrence of the fire and of its having been intentionally caused.[212]

In cases involving illegal drugs, "the drug itself constitutes the *corpus delicti* of the offense."[213] It is therefore not sufficient that the prosecution show that the substance was transmitted to the chemist for analysis, and that the substance presented in court is the same substances seized from the accused and analyzed by the chemist. There can be no crime, no *corpus delicti*, unless the substance is shabu or other prohibited drug, and this fact is often proved through the chemist's report without the chemist taking the stand. When the very *corpus delicti* of the case is at stake, should not the accused be given the opportunity to cross-examine the chemist?

In a more recent case, *Reas v. People*,[214] decided in 2021, where the Court acquitted on appeal the accused, who was convicted of illegal possession of drugs, the issue of the non-presentation of the forensic chemist who conducted the analysis of the drugs was discussed.[215] The discussion, however, focused on the issue of chain of custody. The Court summarized the arguments of the accused as follows —

> Reas also claimed that the non-presentation of the forensic chemist crippled the case. While stipulations were entered, it was not stated who kept the items after the examination and what precautionary steps were taken in preserving the integrity of the seized items. The prosecution did not proffer any explanation why the forensic chemist's testimony was dispensed with.[216]

The Court noted that, in an illegal possession of drugs case,

> [t]he State bears not only the burden of proving the elements of the crimes, but also of proving the *corpus delicti* or body of the crime, which in this case are the prohibited drug and the drug paraphernalia. Any doubt in the identity and integrity of the *corpus delicti* warrants the acquittal of the accused.[217]

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212. *Id*.

213. *Quebral*, 606 SCRA at 255 (citing *Cervantes*, 581 SCRA at 781 & *Bandang,* 553 SCRA at 586-87.)

214. Reas v. People, G.R. No. 248228 (2021) (Notice).

215. *Id*.

216. *Id*.

217. *Id*.

Again, the Court equates *corpus delicti* with the chain of custody. It then identified the links in the chain of custody.

> Jurisprudence summarized the four links in the chain of custody, as follows: (1) the seizure and marking, if practicable, of the illegal drug or drug paraphernalia recovered from the accused by the apprehending officer; (2) the turnover of the seized illegal drug or drug paraphernalia by the apprehending officer to the investigating officer; *(3) the turnover of the illegal drug or drug paraphernalia by the investigating officer to the forensic chemist for laboratory examination; and (4) the turnover and submission of the illegal drug or drug paraphernalia from the forensic chemist to the court*. In this case, the prosecution failed to establish all the four links.[218]

The Court also described the type of stipulations the prosecution and the defense must enter into with each other if the testimony of the chemist is to be dispensed with.

> As regards the third and the fourth links, Officer Federe, who received the dangerous drugs from PO3 Sta Maria[ ] and PSI Gucor, the forensic chemist who examined said drugs, were not presented in court. We held in *People v. Pajarin* that in case the parties stipulate to dispense with the attendance and testimony of the forensic chemist, it should be stipulated that the forensic chemist was to testify that he/she took the precautionary steps required in order to preserve the integrity and evidentiary value of the seized item, thus: (1) that the forensic chemist received the seized article as marked, properly sealed, and intact; (2) that he/she resealed it after examination of the content; and (3) that he/she placed his/her own marking on the same to ensure that it could not be tampered with pending trial.[219]

While the Court addresses the issue of chain of custody, its guidelines beg the hearsay question — what if the chemist's report itself states (1) that the forensic chemist received the seized article as marked, properly sealed, and intact; (2) that he/she resealed it after examination of the content; and (3) that he/she placed his/her own marking on the same to ensure that it could not be tampered with pending trial? Will such entries be considered *prima facie* evidence of these facts?

Moreover, as discussed, the *corpus delicti* in the drugs cases is the "drug itself."[220] Unless the substance seized from the accused is shown to be a prohibited drug, there can be no violation of the drug laws. In contrast, the chain of custody rule requires the prosecution to prove that the substance

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218. *Id.* (emphasis supplied).

219. *Id.*

220. *Quebral* 606 SCRA at 255 (citing *Cervantes*, 581 SCRA at 781 & *Bandang*, 553 SCRA at 586-87).

seized is the same substance that was tested, and the same substance that was presented in court.[221] The question asked by the chain of custody rule (Is this the same substance seized from the accused?) is different from the question asked by the Hearsay Rule (Can the contents of the chemist's report confirming the substance to be shabu be admitted without presenting the chemist in court?).

The concepts of authentication and hearsay need to be disentangled from each other in order that the issue of the right of confrontation can be better understood and appreciated.

V. CONSTITUTIONAL RIGHT TO MEET WITNESS FACE-TO-FACE

The right to confrontation was introduced in the Philippines Islands two years after the signing of the Treaty of Paris between the U.S. and Spain in December 1898.[222] With American colonization came a (statutory) bill of rights.[223] In 1900, Major General Elwell Stephen Otis, who had succeeded Major General Wesley Merritt as Military Governor of the Philippines, issued General Order No. 58, the Criminal Procedure that modified the code of criminal procedure, then in effect in the Philippines.[224] Among the rights conferred on an accused by General Order No. 58 were the rights to "be confronted at the trial by and cross-examine the witnesses against him ... ."[225]

Two years later, in 1902, the U.S. Congress enacted the Philippine Organic Act (also known as the Philippine Bill of 1902), an "Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands."[226] The law guaranteed to the accused in a criminal prosecution a set of rights, which included the right "to meet witnesses face[-]to[-]face."[227]

221. *Fundales, Jr.*, 680 SCRA at 184 (citing *Quebral*, 606 SCRA at 255).

222. General Order No. 58, § 1.

223. *See generally id*.

224. *Id*.

225. *Id*. § 15 (5).

226. An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes, Philippine Bill of 1902, § 1 (1902).

227. *Id*. § 5.

It was a right not found in the 1899 Malolos Constitution.[228] It was adopted from the U.S. Bill of Rights, which guarantees to an accused the right to "be confronted with the witnesses against him."[229]

The right was carried over in the Philippine Autonomy Act of 1916 (also known as the Jones Law), "An Act to Declare the Purpose of the People of the United States As to the Future Political Status of the People of the Philippine Islands, and to Provide a More Autonomous Government for Those Islands."[230]

Then, close to two decades later, it was constitutionalized under the 1935 Constitution.[231] The same right can be found under the 1973 Constitution[232] and the 1987 Constitution. Paragraph 2, Section 14, Article III of the 1987 Constitution reads —

> In all criminal prosecutions, *the accused* shall be presumed innocent until the contrary is proved, *and shall enjoy the right* to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, *to meet the witnesses face*[-]*to*[-]*face*, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.[233]

The right of an accused to meet witnesses face-to-face has been described as "a basic, fundamental human right vested inalienably to an accused."[234] At the very least, it requires a confrontation between the prosecution witness and the accused. If a witness is to testify against an accused, the witness has to do it in the presence of the accused and to his face. As Sir Walter Raleigh puts it, "[b]ut it is strange to see how you press me still with my Lord Cobham, and yet will not produce him[ ] ... let Cobham be here, let him speak it. Call my

228. *See generally* 1899 PHIL. CONST. tit. I-IX (superseded in 1935).

229. U.S. CONST. amend. VI.

230. An Act to Declare the Purpose of the People of the United States as to the Future Political Status of the People of the Philippine Islands, and to Provide a More Autonomous Government for Those Islands [The Jones Law of 1916], Public Law No. 240, § 3 (b) (1916).

231. 1935 PHIL. CONST. art. III, § 1 (17) (superseded in 1973).

232. 1973 PHIL. CONST. art. IV, § 19 (superseded in 1987).

233. PHIL. CONST. art III, § 14 (2) (emphases supplied).

234. Kim Liong v. People, G.R. No. 200630, June 4, 2018, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/64209 (last accessed Oct. 31, 2023).

accuser before my face[.]"[235] The essence of the guarantee of the Confrontation Clause, its "chief purpose," however, is the right of an accused to cross-examine the witnesses against him or her.[236] In the words of the Court —

> The right to confrontation is one of the fundamental rights guaranteed [ ] to the person facing criminal prosecution who should know, in fairness, who his accusers are and must be given a chance to cross-examine them on their charges. The chief purpose of the right of confrontation is to secure the opportunity for cross-examination, so that if the opportunity for cross-examination has been secured, the function and test of confrontation has also been accomplished, the confrontation being merely the dramatic preliminary to cross-examination.[237]

Cross-examination "ensures that courts can confidently ferret out the facts."[238] It is "a valuable instrument in exposing falsehood and bringing out the truth."[239] It is

> essential to test his or her credibility, expose falsehoods or half-truths, uncover the truth which rehearsed direct examination testimonies may successfully suppress, and demonstrate inconsistencies in substantial matters which create reasonable doubt as to the guilt of the accused, and thus, give substance to the constitutional right of the accused to confront the witnesses against him.[240]

The right to confrontation "is properly viewed as a guarantee against the use of unreliable testimony in criminal trials."[241] This is not to say, however, that evidence that is reliable should be admitted; rather, the reliability of evidence is to be tested through cross-examination.[242]

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235. DAVID JARDINE, THE LIVES AND CRIMINAL TRIALS OF CELEBRATED MEN 427 (1835) & The Trial of Sir Walter Raleigh, Knt. at Winchester, for High Treason, 2 How. St. Tr. 1, 15-16 (1603).

236. Ho Wai Pang v. People, G.R. No. 176229, 659 SCRA 624, 637 (2011) (citing People v. Libo-on, G.R. No. 136737, 358 SCRA 152, 171 (2001)).

237. *Id.*

238. *Liong*, G.R. No. 200630.

239. Go v. People, G.R. No. 185527, 677 SCRA 213, 224 (2012) (citing California v. Green, 339 U.S. 157 (1970)).

240. People v. Rivera, G.R. No. 139180, 362 SCRA 153, 154 (2001).

241. *Go*, 677 SCRA at 224.

242. *Id.* (citing Crawford v. Washington, 541 U.S. 26 (2004)).

The ability to cross-examine is especially vital in criminal prosecutions, where what is "at stake is a man's personal liberty, universally cherished among all human rights."[243]

Cross-examination also allows the court to observe the demeanor of the accused when confronted by opposing counsel.[244]

The Philippines follows the English rule on the scope of cross-examination. The cross-examiner is not limited in his or her cross-examination to matters taken up on direct examination. The cross-examiner may examine the witness on "any relevant matter"[245] and "to elicit all important facts bearing upon the issue."[246] This is in contrast to the American rule where the cross-examination is limited to matters testified to on direct examination.[247]

The testimony of a prosecution witness is inadmissible if the accused has not been given the opportunity to cross-examine the witness.[248] Such testimony is considered incomplete[249] and unreliable.[250]

The right to cross-examine, "though fundamental, may be waived either expressly or impliedly."[251]

Also, equally important, the right to confrontation is not an absolute right. At the time General Otis issued General Order No. 58 and the U.S. Congress enacted the Philippine Organic Act, there were already recognized exceptions to the right to confrontation, i.e., there were certain types of out-of-court declarations that were admissible against the accused despite the declarant's non-appearance at trial.[252]

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243. People v. Estibal, G.R. No. 208749, 743 SCRA 215, 246 (2014).

244. *Go*, 677 SCRA at 224.

245. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 132, § 6.

246. *Id*.

247. *See* American Bar Association, How Courts Work, *available at* https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/crossexam (last accessed Oct. 31, 2023) [https://perma.cc/R3GL-VA8Z].

248. *Liong*, G.R. No. 200630.

249. *Id*.

250. *Estibal*, 743 SCRA at 247.

251. People v. Dominguez, G.R. No. 229420, 856 SCRA 109, 138-39 (2018).

252. *See generally* General Order No. 58 & Philippine Bill of 1902.

More than a century ago, in *U.S. v. Gil*,[253] while General Order No. 58 and the Philippine Organic Act were still in effect, the Court held that "the guaranties extended by Congress to the people of the Philippine Islands are to be interpreted as meaning what the like provisions meant when Congress made them applicable to these Islands."[254] The accused in *Gil* was charged with "assassination" and he challenged the admission of the dying declaration of his victim, the governor of Iloilo, citing his fundamental right to confront and cross-examine the witnesses against him, as embodied under the Philippine Bill of 1902 and General Order No. 58.[255] The Court rejected his argument, holding that the Confrontation Clause "purported merely to adopt the general principle of the hearsay rule, and to secure to the accused the right to cross-examine the infrajudicial witnesses against him, and did not purport to enumerate all of the exceptions and limitations to that principle[ ]"[256] and that there existed "a number of well-established exceptions, and there might be others on the future[.]"[257] One such well-established exception is the dying declaration.[258]

Nine years later, in *U.S. v. Virrey*, the Court discussed anew the relation between the Hearsay Rule and its exceptions to the right of a criminal defendant to confront the witnesses against him.[259] (By this time, the right was incorporated in the Jones Law of 1916). In that case, the accused, Lucas Virrey, was charged with murder.[260] One of the pieces of evidence which was considered in support of the finding of guilt was the *ante mortem* statement of the victim, Gelasio Violan.[261] Violan had identified Virrey as his assailant.[262] The Court held the dying declaration to be admissible.[263] It noted that a literal reading of the Confrontation Clause would preclude the introduction of any

253. U.S. v. Gil, 13 Phil. 530 (1909).

254. *Id*. at 548.

255. *Id*.

256. *Gil*, 13 Phil. at 548 (citing 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 283 (16th ed., 1899); Campbell v. State, 11 Ga. 353, 374 (1852); State v. McO'Blenis, 24 Mo. 416 (1857); & Robertson v. Baldwin, U.S., 17 Sup. 326 (1897)).

257. *Id*.

258. *Id*. at 549.

259. *Virrey*, 37 Phil. at 623.

260. *Id*. at 627.

261. *Id*. at 623.

262. *Id*.

263. *Id*.

type of hearsay evidence.[264] It then proceeded to find that the right to confrontation and cross-examination had its origins in the common law, and that the common law recognized certain well-established exceptions.[265] In its words —

> But the admission of such (hearsay) declarations, subject to certain conditions, is established as proper, the reason assigned being that the practice of admitting them had become fully established in the common law courts before our constitutions were created; and it is held that when the authors of the constitutions framed these instruments[,] they had no intention of disturbing legitimate practices already fully established in common law usage.[266]

It added that the exceptions were based on "necessity and to prevent the failure of justice" and that "the courts have not been inclined to extend this exception beyond the well-defined limits set by reason and authority."[267]

These early cases, as well as the cases decided since the Philippines obtained its independence in 1946, have not discussed in depth the meaning and scope of the Confrontation Clause. What has been established is merely that the right is fundamental, and there are certain hearsay exceptions that were existing at the time the United States adopted the Sixth Amendment and, therefore, beyond its protection. U.S. jurisprudence can provide guidance on this matter.

VI. U.S. JURISPRUDENCE

A. Crawford v. Washington, 541 U.S. 36 (2004)

Crawford v. Washington, decided in 2004, is a landmark decision.[268] It overturned the 1980 case of *Ohio v. Roberts*.[269]

Michael Crawford was charged with assault and attempted murder for stabbing Kenneth Lee, who had earlier allegedly tried to rape Crawford's wife.[270] The police interrogated both Crawford and his wife.[271] Crawford

264. *Id.* at 624. *See* PHIL. CONST. art III, § 14 (2).

265. *Virrey*, 37 Phil. at 624.

266. *Virrey*, 37 Phil. at 624 (citing Mattox vs. U.S., 156 U.S. 237, 244 (1895)).

267. *Id.* at 624.

268. Crawford v. Washington, 541 U.S. 36, 37-76 (2004).

269. *Id.* at 40. *See* Ohio v. Roberts, 448 U.S. 56 (1980).

270. *Crawford*, 541 U.S. at 38.

271. *Id.*

claimed he had acted in self-defense because he thought Lee had drawn a weapon.[272] The wife's statement to the police contradicted Crawford's version of events. The prosecution, however, could not present the wife as a witness, due to Washington State's marital privilege rule.[273] The prosecution, thus, sought to introduce the wife's tape-recorded statements to the police under a hearsay exception (declaration against interest) (under Washington State law, if a spouse's out-of-court statement falls under a hearsay exception, it is exempted from the coverage of the marital privilege rule.).[274] Crawford objected to the presentation of his wife's out-of-court statement on the ground that it violated the Confrontation Clause.[275]

The U.S. Court ruled in favor of Crawford, overturning the holding in *Ohio v. Roberts* that out-of-court statements are admissible even if the criminal defendant had no prior opportunity to cross-examine the witness; provided that the out-of-court statements fall within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[276]

The Court found that the meaning of the Confrontation Clause could not be discovered by reading the text alone.[277] It, therefore, undertook a review of the "historical background" of the Confrontation Clause.[278] The Court traced the roots of the Confrontation Clause back to common law and noted that this common law right was developed to curb the abuses of the *ex parte* pre-trial examinations of witnesses by justices of the peace, where the statements obtained in the examinations would be used as evidence against the accused during trial.[279] The Court cited the case of Sir Walter Raleigh as a "paradigmatic confrontation violation."[280]

The Court drew two inferences from its review of the historical background. The first inference was that "the principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against

272. *Id.* at 40.

273. *Id.*

274. *Crawford*, 541 U.S. at 40.

275. *Id.*

276. *Crawford*, 541 U.S. at 40 (citing *Roberts*, 448 U.S. at 66).

277. *Id.* at 42.

278. *Id.* at 43.

279. *Id.*

280. *Crawford*, 541 U.S. at 52 (citing *Campbell*, 30 S.C. L. at 130).

the accused."[281] The Confrontation Clause refers to "witnesses," that is, "those who 'bear testimony[ ]'" and "[t]estimony," based on an early nineteenth century dictionary definition, means "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[282] Thus, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[283] There is a "core class" of "testimonial statements" which the Confrontation Clause is designed to protect.[284] This "core class" includes "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"[285] and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[286] "[*E*]*x parte* testimony at a preliminary hearing[ ]" would fall within the core class of testimonial statements. So would "[s]tatements taken by police officers in the course of interrogations" since "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England."[287] The fact that statements to the police may not be under oath is "not dispositive."[288]

The second inference is that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial[,] unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[289] According to the Court, the

281. *Id.* at 51.

282. *Crawford*, 541 U.S. at 51 (citing Merriam-Webster Dictionary, Definition of Witness, *available at* https://www.merriam-webster.com/dictionary/witness (last accessed Oct. 31, 2023) [https://perma.cc/8DX5-F629] & Merriam-Webster Dictionary, Definition of Testimony, *available at* https://www.merriam-webster.com/dictionary/testimony (last accessed Oct. 31, 2023) [https://perma.cc/4RAS-DPX6]).

283. *Crawford*, 541 U.S. at 51.

284. *Id.*

285. *Crawford*, 541 U.S. at 51-52 (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J. & Scalia, J., concurring opinion)).

286. *Crawford*, 541 U.S. at 52 (citing Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae*, at 3 (on file with the Supreme Court of the United States), *in* Crawford v. Washington, 541 U.S. 36 (U.S.)).

287. *Crawford*, 541 U.S. at 52.

288. *Id.*

289. *Id.* at 54.

Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding"[290] and "the common law in 1791 conditioned admissibility of an absent witness'[ ] examination on unavailability and a prior opportunity to cross-examine."[291] The opportunity to cross-examine is "dispositive, and not merely one of several ways to establish reliability."[292] The Court acknowledges that there are recognized hearsay exceptions, but notes that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial — for example, business records or statements in furtherance of a conspiracy."[293]

The Court rejected the "amorphous notions of reliability" enunciated in *Ohio v. Roberts*.[294] It held — "[t]o be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[295]

It concluded —

> 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. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required [—] unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.
>
> ...

290. *Crawford*, 541 U.S. at 54 (citing *Mattox*, 156 U.S. at 248; *Cf.* State v. Houser, 26 Mo. 431, 433-35 (1858)).

291. *Id.*

292. *Id.* at 55-56.

293. *Id.* at 56.

294. *Roberts*, 448 U.S. at 66.

295. *Crawford*, 541 U.S. at 62.

> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.[296]

B. Davis v. Washington, 547 U.S. 813 (2006)

In the twin cases of *Davis v. Washington*[297] and *Hammon v. Indiana*,[298] the U.S. Court had occasion to expound on the meaning of "testimonial statements."

In *Davis*, a woman (Michelle McCottry) placed a call to a 911 emergency operator, a law enforcement personnel.[299] The woman called to report a domestic disturbance involving her former boyfriend, Adrian Davis.[300] In the course of the call, during which time the operator was eliciting information from the caller to better understand the situation, the caller informed the operator that Davis had just left the house after hitting her.[301] The operator informed the caller that the police were on their way and that they would first look for Davis and afterwards they would go to the caller to talk to her.[302]

Davis was charged with violation of a domestic no-contact order.[303] The prosecution did not present the caller as a witness. Instead, the prosecution presented the recorded 911 exchange between the caller and the operator.[304] At issue in *Davis* was the admissibility of the caller's statements in the 911 recording.

In *Hammon*, on the other hand, the police similarly responded to a domestic disturbance call.[305] Upon arriving at the residence of spouses Amy and Hershel Hammon, one of the police officers spoke with the husband, the other to the wife, about what had happened.[306] The police kept them separate even though the husband wanted to join the conversation between the police

296. *Id.* at 68-69.

297. Davis v. Washington, 547 U.S. 813 (2006).

298. Hammon v. Indiana, 829 N.E.2d 444 (2005) (Ind., U.S.).

299. *Davis*, 547 U.S. at 818.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 819.

304. *Id.* at 818.

305. *Hammon*, 829 N.E. 2d at 447.

306. *Id.*

officer and the wife.[307] After the wife had recounted the incident to the police officer, she was asked to fill out a battery affidavit. She wrote down the following: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter."[308]

The husband was charged with "domestic battery and with violating his probation."[309] The wife did not appear at trial despite the issuance of a subpoena. The prosecution called to the stand the police officer who interviewed the wife and took her affidavit. The police officer recounted, in court, his conversation with the wife and authenticated the affidavit. At issue in *Hammon* was the admissibility of the wife's oral and written statements made to the police officer, and in response to his questions.

The Court focused on the meaning of "testimonial statements." "Only statements of this sort cause the declarant to be a 'witness' within the meaning of the Confrontation Clause."[310] "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."[311]

It distinguished testimonial and nontestimonial statements as follows —

> Without attempting to produce an exhaustive classification of all conceivable statements — or even all conceivable statements in response to police interrogation as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: *Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*[312]

The Court framed the issue in *Davis* as follows: "whether, objectively considered, the interrogation that took place in the course of the 911 call

307. *Id.*

308. *Hammon*, 829 N.E. 2d at 447 n. 1.

309. *Id.* at 447.

310. *Davis*, 547 U.S. at 821 (citing *Crawford*, 541 U.S. at 53 & 54).

311. *Id.*

312. *Id.* at 822 (emphasis supplied).

produced testimonial statements."[313] It found that a "911 call, [...] and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to '[establish or prove]' some past fact, but to describe current circumstances requiring police assistance."[314] After distinguishing the facts in *Crawford* from the facts in *Davis*, it concluded that

> the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*. What she said was not 'a weaker substitute for live testimony at trial, *United States v. Inadi*, 475 U. S. 387, 394 (1986), like Lord Cobham's statements in *Raleigh's Case*, 2 How. St. Tr. 1 (1603), or Jane Dingler's *ex parte* statements against her husband in King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (1791), or Sylvia Crawford's statement in Crawford. In each of those cases, the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No 'witness' goes into court to proclaim an emergency and seek help.[315]

There was a point in the conversation between the caller and the operator when the operator told the caller to stop talking, and to listen to, and answer the operator's questions. The issue, then, was at which point during the 911 call did the statements of the caller become testimonial. The Court saw no difficulty in addressing the issue. According to the Court,

> [j]ust as, for Fifth Amendment purposes, 'police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect,' ... trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial.[316]

As for the case involving Hammon, the Court found that the "interrogation [of the wife] was part of an investigation into possibly criminal past conduct" and that "[t]here was no emergency in progress."[317] It noted that —

> When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine [as in *Davis*] 'what is

313. *Id.* at 827.

314. *Id.*

315. *Id.* at 828.

316. *Davis*, 547 U.S. at 829 (citing *New York v. Quarles*, 467 U.S. 649, 658-59) (1984)).

317. *Compare id.* at 829-30 *with Hammon*, 829 N.E. 2d at 446-47.

> happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime [—] which is, of course, precisely what the officer should have done.[318]

C. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)

In *Melendez-Diaz v. Massachusetts*,[319] the U.S. Court dealt with the issue of the admissibility of affidavits that stated that the results of the forensic analysis showed that the examined substance contained cocaine.[320]

Plastic bags were seized by police offers from Melendez-Diaz and two other men, and the contents of the plastic bags were submitted for chemical analysis to a state laboratory.[321] Melendez-Diaz was charged with "distributing cocaine and with trafficking in cocaine."[322] The prosecution presented the bags seized from the men together with notarized "certificates of analysis" that stated that the bags "[have] been examined with the following results: The substance was found to contain: Cocaine."[323]

The Court held that the certificates of analysis were affidavits, which "fall within the 'core class of testimonial statements[,]'" given that the certificates were a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[324]

It noted that the fact in issue was whether the substance in question was cocaine and that this fact is what the analysts would have to testify to had they been called to the stand. The certificates, according to the Court, were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"[325]

The Court also found significant the fact that "under Massachusetts law[,] the sole purpose of the affidavits was to provide '*prima facie* evidence of the composition, quality, and the net weight' of the analyzed substance," and that

318. *Davis*, 547 U.S. at 830.

319. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (U.S.).

320. *Id.* at 2529.

321. *Id.* at 2531.

322. *Id.*

323. *Id.*

324. *Id.* at 2532.

325. *Melendez-Diaz*, 129 S. Ct. at 2532.

this purpose was "reprinted on the affidavits themselves."[326] Thus, it could be "safely assume[d] that the analysts were aware of the affidavits' evidentiary purpose."[327]

Following the holding in *Crawford*, the Court concluded that "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment."[328]

The Court then proceeded to refute the arguments raised by the State of Massachusetts and the dissent.

To the argument that the forensic analysts are not "accusatory" witnesses, the Court stated that there are only two types of witnesses: those who testify against the defendant, and those who testify in his favor.[329] "[T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[330]

To the argument that the type of evidence provided by forensic analysts does not "recall [ ] events observed in the past[,]" but merely prepares reports that contain "near-contemporaneous observations of the test," the Court stated that "[i]t is doubtful that the analyst's reports in this case could be characterized as reporting 'near-contemporaneous observations[;]' the affidavits were completed almost a week after the tests were performed."[331] It added that the dissent, which cited *Davis*, "misunderstands the role that 'near-contemporaneity' has played in our case law."[332] Even if the statements could qualify as present sense impressions, the statements in *Davis* would still not be admissible, "absent an opportunity to confront the witness."[333]

To the argument that the forensic analysts "observe[d] neither the crime nor any human action related to it," and therefore, is beyond the protection of the Confrontation Clause, the Court noted that the dissent cited no authority for this "novel" exception.[334] If the position of the dissent were

326. *Id.* (citing MASS. GEN. LAWS, ch. 111, § 13 (repealed in 2012) (U.S.)).

327. *Melendez-Diaz*, 129 S. Ct. at 2532.

328. *Id.*

329. *Id.* at 2531.

330. *Id.* at 2534.

331. *Id.* at 2535.

332. *Id.*

333. *Melendez-Diaz*, 129 S. Ct. at 2535 (citing *Davis*, 547 U.S. at 820).

334. *Id.*

upheld, a whole class of witnesses — experts — would be excluded from the coverage of the Confrontation Clause.[335]

To the argument that the forensic analysts did not prepare their reports in response to interrogation by law enforcers, the Court stated that "a person who volunteers his testimony" is no "less a 'witness against' the defendant."[336]

To the argument that "there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is 'prone to distortion or manipulation,' and the testimony at issue here, which is the 'resul[t] of neutral, scientific testing,'" the Court replied that "[t]his argument is little more than an invitation to return to our overruled decision in *Roberts*."[337] As declared in *Crawford*, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[338] It added —"[n]or is it evident that what respondent calls 'neutral scientific testing' is as neutral or as reliable[,] as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation."[339] "A forensic analyst responding to a request from a law enforcement official may feel pressure — or have an incentive — to alter the evidence in a manner favorable to the prosecution."[340] Moreover, "[c]onfrontation is designed to weed out[,] not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials."[341]

To the argument that the forensic analyst affidavit is "akin to the types of official and business records admissible at common law[,]" the Court replied that the certificates of the analysists do not qualify as such since they are "calculated for use essentially in the court, not in the business."[342]

> Business and public records are generally admissible[,] absent confrontation[,] not because they qualify under an exception to the Hearsay Rules, but because — having been created for the administration of an entity's affairs

335. *Id.*

336. *Id.*

337. *Id.* at 2536 (citing *Roberts*, 448 U.S. at 597).

338. *Crawford*, 541 U.S. at 62.

339. *Melendez-Diaz*, 129 S. Ct. at 2536.

340. *Id.*

341. *Id.* at 2537.

342. *Id.* at 2538.

> and not for the purpose of establishing or proving some fact at trial — they are not testimonial.[343]

To the argument that respondent could have subpoenaed the analysts, the Court replied that a subpoena is "no substitute for the right of confrontation."[344] It pointed out that "[u]nlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear."[345] According to the Court—

> Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant[,] to bring those adverse witnesses into court.[346]

D. Bullcoming v. New Mexico, 564 U.S. 647 (2011)

David Bullcoming was charged with driving while intoxicated.[347] Blood sample, drawn from Bullcoming, was sent to the Scientific Laboratory Division of the New Mexico Department of Health.[348] Laboratory results showed that his blood alcohol concentration was above the legal threshold.[349] An unsworn certification to this effect was presented by the prosecution as its principal evidence.[350] Instead of presenting the analyst who signed the certification, however, the prosecution presented another analyst who was familiar with the laboratory's testing procedures[,] but who had no participation in the testing of Bullcoming's blood sample.[351] The analyst who had signed the certification (Curtis Caylor) had "very recently [been] put on unpaid leave."[352] The reason for why he was put on unpaid leave was not

343. *Id.* at 2539-40.

344. *Id.*

345. *Melendez-Diaz*, 557 U.S. at 2540.

346. *Id.*

347. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2707 (2011) (U.S.).

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

disclosed. Over the objection of Bullcoming, the trial court admitted the report as a business record.[353] Bullcoming was convicted by the jury.[354]

The New Mexico Court affirmed the conviction.[355] While it found the certification to be "testimonial," it nonetheless held the report to be admissible for the reasons that the "certifying analyst Caylor 'was a mere scrivener,' who 'simply transcribed the results generated by the gas chromatograph machine'" — the "true accuser" being the machine — and that the analyst who took the stand "qualified as an expert witness with respect to the gas chromatograph machine."[356]

The issue before the U.S. Court was "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification [—] made for the purpose of proving a particular fact [—] through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." [357] It held that "surrogate testimony of that order does not meet the constitutional requirement."[358]

The Court found that the machines used to determine the blood concentration levels were gas chromatograph machines, and that the "[o]peration of the machines requires specialized knowledge and training."[359] If further found that "[s]everal steps are involved in the gas chromatograph process, and human error can occur at each step."[360]

The Court also pointed out that the analyst, who certified the results, made representations "that he received Bullcoming's blood sample intact with seal unbroken, that he checked to make sure that the forensic report number and the sample number 'correspond[ed],' and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol,"[361] and that "no circumstances or condition ... affect[ed] the integrity of the sample

353. *Bullcoming*, 131 S. Ct. at 2707.

354. *Id.* at 2712.

355. *Id.* at 2707.

356. *Id.* at 2713.

357. *Id.* at 2710.

358. *Id.*

359. *Bullcoming*, 131 S. Ct. at 2711.

360. *Id.*

361. *Id.* at 2715.

or ... the validity of the analysis."[362] According to the Court, "[t]hese representations, relating to past events and human actions not revealed in raw, machine-produced data, are [met] for cross-examination."[363] By making these representations, the analyst did not act merely as a scrivener of the date generated by the machine. Even if, however, all that the analyst did was to write down the data that registered on the machine, the prosecution would still not be excused from presenting the certifying analyst. The "'obvious reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause."[364]

The Court noted that cross-examination could have "enabled Bullcoming's counsel to raise questions before a jury concerning Caylor's proficiency, the care he took in performing his work, and his veracity[,]"[365] and that "Bullcoming's counsel likely would have inquired on cross-examination why Caylor had been placed on unpaid leave."[366]

In response to the prosecution's argument that the certification on the laboratory results was not testimonial, the Court stated that a "document created solely for an 'evidentiary purpose,'"[367] and "made in aid of a police investigation [ ] ranks as testimonial."[368]

The prosecution also argued that the certification was "unsworn," but the Court dismissed this argument, citing the observation of the Court of New Mexico that "'the absence of [an] oath [i]s not dispositive' in determining if a statement is testimonial."[369]

The Court concluded that "the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify Caylor's assertions as testimonial. The absence of notarization does not remove his certification from Confrontation Clause governance."[370]

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362. *Id.*

363. *Id.*

364. *Bullcoming*, 131 S. Ct. at 2715 (citing *Crawford*, 561 U.S. at 62).

365. *Bullcoming*, 131 S. Ct. at 2728 n. 7.

366. *Id.*

367. *Id.* at 2717.

368. *Bullcoming*, 131 S. Ct. at 2717 (citing *Melendez-Diaz*, 129 S. Ct. at 2532).

369. *Bullcoming*, 131 S. Ct. at 2717 (citing *Crawford*, 541 U.S. at 52).

370. *Bullcoming*, 131 S. Ct. at 2717.

VII. ANALYSIS

The right to confrontation does not mean that no hearsay evidence is admissible. There were already several exceptions in common law when General Order No. 58 and the Philippine Bill of 1902 first introduced the right at the start of the 20th century and, more importantly, when the United States adopted the Sixth Amendment.[371]

On the other hand, the power to create exceptions to the Hearsay Rule has its limits. The hearsay exceptions should not define the scope of the right to confrontation, as that would allow the statutory tail to wag the constitutional dog. Such an approach would allow a mere rule to dilute, if not eviscerate, constitutional protection. The starting point should, then, be to discover the meaning of the Confrontation Clause, as did the U.S. Court in *Crawford*.[372] That way, it is the right to confrontation that defines the permissible limits of the hearsay exceptions.

Prevailing U.S. jurisprudence draws the line at "testimonial" statements, which includes "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"[373] and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[374] The U.S. Court arrived at this conclusion after reviewing the historical background of the Confrontation Clause, and determining the types of abuses it was designed to curb. The bottom line is that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes — confrontation."[375] Rules of evidence cannot create hearsay exceptions for testimonial statements.

In contrast, in the Philippines, the starting point of the analysis is the hearsay exception of entries in Official Records.[376] If the requisites of Rule

371. *See generally* General Order No. 58, §§ 55-62 & Philippine Bill of 1902, §§ 1-88.

372. *See generally Crawford*, 541 U.S. at 37-76.

373. *Crawford*, 541 U.S. at 52 (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J. & Scalia, J., concurring opinion)).

374. *Crawford*, 541 U.S. at 52 (citing Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae*, at 3 (on file with the Supreme Court of the United States), *in Crawford*, 541 U.S.).

375. *Crawford*, 541 U.S. at 62.

376. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 46.

130, Section 46 (or Rule 132, Section 23) are satisfied, the entries are admissible as *prima facie* proof of the facts therein stated (e.g., the substance is shabu or the body of the offended party bore signs of sexual abuse).[377] The premise of the analysis — that official entries do not impinge on the Confrontation Clause — is treated as an axiom. Jurisprudence has been content in holding that the Official Records exception is warranted on account of necessity and reliability; necessity because public service would be prejudiced if public officials had to haul themselves to court to provide testimony, and reliability because public officials have a duty to make truthful entries.[378] In admitting Official Records in criminal cases, the Court has either simply cited Section 46 of Rule 130 or has cited cases that cite Section 46 of Rule 130, without discussing why such an exception does not violate the Confrontation Clause.[379]

Although it has never cited the case of *Ohio v. Roberts*, the Court seems to have adopted a perspective similar to the perspective in *Roberts*.[380] The *Roberts* Court saw the Confrontation Clause as "reflect[ing] a *preference* for face-to-face confrontation at trial,"[381] noting that "'a primary interest secured by [the provision] is the right of cross-examination.'"[382] At the same time, according to the *Roberts* Court, there exist "competing interests" that could "warrant dispensing with confrontation at trial," one of which was the "strong interest" of society in "effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings."[383] The role of the court is to "accommodate these competing interests."[384]

From these premises, the *Roberts* Court concluded that the "Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay."[385] The first is that hearsay evidence may be admitted only

377. *Id.*

378. *See generally Manalo*, 99 Phil. At 729.

379. *See Uy*, 327 SCRA at 357; *Cervantes*, 581 SCRA at 782 & *Bandang*, 430 SCRA at 586-89.

380. *See generally Roberts*, 448 U.S. at 63.

381. *Id.* (emphasis supplied).

382. *Roberts*, 448 U.S. at 63 (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

383. *Roberts*, 448 U.S. at 65 (citing Snyder v. Massachusetts, 291 U.S. 97, 107 (1934) & California v. Green, 399 U.S. 149, 171-72 (1970)).

384. *Id.*

385. *Roberts*, 448 U.S. at 66.

if it is shown that the preference for face-to-face trial cannot be met (e.g., the witness is dead).[386] It described this first way as a "rule of necessity."[387] The second way in which the Confrontation Clause may restrict the range of admissible hearsay is that hearsay evidence may be admitted only if it is trustworthy or reliable.[388] The *Roberts* Court inferred this second rule from the purpose of cross-examination, which is to "augment accuracy in the fact[-] finding process by ensuring the defendant an effective means to test adverse evidence."[389] Cross-examination helps ensure that the evidence is trustworthy. Thus, in those instances where the witness is unavailable, only trustworthy statements of the unavailable witness may be admitted.[390] The out-of-court statements must either "fall [ ] within a firmly rooted hearsay exception" or there must be "a showing of particularized guarantees of trustworthiness."[391]

As discussed, *Crawford* has already overturned *Roberts*. According to *Crawford*, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: [ ] by testing in the crucible of cross-examination."[392] For purposes of the Confrontation Clause, evidence is not considered reliable, unless it is subjected to cross-examination.[393]

Notably, *Crawford* is not unheard of in Philippine jurisprudence. In 2012, in *Go v. People*, the Court dealt with the issue of whether the prosecution could take the deposition of its principal witness abroad in lieu of live court testimony.[394] The Court upheld the denial of the prosecution's motion to take deposition abroad, citing, among other cases, *Crawford*, which, according to the Court, "expounded on the procedural intent of the confrontation

386. *Id*. at 66 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968); Motes v. United States, 178 U.S. 458 (1900); & *Green*, 399 U.S. at 161-62, 165, 167, & n. 16).

387. *Id*.

388. *Roberts*, 448 U.S. at 66 (citing *Snyder*, 291 U.S. at 107 & *Mancusi*, 408 U.S. at 213).

389. *Id*.

390. *Id*.

391. *Roberts*, 448 U.S. at 68.

392. *Crawford*, 541 U.S. at 62.

393. *Id*.

394. *Go*, 677 SCRA at 219.

requirement."[395] Despite the recognition of this "procedural intent of the confrontation requirement," the Court has not applied it to medico-legal and chemistry reports.[396] Under the test laid down in *Crawford*, and expounded on in *Davis*, *Bullcoming*, and *Melendez-Diaz*, the medico-legal and chemistry reports would be inadmissible hearsay evidence.[397] They qualify as testimonial statements. The government physicians and chemists, in effect, act as witnesses against the accused. The medico-legal and chemistry reports are made "for the purpose of establishing or proving some fact at trial[,]" and are "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"[398] They are documents "created solely for an 'evidentiary purpose,'" and "made in aid of a police investigation" and, hence, "rank as testimonial." Because these reports are "testimonial," the "procedural intent of the confrontation requirement" is to have their reliability tested through cross-examination.[399]

It was only in the past couple of decades that the Court has declared the contents of medico-legal reports and chemistry reports admissible *against* the accused in *criminal* cases, despite the non-presentation of the public officers who conducted the examinations and who prepared the reports.[400]

One of the earliest cases that ruled on the admissibility of an official document is the 1924 case of *Salmon, Dexter & Co. v. Wijangco*.[401] Citing *Wigmore*, the Court held that "the certificate issued by the Director of Agriculture is admissible in evidence as an official document issued by a public officer authorized by law."[402] In his certificate, the Director of Agriculture stated that "for the crop seasons 1920-1921[,] there was planted to palay in the municipality of Magalang Province of Pampanga, 5,050 hectares[,] and that the average yield per hectare for such crop seasons was 22 cavanes."[403] The facts certified to by the Director of Agriculture were "chiefly based on the

395. *Go*, 677 SCRA at 224 (citing *Crawford*, 541 U.S. at 26).

396. *See id*.

397. *See Crawford* 541 U.S. at 26; *Davis*, 547 U.S. at 821 (citing *Crawford*, 541 U.S. at 53 & 54); *Bullcoming*, 131 S. Ct. at 2711; & *Melendez-Diaz*, 129 S. Ct. at 2540).

398. *Melendez-Diaz*, 129 S. Ct. at 2540 & 2532.

399. *Crawford*, 541 U.S. at 26.

400. *Datu*, G.R. No. 254378, at 8.

401. Salmon, Dexter & Co. v. Wijangco, 46 Phil. 386 (1924).

402. *Salmon, Dexter & Co.*, 46 Phil. at 391-92 (citing 3 JOHN HENRY WIGMORE, ET AL., A TREATISE ON THE LAW OF EVIDENCE, § 1636 (1923)).

403. *Salmon, Dexter & Co.*, 46 Phil. at 391.

quarterly reports of the municipal presidents made pursuant to section 2202 of the Administrative Code."[404] The Court accepted these facts to be *prima facie* correct, even though the Director of Agriculture did not take the stand.[405] (Neither did the municipal presidents.)[406] This case, however, was a civil case and therefore, did not implicate the Confrontation Clause.

The leading case of *Africa*, which discussed and applied the official entries exception under the 1940 Rules, was a civil case too.[407]

It was in the 1982 case of *People v. Leones*,[408] a rape case, that the Court had occasion to deal with the issue of admissibility of medical findings of government doctors in a criminal case.[409] The alleged rape victim was brought to a provincial hospital, and was attended to by a government physician.[410] The prosecution presented the clinical case record of the victim as part of its evidence, without presenting the attending physician.[411] The Court held that the entries in the clinical case record were *prima facie* evidence of the facts therein stated.[412] Its ruling reads —

> The written entries in the clinical case record, Exh. '2,' showing the date of her admission in the hospital on [22 April 1973], her complaint of vaginal bleeding[,] and the diagnosis of '[h]ealing lacerated wide at [two] o'clock and 10 o'clock hymen[,]' are *prima facie* evidence of the facts therein stated, the said entries having been made in Official Records by a public officer of the Philippines in the performance of his duty especially enjoined by law, which is that of a physician in a government hospital. (Rule 130, Sec. 38, Rules of Court). In the case at bar, Dr. Antonino Estioco was the admitting physician but unfortunately, he was not presented as a witness for the government.[413]

Significantly, however, the entries in the clinical record were used by the Court to acquit the accused.[414] It found that the clinical record "totally and

404. *Id.*

405. *Id.*

406. *See generally id.*

407. *Africa*, 16 SCRA at 446.

408. People v. Leones, G.R. No. L-48727, 117 SCRA 382 (1982).

409. *Id.* at 389-90.

410. *Id.* at 386.

411. *Id.* at 390.

412. *Id.* at 389-90.

413. *Id.*

414. *Leones*, 117 SCRA at 394.

completely belie[s] the claim of the complainant that she was raped by the accused."[415]

It, thus, appears that the rulings on the admissibility of medico-legal and chemistry reports are of relatively recent vintage. Not surprisingly, they lack solid legal moorings. The Court has simply taken as axiomatic the Official Records exception and has come to mechanically apply it (both Rule 130, Section 46, and Rule 132, Section 23) in criminal cases.

Incidentally, if one were to carry the reasoning of the Court in these cases to its logical conclusion, the Official Records exception should not be limited to the reports of government physicians and chemists. They would cover the reports of arresting officers as well. If so, no police officer will ever need to testify in court. All testimony can be introduced through highly detailed "official" reports pursuant to Rule 130, Section 46.[416] Logical though as this may be, the Court has (wisely) not gone so far as to sanction the admission of statements of arresting police officers through Official Records. It has drawn the hearsay exception line at medico-legal and chemistry reports.[417] The line, however, is an arbitrary one. The statements of arresting officers and the certifications of government physicians and chemists are cut from the same cloth: they are testimonial.

While the Court is not bound by foreign jurisprudence, it is noteworthy that our Confrontation Clause was adopted from the U.S. Constitution. At the time it was incorporated in the 1935 Constitution, its meaning was the same as the meaning of its counterpart Confrontation Clause under the Sixth Amendment.[418] To be sure, by the time of the ratification of the 1973 Constitution,[419] the Philippines had already won its independence, and was exercising full sovereign powers. Nevertheless, there is no reason to suppose that the "people" who had ratified the 1973 Constitution had suddenly developed a different conception of the meaning of the Confrontation Clause. The same holds true with the 1987 Constitution. There was no case law at

415. *Id.* at 387.

416. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 46.

417. *See generally People v. XXX*, G.R. No. 259221, at 8.

418. *See* 1935 PHIL. CONST. art. III, § 1 (17) & U.S. CONST. amend. VI.

419. The 1973 Constitution was "deemed ratified by Citizens' Assemblies held from January 10 to 15, 1973, proclaimed in force by Proclamation by President Marcos, January 17, 1973. Official Gazette, Philippine Constitutions, *available at* https://www.officialgazette.gov.ph/constitutions (last accessed Oct. 31, 2023) [https://perma.cc/WQH3-A5CC].

the time of the ratification of the 1987 Constitution that indicated a departure from the understanding of the Confrontation Clause when the Philippines was still under American rule. It may be that, in declaring medico-legal and chemistry reports to be admissible, the Court was guided by 1980 case of *Roberts* — although, as mentioned, the Court has not made any reference to it in its decisions.[420] *Crawford* has since rejected *Roberts*, and it arguably is based on sounder constitutional reasoning.[421]

The Court has noted that "although the Philippine Constitution can trace its origins to that of the United States, their paths of development have long since diverged."[422] In another case, it declared that "[i]n the Philippine jurisdiction, we have never felt bound to follow blindly the principles of the common law."[423] While these observations may be correct, there still must be some legally sound basis that accounts for the divergence of constitutional paths. The Court has not provided any such basis with respect to the interpretation of the Confrontation Clause.

The Court has never found a need to analyze the nature and scope of the Confrontation Clause. It has contented itself by noting that the essence of the right of confrontation consists in the right to cross-examine the prosecution witnesses. To say simply, as the Court has, that the Confrontation Clause guarantees the accused the fundamental right of cross-examination does not answer the question of when, precisely, the accused is entitled to invoke and exercise this right. The *Roberts* Court would say that, as a general rule, an accused is entitled to meet the witnesses face-to-face, but not when the witness is shown to be unavailable and the out-of-court testimony of the unavailable witness is shown to be reliable.[424] The *Crawford* Court is more inflexible, but arguably more faithful to the meaning of the Confrontation Clause when it held that the accused has a right to cross-examination whenever the statement is "testimonial," regardless of the unavailability of the witness or the reliability of the witness's out-of-court statement. If the out-of-court statement is testimonial and the accused is not given the opportunity to cross-examine the declarant, the statement is inadmissible.

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420. *Roberts*, 448 U.S. at 66.

421. *See Crawford*, 541 U.S. at 54. *Cf. Roberts*, 448 U.S. at 66.

422. Central Bank Employees Association, Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299, 388 (2004) (citing Francisco, Jr. v. House of Representatives, G.R. No. 160261, 415 SCRA 44 (2003)).

423. People v. Toledo, 51 Phil. 825, 833 (1928).

424. *Roberts*, 448 U.S. at 66.

No such similar analysis has been done by the Philippine Court.

Not even the earlier cases of *Gil* and *Virrey*, which at least considered the relationship between the Confrontation Clause and hearsay exceptions, looked at the historical background of the Confrontation Clause to divine its meaning.[425] The purpose of the Court in discussing the Confrontation Clause in *Gil* and *Virrey* was not so much to trace the origins of the Confrontation Clause, as to justify the admissibility of a dying declaration.[426] In both cases, the Court concluded that at the time of the adoption of the Sixth Amendment, there were common law hearsay exceptions that were existing and one such exception was the dying declaration.[427] There was no analysis of the Confrontation Clause itself.[428]

VIII. RECOMMENDATION

The Philippine Court should consider adopting the public records exception under the U.S. Federal Rules of Evidence (FRE). Rule 803 (8) reads —

> Rule 803. Exceptions to the Rule Against Hearsay
>
> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> ...
>
> (8) Public Records. A record or statement of a public office if:
>
> (A) it sets out:
>
> (i) the office's activities;
>
> (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
>
> (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
>
> (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.[429]

425. *See Gil*, 13 Phil. at 548 & *Virrey*, 37 Phil. at 623.

426. *Id.*

427. *Id.*

428. *See generally id.*

429. FEDERAL RULES OF EVIDENCE, rule 803 (8).

Rule 803 (8) is consistent with *Crawford* and *Crawford* is, in turn, more in accord with the historical background of the Confrontation Clause and more faithful to its meaning.[430]

The Court has repeatedly paid paean to the virtues cross-examination. Yet a criminal defendant is deprived of such right when it comes to government physicians and chemists. It must be remembered that government physicians and chemists are agents of the state, the same way that law enforcement field personnel are.[431] In fact, they are members of the Philippine National Police or the National Bureau of Investigation.[432] They are no less witnesses than are the field operatives.

The observation that cross-examination is "a valuable instrument in exposing falsehood and bringing out the truth"[433] is as much true for the arresting officer as it is for the government physician and chemist, especially since the findings of government physicians and chemists, as embodied in their reports, are offered by the prosecution to prove the elements of criminal offenses (e.g., sexual abuse and drug cases). In fact, in drug cases, there is no violation of the drug laws (i.e., *corpus delicti*) unless the substance that has been seized from the accused is a prohibited drug.[434] The determination of whether the substance is a prohibited drug hinges on the chemist's examination and analysis results. As for a sexual abuse or rape case, government physician's findings can bear substantial weight. A finding that a victim has been sexually abused will go a long way to proving the defendant's guilt.[435]

The Court has held that, unless the accused is able to present satisfactory "contrary" evidence, the findings of the government physician or chemist

430. *Cf. Crawford*, 541 U.S. at 54.

431. An Act Revising the Penal Code and Other Penal Laws [REV. PENAL CODE], Act No. 3815, art. 152 (1930).

432. An Act Establishing the Philippine National Police Under a Reorganized Department of the Interior and Local Government, and for Other Purposes [Department of the Interior and Local Government Act of 1990], R.A. No. 6975, § 35 (1990) & An Act Reorganizing and Modernizing the National Bureau of Investigation (NBI), and Providing Funds Therefor [National Bureau of Investigation Reorganization and Modernization Act], R.A. No. 10867, § 3 (2016).

433. *Go*, 677 SCRA at 224 (citing People v. Seneris, G.R. No. L-48883, 99 SCRA 92 (980)).

434. *Fundales, Jr.*, 680 SCRA at 191.

435. *See Datu*, G.R. No. 254378, at 8.

stands.[436] By "contrary" evidence, the Court means evidence other than evidence that may be extracted through cross-examination.[437] But why the limitation? The fact that the Rules treat the entries in Official Records as *prima facie* true does not logically exclude cross-examination. Evidence that is presumptively true may still be subject to cross-examination.

While it may often be foolhardy to cross-examine a government physician and chemist (or ballistician or fingerprint expert, for that matter), cross-examination can nonetheless be of benefit to the accused on occasion. As noted in *Melendez-Diaz*, "[c]onfrontation is designed to weed out[,] not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials ... Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination."[438] The cross-examination of the chemist need not be limited to the results of the examination. It can extend to the chemist's role in the chain of custody of the substance.

It may be true that "there are other ways — and in some cases[,] better ways — to challenge or verify the results of a forensic test,"[439] "[b]ut the Constitution guarantees one way — confrontation."[440] FRE 803 (8) bars the introduction against an accused of a public record containing "a matter observed by law-enforcement personnel," such as reports of government physicians and chemists, because they are untested by confrontation.[441]

As for the justification of "necessity" (i.e., requiring public officers to testify in court will interfere with their functions and negatively impact public service), *Melendez-Diaz* has noted that the sky has not fallen since *Crawford* was handed down five years earlier.[442] There is no showing that public service has suffered as a result of *Crawford*.[443] The reality is that not every defendant demands that the prosecution present the chemist. As observed by the U.S. Court in *Melendez-Diaz*, "[d]efense attorneys and their clients will often

436. *Id.* at 7.

437. *Id.*

438. *Melendez-Diaz*, 129 S. Ct. at 2537.

439. *Id.*

440. *Id.* at 2536.

441. FEDERAL RULES OF EVIDENCE, rule 803 (8).

442. *Melendez-Diaz*, 557 U.S. at 2541. Perhaps the best indication that the sky will not fall after today's decision is that it has not done so already. *Id.*

443. *See generally Crawford*, 541 U.S. at 54.

stipulate to the nature of the substance in the ordinary drug case."[444] The same holds true in the Philippines. As can be seen in the drug cases that reach the Court, the accused often stipulate on the findings of the government chemists.[445]

In any event, the fact that the Confrontation Clause "may make the prosecution of criminals more burdensome" is no reason to disregard it.[446] By its very nature, the Bill of Rights (e.g., the privilege against self-incrimination) imposes burdens on the government.[447] Besides, testifying in court is part of the duty of government agents in faithfully executing the laws.[448] Law enforcement does not end with the arrest of the suspect. It extends to the filing of the criminal case, and the giving of testimony in court.

The right to confrontation becomes all the more important since it may be the only way that an accused may realistically challenge the findings of a chemist or government physician. The right of the accused to meet the witnesses against him should outweigh any incidental inconvenience to the public its exercise might cause.

Of course, the accused may himself call to the stand as an adverse witness the government physician or chemist after the prosecution has rested its case. The court, however, may not be disposed to allow such a witness to take the stand. It may view the calling of the government physician or chemist as a waste of time. On the other hand, the efforts of the accused to compel the attendance of the government physician or chemist can be frustrated if the witness is in a place that is beyond the reach of the court's compulsory processes, the witness has become incapacitated, or has passed away.

More importantly, the obligation to call the chemist or government physician falls on the prosecution.[449] As held by the U.S. Court in *Melendez-Diaz* —

> Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law[,] or the Compulsory Process Clause[,] shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden

444. *Melendez-Diaz*, 129 S. Ct. at 2542.

445. *See generally Uy*, 327 SCRA at 347 & *Razul*, 392 SCRA at 577.

446. *Melendez-Diaz*, 129 S. Ct. at 2541.

447. *Id.*

448. *Id.*

449. *Id.* at 2540.

> on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.[450]

The alternatives to cross-examination are impractical. If the prosecution does not present the government physician in a sexual abuse case, the accused may demand that the offended party undergo another physical examination. If the prosecution does not present the chemist, the accused may demand that a second chemical analysis be conducted. How many criminal defendants can afford having these tests re-done? Besides, "[s]ome forensic analyses, such as autopsies and breathalyzer tests, cannot be repeated, and the specimens used for other analyses have often been lost or degraded."[451] Moreover, subjecting the offended party to a second invasive physical examination would be unnecessarily distressing to the offended party.

It must be emphasized that only those statements that "rank" as "testimonial" call for the application of the Confrontation Clause.[452] There is a difference, for example, between the entries made by an immigration officer and the entries made by an arresting officer. An immigration officer documents the arrival and departure of persons as a matter of routine, and not with a view to, or in anticipation of, litigation. The entries in the records of the PNP Firearms and Explosives Office are of the same nature. The public officers making these types of entries are not acting as "witnesses" against anybody. The "origin" of the entries is "routine and disinterested."[453] Thus, the entries do not qualify, or should not be construed as qualifying, as "a matter observed by law-enforcement personnel."[454]

In contrast, a police officer in an entrapment operation finds himself or herself in an adversarial position relative to the suspect (now the accused). While the chemist and the medico-legal officer do not personally witness the commission of the offense, still there is no mistaking the testimonial nature of their work. Critical physical evidence is submitted to the government physician and chemist for their examination, evidence which the government physician and chemist know will be used by the prosecution in proving its

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450. *Id.*

451. *Melendez-Diaz*, 129 S. Ct. at 2536 n. 5.

452. 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130, § 21.

453. Antonio Lejano v. People of the Philippines, G.R. No. 17386, Dec. 14, 2010, *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/34753 (last accessed Oct. 31, 2023).

454. FEDERAL RULES OF EVIDENCE, rule 803 (8).

case. Their statements or observations are not admissible under Rule 803 (8) of the Federal Rules of Evidence.[455]

Rule 803 (8) is also consistent with the 1982 case of *Lenones*, where the Court relied on the government physician's report to *acquit* the accused.[456] FRE prohibits the introduction by the prosecution of a public record against the accused, but does not prohibit the accused from offering such evidence in his or her defense.

Moreover, under the FRE, entries in Official Records would still be admissible in civil and administrative cases, where the stakes are comparatively less high, and the introduction of hearsay public records finds justification in considerations of necessity and reliability.[457]

IX. CONCLUSION

One of the reasons given by the Court in amending portions of the Rules on Evidence is to "properly address problems that may come up."[458] The Court introduced amendments to many of the sections of the Rules on Evidence but left untouched the Official Records exception (and the section of public records as evidence).[459] Presumably, the Court did not amend them because it did not foresee any problems that may arise in this area of law, which is already treated as settled. A review of this area of law, however, will show that not much discussion or analysis can be found in the judicial decisions on the meaning and scope of the right to confrontation. The Official Records exception is taken as axiomatic.

The application of the Official Records exception in criminal cases raises a serious constitutional problem. The contents of the reports of government physicians and chemists are admitted against the accused without the authors of these reports taking the stand. These reports are out-of-court statements and offered to prove the truth of the facts asserted therein. The assertions in these reports (e.g., the substance is shabu or the body of the victim shows signs of sexual abuse) are not trivial assertions. The reports are, in fact, presented to prove elements of the criminal offense. Yet, the accused does not enjoy the right to meet, face-to-face, these witnesses against him. The justifications

455. *See id*.

456. *Leones*, 117 SCRA at 389.

457. *See* FEDERAL RULES OF EVIDENCE, rule 803 (8).

458. PRIMER ON THE 2019 AMENDMENTS, at 4.

459. *See generally* 2019 AMENDMENTS TO THE 1989 REVISED RULES ON EVIDENCE, rule 130.

given for the admission of the medico-legal and chemistry reports are trustworthiness and necessity of official records. On the matter of trustworthiness, the presumed reliability of an official record is no substitute for cross-examination in a criminal case. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner — by testing in the crucible of cross-examination."[460] On the issue of necessity, it may very well be that the Confrontation Clause may affect, to some extent, the performance of public service, but the convenience of the public must yield to the constitutional rights of the accused, for what is "at stake is a man's personal liberty [—] universally cherished among all human rights."[461]

460. *Go*, 677 SCRA at 225 (citing *Crawford* 541 U.S. at 62).

461. *Estibal*, 743 SCRA at 246.