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FACE TO FACE: THE CRIME LAB EXCEPTION OF RULE 803(8) OF THE MONTANA RULES OF EVIDENCE AND THE MONTANA CONFRONTATION CLAUSE

Nicholas J. Weilhammer*

"Who are the witnesses? . . . Bring them before me, and they will swear their falsehoods when they meet me face to face." 1

I. INTRODUCTION

The proliferation of scientific evidence in the courtroom during the latter part of this century 2 has left courts scrambling to find a legal framework in which to analyze such evidence. 3 Questions of admissibility and reliability often arise in determining the constitutionality of scientific evidence. Reports from crime labs, a primary source for generating scientific evidence, have generally been admitted into evidence regardless of whether the author was called to testify. 4 The Montana Supreme Court had always allowed lab reports to be admitted into evidence without the author testifying, both before and after the adoption of Rule 803(8) of the Montana Rules of Evidence. 5

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*I would like to extend special thanks to Bill Unger, Administrator of the Forensic Science Division, for his invaluable assistance.

1. Delegate J.K. Toole of Lewis & Clark County at the 1889 Montana Constitutional Convention, paraphrasing Queen Mary of Scotland. The delegates were debating the proposed Confrontation and Detention Clauses. Proceedings and Debates of the Constitutional Convention 1889, at 256 (1921).


3. See generally PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE §§ 1-7 (2d ed. 1993); 1, 2 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE (1997).

4. See infra note 111.

5. MONT. R. EVID. 803(8) states: "Public records and reports. To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and
In *State v. Clark*, the Montana Supreme Court unanimously held unconstitutional the portion of 803(8) of the Montana Rules of Evidence, which concerns the admission of state crime lab reports. In so doing, the court overstepped Montana statutory and common law, as well as federal precedent. The court held that admission of crime lab reports without requiring the author of the report to testify violates Article II, Sections 17 and 24 of the Montana Constitution. In particular, the court based its holding on the Confrontation Clause's archaic language of "face to face," which, taken literally, would effectively eliminate several well-established hearsay exceptions.

This case note explores the structure and purpose of the Montana crime lab as well as the long history of Montana's Confrontation Clause in a national context, and discusses the sweeping language of *Clark*, which casts doubt on the future existence of well-established hearsay exceptions in criminal trials. The decision comes at a price for Montanans, whose as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. However, written reports from the Montana state crime laboratory are within this exception to the hearsay rule when the state has notified the court and opposing parties in writing of its intention to offer such report or reports in evidence at trial in sufficient time for the party not offering the report or reports (1) to obtain the depositions before trial of the person or persons responsible for compiling such reports, or (2) to subpoena the attendance of said persons at trial." (emphasis added).

7. *Id.* at __, 964 P.2d at 772-73.
8. See discussion infra Part II.B.
9. Rule 803 of the Montana Rules of Evidence has twenty-three enumerated exceptions, such as the recorded recollection exception, and one residual exception. Rule 804 of the Montana Rules of Evidence has four enumerated exceptions, such as the dying declaration exception, and one residual exception.
small population must continuously finance and enforce decisions handed down by the court, which are not supported legislatively or by common law. As a result, the Montana legislature should take notice of the existence of the archaic phraseology in Montana's Confrontation Clause, evaluate and understand its roots, and consider following the recent national trend of modernizing the Clause's language.10

II. STATE V. CLARK

A. Summary of Facts

On the morning of March 26, 1996, Ronald A. Clark hit the side of a car while driving his Chrysler Newport in Bozeman, Montana.11 Clark failed to stop at the scene of the accident, and continued driving.12 At another intersection, Clark hit the back of a van that was waiting at a stop sign.13 Clark stopped, and tried to persuade the driver of the van, Beverly Garrison-Lammey, to settle the incident without calling the police.14 Garrison-Lammey insisted on calling the police.15 Not wanting to leave her children in the van unattended, she asked Clark if he would call the police.16 Clark went to the nearest gas station, entered, and exited without calling the police.17 Clark then fled north on foot.18 Garrison-Lammey flagged down a Bozeman police officer in the area, who called in the accident to the Bozeman dispatch.19 Officer McLane responded, and spotted a man jogging in the area.20 McLane followed the man by car and then by foot.21 McLane identified himself as a police officer and warned Clark to "freeze," but Clark continued to run.22 McLane took him into custody.23 Clark, uncooperative at the time of his

10. See discussion infra Part VI.
11. See Respondent's Brief at 4, Clark (No. 97-096).
12. See id.
13. See id. at 4-5.
14. See id. at 5.
15. See id.
16. See id.
17. See Respondent's Brief at 5, Clark (No. 97-096).
18. See id.
19. See id.
20. See id.
21. See id. at 4.
22. Id.
23. See Respondent's Brief at 5-6, Clark (No. 97-096).
arrest, refused to be handcuffed or give McLane his name. Clark could not effectively maintain his balance, and had a strong odor of alcohol on his breath.

After Clark's arrest, an inventory of his belongings on his person and impounded car included: a set of Chrysler keys, a hypodermic needle and syringe wrapped inside a piece of newspaper, numerous pairs of rubber gloves, and a small clear plastic bag which contained a brown crystal substance, later identified as amphetamine. The pat search of Clark, who could not stand on his own, required the assistance of two officers. At the detention center, Clark complained of tingling in his toes and legs, and had trouble standing without assistance or sitting in a chair.

On April 3, 1996, Clark was charged with two felony counts of criminal possession of dangerous drugs, misdemeanor counts of criminal possession of drug paraphernalia, second offense DUI, failure to remain at the scene of an accident, failure of duty to stop upon striking an unattended vehicle, and failure to carry proof of insurance. The state filed a motion for leave to file an amended information on October 21, 1996, to consolidate counts one and two, and to change the name of the dangerous drug from methamphetamine to amphetamine. After oral argument on the State's motion, the State filed an amended affidavit on October 22, 1996, upon the court's recommendation. The court permitted the State leave to file an amended information on October 23, 1996. The State did so, consolidating counts one and two, and charging

24. See id. at 6.
25. See id.
26. See id.
27. See id.
28. See id.
30. See MONT. CODE ANN. § 45-9-102(1) (1997), which states: "A person commits the offense of criminal possession of dangerous drugs if he possesses any dangerous drug, as defined in 50-32-101."
32. See id. § 61-8-401.
33. See id. § 61-7-104.
34. See id. § 61-7-106.
35. See id. § 61-6-302.
37. See id. at ___, 964 P.2d at 769.
38. See id.

On October 21, 1996, the State filed a notice of intent to offer the written crime lab report as evidence of criminal possession of dangerous drugs pursuant to 803(8) of the Montana Rules of Evidence. Clark argued that admitting the lab report without calling its author violated his right to confrontation, and chose not to subpoena her. The court ruled that pursuant to Rule 803(8), Clark would have to subpoena the author as a witness if he desired her presence.

On November 27, 1996, a jury convicted Clark of criminal possession of dangerous drugs, criminal possession of drug paraphernalia, DUI, failure to remain at the scene of an accident, and failure of duty to stop upon striking an unattended vehicle. On January 7, 1997, Clark was sentenced to five years with thirty-three days suspended for criminal possession of dangerous drugs, six months with thirty days suspended for criminal possession of drug paraphernalia, and ninety days for counts three, four and five. The sentences were to run concurrently.

The issue that Clark presented on appeal is whether the portion of 803(8) that governs the introduction of written reports from the Montana state crime laboratory violates the Confrontation Clause.

B. Holding

The Montana Supreme Court recognized that it presumes a legislative enactment to be constitutional, and will uphold it on review unless proven unconstitutional beyond a reasonable doubt.

Clark asserted that the portion of 803(8) of the Montana Rules of Evidence that governs the introduction of state crime

39. See id.
40. See id.
41. See id.
43. See id.
44. See id.
45. See id.
46. See id. at __, 964 P.2d at 768.
47. See id. at __, 964 P.2d at 770 (citing Zempel v. Uninsured Employers' Fund, 282 Mont. 424, 428, 938 P.2d 658, 661 (1997) (holding that Workers' Compensation Act did not deny equal protection of the laws or access to the courts under the Montana Constitution to plaintiff injured while working for business on Flathead Reservation)).
lab reports violated his right to confront and cross-examine his "accuser." He argued that the court, by admitting the lab report, denied him a chance to cross-examine the technician, to observe her at trial, to cast doubt on the accuracy of her report, and to question the chain of custody. The State rejected Clark's argument, citing federal court decisions holding that admitting crime lab reports without requiring the technician to testify does not violate the Confrontation Clause of the United States Constitution's Confrontation Clause.

The court invoked its right to interpret the Montana Confrontation Clause to afford greater protection than the United States Constitution. The court cited State v. Stever to illustrate that it was not bound by a United States Supreme Court interpretation of the Sixth Amendment.

The court distinguished Montana's Confrontation Clause from the federal version by its language that guarantees the defendant the right "to meet witnesses against him face to face." The court discussed the importance of full cross-examination as a critical aspect of the right of confrontation, which is a fundamental right of an accused person in a criminal prosecution. According to the court, cross-examination produces truth. Body language, demeanor, and hesitancy in the response of the witness can communicate to the fact-finder

49. See id.
50. See id. at __, 964 P.2d at 770-71 (citing United States v. Roulette, 75 F.3d 418, 422 (8th Cir. 1996) (holding lab reports identifying the substance in drug case may be introduced without requiring the state to prove the author's unavailability)); See also Respondent's Brief at 9-11, Clark (No. 97-096).
51. See id. at __, 964 P.2d at 771 (citing Pfost v. State, 219 Mont. 206, 215, 713 P.2d 495, 500-01 (1985) (holding that Montana's Equal Protection Clause provides a separate ground from the federal version on which rights of Montanans may be founded), overruled on other grounds by Meech v. Hillhaven West, Inc., 238 Mont. 21, 26, 776 P.2d 488, 491 (1989)).
52. 225 Mont. 336, 344, 732 P.2d 853, 858 (1987) (holding that admission of coconspirator's statements under coconspirator exception to hearsay rule did not violate defendant's right of confrontation).
54. Id. (quoting MONT. CONST. art. II, § 24, supra note 7).
55. See id. (citing State v. Young, 249 Mont. 257, 260, 815 P.2d 590, 592 (1991) (holding the defendant's right of confrontation was abridged by trial court's refusal to grant immunity to witness who invoked Fifth Amendment privilege against self-incrimination before cross-examination was completed)).
56. See id.
57. See id.
as much as spoken words.\textsuperscript{58}

The court held that due to the critical nature of the lab report evidence, Clark was entitled to inquire into the technician's experience, background, training, as well as method and manner of conducting the tests.\textsuperscript{59} The court stated that the framers of the Montana Constitution appreciated the need for such safeguards, and purposely distinguished Montana's Constitution from the federal version.\textsuperscript{60} The court held that the portion of 803(8) of the Montana Rules of Evidence governing the introduction of crime lab reports violates Article II, Section 24, of the Montana Constitution.\textsuperscript{61}

III. THE CRIME LAB

A. Procedures, Structure, and Purpose

All of the parties in \textit{Clark}, including the court, incorrectly refer to the author of the crime lab report as a "technician."\textsuperscript{62} According to Bill Unger, Administrator of the Forensic Science Division, the correct title is "Forensic Scientist."\textsuperscript{63} Forensic scientists have codified licensing requirements.\textsuperscript{64} If an employee is hired with no prior forensic experience, the employee undergoes an in-house training period from six to sixteen months, depending on the employee's qualifications.\textsuperscript{65} All employees, regardless of their prior experience, must complete the Forensic Science Division's level of proficiency.\textsuperscript{66}

The crime lab employs different techniques for different

\textsuperscript{58} See id.
\textsuperscript{60} See id.
\textsuperscript{61} See id. at 771-72.
\textsuperscript{62} Id. at ___. 964 P.2d at 770-72; Respondent's Brief at 11, 17, \textit{Clark} (No. 97-096); Appellant's Brief at 16-18, \textit{Clark} (No. 97-096).
\textsuperscript{63} Letter from Bill Unger, Administrator of the Forensic Science Division, to Nicholas J. Weilhammer (Nov. 11, 1998) (on file with author).
\textsuperscript{64} See MONT. CODE ANN. § 37-34-303(1) (1997), which states: "The board shall issue a clinical laboratory scientist license to an individual who meets the qualifications as promulgated by rules of the board. At a minimum, a licensee must be a person who: has graduated with a baccalaureate degree, including a minimum number of hours in areas or disciplines established by rule by the board; and has passed a certifying examination approved by the board." (Sections 2 and 3 list requirements for laboratory specialists and laboratory technicians).
\textsuperscript{65} See Nov. 11, 1998 letter, supra note 63.
\textsuperscript{66} See Nov. 11, 1998 letter, supra note 63.
kinds of submissions. Each technique is designed to insure reliable, accurate lab results. For example, in a suspected marijuana sample, the scientist, upon receiving the sample, examines the packaging containing the sample to ensure it is properly sealed with evidence tape, and no sign of entry is present. The evidence is then opened, inventoried, and weighed. Afterwards, the scientist examines the evidence microscopically. A small portion is removed for further analysis, and the remainder is repackaged and sealed. If the analysis requires the entire sample, which rarely occurs, the lab will call the submitting agency and ask them to notify the defense attorney. The lab will then wait for permission to use the sample. A portion of the sample is usually kept to allow the defense the opportunity to do an independent analysis. To ensure against contamination, blanks are run to ensure accuracy. The evidence then undergoes an analysis by subjecting it to methanol, and the extraction is then analyzed by gas chromatography/mass spectrometry (GC/MS). When the test is complete, a peer review is done of the analysis, and the scientist completes her report. After the report is written, there is a supervisory review before the lab issues the report. The remaining evidence is then returned to the submitting agency. The only concern of the scientist is to identify the

67. See Nov. 11, 1998 letter, supra note 63.
68. See Nov. 11, 1998 letter, supra note 63.
69. See Nov. 11, 1998 letter, supra note 63.
70. See Nov. 11, 1998 letter, supra note 63.
71. See Nov. 11, 1998 letter, supra note 63.
72. See Nov. 11, 1998 letter, supra note 63.
73. See Nov. 11, 1998 letter, supra note 63.
74. See Nov. 11, 1998 letter, supra note 63.
75. See Nov. 11, 1998 letter, supra note 63; see also Letter from Bill Unger, Administrator of the Forensic Science Division, to Nicholas J. Weilhammer (Jan. 29, 1999) (on file with author) ("[A] blank (usually the reagent is methanol) is run to show there is no contamination from the prior run. If there is a contamination another blank is run and this will continue until the column is clean and there is no possibility the result of a case is due to the immediate prior case.").
77. See Nov. 11, 1998 letter, supra note 63.
78. See Nov. 11, 1998 letter, supra note 63.
79. See Nov. 11, 1998 letter, supra note 63.
submission;\textsuperscript{80} therefore, Clark's reference to the forensic scientist as an "accuser" seems misplaced.\textsuperscript{81}

The hearsay exception of Rule 803(8) of the Montana Rules of Evidence does not extend to "law enforcement personnel."\textsuperscript{82} Forensic scientists regularly train law enforcement at the Montana Law Enforcement Academy, but are not considered "law enforcement."\textsuperscript{83} Forensic scientists at the Montana crime lab do not undergo any formal law enforcement training.\textsuperscript{84} The lab's role is more pedagogical—training law enforcement as to the proper collection, packaging and submission of evidence to the lab.\textsuperscript{85} The lab's statutory duty encompasses analysis for law enforcement and other state agencies.\textsuperscript{86} They also perform urine analysis for state correctional facilities, which may or may not be used in litigation.\textsuperscript{87}

Regretfully, the court in Clark does not address its infringement on the efficiency of the crime lab, or the practicalities of its decision. Currently, the crime lab receives in excess of 4000 submissions a year for sampling, with some submissions going to two or more sections of the lab.\textsuperscript{88} If Montana crime rates adhere to national statistics, the number of submissions to the crime lab dealing with the identification of controlled substances will undoubtedly increase over time.\textsuperscript{89}

\textsuperscript{80} See Nov. 11, 1998 letter, supra note 63.
\textsuperscript{81} Appellant's Brief at 16, Clark (No. 97-096). While the Confrontation Clause encompasses "witnesses," and not simply "accusers," Clark inadvertently offers a possible distinction between those who accuse and those who simply report unbiased facts.
\textsuperscript{82} See supra note 5.
\textsuperscript{83} See Nov. 11, 1998 letter, supra note 63.
\textsuperscript{84} See Nov. 11, 1998 letter, supra note 63.
\textsuperscript{85} See Nov. 11, 1998 letter, supra note 63.
\textsuperscript{86} See supra note 5.
\textsuperscript{87} See Nov. 11, 1998 letter, supra note 63.
\textsuperscript{88} See Nov. 11, 1998 letter, supra note 63:
The number of cases varies significantly in our lab, i.e. a Firearms Examiner may have 60 cases a year [sic] a Latent Fingerprint Examiner may have 15 cases a month, and a Chemist may have 60 cases a month. The number of cases completed doesn't reflect workload.
\textsuperscript{89} The Bureau of Justice Statistics reveal that in 1993, there were 791,789 arrests nationally for illegal possession, an increase of 43.3% since 1984. See Drug and Crime Facts, 1994 <http://www.ojp.usdoj.gov/bjs/pub/ascii/dcfacts.txt>.

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Obviously, the crime lab is concerned with the impact Clark will have in the future concerning the amount of time the scientists must spend testifying.\textsuperscript{90} In the few months since Clark, the lab has already noticed a "significant" increase in the number of subpoenas of its forensic scientists.\textsuperscript{91}

Before Rule 803(8) was adopted, the forensic scientist often testified over uncontested matters.\textsuperscript{92} The State Bar of Montana Criminal Defense Section and the Montana Association of Criminal Defense Lawyers argue that the parties may stipulate to the admission of the lab report.\textsuperscript{93} While this possibility is conceivable, it is highly unlikely that any defense attorney would have an interest in aiding the state in its prosecution of the attorney's client who is on trial for criminal possession. The defendant is more likely to prey upon the confusion and misunderstanding of the lay juror,\textsuperscript{94} who may already have a mistrust of science. Isolated cases of misconduct by other lab scientists\textsuperscript{95} will undoubtedly be brought up by the defense, creating an unwarranted suspicion in the minds of the jury that crime lab reports in general are unreliable.

\textbf{B. Admitting Crime Lab Reports in Montana}

Before the Montana Rules of Evidence were adopted, Montana accepted reports from the crime lab without calling the author to testify.\textsuperscript{96} In 1975, the court unanimously held a written criminal laboratory report identifying a substance taken

\textsuperscript{90} See Nov. 11, 1998 letter, \textit{supra} note 63.

\textsuperscript{91} See Jan. 29, 1999 letter, \textit{supra} note 75 (Though, as Unger notes, the cases since Clark are just beginning to be litigated; therefore, it is hard to tell what precise impact Clark will have.).

\textsuperscript{92} See \textit{Brief of Amici Curiae at Exhibit A-4, Clark} (No. 97-096).

\textsuperscript{93} See \textit{id. at} 8 ("An accused person may choose not to challenge the laboratory's test results as to the nature of the drug in question; rather, she may defend on the theory that she did not possess the drugs. In such a case, it might be possible to stipulate to the admissibility of a laboratory report.").

\textsuperscript{94} \textit{THE CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY AND GOVERNMENT}, commenting on scientific evidence: "Critics have objected that judges cannot make appropriate decisions because they lack technical training, that jurors do not comprehend the complexity of the evidence they are supposed to analyze . . . ." \textit{CARNEGIE COMM’N ON SCIENCE, TECHNOLOGY, & GOV’T, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES} 11 (1993).

\textsuperscript{95} In the Matter of West Virginia State Police Crime Lab., 438 S.E.2d 501 (W. Va. 1993) (upholding lower court's finding that a serologist from the state crime laboratory had falsified evidence) (cited in the Brief of Amici Curiae at 9, \textit{Clark} (No. 97-096)).

from the defendant as marijuana admissible under the Uniform Official Reports as Evidence Act.97

The implementation of 803(8) of the Montana Rules of Evidence in 1977 had seemingly overruled Snider.98 The old rule's adoption caused substantial difficulties in the operation of the crime lab, prompting the Attorney General to ask the Montana Supreme Court Commission on Rules of Evidence (Commission) to reconsider the question.99 The Commission amended 803(8) with the crime lab exception, resulting in the current version of Rule 803(8) of the Montana Rules of Evidence.100 The Commission decided that there was no violation of confrontational rights under the proposed rule since the defendant had the right to subpoena the witness, or request the trial court to call the witness pursuant to Rule 614 of the Montana Rules of Evidence.101 Two of the current justices102 signed the order in 1990;103 eight years later, both of them held their order unconstitutional.

While the court had not ruled on the constitutionality of Rule 803(8) of the Montana Rules of Evidence before Clark, the court had recognized Rule 803(8). In 1992, the court in State v. Zachuse104 allowed the crime lab report into evidence, including a chain of custody log for drug evidence that listed names of persons at the crime lab who handled the evidence.105 In State v. Bradley,106 the court held that the crime lab report containing the defendant's blood test was within the hearsay exception of Rule 803(8) of the Montana Rules of Evidence.107

97. See id. The MONT. REV. CODE ANN. § 93-901-1 (1947) stated: "Written reports of findings of fact made by officers of this state, on a matter within the scope of their duty as defined by statute, shall, in so far as relevant, be admitted as evidence of the matters stated therein."

98. See Brief of Amici Curiae at Exhibit A-4, Clark (No. 97-096).

99. See id. ("Laboratory personnel were required to use large amounts of time and funds traveling to court hearings where their findings were not contested. The alternative of changing to the equivalent Federal Rule, and admitting a wide variety of public records now classed as hearsay, was rejected, but the Commission agreed that laboratory reports were a special case and should be an exception to the hearsay rule.".

100. See id.

101. See id.

102. Justice Hunt and Chief Justice Turnage were members of the court in 1989.

103. The court has authority pursuant to MONT. CONST. art. VII, § 2(3) to make rules governing practice and procedure for all other courts.


105. See id.


107. See id.
C. Admitting Crime Lab Reports in Federal Court

The Federal Rules of Evidence govern the admission of lab reports in federal courts under the regularly conducted activity and public record exceptions. Regardless of the difference between Montana and Federal evidentiary rules, a majority of federal courts have held that the admission of lab reports without calling its author as a witness did not violate federal confrontational rights. While Montana Rule of

108. Note, however, that in probation revocation hearings, courts are urged to apply evidentiary rules flexibly. See FED. R. EVID. 1101(d)(3); United States v. Kindred, 918 F.2d 485 (5th Cir. 1990) (holding lab report could be admitted through testimony of probation officer); Morrissey v. Brewer, 408 U.S. 471 (1972) (holding confrontation rights under the Sixth Amendment still apply in probation revocation hearings).

109. See FED. R. EVID. 803(6) which states: "Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

110. See FED. R. EVID. 803(8) which states: "Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

111. FIRST CIRCUIT: Manocchio v. Moran, 919 F.2d 770 (1st Cir. 1990) (allowing autopsy report for purpose of proving cause of death); SECOND CIRCUIT: United States v. Frattini, 501 F.2d 1234 (2d Cir. 1974) (holding chemist's report identifying substance as cocaine admissible under business records exception); Reardon v. Manson, 806 F.2d 39 (2d Cir. 1986) (holding admission of drug test identifying substance as marijuana allowed without testimony by performing chemist); FOURTH CIRCUIT: Kay v. United States, 255 F.2d 476 (4th Cir.) (holding admission of certificate showing blood alcohol content of defendant did not deprive defendant of right to confrontation); FIFTH CIRCUIT: United States v. Kindred, 918 F.2d 485 (5th Cir. 1990) (holding defendant's right of confrontation was not violated by admission of a urinalysis report without the author's testimony in probation revocation hearing); United States v. McCormick, 54 F.3d 214 (5th Cir. 1995) (holding urinalysis report did not violate releasee's confrontational rights); Sherman v. Scott, 62 F.3d 186 (5th Cir. 1995) (holding admission of laboratory analysis through the supervisor of two of the chemists who did the report did not violate confrontation rights); SEVENTH CIRCUIT: United States v. Pierre, 47 F.3d 241 (7th Cir. 1995) (holding results of drug test admissible in probation revocation hearing through affidavit of lab director); EIGHTH CIRCUIT: United States v. Baker, 855 F.2d 1353 (8th Cir. 1988) (holding lab report identifying controlled substance, as a firmly rooted exception to hearsay rule, did not violate Confrontation Clause); United States v. Bell,
Evidence 803(8) differs from its federal counterpart, it is enlightening to examine federal courts' confrontational analyses of admitting lab reports without the author's presence.

Federal courts have justified their conclusions based on the fact that a lab report is likely to contain detailed descriptions that often will be superior to the scientist's later recollection. Ordinarily, the author of the lab report will only be able to testify by reference to the report. The lab professional often employs routine, standardized procedures, "exercising a special responsibility which the law assigns to him," that assure their independent reliability. The courts have placed special emphasis with those departments that have statutory requirements for employment qualification. It is presumed that chemists have no motivation to falsify information on reports, thus jeopardizing their careers. In *United States v. Pierre*, Judge Easterbrook added:

"What was the technician going to say on the stand? One vial of urine looks like another; the technicians would not have remembered what they did with [the releasee's] specimens and therefore would have described their normal procedures, and the judge would not have been enlightened. A court cannot resolve scientific controversies by looking witnesses in the eye; the question is not whether a technician believes the tests accurate but whether they are accurate. To find out whether tests are accurate, one uses the methods of science."

IV. THE CONFRONTATION CLAUSE

A. The Origin of Montana's Confrontation Clause

Montana is not the only state that retains the often-

785 F.2d 640 (8th Cir. 1986) (holding urinalysis report did not violate confrontational rights in probation revocation hearing); *United States v. Roulette*, 75 F.3d 418 (1996) (holding lab report identifying substance as cocaine did not violate confrontation rights as a firmly rooted hearsay exception); TENTH CIRCUIT: *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994) (holding admission of police chemist's laboratory notes did not violate Confrontation Clause).

113. *See id.*
114. *Id.* at 775.
115. *See* Reardon v. Manson, 806 F.2d 39, 43 (2d Cir. 1986).
116. *See id.*
117. 47 F.3d 241 (7th Cir. 1995).
118. *Id.* at 243.
circumscribed language that requires witnesses to testify against a defendant "face to face." Given the importance that the court attributes to this fourteenth century phraseology, as well as the framers’ intent in distinguishing Montana's Constitution from the United States Constitution, it is important to ascertain the motivation of the framers for using such language. Unfortunately, Montana records do not go that far back in time.

Some reasonable inferences can be made as to the origin of Montana's Confrontation Clause. Looking at the 1972 Constitutional Convention, the Bill of Rights Committee stated:

The committee voted unanimously to retain the former [1889 Montana Constitution] Article III, Section 16 unchanged. The committee felt it was an admirable statement of the fundamental procedural rights of an accused. No delegate proposals were received on this provision.

Rick Applegate, research analyst for the 1972 Bill of Rights Committee, aligns Montana's provision with the federal version, noting that "this type of provision 'is no more than a


120. See Webster's Ninth New Collegiate Dictionary 444 (1983). The word "confront" has roots which imply the right to face accusers: "the word 'confront' ultimately derives from the prefix 'con' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)." Coy v. Iowa, 487 U.S. 1012, 1016 (1988). One scholar notes that "[i]n the first half of the sixteenth century, practitioners must have begun to use the phrase 'face to face' to capture the essence of a defendant's right to confrontation." Frank R. Herrmann & Brownlow M. Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481, 539-40 (1994).

121. See State v. Clark, __Mont. __, 964 P.2d 766, 771 (1998) ("The framers of the Montana Constitution... saw fit to distinguish our Confrontation Clause from the United States Constitution by insuring a criminal defendant the right 'to meet the witnesses against him face to face.'").


123. Wade Dahood, Chairman of the Bill of Rights Committee, explained Applegate's role: "Our work... would not have succeeded so completely without the intense dedication of our research analyst, Rick Applegate [sic] who listened to our desires and expertly analyzed and researched the issues and provided the logical and authoritative support necessary to frame these concepts...." 100 DELEGATES – MONTANA CONSTITUTIONAL CONVENTION OF 1972, at 25 (1989).

124. After quoting the United States Confrontation Clause, Applegate says that
restatement of a very old common law rule dating from around 1600.”

Applegate declares that the “principal design of this provision is to permit the defendant to cross-examine his accusers and to question their credibility.” Various behavior patterns, according to Applegate, “can indicate to a jury what a literal statement cannot.” Applegate justifies face-to-face confrontation by the court’s language in State v. Storm, a case the Montana Supreme Court expressly overruled two years prior to his Bill of Rights Committee study and the Constitutional Convention. Applegate cites a series of United States Supreme Court cases in conveying the importance of face-to-face confrontation.

In his conclusion, Applegate notes that the “rights of confrontation and cross-examination are among those suggested for extension to administrative hearings and legislative investigations.” Applegate warns: “there is a potential conflict between this right [of confrontation] and the detention provisions of Article III, Section 17 [of the 1889 Constitution].” On the conventional floor, there was confusion as to how the two provisions were to be reconciled. The Chairman of the Bill of Rights Committee postulated that


125. Id. (quoting DAVID FELLMAN, THE DEFENDANT’S RIGHTS 47 (1958)). Professor Fellman’s excerpt, written before the Supreme Court held that the Fourteenth Amendment applied the Sixth Amendment to states, refers to the Sixth Amendment.

126. Id.

127. Id. at 171.

128. 127 Mont. 414, 419, 265 P.2d 971, 973 (Mont. 1953). Applegate misquotes the following passage: “It was the right of the defendant to have the jury see and observe the witness Hay upon the witness stand. It was his right that the jury see how Hay acted while under direct and cross-examination. It was his right to have the jury judge the credibility of Hay from his appearance and manner while on the witness stand. None of these rights could be had except and unless the witness met the defendant ‘face to face’ in the presence of the jury during the course of the trial.” Applegate, supra note 124, at 171.

129. See Applegate, supra note 124, at 171. State v. Storm was overruled by State v. Bouldin, 153 Mont. 276, 282, 456 P.2d 830, 833 (1969) (holding that preliminary testimony of an absent witness was admissible).

130. See Kirby v. United States, 174 U.S. 47 (1899) (holding that the confrontation right is fundamental guarantee); Pointer v. Texas, 380 U.S. 400 (1965) (holding that the Fourteenth Amendment applies the Sixth Amendment to the states).

131. Applegate, supra note 124, at 172.

132. See infra note 139.

133. Applegate, supra note 124, at 172.

134. See 5 MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS 1773-75 (1981).
depositions could be used, and satisfy the Confrontation Clause, when "there has been fair process, just process, due process with respect to that defendant."135 The conflict between the use of depositions and face-to-face confrontation was recognized by the framers of the previous Montana Constitution nearly one hundred years prior to the 1972 Constitutional Convention.136

On July 4, 1889, a convention of seventy-five delegates met in Helena, Montana.137 In the 1889 account, Proceedings and Debates of the Constitutional Convention, there is little debate on the Confrontation Clause upon its introduction to the convention floor.138 However, the Detention Clause139 prompted discussion as to the meaning and scope of face-to-face confrontation.140 Delegate J.K. Toole of Lewis & Clark County expressed his displeasure over the apparent conflict between the Confrontation Clause and the Detention Clause.141 According to Toole, the accused had an unfettered right to confront witnesses at trial under the Confrontation Clause in accordance with the United States Constitution.142 In his plea to strike the use of depositions at trial, Toole used policy arguments from the Book of Luke and Queen Mary of Scotland.143

Delegate Hiram Knowles of Silver Bow County responded by illustrating that courts had not required a witness to be present for the preliminary examination and trial "for a great

135.  Id. at 1774.
136.  See Proceedings, supra note 1, at 254-61.
138.  See Proceedings, supra note 1, at 124.
139.  See Mont. Const. of 1889, art. III, § 17 (1972) which stated: "That no person shall be imprisoned for the purpose of securing his testimony in any case longer than may be necessary in order to take his deposition. If he can give security for his appearance at the time of trial he shall be discharged upon giving the same; if he cannot give security his deposition shall be taken in the manner prescribed by law, and in the presence of the accused and his counsel, or without their presence, if they shall fail to attend the examination after reasonable notice of the time and place thereof. Any deposition authorized by this section may be received as evidence on the trial, if the witness shall be dead or absent from the state."
141.  See Proceedings, supra note 1, at 255-57.
142.  See Proceedings, supra note 1, at 255 ("I undertook [Section 16] to show that the original intention of the Constitution of the United States, when it provided that the defendant should be entitled to meet the witness face to face meant something more than meeting him before the committing magistrate.").
143.  See Proceedings, supra note 1, at 256.

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many years."\textsuperscript{144} Knowles believed that the Confrontation Clause and the Detention Clause "will be construed together by any court in the world."\textsuperscript{145} Delegate Stapleton of Silver Bow County supported Knowles' position, noting that the use of depositions provided protections for the citizens of Montana.\textsuperscript{146} The committee on the whole rejected Mr. Toole's motion to strike the Detention Clause, which was subsequently passed.\textsuperscript{147}

While the mammoth \textit{Proceedings and Debates} provides some insight as to the Confrontation Clause's origin, Montana scholar James McClellan Hamilton notes that several proposals were copied verbatim from the 1884 Constitutional Convention in the interest of time and money.\textsuperscript{148} Looking at the rejected 1884 Montana Constitution, one finds that Article I, Section 16 is virtually identical to the 1889 version.\textsuperscript{149} The 1884 convention proceedings, available in longhand format,\textsuperscript{150} reveal the delegation largely deferred to the Bill of Rights.

\begin{footnotes}
\footnote{144. See \textit{Proceedings}, supra note 1, at 258 ("The gentleman [Mr. Toole of Lewis & Clark] wishes this matter so established and fixed that the witness must be present upon trial. As he has admitted here, this is against former decisions of the courts.").}

\footnote{145. See \textit{Proceedings}, supra note 1, at 258.}

\footnote{146. See \textit{Proceedings}, supra note 1, at 260 ("Now, you take the proposition of Mr. Toole, that a deposition shall in no case be taken: take the other proposition that the witness shall in no case be imprisoned and held as a witness; why, it necessarily results you have got no witness when the day of trial comes, and the result is that a man who has committed a cold-blooded murder, or any other crime that was witnessed by half a dozen people cannot be convicted because they are all gone and there is nobody to fix the murder at all . . . . The people demand that they shall be protected . . . .").}

\footnote{147. See \textit{Proceedings}, supra note 1, at 262.}

\footnote{148. See JAMES MCCLELLAN HAMILTON, \textit{FROM WILDERNESS TO STATEHOOD} 541 (1957) (noting that many sections, especially the Bill of Rights, were taken from the Convention of 1884, and approved in the committee of the whole without discussion or amendment).}

\footnote{149. MONT. CONST. of 1884 art. I, § 16 (not ratified) states: "That in criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."}

\footnote{The only discrepancies from the 1889 version is the absence of the phrase "subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same," which concludes the clause, and the insertion of "all" in front of "criminal prosecutions." The latter amendment was an attempt to conform to the Sixth Amendment. Both amendments made were on Friday, July 19th, 1889. See \textit{Proceedings}, supra note 1, at 160, 167.}

\footnote{150. The longhand version of the proceedings and journal of minutes were found in 1970 as a result of the Secretary of State's efforts to organize Montana's territorial records. Alexander Blewett, \textit{Preface to Index to Proceedings and Debates of the 1889 Montana Constitutional Convention, in Montana Constitutional Convention Comm'n, Montana Constitutional Convention Memorandum No. 5}, at iii, iii-iv (1972).}
\end{footnotes}
Committee.\textsuperscript{151}

In 1910, Elbert Allen found that many provisions in Montana's constitution, particularly the Declaration of Rights, were taken directly from the constitution of Colorado.\textsuperscript{152} Colorado, which achieved statehood in 1876, retains the same constitution, which was written in the same year. Colorado's original draft\textsuperscript{153} of its Confrontation Clause underwent a series of amendments at the constitutional convention of 1876,\textsuperscript{154} which resulted in the first and final draft of the 1884 Montana Confrontation Clause.\textsuperscript{155}

To continue tracing the history of Montana's Confrontation Clause, one must follow the Lewis and Clark Trail back to Missouri. Looking at the present-day Confrontation Clause of the 1945 Missouri Constitution, one notices that Section 18(a)\textsuperscript{156} contains virtually the same language as the rough draft of Colorado's Confrontation Clause.\textsuperscript{157} In addition, Montana, Colorado, and Missouri all share strikingly similar provisions in their Bill of Rights.\textsuperscript{158} The Historical Notes reveal that the 1945

\begin{footnotesize}
\begin{enumerate}
\item Proceedings of the Convention Convened at Helena, Montana Territory, Jan. 14, 1884, microformed by Montana Historical Society. The manuscript is available at the Secretary of State's office, the Historical Society Library, the University of Montana Library and Montana State University Library.
\item Elbert F. Allen, Sources of the Montana Constitution (1910), reprinted in Montana Constitutional Convention Comm'n, Montana Constitutional Convention Memorandum No. 4, at 1-2 (1972).
\item Article II, then § 18 of the Colorado Constitution stated: "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation, to meet the witnesses against him face to face, to have process to compel the attendance of witnesses in his behalf and a speedy public trial by an impartial jury of the country [sic]." Proceedings of the Constitutional Convention Held in Denver, December 20, 1875, at 91 (1907).
\item The puzzling use of the word "country," most likely a misprint or inadvertent error, was changed to "county or district in which the offense is alleged to have been committed." Id. at 208. Another amendment, adding "except as provided in section 19 of this article" after "face to face," was passed and later abandoned. Id. at 208, 488.
\item See supra note 149.
\item Mo. Const. art. I, § 18(a) states: "Rights of accused in criminal prosecutions. That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county."
\item Compare supra notes 149 and 153. The only discrepancy is Colorado's use of the word "country."
\item The provisions below all share linguistic similarities:

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Missouri Constitutional Convention adopted the clause, without change, from the 1875 Missouri Constitution, one year prior to the Colorado Convention.¹⁵⁹

Nebraska's present-day Confrontation Clause, also contains the same language,¹⁶⁰ lacking only the venue clause that Montana added at the 1889 Constitution.¹⁶¹ Unlike Missouri, Nebraska's history of their Confrontation Clause ends in 1875.¹⁶² The Missouri Historical Notes trace Missouri's Confrontation Clause origin back further, stating that the provision is substantially similar to the 1865 and 1820 Constitutions.¹⁶³ Given Missouri's earlier inception into the Union than either Montana, Colorado, or Nebraska,¹⁶⁴ as well as its importance as a territorial outpost during early Western

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¹⁵⁹. MO. CONST. of 1875, art. II, § 22 (1945).

¹⁶⁰. NEB. CONST. art. I, § 11 states: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Compare supra notes 149, 153, and 156.

South Dakota's Confrontation Clause also contains strikingly similar characteristics. See S.D. CONST. art. VI, § 7. However, the subtle linguistic variations, as well as the nearness in time of the South Dakota and Montana constitutional conventions, tend to suggest that Montana's Clause has another source.

¹⁶¹. See supra note 149.

¹⁶². The source is credited to NEB. CONST. of 1875, art. I, § 11 (1943).

¹⁶³. MO. CONST. of 1865, art. I, § 18 (1875); MO. CONST. of 1820, art. XIII, § 9 (1865).

¹⁶⁴. Missouri achieved statehood in 1821; Nebraska and Montana became states in 1867, and 1889, respectively.
expansion, it is a likely source for Montana’s Confrontation Clause. Unfortunately, no historical record from the 1820 Missouri Constitutional Convention exists.

Continuing the search for the Confrontation Clause’s origin, one finds that Pennsylvania’s Confrontation Clause holds additional clues. Filling in the recently removed “face to face” language, the current Pennsylvania Confrontation Clause looks vaguely familiar. The Historical Notes reveal that the Pennsylvania Constitutions of 1838 and 1790 contained identical provisions, the recent amendments notwithstanding.

165. See, e.g., THOMAS D. CLARK, FRONTIER AMERICA: THE STORY OF THE WESTWARD MOVEMENT (1959); 3 LOUIS HOUCK, A HISTORY OF MISSOURI (1908); JOHN BRADBURY, TRAVELS IN THE INTERIOR OF AMERICA IN THE YEARS 1809, 1810, AND 1811 (U. of Neb. 1986); THOMAS EDWIN SPENCER, THE STORY OF OLD ST. LOUIS (1914).

Missourians have long been aware of their status as a leader in western policymaking, noting at an 1861 convention discussing civil war: “That Missouri is an integral part of the great West... and invites her sister States of the West... to inaugurate a Western policy, loyal to the Federal Constitution and the Union of the States.” Journal and Proceedings of the Missouri State Convention, Held at Jefferson City and St. Louis 26 (Mar. 1861).

166. Montana more closely resembles the syntax and punctuation of Missouri’s Confrontation Clause than Nebraska’s Clause. Furthermore, brief reference to Missouri case law is made at the 1889 Montana Constitutional Convention during the discussion of the Detention and Confrontation Clauses. See Proceedings, supra note 1, at 258.

167. PA. CONST. art. IX, § 9 states: “In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself. Notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television.”

The Historical Notes reveal that the second sentence was added in 1984, the third sentence was added in 1995, and the requirement that the defendant “meet the witnesses face to face” for “be confronted with the witnesses against him” in 1995.

Prior to the removal of the “face to face” language, the Pennsylvania Supreme Court strictly enforced the defendant’s right to confrontation: “Many people possessed the trait of being loose-tongued or willing to say something behind a person’s back that they dare not or cannot truthfully say to his face or under oath in a courtroom. We have no right to disregard or (unintentionally) erode or distort any provision of the Constitution, especially where, as here, its plain and simple language make its meaning unmistakably clear...” Commonwealth v. Russo, 131 A.2d 83, 88 (Pa. 1957).

168. Compare supra notes 149, 153, 156, and 167.

169. PA. CONST. art. I, § 9 historical notes.
Furthermore, the Pennsylvania Constitution of 1776 contained a "substantially similar provision." The similarities between the Missouri Confrontation Clause and the Pennsylvania Confrontation Clause are undeniable; therefore, Montana’s Confrontation Clause appears to have its roots in eighteenth century Pennsylvanian jurisprudence.

The Missouri and Nebraska Supreme Courts interpret their Confrontation Clause in accordance with the United States Supreme Court. However, the Montana Supreme Court, with virtually the same provision as Missouri and Nebraska, usually reserves its right to interpret Montana’s confrontational rights differently.

B. The Montana Confrontation Clause and the Montana Supreme Court

The Montana Supreme Court has often recognized its right to interpret a Montana constitutional provision as affording greater protection than its federal counterpart. Regardless of

170. Id.
171. Certainly, the requirement of bringing accusers before a defendant has been around much longer. As one article notes, it has been acknowledged for at least 1,500 years. Frank R. Herrmann & Brownlow M. Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 VA. J. INT'L L. 481, 483 (1994). However, this requirement applied only to the accuser, not the prosecution's witnesses. Id. at 488.
172. The Missouri Supreme Court, in State v. Schaal, 806 S.W.2d 659, 662 (Mo. 1991), stated: "[t]he confrontation rights protected by the Missouri Constitution are the same as those protected by the Sixth Amendment of the United States Constitution." (holding that videotaped statement of child victim of sexual abuse does not violate defendant's confrontation or due process rights).
173. The Montana Supreme Court has never officially commented on constitutional similarities with Missouri or Nebraska.
174. Compare infra notes 175 and 184.
175. Pfost v. State, 219 Mont. 206, 215, 713 P.2d 495, 500-01 (1985); See Ranta v. State, ___ Mont. ___, 958 P.2d 670, 675 (1998) ("[W]e refuse to 'march lock-step' with the United States Supreme Court, even where the applicable state constitutional provisions are nearly identical to the United States Constitution."); State v. Scheetz, 286 Mont. 41, 47, 950 P.2d 722, 725 (1997) ("[W]e have chosen not to 'march lock-step' with the United States Supreme Court, even when applying nearly identical language."); Kills on Top v. State, 279 Mont. 384, 420, 928 P.2d 182, 204 (1996) ("We have chosen not to 'march lock-step' with the United States Supreme Court, even when applying nearly identical language."); Byers v. Mahoney, 279 Mont. 28, 32, 929 P.2d 202, 205 (1996) ("We have stated that we will not 'march lock-step' with the United States Supreme Court where
whether its reasoning is independently justified in light of
Nebraska and Missouri case law, the court has failed to
illustrate any qualifiable difference between the Montana
Confrontation Clause and the federal version.

The court has held that the integrity of the fact-finding
process at trial is undermined when the parties do not have the
opportunity to confront each other or the witnesses. However,
the right to confrontation has never been "absolute" in
Montana. In *Tooker v. State*, the court allowed depositions
to be introduced at trial due to the inability to locate
witnesses. In *State v. McCord*, the court allowed detectives
to introduce inculpatory statements made by an unavailable
witness that contradicted the defendant's testimony. The
court has also allowed child witnesses to testify in court through
the placement of a screen between the defendant and the
witnesses in a sexual assault case. None of the above cases
allowed the defendant to confront his or her accuser face to face
at trial.

The court has stated that the Montana Constitution, using
substantially similar language to the Sixth Amendment, "grants
the same right." The court explained the primary purpose
behind both provisions: "The primary purpose behind both of
these provisions was to prevent an accused from being convicted

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176. *See supra* note 172.

(finding reversible error in divorce proceedings to allow wife to testify by telephone at
hearing on merits of custody and child support issues).

178. *See* State v. Vanella, 40 Mont. 326, 106 P. 364 (1910) (noting that the
Detention Clause illustrates that the right to confrontation is not absolute); State v.
Storm, 127 Mont. 414, 265 P.2d 971 (1953) (noting the right of a defendant in a criminal
case to meet the witnesses against him face to face is not absolute) (dissenting opinion);
Tooker v. State, 147 Mont. 207, 410 P.2d 923 (1966) (holding appellant was not denied
confrontational rights when depositions of unavailable witnesses were introduced at
trial).


180. *See id.* at 219, 410 P.2d at 929.


182. *See id.* at 323, 825 P.2d at 198.

Supreme Court based its argument on the Sixth Amendment, it later stated that it
"adopted" the United States Supreme Court's reason for protecting sexually abused
1383, 1388 (1997).

solely on the basis of ex parte affidavits or depositions."

Not since Storm has the Montana Supreme Court relied
so heavily on the "face to face" phraseology of the Confrontation
Clause. In Storm, the defendant was charged with second-
degree murder. The prosecution, over objection by the
defense, read testimony from an absent witness who testified at
the defendant's first trial into the record. The court held that
admitting witness testimony from the defendant's first trial,
which was the only evidence linking the defendant at the scene
of the crime, was error. The court applied a strict
interpretation of the Confrontation Clause, relying on the
defendant's right to "face to face" confrontation. The lone
exception recognized by the court in Storm was the use of
depositions as allowed by the Detention Clause. The
confusing series of decisions following Storm has been
characterized as "bizarre"—an unreliable period where the court
excluded all former testimony in criminal actions, demanding
"face to face" confrontation. Finally, the court overturned
itself in State v. Bouldin, abandoning the inexorable right to
face-to-face confrontation, thus returning Montana "to the
mainstream."

\section*{C. The Federal Confrontation Clause and the United States
Supreme Court}

The United States Supreme Court has not directly ruled on
lab reports' admissibility. Given the Court's stance on
confrontational issues, it would likely admit lab reports without
the author's testimony under a confrontational analysis and
hearsay analysis.

\begin{thebibliography}{195}
\bibitem{185} Id.
\bibitem{186} 127 Mont. 414, 265 P.2d 971 (1953).
\bibitem{187} See id.
\bibitem{188} See id.
\bibitem{189} See id.
\bibitem{190} Id. at 417-18, 265 P.2d at 972.
\bibitem{191} See id.
\bibitem{192} WILLIAM F. CROWLEY, EVIDENCE CASES AND MATERIALS at 485-86 (Fall 1998)
("If taken at face value, this declaration would have excluded any type of hearsay in
criminal actions . . . . For the sixteen years that this bizarre doctrine was in effect,
Montana law was at variance with that of every other American jurisdiction.").
\bibitem{193} 153 Mont. 276, 456 P.2d 830 (1969) (holding admission of testimony of absent
witness taken at preliminary hearing satisfied confrontation rights).
\bibitem{194} See CROWLEY, supra note 192, at 486.
\bibitem{195} See James W. Diehm, Protecting Criminal Defendants' Rights When the

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In 1965, the Supreme Court applied the Confrontation Clause to the states in *Pointer v. Texas*, noting the role of cross-examination in exposing falsehood. The Court held that confrontation was a fundamental right that was essential to a fair trial. *Douglas v. Alabama*, decided the same day as *Pointer*, held that an adequate opportunity for cross-examination might satisfy the Clause, even in the absence of face-to-face confrontation. *California v. Green* compared the purposes of the confrontation clause in light of the "alleged dangers" of admitting out-of-court statements:

Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth;" (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding in assessing his credibility.

In *Chambers v. Mississippi*, the Court noted that the right to confront and to cross-examine is not absolute and may "bow to accommodate other legitimate interest in the criminal trial process." Finally, in *Ohio v. Roberts*, the Court attempted to establish guidelines for the hearsay declarant absent from cross-examination at trial. The Court held that the Confrontation Clause normally requires a showing that the witness is unavailable, and then the hearsay will be admitted

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**Government Adduces Scientific Evidence: The Confrontation Clause and Other Alternatives - A Response to Professor Giannelli**, 22 CAP. U.L. REV. 85, 94 (1993) ("Since it appears that both the business records exception and the public records exception are 'firmly rooted' exceptions to the hearsay, the Court would probably find that the admission of the [lab] report presents no confrontation issues.").

197. *See id.* at 404.
198. *See id.*
200. *See id.* at 418.
202. 5 WIGMORE ON EVIDENCE § 1367 (Chadbourn rev. 1974).
203. *Green*, 399 U.S. at 158.
205. *Id.* at 295 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972)).
207. *See id.*
208. *See id.* at 65 n.7 (holding that here the utility of trial confrontation is remote, the prosecution is not required to produce a seemingly available witness).
if it bears proper indicia of reliability. Lacking indicia of reliability or firm roots in hearsay exception, the Court still may admit the evidence if it contains particularized guarantees of trustworthiness.

Subsequent cases limited the Roberts unavailability requirement to situations involving former testimony. In United States v. Inadi, the court clarified Roberts in that it "cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." The court has stated: "the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured." While it is not clear in what cases the Supreme Court will impose an unavailability requirement, it is not expected to be a major consideration for admitting lab reports from forensic scientists in light of the other factors of reliability or firmly rooted hearsay exceptions.

D. Summary Analysis of Legislative Intent and Judicial Interpretation of Montana's Confrontation Clause

The court maintains it has authority to interpret the Montana Confrontation Clause to afford greater protection than the United States Constitution. Certainly, the court has the power to interpret acts of the legislature as it sees fit.

209. See id. at 65-66.
210. See id. at 66.
211. See id. Statements that contain "particularized guarantees of trustworthiness" include self-inculpatory statements, Lee v. Illinois, 476 U.S. 530 (1986), and statements which are considered so trustworthy that adversarial testing would add little weight as to its reliability, Idaho v. Wright, 497 U.S. 805 (1990).
212. See United States v. Inadi, 475 U.S. 387, 392-92 (1986) ("Roberts should not be read as an abstract answer to questions not presented in that case, but rather as a resolution of the issue the Court said it was examining . . ."); White v. Illinois, 502 U.S. 346, 354 ("Roberts stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.").
214. Id. at 394 (emphasis added).
Nevertheless, it is troubling to find that no legislative authority exists to support the Court’s empowering conclusion that the framers of the Montana Constitutions either intended or suggested an independent state interpretation that differs from the federal version.

The Research Analyst for the Bill of Rights Committee, Rick Applegate, cites decisions of the United States Supreme Court, and aligns Montana’s Confrontation Clause with a federal interpretation. The Constitutional Convention of 1889, which adopted the present Clause, also found it very much in line with the federal version; one delegate appears to be under the impression that the federal version uses the language “face to face.” While the 1884 Convention most likely borrowed the original language of the Clause from Missouri, it is doubtful that they believed their adoption of “face to face” language was intended to be a departure from a federal interpretation of the procedural rights of an accused. The Clause that exists today is one that was originally adopted by a Convention that had neither legal authority nor the conveniences of time or money to explore their ramifications.

In settings such as the 1889 Constitutional Convention in Montana, arbitrary linguistic choices often have to be made. Delegates may misconstrue precedent, or have completely different intentions than their word choice suggests, or may simply contradict themselves. To ignore literary imprecision on the part of constitutional drafters is to ignore shortcomings of human expression.

Though maintaining the right to interpret Montana’s Confrontation Clause differently from the federal version, the Montana Supreme Court has not done so in the past. In a 1987 case, the Montana Supreme Court stated that Montana’s Confrontation Clause contains substantially similar language, and “grants the same right.” The court has explicitly stated that the purposes behind both Clauses were identical. The Montana Supreme Court has never interpreted the Montana Confrontation Clause to grant an absolute right. The United

218. See supra note 142.
220. See supra note 128 and 142.
221. See discussion supra Part IV.A.
223. See id. at 88-90, 731 P.2d at 340.
224. See supra note 178.
States Supreme Court in accordance has also recognized confrontational exceptions.\textsuperscript{225}

In \textit{Clark}, the Montana Supreme Court cited \textit{State v. Stever}\textsuperscript{226} to illustrate that they were not bound by a United States Supreme Court interpretation of the Sixth Amendment.\textsuperscript{227} In \textit{Stever}, the court declared it was not bound by the United States Supreme Court, and then proceeded to adopt the reasoning of \textit{United States v. Inadi} in admitting an out-of-court statement made by a non-testifying coconspirator.\textsuperscript{228}

V. THE PURPOSE OF CROSS-EXAMINATION

The court fails to explain why Rule 803(8) of the Montana Rules of Evidence violates the Confrontation Clause beyond a reasonable doubt. Clark's right to confront and cross-examine his "accuser" was not violated by the portion of 803(8) that governs the introduction of state crime lab reports.\textsuperscript{229} Clark's argument is best supported by a theoretical absolute right of confrontation, which the Montana Supreme Court has expressly rejected in the past.\textsuperscript{230} Clark claims that he is entitled to an unfettered right to cross-examine the "technician," observe her at trial, cast doubt on the accuracy of her report, and question the chain of custody.\textsuperscript{231} The Montana Supreme Court agrees that Rule 803(8) infringes upon Clark's confrontational rights.\textsuperscript{232} The court explained the purpose of cross-examination:

Cross-examination is the hallmark of our system of justice because it produces truth. Such things as the demeanor of a witness, his or her body language, and a witness's hesitancy in giving testimony, often communicate as much as to the fact-finder as the spoken words. All of this is lost in a written deposition.\textsuperscript{233}

The court seems primarily interested in the production of

\begin{itemize}
\item \textsuperscript{225} See \textit{Richardson v. Marsh}, 481 U.S. 200, 211 (1987) (holding that admission of nontestifying codefendant's confession did not violate felony-murder defendant's right under confrontation clause); \textit{Maryland v. Craig}, 497 U.S. 836, 857 (1990) (holding that the Confrontation Clause does not categorically prohibit child witness in child abuse case from testifying against the defendant at trial, outside of defendant's presence).
\item \textsuperscript{226} 225 Mont. 336, 732 P.2d 853 (1987).
\item \textsuperscript{227} See \textit{State v. Clark, ___ Mont. ___, 964 P.2d 766, 771 (1998)}.
\item \textsuperscript{228} \textit{See Stever}, 225 Mont. at 344, 732 P.2d at 858.
\item \textsuperscript{229} See Appellant's Brief, \textit{supra} note 81.
\item \textsuperscript{230} \textit{See supra} note 178.
\item \textsuperscript{231} \textit{See State v. Clark, ___Mont. ___, 964 P.2d at 770}.
\item \textsuperscript{232} \textit{See id. at ___}, 964 P.2d at 771.
\item \textsuperscript{233} \textit{Id}.
\end{itemize}
truth through nonverbal forms of communication, namely the demeanor and body language of the scientist.\textsuperscript{234} The forensic scientist, who is not likely to be able to distinguish one report from another, should not be concerned with her demeanor or body language. As noted by one scholar: “Personal attractiveness, wardrobe, mannerisms, unusual speech patterns, or other visible characteristics of a witness that may be unrelated to truthfulness may influence whether the jurors or judge will credit a witness’s testimony.”\textsuperscript{235}

The forensic scientist’s report is based on objective facts, not opinions. Such is the nature of science. It is beyond this author’s comprehension how the body language of a forensic scientist illustrates the validity of a urinalysis or GC/MS analysis. For the finder of fact to question the content of the report based on the scientist’s demeanor dilutes the purpose and importance of cross-examination at trial. As Judge Easterbrook pointed out in \textit{United States v. Pierre},\textsuperscript{236} the question is not whether the scientist \textit{believes} the tests to be accurate, but whether they \textit{are} accurate.\textsuperscript{237} The defendant should bear the burden of disproving scientific facts that are a result of the regularly conducted activity of experienced forensic scientists. This could easily be accomplished by a subpoena of the scientist, thus forcing her to testify, or an independently conducted test by another lab.

The court also stated that evaluating the hesitancy of the forensic scientist to recall her report produces truth.\textsuperscript{238} Given the volume of reports the lab must analyze every year, the hesitancy of the forensic scientist on the witness stand should be \textit{expected} by the trier of fact. It is unlikely the forensic scientist had anything to add to the detailed report, which was likely written several months or more prior to trial. In addition to field and trial work, the Montana Supreme Court now mandates that the forensic scientist spend time reviewing her work to ensure against hesitancy in front of the fact finder.

The court formally recognizes Clark’s fundamental right at

\textsuperscript{234} See \textit{id.}

\textsuperscript{235} Toni M. Massaro, \textit{The Dignity Value of Face-to-Face Confrontations}, 40 U. Fla. L. Rev. 863, 899 (1988). Massaro notes one commentator’s conclusion that “people generally do no better at detecting whether someone is lying than they would if they chose randomly.” \textit{Id.} at 899 n.130 (citation omitted).

\textsuperscript{236} 47 F.3d 241 (7th Cir. 1995).

\textsuperscript{237} See \textit{id.} at 243 (emphasis added).

trial to delve into the experience, background, and training of the "technician," as well as the method and manner of the tests conducted.\textsuperscript{239} A great deal of Clark's newly founded rights can be found by examining the codified licensing requirements of the board of clinical laboratory science practitioners.\textsuperscript{240} The court declines to answer whether all of the scientists who work on a sample will be required to testify, and have their backgrounds examined. The question also remains whether those who participate in the peer review, as well as the subsequent supervisory review,\textsuperscript{241} must also testify as to their qualifications.

Requiring the forensic scientist to testify on objective facts leaves a clause in the Montana Constitution that serves no purpose, but is merely a series of words without the companionship of common sense. The Confrontation Clause, as part of a living, breathing Constitution, should strive to preserve ideals, not simply dismiss rational arguments based on imported expressions or hastily drafted words. Concepts such as the preservation of dignity of the defendant, the search for trustworthiness and reliability should be the goals of the court, and the Confrontation Clause should be the vehicle. Courts have long recognized this objective, and have sculpted the Clause accordingly.

The Montana Supreme Court's strict interpretation of the Confrontation Clause is by no means unprecedented. Originalists have long lamented over what has been deemed the erosion of the Clause's plain meaning. Justice Scalia, in the dissent of \textit{Maryland v. Craig},\textsuperscript{242} chastised the Supreme Court:

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "\textit{[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.}\textsuperscript{243}"

As Scalia points out, a contemporary interpretation of legislative language has the potential to destroy the plain meaning of the text. However, modernity gives rise to problems that were not

\begin{itemize}
\item \textsuperscript{239} \textit{Id.}
\item \textsuperscript{240} \textit{See supra note 64.}
\item \textsuperscript{241} \textit{See Nov. 11, 1998 letter, supra note 63.}
\item \textsuperscript{242} \textit{497 U.S. 836 (1990)} (holding that confrontation clause did not prohibit a child witness in child abuse case from testifying against the defendant, outside of defendant's physical presence, by a one-way closed circuit television).
\item \textsuperscript{243} \textit{Id. at 860-61} (alteration in original).
\end{itemize}
contemplated by the framers of constitutions. Alternatives to complying with an inexorable Confrontation Clause, such as allowing child victims to testify via one-way closed circuit television, or allowing a scientific lab report into the courtroom without needless testimony, should not be dismissed simply because it is believed that the meaning of archaic phraseology is understood.

VI. CAPTURING THE ESSENCE OF CONFRONTATION

Given the unanimity of the court's decision in Clark, the aforementioned confrontational exceptions could be vulnerable to a judicial attack. Before the purpose of cross-examination is forgotten, the Montana legislature should consider modernizing the Confrontation Clause's wording. Montana can again look to Pennsylvania for guidance.

In 1991, the Supreme Court of Pennsylvania, relying on Pennsylvania's Confrontation Clause which at that time required "face to face" confrontation, faced the dilemma as to whether to allow a child victim of sexual assault to testify against the defendant via closed circuit television. In Commonwealth v. Ludwig, the defendant was charged with rape, involuntary deviate sexual intercourse, incest, indecent assault, corrupting the morals of a minor, and endangering the welfare of his five year old daughter. A psychologist testified that the victim had become withdrawn, and was concerned that if the victim were forced to testify in the presence of the defendant, her psychological progress could be impaired. As a result, the court allowed the victim to testify via closed circuit television from another room, accompanied by her mother. The child was linked to the courtroom by a microphone. While the child could not see the people in the courtroom, she was able to hear them and respond to questions. The defendant was subsequently convicted. The court overturned

245. See discussion supra Part IV.B.
246. See supra note 167.
248. Id.
249. See id. at 282.
250. See id.
251. See id.
252. See id.
his conviction, holding that testimony by the child victim via closed circuit television violated the Pennsylvania Constitution, which required witnesses against the defendant to meet him or her “face to face.”

The Pennsylvania legislature responded. In 1995, it amended the Pennsylvania Confrontation Clause, substituting “be confronted with the witnesses against him” for “meet the witnesses face to face,” and specifically allowed for child victims to testify by closed-circuit television.

Illinois experienced similar problems with its “face to face” language. In 1994, the Supreme Court of Illinois struck down a statute enabling child victims of sexual abuse to testify against the defendant via closed circuit television, citing the importance of the literal compliance of face-to-face confrontation. Later that year, an amendment substituting “to be confronted with the witnesses against him or her” for “to meet the witnesses face to face” was passed.

Amending the language of Montana’s Confrontation Clause would preserve valuable exceptions and eliminate an inexorable right to face-to-face confrontation. It would also allow judges, in rare circumstances, more room to protect child victims and eliminate wasteful testimony such as a forensic scientist's recollection of performing standardized tests, thereby promoting judicial efficiency. Amending the Clause would eliminate confusing periods of interpretation, as was seen during the Storm period, and allow judges to analyze the necessity of calling witnesses in criminal trials on a case-by-case basis. As technology has shown the judicial arena, creative and equally effective methods can be used to allow the fact-finder to analyze the witness’ veracity without requiring a staring match between the defendant and the witness.

254. Id. at 281-82. Chief Justice Nix dissented, noting: “[a]lthough not expressly stated, the federal constitutional provision clearly guarantees a face-to-face confrontation; notwithstanding, it does not graphically express that protection by the use of the phrase, “face-to-face,” as does the Pennsylvania Constitution. Moreover, the attempt by the majority to latch upon this stylistic difference in the two provisions as a basis to support the contention that our state constitutional provision provides an absolute right of confrontation is not only superficial but is indeed demonstrably incorrect.” Id. at 285.

255. See supra note 167.


257. See ILL. CONST. art. I, § 8 historical note.
VII. CONCLUSION

Undoubtedly, the courtroom of the twenty-first century will be inundated with scientific evidence. While the courts should view empirical and demonstrative evidence with a cautious eye, there is no reason why tests conducted by a forensic scientist should be questioned through trial testimony. For the aforementioned reasons, the testimony adds little if anything to the report itself. A number of remedies and safeguards are available to the defendant, including subpoena of the forensic scientist or an independent test by another testing agency. If the defendant alleges that the procedure followed was careless and sloppy, thus calling the competence of the scientist into question, the defendant has every right to demand the scientist’s presence in court through subpoena. Absent such an allegation, it is rash and unreasonable to presuppose that any product from the lab is unreliable.

The forensic scientist often testifies over uncontested matters. A majority of courts have noted the remote utility of calling such witnesses, recognizing the firmly rooted exception of lab reports. The court’s desire to distinguish Montana in the constitutional arena has left the state with a minority rule that it can scarcely afford financially. The Montana Supreme Court Commission on Rules of Evidence appreciated these financial and labor difficulties in 1989 when it promulgated the 803(8) exception to the Montana Rules of Evidence. As admirable as the court’s decision is to protect the defendant against any possible presumption of guilt, Montana, with a small population and large geographical area, cannot afford all of the constitutional luxuries the court would bestow unto it. The court should interpret the Montana Bill of Rights prudently and conservatively, and side with the United States Supreme Court when evidence exists to support a federal interpretation.

Whatever the source is for the Montana Confrontation Clause, there is no denying a need for the preservation of personal confrontation; something in human nature demands it. As noted by one scholar:

The United States military acknowledges this intrinsic value of face-to-face encounters by its practice of delivering the news of the death of a serviceman or woman in person. Likewise, in the business world it is ‘indecent’ to terminate an employee with a
letter, instead of in a face-to-face exchange.\textsuperscript{259}

Face-to-face confrontation ensures that those who would normally lie or mislead the finder of fact are confronted by the defendant, and their falsehoods are exposed. The adversarial process furthers the dignity and integrity of the judicial process.

Unfortunately, the central purpose of the Confrontation Clause is lost in \textit{Clark}. The court has transformed it into a procedural rule that neither breathes nor flexes, but merely exists. Based on \textit{Clark}'s sweeping language, the Montana criminal practitioner would be remiss not to utilize \textit{Clark} to question every hearsay exception. Unless the court is willing to recognize the true purpose of the Confrontation Clause, the days of \textit{Storm} may be back. The Confrontation Clause should be concerned with providing the accused a trial that is directed toward the pursuit of truth, not strict adherence to criminal procedural rules which were promulgated in the early nineteenth century. If the court is unwilling to recognize the symbolic language of the Confrontation Clause, the Montana legislature should join Illinois and Pennsylvania,\textsuperscript{260} and revise the language of the Confrontation Clause to conform with twentieth century jurisprudence.

\textsuperscript{259} \textit{See} Massaro, \textit{supra} note 235, at 905.  
\textsuperscript{260} \textit{See supra} note 119.