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BORDEN, J., concurring. I agree with the result reached by the majority, affirming the judgment of the trial court. I reach that same result, however, by a different route.

I

The defendant, Miguel Estrella, first claims that he was deprived of his constitutional right of confrontation, under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 354, 158 L. Ed. 2d 177 (2004), because at the probable cause hearing he did not have the opportunity to cross-examine an accomplice, Jonathan Rivers, about a letter that Rivers subsequently wrote admitting that he had lied at that hearing.[1] More specifically, the defendant's claim is that, under *Crawford*, he did not have an adequate opportunity to cross-examine Rivers at the hearing because that opportunity did not include the use of the letter in that cross-examination. The majority addresses this claim by concluding that "[m]easuring the defendant's ability to cross-examine Rivers on matters affecting his reliability and credibility in order to comport with the constitutional standards embodied in the right to cross-examine; *State* v. *Ortiz*, 198 Conn. 220, 224, 502 A.2d 400 (1985); we are satisfied that the defendant was provided the requisite procedural safeguard to the right of confrontation. *Crawford* v. *Washington*, supra, [61]. Accordingly, we conclude that the defendant had a more than adequate and full opportunity to cross-examine Rivers both generally and specifically to address whether Rivers was giving truthful testimony." The majority then goes on to conclude that the fact that the letter did not exist at the time of the hearing does not undermine its conclusion because "[e]ven if we were to assume without deciding that such evidence [namely, evidence that did not exist at the time of the prior opportunity for cross-examination] is relevant to the adequacy of the prior cross-examination . . . the letter . . . did not introduce any new evidence . . . [and] did not provide specific details of the crime . . . ." Thus, on that basis, the majority rejects the defendant's claim that his opportunity for cross-examination at a prior occasion is only adequate when it is " 'identical to that afforded at trial.' " Quoting *State* v. *Outlaw*, 216 Conn. 492, 508, 582 A.2d 751 (1990). In sum, the majority's analysis rests on the assumption that evidence that did not exist at the time of the prior testimonial evidence is relevant to the claimed nonadmissibility under *Crawford*, of the prior testimonial evidence and the majority's assessment of the reliability of Rivers' testimony at the probable cause hearing, as well as its consequent conclusion that this element of reliability rendered the defendant's opportunity for cross-examination adequate under *Crawford*.

In my view, this approach misconstrues the import of *Crawford*, and makes what is a very simple question into a needlessly complex one. Contrary to the majority's assumption of relevance of nonexistent evidence under *Crawford*, I conclude that such evidence is simply irrelevant to a proper *Crawford* analysis.

It cannot be the law that, under *Crawford*, evidence that did not even exist at the time of the prior opportunity for cross-examination can somehow render that opportunity inadequate, and therefore render the prior testimony inadmissible. Put another way, whether the prior opportunity for cross-examination was adequate, within the meaning of *Crawford*, must be gauged on the basis of evidence that was, at the least, *in existence* at that time; evidence that did not come into existence until years later, such as the letter in the present case, is simply irrelevant to the adequacy of the prior cross-examination.[2] In short, whether the testimony that the defendant now challenges as inadmissible under *Crawford* was *reliable* is simply beside the point. Once it is determined that, under *Crawford*, the witness is now unavailable and that his prior testimony was ''testimonial,'' its reliability vel non is irrelevant; the only remaining question is whether the defendant had an adequate prior opportunity for cross-examination of the witness, and in my view the answer to that question cannot be affected, for good or ill, by evidence that did not even exist at the time of the initial cross-examination. I conclude, therefore, that the defendant's *Crawford* claim fails at its inception because the evidence on which he relies—Rivers' letter written three years later—did not exist at the time of Rivers' probable cause hearing testimony.

Crawford fundamentally changed our jurisprudence under the confrontation clause of the sixth amendment, as applied to the states through the fourteenth amendment. Whereas prior to *Crawford* our jurisprudence focused on whether hearsay was sufficiently reliable to satisfy the confrontation clause; see, e.g., *Ohio* v. *Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); in *Crawford*, the United States Supreme Court changed the confrontation clause analysis from an assessment of reliability to the original understanding of the meaning of that clause. Thus, the court held that ''the principal evil at which the [c]onfrontation [c]lause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused''; *Crawford* v. *Washington*, supra, 541 U.S. 50; and that ''the [f]ramers 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.'' Id., 53–54. Under the confrontation clause, therefore, ''[t]estimonial statements of witnesses absent from trial have been

admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'' Id., 59. Furthermore, the court made clear that the inherent or contextual reliability of the statement at issue is irrelevant for confrontation clause purposes. ''Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the [c]lause'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. The [c]lause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.'' Id., 61. Finally, the court made clear what has long been understood and never questioned, namely, that once testimony has been determined to come within—in the sense of violating—the confrontation clause, it is *inadmissible*. See id., 68–69 (court noted that out-of-court statement was inadmissible, and that ''[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the [c]onstitution actually prescribes: confrontation''). Thus, once we determine that testimony is covered by *Crawford* in the sense of being testimonial, as is Rivers' probable cause testimony, if it were to violate *Crawford* for some other reason, it would be inadmissible.

Applying this analysis to the defendant's claim, the conclusion is inexorable, in my view, that the letter, which did not exist at the time of the defendant's prior opportunity to cross-examine Rivers, cannot affect the admissibility, under *Crawford*, of that testimony. It is simply inconceivable to me that we could conclude that evidence that did not exist at the time of the prior testimony could somehow retroactively make that testimony *inadmissible* under the confrontation clause because the defendant did not have that evidence available to him.[3] Of course he did not, and could not. Put another way, because *Crawford* has dispensed with the reliability analysis of testimonial evidence for purposes of the confrontation clause, I simply do not see how it could inject reliability into the prior opportunity for cross-examination element based on evidence that could not have been available to anyone because it simply did not exist.

The following hypothetical demonstrates the problem with the majority's analysis. Suppose that in a probable cause hearing an expert testifies that, under the DNA technology available at the time, the blood found on the victim is that of the defendant, and suppose further that the defendant has an opportunity to cross-examine the witness regarding that evidence and does so. Now suppose that, by the time of the trial, the expert witness has died, and the state offers her probable cause

testimony. Under *Crawford*, the probable cause testimony would be admissible because of the defendant's prior opportunity for cross-examination.

Now add the fact that, by the time of trial,[4] the defendant offers a new and, in his expert's opinion, more reliable type of DNA analysis, which was not in existence at the time of the prior testimony, that would tend to establish that the blood was not that of the defendant. The defendant objects to the admission of the state's expert's prior probable cause testimony, arguing that under *Crawford* he did not have an adequate opportunity to cross-examine the witness because he did not have the later DNA evidence with which to cross-examine the expert and, therefore, that prior testimony of the witness is *inadmissible* under *Crawford*. If the majority's assumption in the present case is correct, the defendant in this hypothetical probably would be correct as well. That simply cannot be the law. Although the defendant certainly would be entitled to have the later DNA evidence *admitted*, he certainly could not be entitled to have the prior DNA testimony of the now deceased witness *excluded*.

Thus, the only legitimate question raised by the defendant's claim is not his *Crawford* claim of inadmissibility of Rivers' testimony based on the letter—which I would summarily reject because the letter simply did not exist at the time of Rivers' testimony—but his second claim, namely, that the trial court improperly excluded the letter. That, therefore, brings me to the defendant's second claim.

II

I agree with the majority that the letter was improperly excluded as impeachment evidence of Rivers' probable cause testimony, but that the error was harmless. Without belaboring the point, I would also conclude, however, contrary to the majority's posture of not deciding the question, that the trial court's error was evidentiary and not constitutional.

It seems quite clear to me that there is no foundation—unless I am missing something—for a constitutional basis for the letter's admissibility. It is not bias or motive evidence; it is nothing more than evidence that impeaches Rivers' prior testimony at the probable cause hearing, and the trial court abused its discretion in excluding it. Thus, the error was evidentiary, and not constitutional. For all of the reasons given by the majority, however, I agree that the trial court's decision to exclude the letter was harmless.

[1] I fully agree with the majority's conclusions that Rivers' testimony at the hearing was "testimonial" within the meaning of *Crawford*, and that Rivers' invocation of his fifth amendment right not to incriminate himself rendered him "unavailable," and that, therefore, *Crawford* applies to the present case.

[2] I emphasize that I focus here only on evidence, such as the letter written by Rivers three years after his probable cause testimony, that did not exist at the time of that testimony. I do not discuss evidence that was in existence

but was not discovered or discoverable by the defendant.

[3] It is conceivable that there may be extreme circumstances in which evidence that subsequently comes into existence renders the prior testimonial evidence so patently unreliable that its admissibility would constitute a due process violation. That would not, however, involve a *Crawford* analysis. Moreover, this is not such a case.

[4] Let us also suppose, to make the hypothetical even more complicated, that there is a delay of several years between the probable cause hearing and the trial, because the defendant absconded to Switzerland, where he spent several years skiing in the Alps, and was then located and returned to Connecticut for trial.