

## TODAY'S CONFRONTATION CLAUSE (AFTER *CRAWFORD* AND *MELENDEZ-DIAZ*)

G. MICHAEL FENNER†

### I. INTRODUCTION

In the Sixth Amendment to the United States Constitution, the Confrontation Clause states that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>1</sup> This right applies to federal prosecutions directly from the Sixth Amendment and to state and local prosecutions by incorporation into the Due Process Clause of the Fourteenth Amendment.<sup>2</sup> In recent years the Supreme Court of the United States’s understanding of the meaning of this Clause may well be the single part of constitutional law—certainly of criminal procedure—that has undergone the most radical change.<sup>3</sup>

Two Supreme Court judgments in roughly the past five years have introduced this change and have greatly expanded the right of the accused in criminal prosecutions to confront the witnesses against them. This Article is about this sharp turn in the law of the Confrontation Clause. After a brief discussion of the history of the Court’s understanding of the Clause, this Article settles into a discussion of its new understanding, as found primarily in the Court’s opinion in 2004’s *Crawford v. Washington*<sup>4</sup> and its 2009 opinion in *Melendez-*

---

† James L. Koley ‘54 Professor of Constitutional Law, Creighton University School of Law. JD, University of Missouri-Kansas City; BA, University of Kansas. Past Chair of the Evidence Section of the Association of American Law Schools. Former trial attorney at the United States Department of Justice. I express my deep appreciation to Mark Hill, Creighton University School of Law, JD 2010, for his hard and terrific work on this article. By his attitude and his work product, he made this project a lot easier.

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

2. *Melendez-Diaz v. Massachusetts* 557 U.S. \_\_\_, \_\_\_, 129 S. Ct. 2527, 2531 (2009); *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

3. U.S. CONST. amend. VI. Regarding the “radical” change, see, e.g., *Melendez-Diaz*, 129 S. Ct. at 2543 (“It is remarkable that the Court so confidently disregards a century of jurisprudence. We learn now that we have misinterpreted the Confrontation Clause—hardly an arcane or seldom-used provision of the Constitution—for the first 218 years of its existence.”) (Kennedy, J., dissenting); *Danforth v. Minnesota*, 552 U.S. 264, \_\_\_, 128 S. Ct. 1029, 1031 (2008) (In *Crawford* “we announced a ‘new rule’ for evaluating the reliability of testimonial statements in criminal cases.”); *Crawford v. Washington*, 541 U.S. 36 (2004); *passim*, below. *But see*, *Melendez-Diaz*, 129 S. Ct. at 2533 (“In faithfully applying *Crawford* to the facts of this case, we are not overruling 90 years of settled jurisprudence.”).

4. 541 U.S. 36 (2004).

*Diaz v. Massachusetts*<sup>5</sup>—a discussion of where the Court's understanding sits today and where it may be headed. Throughout, the Article deals with the details of the coverage of the Confrontation Clause—when the right attaches and what the Clause requires when the right does attach.

Part II presents a brief history of the High Court's treatment of the Confrontation Clause—how the clause was understood prior to 2004 and how, in that year, that understanding changed.<sup>6</sup> Part III separates out and discusses Justice Thomas's understanding of the Clause, important because it supplies the fifth vote for the majority's new understanding of the right and, therefore, may be the vote that controls its scope.<sup>7</sup> Part IV discusses the elements foundational to the attachment of the confrontation right: testimonial statements; offered in a criminal prosecution; offered against the accused; and offered to prove the truth of the matter asserted (and, of course, the affect *Crawford* and *Melendez-Diaz* have had upon these requirements).<sup>8</sup> Part V is about the importance of raising Confrontation Clause issues before the start of the trial.<sup>9</sup> Part VI discusses situations where the right attaches and might at first glance appear to be infringed, but on a closer look is not.<sup>10</sup> Part VII discusses inefficiencies created by the right to confront, how the inefficiencies are not as great as they may at first glance seem, and how, in any event, whether the right is inefficient or not is largely irrelevant.<sup>11</sup> Part VIII concerns the traumatized victim of the crime-on-trial who will be further traumatized if made to testify against the accused victimizer.<sup>12</sup> Part IX covers situations where the Confrontation Clause might well have applied but the accused has either forfeited the right to invoke the clause or waived the right-to-confront objection—waived it during the trial or, upon appropriate motion, well before the trial.<sup>13</sup> Part X is about the harmless error rule as it applies to the confrontation right.<sup>14</sup> Part XI is a brief conclusion.<sup>15</sup>

---

5. 557 U.S. \_\_\_, 129 S. Ct. 2527 (2009).

6. See *infra* Part II and accompanying notes.

7. See *infra* Part III and accompanying notes.

8. See *infra* Part IV and accompanying notes.

9. See *infra* Part V and accompanying notes.

10. See *infra* Part VI and accompanying notes.

11. See *infra* Part VII and accompanying notes.

12. See *infra* Part VIII and accompanying notes.

13. See *infra* Part IX and accompanying notes.

14. See *infra* Part X and accompanying notes.

15. See *infra* Part XI.

## II. A BRIEF HISTORY OF THE SUPREME COURT OF THE UNITED STATES'S INTERPRETATION OF THE CONFRONTATION CLAUSE

There is a close, perhaps obvious, relationship between the Confrontation Clause and the hearsay rule. Each deals with the same problem—the testimonial infirmities attached to second-hand evidence.<sup>16</sup> Each bars the receipt of some second-hand evidence.<sup>17</sup>

Exceptions to the bar of the hearsay rule are based on findings that particular categories of statements<sup>18</sup> or particular individual statements<sup>19</sup> tend to be reliable and, in some cases, that there is an unusual need for the evidence.<sup>20</sup> Hearsay reliability can be found in a number of ways: there was contemporaneous cross examination, the statement was made in the face of impending death or with the expectation that it would lead to medical diagnosis or treatment, the time between the event and the statement was too short for the declarant to have fabricated a lie or have forgotten the relevant facts, and so forth.<sup>21</sup>

The limits to the bar of the Confrontation Clause also have to do with reliability. For years, Confrontation Clause jurisprudence more or less tracked the hearsay rule. The evidentiary rule and the constitutional clause dealt with the problem of the reliability of second-hand evidence in much the same way. The Confrontation Clause did “not bar admission of an unavailable witness’s statement against a criminal defendant if the statement [bore] adequate indicia of reliability. To meet that test, evidence [had to] either fall within a firmly-rooted hearsay exception or bear particularized guarantees of trustworthi-

---

16. The lack of cross-examination of the declarant prevents the accused from testing the testimonial infirmities: declarant’s perception, memory, sincerity, and honesty. G. Michael Fenner *THE HEARSAY RULE* 5-6 (2d ed. 2009) [hereinafter Fenner, *THE HEARSAY RULE* (2d ed.)].

17. See, e.g., *Giles v. California*, 554 U.S. \_\_\_, \_\_\_, 128 S. Ct. 2678, 2686 (2008) (Pre-constitutional “courts . . . excluded hearsay evidence in large part because it was unopposed. As the plurality said in *Dutton v. Evans*, 400 U.S. 74, 86 (1970), “[i]t seems apparent that the Sixth Amendment’s Confrontation Clause and the evidentiary hearsay rule stem from the same roots.”) (emphasis in original).

18. See particularly, *FED. R. EVID.* 803 and 804.

19. See particularly, *FED. R. EVID.* 807.

20. See particularly *FED. R. EVID.* 804 (declarant’s in-court testimony must be unavailable) and *FED. R. EVID.* 807 (“the statement [must be] more probative on the point for which it is offered than any other evidence . . . the proponent can produce through reasonable efforts.”).

21. See, e.g., in the order in which they appear in the main text, Fenner, *THE HEARSAY RULE* at Ch. 4(II)(D) (2d ed.) (the former testimony exception); Fenner, *THE HEARSAY RULE* at Ch. 3(V)(C) (2d ed.) (the medical diagnosis or treatment exception); Fenner, *THE HEARSAY RULE* at Ch. 3(II)(C) (2d ed.) (the present sense impression exception).

ness.”<sup>22</sup> In *Crawford v. Washington*,<sup>23</sup> the Court dissolved the partnership between the Confrontation Clause and the hearsay rule. Reliability as a limit on the scope of the right to confront witnesses is no longer assessed by reference to the hearsay rule or to singular guarantees of trustworthiness inherent in the individual out-of-court statement at issue. Rather, “reliability [must] be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>24</sup> Where the confrontation right applies, the accused must have had or currently have an opportunity to confront the witness through cross-examination.

The opinion in *Crawford* states these two important Confrontation Clause principles: The right to confront the declarant applies against “testimonial” out-of-court statements offered against the accused in a criminal prosecution to prove the truth of the matter asserted in the statement.<sup>25</sup> Introducing such a statement into evidence infringes the confrontation right of the accused unless the declarant’s in-court testimony is unavailable and the accused had an opportunity to cross-examine the declarant.<sup>26</sup>

---

22. *Crawford v. Washington*, 541 U.S. 36, 40 (2004) (citations and internal quotation marks omitted) (describing the preexisting rule established in *Ohio v. Roberts*, 448 U.S. 56 (1980)).

23. 541 U.S. 36 (2004)

24. *Crawford*, 541 U.S. at 61. “[T]he only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.* at 68-69.

“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with [a] jury trial because a defendant is obviously guilty.” *Id.* at 62. “Dispensing with confrontation because testimony is obviously reliable” is a nice summary of the so-called *Roberts* rule, the confrontation-rule that pre-existed *Crawford*.

25. *Id.* at 59. Perhaps this is worth restating in the negative. The right to confront does not apply if the evidence is not an out-of-court statement; if it is not offered to prove the truth of the matter asserted; if it is not offered in a criminal prosecution against the accused; if it is not “testimonial;” or if the accused had a prior opportunity to cross-examine the declarant.

In Justice Clarence Thomas’s view the out-of-court statement must be “formalized.” In many cases, his view of the scope of the Clause will provide the controlling fifth vote to make the majority. This is discussed below in Part III of this article.

26. *Id.* at 68 (“Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”); *id.* at 53-54 (“[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”); see also *id.* at 59.

### III. JUSTICE THOMAS'S UNDERSTANDING OF THE RIGHT AND THAT UNDERSTANDING'S IMPACT ON FUTURE CASES

Justice Thomas is a member of the five-Justice majority joining the opinion of the Court in *Melendez-Diaz v. Massachusetts*.<sup>27</sup> He wrote a concurring opinion in that case<sup>28</sup> and has written similar opinions in three other recent Confrontation Clause cases.<sup>29</sup> His understanding of the scope of the Confrontation Clause is narrower than that of the other four Justices in the *Melendez-Diaz* majority.

As noted above, the other four Justices in the majority find that the right to confront witnesses applies to the admission of "testimonial" out-of-court statements. Justice Thomas's "position [is] that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in *formalized* testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"<sup>30</sup>

The difference is, of course, in the italicized word: "*formalized*." This is a considerably narrower position than that of the other four Justices in the majority, narrower than saying that the right attaches to all testimonial statements, formalized or not. Justice Thomas sees a constitutionally significant difference between an alleged coconspirator's affidavit implicating the accused (the right does attach) and a recording made and, at trial, authenticated by the 911 operator who has answered a victim's call for help (the right does not attach).<sup>31</sup>

Four Justices believe that the coverage of the Confrontation Clause is quite broad,<sup>32</sup> four believe it is quite narrow,<sup>33</sup> and Justice

---

27. 557 U.S. \_\_\_, 129 S. Ct. 2527 (2009).

28. *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring).

29. *Giles v. California*, 554 U.S. \_\_\_, \_\_\_, 128 S. Ct. 2678, 2693 (2008) (Thomas, J., concurring); *Davis v. Washington*, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in judgment in part and dissenting in part); *White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J., concurring in part and concurring in the judgment).

30. *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (emphasis added) (quoting *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment)).

31. The case popularly thought of as the father of the accused's right to confront witnesses, the trial of Sir Walter Raleigh, involved the admission against Raleigh of the affidavit (no doubt festooned with ribbons and dripping with seals, as solemn and "formalized" a presentation as was possible) of an alleged witness who the state had imprisoned nearby the courtroom. See *infra* note 189 and accompanying text.

32. Justices Scalia, Stevens, Souter, and Ginsburg understand the Clause to apply to all testimonial statements offered against the accused to prove the truth of an assertion in the statement. Justice Thomas joined these four Justices to form the majority in *Melendez-Diaz*. Justice Souter's seat on the Court is now Justice Sotomayor's. Not knowing her understanding of the Clause further complicates the vote count. See *infra* note 35 and accompanying text.

33. Chief Justice Roberts and Justices Kennedy, Breyer, and Alito understand the right to be one that does not attach to affidavits reporting the results of scientific analysis. It is their understanding that the Clause does not give the accused the right to

Thomas's view falls in the middle.<sup>34</sup> His is the fifth vote. When the case arises where an out-of-court statement is offered against an accused, and the statement is "testimonial" but not "formalized," Justice Thomas's view should determine the outcome.<sup>35</sup>

#### IV. THE RIGHT ATTACHES TO A TESTIMONIAL OUT-OF-COURT STATEMENT OFFERED AGAINST THE ACCUSED IN A CRIMINAL PROSECUTION

There are several prerequisites to the application of the right to confront witnesses. First, and in no particular order, the right guaranteed by the Confrontation Clause is guaranteed to the "accused,"<sup>36</sup> and it attaches only in a "criminal prosecution[ ]."<sup>37</sup> Second, the evidence must be in the form of an out-of-court statement offered to prove the truth of the matter asserted.<sup>38</sup> Third, and most difficult to pin down, the statement must be "testimonial."<sup>39</sup>

---

confront the technicians and analysts who did the work on which the reports are based. *Melendez-Diaz*, 129 S. Ct. at 2543-61 (Kennedy, J., dissenting). These are the four dissenting Justices in *Melendez-Diaz*.

34. Justice Thomas's understanding is that the right attaches only to "formalized testimonial" out-of-court statements offered to prove truth, which includes the affidavits containing the results of the scientific analysis at issue in *Melendez-Diaz*.

35. This is further complicated by the fact that Justice Souter, one of the four Justices with the broadest understanding of the coverage of the Confrontation Clause, has retired and Justice Sotomayor has been confirmed to fill that seat on the Court. We do not know her understanding of the meaning of the Confrontation Clause. If it is different than that of Justice Souter and, *stare decisis* aside, she votes with the four Justices currently in dissent, that could (once again) recast the right altogether.

There was a general view extant that the Justice taking Justice Souter's seat would not affect the outcome of many of the recent 5-to-4 cases because whoever was confirmed was likely to vote in the same four-Justice group Justice Souter tended to join. Of the liberal-conservative split on the Court, Justice Souter was in the liberal camp with Justices Stevens, Ginsburg, and Breyer, and the new justice was expected to pitch her tent there as well. Whatever the merits of that general feeling, it does not apply to the Court's cases on the Confrontation Clause. As can be seen in the first two of the three preceding footnotes, the 5-to-4 *Melendez-Diaz* split is an unusual mix of Justices.

36. See *infra* Part IV(A).

37. U.S. CONST. amend. VI. See *infra* Part IV(A).

38. See *infra* Part IV(B).

39. See *infra* Part IV(C). Furthermore, as just noted, in Justice Thomas's fifth-vote view that it must be a statement "contained in formalized testimonial material." See *supra* Part III.

Here is one thing that is not required. The out-of-court statement need not inculcate the accused. *E.g.*, *United States v. Nguyen*, 565 F.3d 668, 674 ("*Crawford* does not require that a statement inculcate a defendant to trigger error under the Confrontation Clause . . . . If the statement is not inculpatory, that might be probative of the harmlessness of an error, but not of [its] existence.>").

## A. OFFERED AGAINST THE ACCUSED IN A CRIMINAL PROSECUTION

1. *In General*

The right guaranteed by the Confrontation Clause is a right of “the accused”—it says so right in the Sixth Amendment.<sup>40</sup> The prosecution does not have an equivalent constitutional right to confront witnesses against the State. When accused defendants seek to enter hearsay statements into evidence, the only rules they must get past are the rules of evidence—not the rules of evidence plus the Confrontation Clause.

Furthermore, the right only applies “[i]n . . . criminal prosecutions.”<sup>41</sup> It does not apply in civil proceedings, even those that are quasi-criminal; it does not apply in criminal proceedings that are not “prosecutions.”<sup>42</sup>

2. *Confrontation at the Penalty Stage of a Criminal Proceeding*

Does the right to confront witnesses apply at the penalty stage of the criminal proceeding, or only at the trial stage?

Since the right belongs to “the accused,” plain language might point to the conclusion that the right does *not* apply at the sentencing phase. By the time of sentencing, the complainant is no longer “accused,”<sup>43</sup> but “convicted.”<sup>44</sup> One eminent jurist, the Honorable Sonia Sotomayor, agrees that case precedent supports this conclusion as well: “Both the Supreme Court and this Court . . . have consistently held that the right of confrontation does not apply to the sentencing context and does not prohibit the consideration of hearsay testimony

---

40. “In all criminal prosecutions, *the accused* shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI (emphasis added).

41. *Id.*

42. See *Wolff v. McDonnell*, 418 U.S. 539, 568 (1974) (holding the Clause does not apply to prison disciplinary hearings); *United States v. Ray*, 530 F.3d 666, 668 (8th Cir. 2008) (holding the Clause does not apply at a parole revocation hearing); *United States v. Kelly*, 446 F.3d 688, 689 (7th Cir. 2006) (holding the Clause does not apply to supervised release revocation hearings); *Rosenthal v. Justices of Supreme Court*, 910 F.2d 561 (9th Cir. 1990) (holding the Clause does not apply to disbarment proceedings).

43. U.S. CONST. amend. VI,

44. *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (“Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a *convicted defendant*.”) (emphasis added). Referring to the accused’s Sixth Amendment right to assistance of counsel, with the quotation changed as noted to apply it to the Sixth Amendment right to confront witnesses, Justice Alito wrote that, “[t]he Amendment thus defines the scope of the right to [confront witnesses] in three ways: It provides *who* may assert the right (‘the accused’); *when* the right may be asserted (‘[i]n all criminal prosecutions’); and *what* the right guarantees (‘the right . . . to [be confronted with the witnesses against him]’).” *Rothgery v. Gillespie County*, 128 S. Ct. 2587, 2592 (2008) (Alito, J., concurring). At sentencing the individual attempting to assert the right is no longer “the accused.”

in sentencing proceedings.<sup>45</sup> Another eminent jurist, the Honorable Richard S. Arnold, disagrees. He has written that “[i]f ‘plain meaning’ is the criterion, this is an easy case. Surely no one would contend that the sentencing is not a part, and a vital one, of a ‘criminal prosecution.’”<sup>46</sup>

It seems that Judge Arnold is correct. All of the rights protected by the Sixth Amendment are rights of “the accused.”<sup>47</sup> The Supreme Court of the United States has held that the accused’s other Sixth Amendment rights apply at the sentencing stage.<sup>48</sup> It seems that “accused” is the word the Framers of the Sixth Amendment chose to designate the person to whom the Amendment’s rights apply, and it was chosen to confine the Amendment’s protections to persons on the wrong side of the law in criminal cases. At sentencing the person has

45. *United States v. Martinez*, 413 F.3d 239, 242 (2d Cir. 2005) (then-Judge Sotomayor). The quotation continues:

*See Williams v. Oklahoma*, 358 U.S. 576, 584 (1959) (“[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court . . . .”); *Williams v. New York*, 337 U.S. 241, 246-51 (1949) (“[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.”); . . . cf. *Witte v. United States*, 515 U.S. 389, 398 (1995) (noting that “[a]s a general proposition, a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he [or she] may consider, or the source from which it may come.” (alteration in original) (citation and internal quotation marks omitted)).

Then-judge Sotomayor also cites and parenthetically describes five opinions from the Second Circuit Court of Appeals, *id.* at 242-43, and cites six supporting cases from other circuit courts of appeals, *id.* at 243 n.5. All of the cases cited by Judge Sotomayor predate *Crawford*. The appellant argued that the Second Circuit had to “reconsider our case law regarding the right of confrontation in the sentencing context to the extent that it conflicts with *Crawford v. Washington*.” Her response: “We disagree . . . . *Crawford* [does not] address[] the applicability of the right of confrontation to the sentencing context or the admissibility of hearsay testimony at sentencing proceedings. [It] provide[s] no basis to question prior Supreme Court decisions that expressly approved the consideration of out-of-court statements at sentencing.” *Martinez*, 413 F.3d at 243.

46. *United States v. Wise*, 976 F.2d 393, 407 (8th Cir. 1992) (Arnold, C.J., concurring in part and dissenting in part).

47. The Sixth Amendment includes “the right to a speedy and public trial, by an impartial jury, . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI. Each of these rights is a right of “the accused” in a criminal prosecution. *Id.*

48. The right to counsel: *e.g.*, *Mempa v. Rhay*, 389 U.S. 128, (1967) (holding that the right to counsel applies at the sentencing stage). The right to a trial by jury: *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that the right to trial by jury applies to questions of fact decided at the sentencing stage; the Constitution’s “guarantee that ‘[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury,’ has no intelligible content unless it means that all facts which must exist in order to subject the defendant to legally prescribed punishment *must* be found by the jury”).

not changed and we cannot ignore the fact that sentencing generally is a vital part of the criminal prosecution.

Though then-judge Sotomayor's opinion post-dates (and cites) *Crawford v. Washington*,<sup>49</sup> all of the cases cited in support of her conclusion predate *Crawford* and its radical change in our understanding of the Confrontation Clause. Her opinion notes that *Crawford* does not address the issue confrontation at sentencing.<sup>50</sup> Other Sixth Amendment rights do, however, apply at sentencing and with the reincarnation of the confrontation right there is reason to believe that this Sixth Amendment right also applies at sentencing. The Court's understanding of the right's relationship to the hearsay rule has completely changed. The right to confront witnesses is no longer mostly just a rule of evidence in another dress, but a fully developed constitutional right. There is reason to suspect that, like other fully developed Sixth Amendment rights, this one too will, to one extent or another, apply at the sentencing stage.

When considering the scope of other Sixth Amendment rights, the Court focuses on critical stages of the prosecution, not on when "the accused" becomes "the convicted." As a general rule, then, Sixth Amendment rights do apply at the punishment stage. There may, however, be reasons to treat the Confrontation Clause somewhat differently. Notwithstanding the scope of other Sixth Amendment rights, it may be that the right to confront witnesses applies only at some, not all, stages of the sentencing proceeding.

The penalty stage of a criminal prosecution is broken down into two parts. The first part is the "eligibility" stage: the determination of the range of penalties for which the defendant is eligible. The second part is the "selection" stage: the selection of the particular sentence from among the sentences for which defendant is eligible. History and tradition support the conclusion that the right to confront witnesses only applies at the eligibility phase, not at the selection phase. Historically, in a trial to a jury, the jury, convicted the accused of a common-law or statutory crime; that law delineated the range of penalties that could be imposed for conviction of that particular crime; therefore, in determining guilt, the jury determined the upper and lower limits of the sentence. The jury determined the sentencing range, *i.e.*, "eligibility," when it convicted the defendant of one crime instead of some other.<sup>51</sup> Following the conviction, the judge had complete power to

---

49. 541 U.S. 36 (2004).

50. *Martinez*, 413 F.3d at 243.

51. For an example of the eligibility stage versus the selection stage, consider the variola virus. Unless done "by or under the authority of, the Secretary of Health and Human Services," it is "unlawful for any person to knowingly produce, engineer, synthesize, acquire, transfer directly or indirectly, receive, possess, import, export, or use, or

select any penalty within that range. After the jury determined the range, the judge exercised the discretion to set the specific sentence within the range set out in the statute or common law under which the defendant was convicted—within the limits of the jury-determined eligibility. The trier of fact made the relevant factual determinations at the eligibility stage. The trier of law made the relevant factual determinations at the selection stage. This “selection” discretion remained generally consistent during the evolution of our criminal justice system from a common-law sentencing system to a statutory based system. Sentencing within the range was the sole responsibility of the judge. Historically and traditionally, after the jury returned a guilty verdict, the judge would often hear additional evidence—commonly character evidence<sup>52</sup>—before imposing a sentence within the range. Both English and American courts allowed the sentencing judge wide discretion in determining what evidence was useful in making this determination; and allowed it to be presented without confrontation.<sup>53</sup> Further, at least in noncapital cases,<sup>54</sup> “[e]arly En-

---

possess and threaten to use, variola virus.” 18 U.S.C. § 175c(a) (2004). The penalties for violation of this statute (the eligibility stage) are stated as follows:

(1) [One] who violates, or attempts or conspires to violate, subsection (a) shall be fined not more than \$2,000,000 and shall be sentenced to a term of imprisonment not less than 25 years or to imprisonment for life.

(2) [One] who, in the course of a violation of subsection (a), uses, attempts or conspires to use, or possesses and threatens to use, any item or items described in subsection (a), shall be fined not more than \$2,000,000 and imprisoned for not less than 30 years or imprisoned for life.

(3) Special circumstances. If the death of another results from a person’s violation of subsection (a), the person shall be fined not more than \$ 2,000,000 and punished by imprisonment for life.

18 U.S.C. § 175c(c) (2004). The trier of fact decides which, if any, of these three crimes was committed. That determines the penalties for which the defendant is eligible. From among those penalties, the trier of law selects which to impose on the defendant. The federal crime of first-degree murder is punishable by death or imprisonment for life. 18 U.S.C. § 1111 (2003). Second-degree murder is punishable by any term of years or life. *Id.* Voluntary manslaughter, a fine or imprisonment for not more than 8 years or both, and involuntary manslaughter, a fine or imprisonment for not more than 20 years, or both, and attempted murder, a fine, imprisonment for not more than 7 years, or both. 18 U.S.C. § 1113 (1996). Again, the trier of fact decides which crime, if any, was committed. In doing so, the trier of fact decides the sentencing range: this is the eligibility stage. The trier of law then selects the penalty from that range: this is the selection stage.

52. Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715, 717 (1942) (citing *Rex v. Wilson*, 4 Term Rep. 487 (K.B. 1791); *Rex v. Withers*, 3 Term. Rep. 428 (K.B. 1789); *Rex v. Bunts*, 2 Term. Rep. 683 (K.B. 1788); *Kistler v. State*, 54 Ind.400, 403 (1876); Bishop, *CRIMINAL LAW* § 934 (9th ed. 1923)).

53. We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case. *See, e.g., Williams v. New York*, 337

U.S. 241, 246 (1949) (“Both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law” (emphasis added)). As in *Williams*, our periodic recognition of judges’ broad discretion in sentencing—since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range, Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. Chi. L. Rev. 715 (1942)—has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature.

*Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (note particularly “wide discretion in the sources and types of evidence used”). *Accord* *Blakely v. Washington*, 542 U.S. 296, 341-42 (2004) (No historical writer “disputes the proposition that judges historically had discretion to vary the sentence, within the range provided by the statute, based on facts not proved at the trial.” (Breyer, J., dissenting) (citing 1 J. Bishop, *Criminal Procedure* 87, at 54 (2d ed. 1872)); *Mitchell*, 508 U.S. at 485 (1993); (“Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant.”); *Payne v. Tennessee*, 501 U.S. 808, 820-21 (1991) (“[T]he sentencing authority has always been free to consider a wide range of relevant material. In the federal system, . . . a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.” (citing *Williams*, *infra*, and quoting *United States v. Tucker*, 404 U.S. 443, 446 (1976))); *Williams v. New York*, 337 U.S. 241, 246 (1949) (“[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders.”) (citations omitted); *United States v. Fields*, 483 F.3d 313, 371 (5th Cir. 2007) (Benevides, J., dissenting) (“Early English and American cases suggest that judges conducted noncapital sentencing in informal proceedings featuring testimonial hearsay. In *Rex v. Sharpness*, for example, the court allowed the prosecutor to read an aggravating affidavit before sentencing the defendant to one month of imprisonment on the crime of ‘suffering a prisoner to escape.’ 99 ENG. REPP. 1066, 1066 (K.B.1786). Similarly, *State v. Smith* held that the defendant could present a sentencing court with mitigating affidavits to show that he deserved a reduced sentence for assault and battery. 2 S.C.L. (2 Bay) 62,62 (1796).”); Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715, 717 n.10 (1942) (“By the common law, the jury determined merely the guilt or innocence of the prisoner; and, if their verdict was guilty, their duties were at an end . . . . The court alone determined what the punishment should be . . . .” (quoting *Fields v. State*, 47 Ala. 603, 606 (1872) and citing *Kistler v. State*, 54 Ind.400, 403 (1876))). See also *Oregon v. Ice*, 129 S. Ct. 711, 717 (2009) (holding that the fact questions related to the decision to apply consecutive sentences need not be decided by the jury as that decision “is not within the jury’s function that ‘extends down centuries into the common law.’” (quoting *Apprendi*, 530 U.S. at 477)); *id.* at 721 (Scalia, J., dissenting) (stating, in the context of the right to trial by jury, that “[t]here is no Sixth Amendment problem with a system that exposes defendants to a known range of sentences after a guilty verdict”).

And it is, of course, history and tradition that defines the right. *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (“[T]he ‘right . . . to be confronted with the witnesses against him,’ Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”). As discussed below, at the text accompanying and following note 114, the Supreme Court has stated that there likely is one exception to the confrontation right, and

glish and American cases suggest that [within the range allowed by the conviction] judges conducted . . . sentencing in informal proceedings featuring testimonial hearsay.”<sup>55</sup>

That was then. Modern courts seem unanimous that the right to confront witnesses applies at the eligibility stage. The history and tradition regarding the selection stage aside, modern courts are split on whether the right applies at the selection stage.<sup>56</sup>

This history of discretion and unopposed evidence at the selection part of the penalty phase *does* distinguish the confrontation right from other Sixth Amendment rights that are applied at both stages of the penalty phase. On the other hand, if Sixth Amendment attachment is only dependent on whether or not the penalty selection is a critical stage of the prosecution, then it is dead clear that selection is critical following some convictions—the possibility of a death sentence comes to mind. If “critical stage” is the test, then the Confrontation Clause applies at the eligibility part of the penalty phase and it applies at the selection phase when the accused has been convicted of a capital<sup>57</sup> or other serious crime<sup>58</sup>—when the selection of the penalty is “critical.”

---

that is when the statement in question is a dying declaration. This is so because this exception is based on “the common law’s uniform” exception from confrontation in the case of a dying declaration. *Giles v. California*, 554 U.S. \_\_\_, \_\_\_, 128 S. Ct. 2678, 2688 (2008). *Accord*, e.g., *Commonwealth v. Nesbitt*, 892 N.E.2d 299, 310-11 (Mass. 2008). *See also Oregon v. Ice*, 129 S.Ct. at 717 (stating that the Sixth Amendment jury-trial right “is rooted” in “long-standing common-law practice” and finding that “[t]he decision to impose sentences consecutively is not within the jury function that ‘extends down centuries into the common law’” (citations omitted)); *id.* at 718 (stating that “the scope of the constitutional jury right must be informed by the historical role of the jury at common law”).

54. For example, Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L.REV. 715, 718 (1942) cites two examples from the 1930s where defendants pleaded guilty, the court empanelled a jury to impose the sentence, and the jury sentenced the defendants to death: *Dalhover v. United States*, 96 F.2d 355 (7th Cir.), *cert. denied* 305 U.S. 632 (1938); *Reppin v. People*, 34 P.2d 71 (Colo. 1934). *See generally United States v. Fields*, 483 F.3d 313, 369-77 (5th Cir. 2007) (Benavides, J., dissenting) (discussing the history surrounding the Confrontation Clause as it applies to the selection stage of sentencing and concluding that “[t]he Confrontation Clause should apply fully because . . . unlike noncapital sentencing, [the Federal Death Penalty Act procedure] involves a trial-like adversarial proceeding”).

55. *Fields*, 483 F.3d at 371 (Benavides, J., dissenting) (citations omitted). *See also 77 A.L.R. 1211* (originally published in 1932); and many of the cases cited and discussed in note 49, above.

56. *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1219 (D. Colo. 2007) (citing and discussing cases).

57. *See supra* note 54 and accompanying text.

58. The Sixth Amendment right to the assistance of counsel is stated as a right that is applicable to “the accused,” without explicit qualification depending on the seriousness of the crime. Nonetheless, the Supreme Court has held that the indigent’s right to appointed counsel attaches when the indigent is charged with a felony. *Whorton v. Bockting*, 549 U.S. 406, 419 (2007) (characterizing *Gideon v. Wainwright*, 372 U.S. 335

B. AN OUT-OF-COURT STATEMENT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED

The evidence in question must be in the form of an out-of-court statement that is offered to prove the truth of the matter asserted. If there is no out-of-court statement, but only in-court testimony regarding the witness's first-hand observations, the right to confront is satisfied: The accused can cross-examine the real witness to the relevant facts.<sup>59</sup>

Take a witness testifying that he or she searched records of a regularly conducted activity (business records or public records, for example) and did not find a particular entry. There is no out-of-court assertion, just the in-court assertion that no entry was found. The real witness to that relevant fact is the testifying witness. The relevant assertion can be "test[ed] in the crucible of cross examination"<sup>60</sup> and taken for what it is worth. The right to confront is satisfied.<sup>61</sup>

---

(1963)). Whether that is a limitation on the right or simply a statement of the nature of the crime involved in *Gideon*—a felony—is not clear. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) ("We . . . hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.") (footnotes omitted).

The same is true for the right to a trial by jury. *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968) ("[A] general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."); *Ballew v. Georgia*, 435 U.S. 223, 229 (1978) ("The Fourteenth Amendment guarantees the right of trial by jury in all state nonpetty criminal cases . . . The right attaches in the present case because the maximum penalty . . . exceeded six months' imprisonment.").

59. *Crawford*, 541 U.S. at 59 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

60. *Id.* at 61. The result would be different if, instead of witnesses testifying that they searched the record and did not find an entry, prosecutors offered affidavits from those who searched the record. Now we are dealing with testimonial out-of-court statements—affidavits—offered against the accused to prove the truth of the assertion in the affidavit—the out-of-court declarant's affirmation that there was no such entry.

61. One might be forgiven for thinking that a witness's testimony that no entry was found would be a hearsay statement because there are two hearsay exceptions specifically written to allow such testimony. FED. R. EVID. 803(7) and 803(10). Yet, as a general rule, the fact that no one made an entry into a record is not a statement in the first place and, therefore, it is not hearsay in the first place. Except in rare instances, no one purposefully avoids making an entry intending to assert the nonexistence of the thing not entered. See Fenner, *THE HEARSAY RULE* at 227 n.293 (2d ed.). Since there is no out-of-court statement, but just in-court testimony that the record does not exist, all the confrontation required is available. *United States v. Mendez*, 514 F.3d 1035, 1044 (10th Cir. 2008) (testifying witness's statement that he searched a database and did not find an entry for the defendant did not violate the confrontation rights because there was no out-of-court statement). See generally Fenner, *THE HEARSAY RULE* at 226-27, 242-44 (2d ed.). See also *United States v. Lamons*, 532 F.3d 1251, 1263 (11th Cir. 2008) (phone company billing data generated by computer does not implicate the confrontation right because "the Sixth Amendment provides the right to confront (human) 'wit-

If there is an out-of-court statement but it is not admitted to prove the truth of any assertion therein, the Confrontation Clause does not apply. If the statement is relevant in any way other than to prove the truth of an assertion therein—if it is admitted as a prior inconsistent statement, only to impeach, as evidence circumstantially indicating the speaker's state of mind, to provide context to non-hearsay evidence,<sup>62</sup> or to show notice on the part of the person who heard the statement<sup>63</sup>—the clause does not apply.<sup>64</sup>

---

nesses.'" (quoting *United States v. Washington*, 498 F.3d 225, 230 n.1 (4th Cir. 2007)); *United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) (reasoning that while a physician's diagnosis is testimonial, raw data from a machine is not; after all how could one "cross-examine a gas chromatograph").

62. See, e.g., *State v. Johnson*, 771 N.W.2d 360, 369 (S.D. 2009) (concluding that statements from an informant's conversation with the defendant were not offered to prove the truth of any assertion, and therefore were not hearsay, and therefore did not implicate the Confrontation Clause).

63. See Fenner, *THE HEARSAY RULE* at 35 (2d ed.).

64. "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). Cataloguing non-truth uses for out-of-court statements is beyond the scope of this article. Lists and discussions of non-truth uses for out-of-court statements can be found elsewhere. See, e.g., Fenner, *THE HEARSAY RULE* ch. 1 (2d ed.); Christopher B. Mueller & Laird C. Kirkpatrick, *EVIDENCE*, §§ 8.16-8.21 (4th ed. 2009). One important nonhearsay use for Confrontation Clause purposes is the statement offered not for its truth but to show why the police approached the accused in the first place. See Fenner, *THE HEARSAY RULE* at 410-11 (2d ed.). Here are some cases specifically dealing with the confrontation issue and out-of-court statements that are not offered to prove the truth of any assertion therein. *United States v. Tucker*, 533 F.3d 711, 715 (8th Cir. 2008); *State v. DeJesus*, 947 A.2d 873, 882 (R.I. 2008) (context evidence offered to explain the defendant's responses is not offered to prove the truth of any assertions contained therein); *Turner v. Commonwealth*, 248 S.W.3d 543, 546-47 (Ky. 2008) (similar); *Brunson v. State*, 245 S.W.3d 132, 149 (Ark. 2006) (a statement offered as circumstantial evidence of the state of mind of the declarant).

Some courts have said that the Clause only applies when the evidence in question is hearsay. This is not exactly true. Post-*Crawford* Confrontation Clause jurisprudence is based on the common law at the time of the ratification of the Constitution. See *infra* notes 115-16, 222, 226 and accompanying text, notes 222 and 226. It is true that the Clause only applies to evidence that was hearsay at the common-law. Common-law hearsay is an out-of-court statement offered to prove the truth of the matter asserted. The federal-rules statutory definition is a bit different. See generally Fenner, *THE HEARSAY RULE* at ch. 2 (2d ed.). Because the statute states that certain out-of-court statements offered to prove the truth of the matter asserted are not hearsay, the Confrontation Clause applies to some statements that were hearsay under the common law but are no longer hearsay under the Federal Rules of Evidence. The federal rules define certain prior consistent and inconsistent statements and statements of identification of a person as nonhearsay. FED. R. EVID. 801(d)(1). One foundational element here is that the declarant must be testifying and subject to cross-examination. There is, therefore, no Confrontation Clause problem. These rules also define certain kinds of admissions, including admissions by a party opponent's agent or coconspirator, as nonhearsay. FED. R. EVID. 801(d)(2). This exclusion does not require that the declarant be testifying and subject to cross-examination. The Confrontation Clause can apply to these nonhearsay statements. *But see State v. Johnson*, 771 N.W.2d 360, 369 (S.D. 2009) (concluding that because the out-of-court "statements constitute admissions by a

### C. THE STATEMENT MUST BE TESTIMONIAL

The confrontation right does not attach unless the statement is “testimonial,”<sup>65</sup> and, in Justice Thomas’s fifth-vote view, “‘contained in formalized testimonial materials.’”<sup>66</sup> Much of the litigation occurring as this is written involves the question of what out-of-court statements are testimonial.<sup>67</sup> Here is what is known so far and a suggestion or two regarding where this part of the law is headed.<sup>68</sup>

#### 1. *The Relevance of the Identity of the One Who Made the Statement, the One Who Perceived the Statement, and the Form in Which the Statement is Offered*

The first thing to know is that neither the identity of the out-of-court declarant nor the identity of the in-court declarant is the determining factor. The question is not, who made the statement? The question is not, who heard or read the statement?<sup>69</sup> The question is

---

party-opponent and, as such, are by definition not hearsay under Federal Rule of Evidence 801(d)(2)(A) [and] [b]ecause the prohibition announced in *Crawford* applies to hearsay statements, that prohibition does not cover [the statements at issue].”)

65. “The text of the Confrontation Clause . . . applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” *Crawford*, 541 U.S. at 51 (citations omitted). *Accord, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_, \_\_\_, 129 S. Ct. 2527, 2531 (2009); *State v. Cannon*, 254 S.W.3d 287, 303 (Tenn. 2008) (“If the statement is nontestimonial, the Confrontation Clause does not apply, and the statement must be analyzed under the ‘traditional limitations upon hearsay evidence.’” (quoting *Davis v. Washington*, 547 U.S. 813, 821 (2006))).

66. *See supra* Part III.

67. Within a week after deciding *Melendez-Diaz*, the Supreme Court granted certiorari in *Briscoe v. Virginia*. The single question presented in the petition for the writ of certiorari is this: “If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?” *Briscoe v. Virginia*, Petition for a Writ of Certiorari, 2008 WL 6485425, at \*1 (May 29, 2008) (No. 07-11191), *cert. granted*, *Briscoe v. Virginia*, 2009 WL 1841615 (June 29, 2009) (“Motion of petitioners for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Virginia granted.”).

68. At this point, it should be noted again that *Melendez-Diaz* was decided by a 5 to 4 vote. One of the five, Justice Thomas, wrote a concurring opinion reiterating his previously stated view of the scope of the coverage of the Confrontation Clause, *i.e.*, that the clause only applies to “formalized” testimonial statements. The other four Justices in the majority hold the view that the clause applies to all “testimonial” statements, formalized or not. Justice Thomas’s view is considerably narrower than the view of the other four Justices in the majority (and one of those other four has retired; *see supra* note 35). This point is the subject of Part III of this article, above, and it will be mentioned at various places, as relevant, throughout this part of the article.

69. Statements made to a police officer, a 911 operator, a doctor, or a family member can be testimonial or nontestimonial. *Clarke v. United States*, 943 A.2d 555, 557 (D.C. 2008) (“[T]hat a statement was made ‘to someone other than law enforcement personnel,’ does not—so far as *Crawford* and *Davis* teach—make it nontestimonial, for the Court left that issue open in both cases. Nevertheless, in a setting such as this one where [the person to whom declarant spoke, *i.e.*, his mother,] had no affiliation, even

not, was it an oral statement or a written statement? Rather, the question is, why was the statement made? The key is the primary purpose of the statement as judged by the context in which the statement was made. The identity of the out-of-court and in-court declarants and the medium of transmittal are relevant only in so far as they shed light on the primary purpose of the statement.<sup>70</sup> And “primary purpose” is the second thing to know.

## 2. *The Primary Purpose Test*

### a. *The General Rule*

The test for determining whether a statement is testimonial is a “primary purpose” test.<sup>71</sup> “[N]ot all hearsay implicates the Sixth Amendment’s core concerns.”<sup>72</sup> Whether particular hearsay does or not depends on its primary purpose, which requires that the statement be judged in its context.<sup>73</sup> For example:

---

remote, with law enforcement and nothing in [declarant’s] statement suggested that he meant her somehow to convey his utterance to the police, we think the fact that she was a lay person—indeed, a family member—must weigh against a finding that it was testimonial.” (citations omitted); *Cannon*, 254 S.W.3d at 305 (*infra* note 78); *Garcia v. State*, 246 S.W.3d 121, 133 (Tex. App. 2007) (statements to co-workers and friends, and to declarant’s divorce attorney).

70. The form of the statement might matter in some cases. As noted above, the fifth vote in the five-to-four Confrontation Clause majority is that of Justice Thomas. In his view, the form of the statement does matter in that, in his view, the clause only applies to “formalized” testimonial statements. *See supra* Part III.

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

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

73. “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford*, 541 U.S. at 51. *Accord*, e.g., *Davis*, 547 U.S. at 823-24; *Long v. United States*, 940 A.2d 87, 94 n.6 (D.C. 2007) (“[T]he Supreme Court has defined ‘testimonial’ in functional rather than categorical terms. . . . [W]hile the purpose of any questioning is critical to the Court’s analysis, the nature of the declarant’s statement remains a significant factor . . . . [T]he line between testimonial and nontestimonial . . . will not always be clear; and ‘each victim statement thus must be assessed on its own terms and in its own context to determine on which side of the line it falls.’” (quoting *Thomas v. United States*, 914 A.2d 1, 14 (D.C. 2006) and *United States v. Arnold*, 486 F.3d 177, 189 (6th Cir. 2007) (en banc)) (paragraph break omitted)).

“[S]tatements are not testimonial simply because they might reasonably be used in a later criminal trial. Rather, a critical consideration is the primary purpose . . . . Statements are testimonial if the primary purpose was to produce evidence for possible use at a criminal trial; they are nontestimonial if the primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator.” *People v. Romero*, 187 P.3d 56, 81 (Cal. 2008) (citations omitted). In *Romero*, officers responding to an emergency call “encountered an agitated victim of a serious assault, who described” his assailants and the attack. *Id.* His statements provided the officers “with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators.” *Id.* The primary purpose of the statements was not to produce evidence for a later trial, but “to determine whether the per-

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that *the primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that *the primary purpose* of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>74</sup>

When investigating officers first arrive on the scene it is often the case that they need to assess the situation—the continuing danger, if any, to the victim, the officers themselves, and the public at large; the extent of the victim's injuries—and, in order to do this, they often need to know who is doing what to whom. Statements to an officer in this context are nontestimonial.<sup>75</sup> On the other hand, the danger may have passed, the suspect may be in custody, and the primary purpose of the inquiry may be to collect and maintain evidence to use in the hoped for trial of the perpetrator. Statements obtained in this context are testimonial<sup>76</sup>—at least when they are “formalized . . . such as affidavits, depositions, prior testimony, or confessions.”<sup>77</sup>

---

petrators had been apprehended and the emergency situation had ended or whether the perpetrators were still at large so as to pose an immediate threat.”

74. *Davis*, 547 U.S. at 822 (emphasis added). *Accord*, e.g., *Romero*, 187 P.3d at 80.

75. *E.g.*, *Davis*, 547 U.S. at 831 (this “may often mean that ‘initial inquiries’ produce nontestimonial statements.”) (emphasis in original); *Nesbitt*, 892 N.E.2d at 309 (the dying victim's statements to the 911 operator and the operator's questions were clearly designed to get help for the victim and assess the danger presented to the victim, first responders, and others; declarant “could barely talk at the time and was incapable of spelling her name or describing her injuries. She, like any person in that position, would have been consumed by the immediacy of the situation and was struggling to communicate. ‘It is almost inconceivable that, moments after such an event, [someone in declarant's] condition—described as essentially frantic—could have spoken in contemplation of a future legal proceeding.’ In these circumstances, her statement was plainly not testimonial.” (quoting *Commonwealth v. Tang*, 66 Mass. App. Ct. 53, 60-61 (2006))); *Long*, 940 A.2d at 97-98 (“Under the circumstances Officer James’ immediate task was not to investigate but to find out what had caused the injuries so that he could decide what, if any, action was necessary to prevent further harm. Asking [the victim] ‘what happened’ was a normal and appropriate way to begin that task . . . . Viewed objectively, [Officer James’] questions were designed to find out whether there was any continuing danger and to respond to the situation with which he was confronted.” (citations and internal and multiple quotation marks omitted)); *State v. Warsame*, 735 N.W.2d 684, 693 (Minn. 2007) (to assess a victim's injuries “officers must inevitably learn the circumstances by which the party was injured, and if the circumstances of the questions and answers objectively indicate that gaining such information is the primary purpose of the interrogation, then the party's statements are nontestimonial”).

76. *E.g.*, *Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1111 (D. Minn. 2008) (five days after the sexual abuse of a child, after the police investigation had begun and a suspect had been identified, and the victim was not at imminent risk, the detective in charge initiated a formal interview with the victim, at police headquarters; the primary purpose of the statements was testimonial).

77. *See supra* Part III.

In some contexts, of course, statements can jump from one primary purpose to another.<sup>78</sup> In *Davis v. Washington*,<sup>79</sup> the out-of-court declarant was the victim and the out-of-court statement was made to a 911 operator. The Supreme Court of the United States discussed the fact that a victim's statements to a 911 operator can turn from nontestimonial to testimonial and may do so "at the point when the assailant drove away from the scene and the ongoing emergency ended."<sup>80</sup> The *Davis* decision states that when an assailant, who is not a danger to anyone other than the declarant, drives away and is no longer a danger to the declarant, the latter's statements can turn testimonial. Surely, if the assailant comes back, or even just seems to have come back, the statements can turn nontestimonial again.<sup>81</sup>

Before moving on, this caveat should be noted. Justice Thomas's understanding of the Confrontation Clause puts in doubt much of this discussion of statements that suddenly turn from nontestimonial to testimonial.<sup>82</sup> His is the fifth vote for the *Melendez-Diaz v. Massachusetts*<sup>83</sup> majority and his understanding is that for the right to attach the out-of-court statement must be "contained in formalized testimonial material."<sup>84</sup> For Justice Thomas the change in the nature of a statement in progress comes only at the point when the statement is

---

78. The interrogation can begin with the intent to get the situation under control and, once order is assured, can flow into one with the intent of gathering information to use in the prosecution of the perpetrator. *E.g.*, *Long*, 940 A.2d at 98 n.12.

In *Cannon*, 254 S.W.3d at 292, the victim had been raped. She was treated by emergency-room medical professionals. Statements she made in the course of this treatment were nontestimonial. Later she was examined by a sexual-assault nurse examiner who was trained to examine suspected rape victims, who had been instructed by the police on how to ask questions and collect evidence, and who characterized her examination as an interrogation. By the time the victim talked with this nurse-examiner she had been treated and stabilized. Her statements to this nurse were testimonial. "[T]he primary purpose of th[is] interrogation was 'to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at 305 (quoting *Davis*, 547 U.S. at 822). Moreover, the court recognized that its holding "should not be interpreted as a blanket rule characterizing as testimonial all the portions of all out-of-court statements given by sexual assault victims to sexual assault nurse examiners. As the Supreme Court in *Davis* recognized, statements may evolve from nontestimonial to testimonial." *Cannon*, 254 S.W.3d at 305 (citing *Davis*, 547 U.S. at 828).

79. 547 U.S. 813 (2006).

80. *Cannon*, 254 S.W.3d at 305 (characterizing the *Davis* opinion).

81. In *Smith v. State*, 947 A.2d 1131, 1134 (D.C. 2008), for example, the court stated that "statements about the forcible entry and physical attack upon complainant shortly before her call for help came well within the scope of nontestimonial circumstances because they objectively indicate that their main purpose was to summon help for an ongoing emergency . . . . In the circumstances here, it is undisputed that when complainant made the 911 call, she did not know appellant's location, could not know if the attack had ended, and feared he might return." Therefore, though *Smith* does not say so, the interrogator cannot know if the emergency is ongoing, and must assume it is.

82. See *supra* Part III.

83. 557 U.S. \_\_\_, 129 S. Ct. 2527 (2009).

84. *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring).

formalized. The statements in the examples above do not change from nontestimonial to "formalized testimonial"<sup>85</sup> and the Confrontation Clause never attaches.

Moving on, it is the same with out-of-court statements to family members or friends, to healthcare workers,<sup>86</sup> and to newspaper reporters. The question is the primary purpose of the statement. It is the same with spontaneous statements,<sup>87</sup> excited utterances,<sup>88</sup> re-

---

85. *Id.* In addition, there is the question of Justice Sotomayor's understanding of the Clause. See *supra* note 35.

86. When a victim is talking with medical professionals for the primary purpose of securing medical diagnosis and treatment, the victim's statements are nontestimonial. See *Melendez-Diaz*, 129 S. Ct. at 2533 n.2 ("[M]edical reports created for treatment purposes [are] not . . . testimonial."). When the victim is talking with medical professionals for the primary purpose of aiding the criminal investigation, the victim's statements are testimonial. *State v. Buda*, 949 A.2d 761, 778-79 (N.J. 2008) (a sobbing and emotional three-year-old child, in the hospital and likely to have been beaten, was questioned by a Division of Youth and Family Services ("DYFS") worker about what had happened; the boy made statements implicating his father; the DYFS worker "was seeking information from a victim to determine how best to remove the very real threat of continued bodily harm and even death"; though the child's statements are certainly relevant to the investigation of the crime and the prosecution of the perpetrator that "did not convert it, in these circumstances, into a testimonial statement"); *State v. Snowden*, 867 A.2d 314, 329 (Md. 2005) ("The fact that there is a therapeutic element to the interviews does not eclipse the overriding fact that the interviews were designed to develop testimony that may be used at trial."). But see *supra* Part III, regarding Justice Thomas's fifth-vote-for-the-majority view that the only medical reports to which the right attaches are those that are "contained in formalized testimonial material." In *Snowden*, for example, social workers were allowed to testify to what nontestifying child-victims had told them about the sexual touching the accused inflicted upon them. The statements were testimonial and, said the court, inadmissible. These statements were not, however, "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Melendez-Diaz* 129 S. Ct. at 2543 (quoting *White v. Illinois*, 502 U.S. 346, 365 (Thomas, J., concurring in part and concurring in the judgment)). Justice Thomas would not attach the right of confrontation to the children's statements; that changes the 5-to-4 majority; the children's out-of-court statements should have been admitted.

87. *Buda*, 949 A.2d at 777-78 ("Because spontaneous statements do not bear the indicia of 'a formal statement to government officers' but instead are akin to 'a casual remark to an acquaintance[,] . . . N.M.'s . . . spontaneous and unprompted hearsay statement to his mother that 'Daddy beat me' is nontestimonial."); *State v. Contreras*, 979 So.2d 896, 903-04 (Fla. 2008) (canvassing cases where a child victim's "spontaneous statement to a friend or family member . . . [or] medical professional" are not testimonial, and cases where "statements by child victims to police officers or members of child protection teams are testimonial"); *State v. Arroyo*, 935 A.2d 975, 999 n.23 (Conn. 2007) (the social worker's primary purpose in taking the child's statements was to provide medical assistance; the statement was nontestimonial despite the fact that law enforcement personnel observed, and retained audiotapes of, the interview).

Yet it is possible that even a present sense impression can be testimonial for the four members of the *Melendez-Diaz* majority that take the broadest view of the scope of the right. Take this example. From the front window of his home, someone is witnessing a home invasion in progress across the street. He calls 911. The 911 operator first establishes that the caller is not in danger and that there is no one but the invaders in the home across the street, and then begins "interrogating" the caller. The operator takes over the conversation and asks the caller a series of specific questions to which the

corded recollections, and public records and reports. It is the same with most records of a regularly conducted activity.<sup>89</sup> It is the same with all out-of-court statements offered against the accused in a criminal prosecution to prove the truth of some matter asserted therein. In context, what was the primary purpose of the “conversation?”<sup>90</sup> Was it a spontaneous statement made with no purpose at all?<sup>91</sup> Was the statement made out of shock or fear and completely without testimonial purpose? Was the purpose of the statement to share (and have kept) a confidence, to seek medical assistance,<sup>92</sup> or to fulfill a nontesti-

---

caller responds with present sense impressions. While prosecution has not entered the mind of the caller, it is foremost in the mind of the operator. The caller is conveying present sense impressions—descriptions of the invaders, the license number of the getaway truck, names by which the invaders call one another, etc.—and yet it is an interrogation by an agent of the police that is designed to gather and preserve information to aid in the capture and prosecution of the perpetrators. It all depends on context.

88. *Nesbitt*, 892 N.E.2d at 309 (“[Declarant,] like any person in [her] position, would have been consumed by the immediacy of the situation and was struggling to communicate. ‘It is almost inconceivable that, moments after such an event, [someone in declarant’s] condition—described as essentially frantic—could have spoken in contemplation of a future legal proceeding.’ In these circumstances, her statement was plainly not testimonial.” (quoting *Tang*, 66 Mass. App. Ct. at 60-61)). See also *supra* note 76; *Long*, 940 A.2d at 98 (“As the trial court implicitly found when it admitted [the statements] as excited utterances, [declarant’s] exclamations were not really responsive to [the officer’s] questions. ‘While the fact that [the] . . . statement was unprompted and thus not in response to police interrogation does not by itself answer the inquiry, [it] at least suggests that the statement was nontestimonial.’ (citations omitted)); *United States v. Brito*, 427 F.3d 53, 61 (1st Cir. 2005) (some courts hold that all excited utterances are nontestimonial and others hold that the excited nature of an utterance is irrelevant to whether it is testimonial; this court rejects both, holding that “the excited utterance and testimonial hearsay inquiries are separate, but related”—the former “focuses on whether the declarant was under the stress of a startling event” and the latter “focuses on whether a reasonable declarant, similarly situated (that it, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement”).

89. Some business records will be testimonial because the regularly conducted business activity in question will be the preparation of testimonial statements. See *infra* note 120 and accompanying text.

90. See, e.g., *State v. Snowden*, 867 A.2d at 329 (“[T]he formulations in *Crawford* outlining what is testimonial not only take into account the intentions of the declarant, but also look to the intentions of the person eliciting the statement.” (citing *Crawford*, 541 U.S. at 55 n.7)). And, in Justice Thomas’s perhaps controlling view, the judge must consider whether the “conversation” is being offered in the form of a “formalized testimonial” statement. See *supra* Part III (discussing Justice view).

91. “SPONTANEOUS applies to acts that come about so naturally, are so unconscious and so unaffected or *unprompted* by ulterior motive or *purpose* that they seem totally unpremeditated.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED. 2204 (2002) <http://unabridged.merriam-webster.com> (9 Jul. 2009) (emphasis added).

92. “[M]edical reports created for treatment purposes [are] not . . . testimonial.” *Melendez-Diaz*, 129 S. Ct. at 2533.

monial business duty?<sup>93</sup> Was the primary purpose to develop evidence for use at trial? Or was it some other purpose altogether?

The unanswered question regarding the attempt to classify a statement as testimonial or not is what to do with the statement where one party to the conversation has no testimonial intent and the other party has nothing but testimonial intent? What happens, for example, when the police are convinced that someone has murdered witnesses scheduled to testify against him? The bodies cannot be found. The police believe that the suspect's girlfriend knows the location of the bodies. The girlfriend is in jail. In an attempt to gain information from the girlfriend, a police officer poses as a criminal serving a life sentence. The officer tells the girlfriend that since he has nothing to lose, he will, for certain consideration, confess to the murders. The girlfriend agrees and, so the confession will be believable, draws a map to where the bodies can be found. Is that map admissible against the defendant? The girlfriend made the map without any intention, any knowledge, that it would be used to prosecute the accused. The map was given to the faux-criminal police officer who went out of the way to obtain it for the purpose of using it against the accused at his criminal trial.<sup>94</sup> What is the primary purpose of this out-of-court statement—testimonial or not? The answer in this situation is found by asking the same question as in every other testimonial versus non-testimonial situation: What was the primary purpose of the statement? The primary purpose here is dependent upon the same thing as always: context. It is just that in some cases context is more difficult to divine.

Under Justice Thomas's controlling understanding the question of the primary purpose of the girlfriend's statement is not a problem. Under Justice Thomas's view you ask whether the statement is "contained in formalized testimonial material."<sup>95</sup> The fact that one party to the conversation has no testimonial intent and the other party has nothing but testimonial intent is not relevant.

One federal court has held that, in a situation like the one above, "the proper focus is on [the girlfriend's] expectations as the declarant," not on the expectations of the one receiving the statement.<sup>96</sup> Is it that

---

93. Some businesses are, in part, at least, in the business of preparing testimonial statements police crime labs, court reporting services, and the like. Their statements in fulfillment of a business duty can be testimonial. *E.g.*, *Melendez-Diaz*, 129 S. Ct. at 2538.

94. This scenario is based on the facts of *United States v. Hoken*, 541 F.3d. 1146 (8th Cir. 2008), which is quoted *infra* note 96.

95. *See supra* Part III.

96. *Hoken*, 541 F.3d at 1160 (The girlfriend "did not draw the maps with the expectation they would be used against [defendant] at trial . . . [but] for the express purpose of recruiting another inmate to confess to the murders so she and [defendant] could go

simple? One part of the Supreme Court's opinion in *Davis v. Washington*<sup>97</sup> seems to suggest it is that simple. The Supreme Court cited two of its own cases, characterized the first<sup>98</sup> as involving "statements made unwittingly to a Government informant"<sup>99</sup> and the second<sup>100</sup> as involving "statements from one prisoner to another,"<sup>101</sup> and went on to say that in each case "the statements at issue were clearly nontestimonial."<sup>102</sup> These characterizations of the statements in the two earlier cases as "clearly nontestimonial," or at least the characterization in the first, focus entirely on the expectation, the "primary purpose," of the declarant with no regard for that of the eventual testifying witness. The *Davis* opinion went on, however, to find that the relevant portions of the 911 call at issue there (statements made while the assailant was on the premises) were nontestimonial and to suggest that other parts of the call (statements made after the assailant left the premises and when the 911 operator began to interrogate the victim) were testimonial.<sup>103</sup> Between one part of the call and the other, the only motivation that changed was that of the 911 operator: After learning the assailant had driven away, the operator switched out of assistance mode and into interrogation mode.<sup>104</sup> There is no evidence that the victim's primary purpose changed, that evidence-collection or assailant-prosecution had entered her mind. By all appearances, she still wanted help. Those two parts of *Davis* leave the trial court a great deal of wiggle room and leave the attorneys on both sides a great deal to argue over.

In *Crawford*, the Supreme Court refers to statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."<sup>105</sup> It is not clear whether the "witness" in this quotation refers to an objective person in the shoes of the out-of-court declarant or an objective person witnessing the out-of-court statement. It seems to be a reference to the latter because it speaks of "an objective witness," some kind of reasonable person standard. But perhaps it means an

---

free. Further, the maps obviously were not a 'solemn declaration' or a 'formal statement.' . . . We simply cannot conclude [she] made a 'testimonial' statement against [defendant] without the faintest notion she was doing so.") In addition, the court noted that even if the statements were testimonial, there were days and piles of other evidence against the defendant and "any error was harmless beyond a reasonable doubt." *Id.*

97. 547 U.S. 813 (2006).

98. *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987).

99. *Davis v. Washington*, 547 U.S. 813, 825 (2006).

100. *Dutton v. Evans*, 400 U.S. 74 (1970) (plurality opinion).

101. *Davis*, 547 U.S. at 825.

102. *Id.*

103. *Id.* at 827-29.

104. *Id.* at 828-29.

105. *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford* 541 U.S. at 52).

objective person in the shoes of the out-of-court declarant. After quoting the above statement from *Crawford*, the *Melendez-Diaz* opinion goes on to state, “[w]e can safely assume that the analysts were aware of the affidavits’ evidentiary purpose.” This seems to stress the importance of the belief of the Confrontation Clause “witness,” the out-of-court declarant.

If that is the case, however, where do we find the “objective” victim when the witness is a woman who has just been beaten to within inches of her life by her live-in boyfriend, a boyfriend who has done it before, been kicked out before, and been taken back before? How do most any of the lawyers and judges who will be arguing and deciding these “testimonial” questions have any idea what is in the mind of a child repeatedly raped by a parent? How do we make this decision? Is it simply that we argue the facts and the judge must decide? If so, what facts do the lawyers argue? Regardless of the facts argued, how does a reasonable judge decide what an “objective witness” in this situation would believe?

And, on the other hand, the Court’s “objective witness” statement cannot mean that we focus only on the objective person in the shoes of the victim because in the *Davis* opinion’s example of the statement jumping from nontestimonial to testimonial there is absolutely no indication that the victim stopped thinking “He’s going to kill me,” and began thinking “Here’s some information that may help them prosecute him.” It was the 911 operator who stopped thinking “I must save this woman if I can,” and began thinking “I must get information that will help us prosecute this man.”

Perhaps the answer is found in an opinion of the Illinois Supreme Court:

[W]hen the statement under consideration is the product of questioning, either by the police or someone acting on the behalf of law enforcement, the objective intent of the questioner is determinative. However, if the statements are not the product of law enforcement interrogation, the proper focus is on the intent of the declarant and the inquiry should be whether the objective circumstances would lead a reasonable person to conclude that his statements could be used against the defendant.<sup>106</sup>

Perhaps this really is what the Supreme Court of the United States is saying. It does not seem, however, that the question regarding law enforcement questioning would be whether “a reasonable per-

---

106. *State v. Sutton*, 908 N.E.2d 50, 64 (Ill. 2009). *Id.* at 66 (finding that statements made to a police officer in “an interrogation to determine the need for emergency assistance” were not testimonial even though “the offender was no longer on the scene,” (citing and discussing many similar cases)).

son [would] conclude that [the] statements could be used against the defendant.” Perhaps it is the lawyer in me, but I think that if the “objective witness” is to be placed in the shoes of the one who has been attacked, all that person wants is help. If the “objective witness” is to be placed in the shoes of a third-party observer, she would conclude that most anything said to the police could be used against the defendant. “[O]bjective witness[es]” watch television.<sup>107</sup> When the statement is made in response questions from law enforcement officers or their agents, perhaps the real question is this: Would the reasonable person (or would it be the reasonable law enforcement officer?) conclude that the law enforcement officer’s primary purpose was testimonial or nontestimonial? Was the officer, for example, making a case for prosecution of the perpetrator or securing the scene?

This whole “testimonial” decision is all about context. This may be the model for exploring the context. First, was the statement made in response to questioning by the police or someone acting on their behalf? Second, if yes, then what was the primary purpose of the questioner? If no, then what was the primary purpose of the person answering the questions? Whether the questioner is with or acting on behalf of law enforcement is not determinative, but it might be the place to start the inquiry. Likewise, when the statement is made to someone who is not associated with law enforcement, the primary purpose of the declarant might be the place to start.

Today’s lawyers and judges aside, what did the Framers of the Sixth Amendment think about these cases of parental or spousal abuse? In so many ways, the law at the time of the Sixth Amendment’s Framing treated children and women as the property of their fathers and husbands.<sup>108</sup> As a general rule, neither child abuse nor spouse abuse, as understood today, was considered a serious crime and both were rarely prosecuted.<sup>109</sup> As Justice Souter has noted, “to-

---

107. “Everything you say can and will be used against you in a court of law.” See *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) and almost any television program concerning police work produced since the late 1960s. “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.” *Dickerson v. United States* 530 U.S. 428, 443 (2000).

108. Reva B. Siegel, “*The Rule of Love, Wife Beating as Prerogative and Privacy*,” 105 *YALE L.J.* 2118 (1995-96). “By law, a husband acquired rights to his wife’s person, the value of her paid and unpaid labor, and most property she brought into the marriage. A wife was obliged to obey and serve her husband, and the husband was subject to a reciprocal duty to support his wife and represent her within the legal system.” *Id.* at 2122.

109. See Siegel, “*The Rule of Love, Wife Beating as Prerogative and Privacy*,” 105 *YALE L.J.* at 2125 (citing early American cases “recognize[ing] a husband’s prerogative to chastise his wife”) (citing and discussing cases). Here are two particularly notable examples cited by Professor Siegel. *State v. Black*, 60 N.C. (Win.) 262, 262 (1864) (“permitting husband ‘to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be

day's understanding of domestic abuse had no apparent significance at the time of the Framing."<sup>110</sup>

What, then, is clear? For four of the five-Justice majority, this is clear: To decide whether a statement is testimonial requires a thorough review of the context in which the statement was made,<sup>111</sup> and, sometimes, because the primary purpose of a statement can change as the conversation progresses, a thorough review of the context in which various parts of the statement were made. The context includes the intention of the person making the statement and the person receiving the statement. If neither party has prosecution in mind, the statement is not testimonial. If both parties have prosecution in mind, the statement is testimonial. If the intentions of the two are split in this regard, then context controls—consider everything in the mind of each party to the conversation and decide a primary purpose.

For the fifth Justice in the majority, the one with the controlling vote, the only “context” really needed is this: Is the statement “‘contained in formalized testimonial material’”?<sup>112</sup>

#### b. Dying Declarations—The Exception to the Right to Confront Witnesses

There does seem to be one exception to the general rule that testimonial hearsay statements offered against the accused in a criminal case are inadmissible absent an opportunity for the accused to cross-examine the hearsay declarant, and that is when the statement fits under the hearsay exception for statements under belief of impending death.<sup>113</sup> As explained in *Crawford v. Washington*,<sup>114</sup> the reasons for this are historical. The Confrontation Clause meant to constitutionalize the pre-ratification common law of confrontation, which included an exception for statements under belief of impending death.<sup>115</sup> “Al-

---

inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain”); *People v. Winters*, 2 Parker’s Crim. Cas. 10 (N.Y. 1823) (“declaring that while husband has no right to inflict corporal punishment on his wife, he may defend himself against her; holding that husband who struck his wife on head and bruised her severely when she attempted to prevent him from striking one of their children was not guilty of assault and battery because jury found prisoner ‘had done nothing more than was necessary to defend himself in this case.’”).

110. *Giles v. California*, 128 S. Ct. 2678, 2695 (Souter, J., concurring in part).

111. See, e.g., *Snowden*, *supra* note 90.

112. See *supra* Part III.

113. FED. R. EVID. 804(b)(2). See *Nesbitt*, 892 N.E.2d at 311 (“Thus, in the unique instance of dying declarations, we ask *only* whether the statement is admissible as a common-law dying declaration, and not whether the statement is testimonial.”) (emphasis in original).

114. 541 U.S. 36 (2004).

115. *Crawford*, 541 U.S. at 56. The Supreme Court has noted “the common law’s uniform exclusion of unconflicted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in the innumerable cases in which

though many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.<sup>116</sup>

If the Supreme Court does accept this as an exception to the Confrontation Clause, as all signs suggest it will, that leaves open this question: Does the confrontation exception only include statements covered by this hearsay exception as it existed pre-ratification, or does it include statements covered by post-ratification expansion of the hearsay exception? Did the Framers of the Sixth Amendment intend to allow statements under belief of impending death only to the extent they were allowed under the hearsay exception as it existed on the day of ratification or did they mean for this confrontation exception to follow the hearsay exception? Did they mean for the Constitution to incorporate the future expansion or retraction of the exception?

Surely any Framers of the Sixth Amendment who gave the matter any thought were aware that each common-law hearsay exception was a work in progress. The whole notion of a common-law exception is that it will continue to be developed by the courts. Its future meaning is dependent upon future interpretations of the common-law.<sup>117</sup> The question, then, is whether the Framers intended for this to continue to be a work in progress or, for Confrontation Clause purposes, to freeze the exception as of December 15, 1791, the day of ratification.

Whether the Framers intended this exception to the confrontation right to include only dying declarations as defined on the day of ratification or to include the post-ratification development—expansion or retraction—of the dying declaration exception is a question beyond the scope of this Article. It makes sense, however, that if they meant to have a common-law exception define one limit on the reach of the Confrontation Clause, then, recognizing that the common law of 1791 had not yet identified all of the nuisances of exception's application, they meant to allow for its continued common-law development. This would be so as long as, of course, the exception is not changed so radically that it is no longer really a dying declaration (the common-law label) or a statement under belief of impending death (the Federal

---

the defendant was on trial for killing the victim . . . ." *Giles v. California*, 128 S. Ct. at 2688. *Accord, e.g., Nesbitt*, 892 N.E.2d at 310-11. *See also Crawford*, 541 U.S. at 54 ("[T]he 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.").

116. *Crawford*, 541 U.S. at 56 n.6 (citations omitted).

117. BLACK'S LAW DICTIONARY 293 (8th ed. 2004) ("common law, . . . The body of law derived from judicial decisions, rather than from statutes or constitutions.").

Rules of Evidence label<sup>118</sup>), in anything but name. This would be so as long as the exception does not become unrecognizable to the common law exception.

c. Business Records

In *Crawford v. Washington*,<sup>119</sup> the Supreme Court of the United States stated that, “by their nature [business records are] not testimonial.”<sup>120</sup> By nature they are not, but in context they can be. There are lots of business records that are specifically prepared to be used in criminal trials—to “testify” against the accused in the event there is a criminal trial. As the Court wrote in *Melendez-Diaz v. Massachusetts*,<sup>121</sup> business records may be admitted at trial over the hearsay objection and sometimes over the Confrontation Clause objection, but not over the Confrontation Clause objection “if the regularly conducted business activity is the production of evidence for use at trial.”<sup>122</sup>

---

118. FED. R. EVID. 804(b)(2).

119. 541 U.S. 36 (2004).

120. *Crawford*, 541 U.S. at 56. “Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rule, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” *Melendez-Diaz*, 129 S. Ct. at 2539-40.

Just as business records generally are nontestimonial by their very nature, it may be that by their very nature statements by confidential informants generally are testimonial. *United States v. Cromer*, 389 F.3d 662, 670-71 (6th Cir. 2004); *Turner v. Commonwealth*, 248 S.W.3d 543, 545 (Ky. 2008) (citing *United States v. Nettles*, 476 F.3d 508, 517 (7th Cir. 2007); *United States v. Hendircks*, 395 F.3d 173, 181 (3d Cir. 2005)).

121. 557 U.S. \_\_\_, 129 S. Ct. 2527 (2009).

122. *Melendez-Diaz*, 129 S. Ct. at 2538.

*Testimonial*: *E.g.*, *State v. Belvin*, 968 So.2d 516, 520 (Fla. 2008) (finding a “breath test affidavit” testimonial where “the sole purpose of [the] affidavit is to authenticate the results of the test for use at trial”); *State v. Johnson*, 982 So.2d 672, 678 (Fla. 2008) (finding a report from a law enforcement lab testimonial where it was prepared “in anticipation of the prosecution of the defendant” and “used by the State to prove that the seized substances were illegal drugs”) (discussing cases); *State v. March*, 216 S.W.3d 663, 666 (Mo. 2007) (finding a lab report “prepared solely for prosecution to prove an element of the crime charged is ‘testimonial’”); *State v. Caulfield*, 722 N.W.2d 304, 309 (Minn. 2006) (finding a lab report identifying seized substance as cocaine was prepared for litigation and was testimonial).

*Not testimonial*: *E.g.*, *United States v. Mendez*, 514 F.3d 1035, 1043 (10th Cir. 2008) (finding that ICE is a centralized database that archives records of documents granting entry into the United States, created and is maintained “in connection with ongoing regulatory functions independent of prosecution”; its primary purpose is not testimonial) (citing many cases); *Rockwell v. State*, 176 P.3d 14, 26 (Alaska Ct. App. 2008) (finding “passport stamps and immigration card . . . were not made and maintained for the primary purpose of criminal investigations, and the [Peruvian] government employees who stamped the documents performed a ministerial duty that had nothing to do with prosecuting a particular person for criminal activity”; they “are not ‘testimonial hearsay’”).

It may be as simple as asking what is the primary purpose of the regularly conducted business activity. That may decide it. In the context required here, however, the business may not have a primary purpose. Just as a statement can shift from nontestimonial to testimonial, a business can regularly conduct more than one kind of activity. Some laboratories can, for example, be in the business of analyzing DNA. They can do this for a person wanting to confirm a blood relationship, for a person wanting to confirm or deny a predisposition to or the presence of certain diseases, and for the police, in order to produce evidence for use at trial. If such a lab prepares a report for the purpose of confirming or denying the presence of the marker for Huntington's disease for a self-interested individual and that report later becomes relevant in a criminal prosecution, that business record is not testimonial. If the prosecutor uses the same lab to test the victim of a crime for the presence of the Huntington's marker because its presence, if found, is relevant to an anticipated criminal prosecution, then the lab's report finding the marker would be testimonial.<sup>123</sup>

The key is the primary purpose of the business record; sometimes persuasive evidence of that is the primary purpose of the business itself.

A record of the results of a breath test might be testimonial. As a general rule, however, a certificate of inspection of the breath-testing equipment will not be. Depending on the facts, the former may have been recorded primarily to be used in the potential criminal prosecution of the person tested. Not so with the latter. The inspector's primary purpose is not the preparation of evidence to be used in a criminal prosecution but making sure that the machine is in proper working order and that those who will use it will know it is in proper working order. While a prosecutor may use the certificate in a criminal case, that use is not its primary purpose. Officers must know the machine works whether they will ever arrest anyone based on its results or not.<sup>124</sup>

---

123. *Melendez-Diaz* makes it clear that a laboratory report from a police crime lab, offered against the accused in a criminal prosecution by affidavit of the lab analyst who did the testing, is testimonial and the right to confront the declarant attaches. "[t]here is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements' thus described." *Melendez-Diaz*, 129 S. Ct. at 2532. Even under Justice Thomas's less sweeping application of the right to confront, the affidavit is "formalized testimonial material[]" and, therefore, the right attaches. See *supra* Part III.

124. See *State v. Sweet*, 949 A.2d 809, 819 (2008). Dictum in *Melendez-Diaz* suggests that this is so. *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case . . . . Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.").

The same kind of analysis can be applied to any number of other kinds of lab tests. Sometimes the reports generated will be testimonial and sometimes not. Take the results of an autopsy. "Although any experienced [pathologist] is undoubtedly aware of the possibility that any information he gleans may ultimately become evidence, building a prosecution is not" necessarily the motivation for the pathologist's work.<sup>125</sup>

— An autopsy report can be testimonial. If the police deliver the deceased victim of an apparent gunshot and tell the pathologist, "We believe there has been a murder, we have a suspect with a weapon, and we need to build a case," then the work of the pathologist is to develop evidence for possible use at trial and the report is testimonial.<sup>126</sup>

— An autopsy report can be nontestimonial. It can be "in response to an emergency situation"<sup>127</sup> involving a possible epidemic, and performed primarily to get the situation under control, rather than to provide evidence.

— An autopsy report can have mixed motives. The pathologist can be faced with deceased victims of what seems to be a terroristic gas attack, and produce an autopsy report designed both to help survivors of the attack and to help convict those responsible.

— A pathologist can be performing an autopsy and a creating a report in a case where a death appears to be accidental and, in the process, can uncover evidence of murder. A report that is prepared as the autopsy proceeds can evolve from one intent to another, from nontestimonial to testimonial. A report prepared after the autopsy is over and the pathologist has concluded the death was intentional might be testimonial.<sup>128</sup>

---

125. *Long*, 940 A.2d at 97 (substituting "pathologist" for "police officer").

126. The report is testimonial even in Justice Thomas's less-sweeping understanding because the report will be presented "in formalized testimonial materials, such as affidavits . . ." See *supra* Part III.

127. *Long*, 940 A.2d at 97 (substituting pathologist for police officer). Accord *Davis*, 547 U.S. at 822 (a statement the purpose of which is "to meet an ongoing emergency").

128. Cases that say that these kinds of reports are business records and therefore are never testimonial are wrong. Take, for example, *United States v. De La Cruz*, 514 F.3d 121, 133 (1st Cir. 2008) (stating that "[a]n autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford*." (citing cases). Such a rigid rule is contrary to *Davis*' primary purpose test. It fails to recognize that the primary purpose of some lab tests (business records or not) is testimonial and the primary purpose of others is nontestimonial. The lesson from *Davis* surely is that each statement must be considered on its own facts and circumstances.

In many cases, the laboratory analyst is not going to remember the details or the results of any particular lab work, particularly lab work done months or years before the trial. Even if the report is “contained in formalized testimonial material,”<sup>129</sup> the Confrontation Clause does not mean that this evidence will be lost. If the report is testimonial, it may be that the prosecutor will have to call the out-of-court analyst to the stand.<sup>130</sup> While on the stand, the analyst can authenticate the report, the report can be entered into evidence under the appropriate hearsay exception, and the accused can confront the analyst, if the accused chooses to do so. The analyst-declarant is available for cross-examination. The analyst’s lack of specific memory does not change that.<sup>131</sup> The Confrontation Clause is satisfied.<sup>132</sup>

It may also be that the prosecutor will not have to call the witness to the stand, but rather provide the means for the defendant to do so. As discussed below, it may be that if the report fits under a hearsay exception, the declarant is available, and the prosecutor can ensure that, upon request, the declarant will be produced to testify, then the prosecutor can go ahead and offer the report in his or her case-in-chief and leave the confrontation for defendant’s case.<sup>133</sup>

#### d. Other Categories of Out-of-Court Statements

The Supreme Court of the United States’s analysis of business and public records in *Melendez-Diaz v. Massachusetts*<sup>134</sup> includes the statement that, “by their nature [they are] not testimonial.”<sup>135</sup> This

129. See *supra* Part III (discussing Justice Thomas’s fifth-vote view of the Clause).

130. *Melendez-Diaz* states that “[t]he prosecution *must* produce [witnesses against the defendant].” *Melendez-Diaz*, 129 S. Ct. at 2534. What exactly the Court means by “produce” is not entirely clear. It could mean that the prosecutor must call the witness as part of the government’s case-in-chief. It could mean that the prosecutor need not call the witness to the stand but must produce the witness if the defendant chooses to call that witness after the prosecution rests. This issue should be resolved during the current term. See *Briscoe v. Virginia*, 129 S.Ct. 2858, No. 07-11191, 2009 WL 1841615 (June 29, 2009) (granting certiorari). Regarding *Briscoe*, see *supra* note 67.

131. *Crawford*, 541 U.S. at 59 (“[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”); *United States v. Owens*, 484 U.S. 554, 561 (1988) (“Ordinarily a witness is regarded as ‘subject to cross-examination’ when he is placed on the stand, under oath, and responds willingly to questions.”); *State v. Simpson*, 945 A.2d 449, 463 (Conn. 2008) (the right to confront the witness is satisfied if he or she “appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination.”) (citation omitted).

132. If the prosecutor calls the declarant to the stand then it is also possible that the prosecutor could use the present recollection refreshed to jog the witness’s memory and get the information into evidence. See, e.g., Fenner, *THE HEARSAY RULE* at 202-07 (2d ed.).

133. See *infra* part VI(C).

134. 557 U.S. \_\_\_, 129 S. Ct. 2527 (2009).

135. *Crawford*, 541 U.S. at 56. See *above supra* note 120 and accompanying text. .

applies, of course, to other categories of hearsay evidence. Many, perhaps most, of the exceptions cover statements that are not by their nature testimonial.

As suggested above,<sup>136</sup> many a present sense impression<sup>137</sup> or an excited utterance<sup>138</sup> will be made spontaneously, “unprompted . . . by purpose.”<sup>139</sup> If the statement has no purpose then it cannot have a primarily-testimonial purpose.<sup>140</sup> The same is true, really, for all of the hearsay exceptions and exclusions<sup>141</sup>—as a general rule the primary purpose of the statements covered by each is nontestimonial.<sup>142</sup> It does not matter whether the category of statements covered is statements of one’s own state of mind,<sup>143</sup> statements for purposes of medical diagnosis or treatment,<sup>144</sup> statements in an ancient document,<sup>145</sup> a market report,<sup>146</sup> or a learned treatise,<sup>147</sup> a defendant’s own statements<sup>148</sup> or those of defendant’s coconspirator<sup>149</sup> or employee,<sup>150</sup> or statements against interest.<sup>151</sup> As a general rule the covered statements will be nontestimonial.<sup>152</sup> Part of the point of *Melendez-Diaz* is that the question is not whether a hearsay statement fits under a hearsay exception but whether it is testimonial—and, actually, whether it is “contained in formalized testimonial material.”<sup>153</sup>

136. See *supra* notes 87 and 88.

137. FED. R. EVID. 803(1).

138. FED. R. EVID. 803(2).

139. “spontaneous,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2204 (2002). <http://unabridged.merriam-webster.com> (9 Jul. 2009).

140. It is possible, I suppose, that the person hearing the statement could be primarily interested in gathering and maintaining evidence for use at a possible later criminal trial. This would be a rare situation. Even in this situation, the declaration would not be a “formalized testimonial” statement, *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring), and the confrontation right would not attach because only four of the Justices in the five-Justice *Melendez-Diaz* majority attach the right to an informal testimonial statement. See *supra* Part III. (And one of those four, Justice Souter has retired and Justice Sotomayor’s vote on this issue has not been recorded. See *supra* note 35 and accompanying text.)

141. 142. FED. R. EVID. 801(d), 803, 804, and 807.

142. “Most of the hearsay exceptions covered statements that by their nature were not testimonial.” *Melendez-Diaz*, 129 S. Ct. at 2539 (quoting *Crawford*, 541 U.S. at 56).

143. FED. R. EVID. 803(3).

144. FED. R. EVID. 803(4); *Melendez-Diaz*, 129 S. Ct. at 2533 n.2.

145. FED. R. EVID. 803(16).

146. FED. R. EVID. 803(17).

147. FED. R. EVID. 803(18).

148. FED. R. EVID. 801(d)(2)(A).

149. FED. R. EVID. 801(d)(2)(E). *Melendez-Diaz*, 129 S. Ct. at 2539 (quoting *Crawford*, 541 U.S. at 56).

150. FED. R. EVID. 801(d)(2)(D).

151. FED. R. EVID. 804(b)(3).

152. In this regard, see *supra* note 140.

153. The quotation is from Justice Thomas’s concurring opinion, which is necessary for the five Justice majority. See *supra* Part III. Were we only concerned with the opinion of the Court, and not the concurring opinion, then the sentence in text, with the

There are other kinds of statements that will, by their very nature, tend to be testimonial. Statements by confidential informants, for example, may by their nature be testimonial.<sup>154</sup> But still, not every statement by such an informant will require confrontation. The primary purpose of the conversation may be to recover a child, stop an assassin, or prevent an attack on a public place. The primary purpose may be to prevent a tragedy or to get under control a tragedy in progress.<sup>155</sup> Or the primary purpose may well be both to get a situation under control and to prepare a case against the eventual accused.

The point is that (except in the case of the dying declaration<sup>156</sup>) whether the United States Constitution requires that a witness be presented for confrontation is not a categorical decision. It is an *ad hoc* decision. It is, however, an *ad hoc* decision made in a universe where, because of the close affinity between the Confrontation Clause and the hearsay rule, much of the discussion is bound to place the statements into categories taken from the list of hearsay exceptions.

#### V. THE IMPORTANCE OF MAKING CONFRONTATION CLAUSE DECISIONS PRIOR TO THE START OF THE TRIAL

Because the resolution of these admissibility issues are so fact specific, particularly the issue of whether a statement is in whole or in part testimonial, "*in limine* procedure[s]"<sup>157</sup> are particularly important. Courts should hold pretrial hearings to sort through the statement, to sort through the facts, and to decide what statements, or parts of statements, are testimonial and what statements are not. Statements should be redacted as necessary.<sup>158</sup> Pretrial decisions of this sort will affect the plea bargain the prosecutor is willing to offer and the one the defendant is willing to accept, and in this way the extra hearing will actually save the courts' time. At jury trials such pretrial decisions will decrease the chance of prejudice from the jury hearing inadmissible evidence elicited during the trial, faster than the

---

deletions overstuck, would read, "Part of the point of *Melendez-Diaz* is that the question is not whether a statement fits under a hearsay exception but, hearsay exception or not, whether it is "contained in formalized testimonial material." *Melendez-Diaz*, 129 S. Ct. at 2539.

154. *United States v. Hendricks*, 395 F.3d 173, 181 (3d Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 670-71 (6th Cir. 2004); *Turner v. Commonwealth*, 248 S.W.3d 543, 545 (Ky. 2008) (citing *United States v. Nettles*, 476 F.3d 508, 517 (7th Cir. 2007)).

155. Statements to the police made "to meet an ongoing emergency," are nontestimonial. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

156. *But see supra* notes 113-18 and accompanying text.

157. *Davis v. Washington*, 547 U.S. 813, 829 (2006).

Regarding pretrial motions, *see also infra* notes 259-62 and accompanying text.

158. *Id.* In *Davis*, the Court related this to the procedure courts use to "redact or exclude the . . . unduly prejudicial portions of otherwise admissible evidence." *Id.*

trial objection can be lodged, or overheard while the point is being argued to the judge.

In addition, prosecutors should rather routinely use pretrial procedures to require defendants to make their Confrontation Clause objections prior to trial. Upon appropriate motion, if the objection is not made prior to trial, then it is waived.<sup>159</sup> Either way—objection made or waived—prosecutors can better prepare their own case, including their own witness list.

## VI. SITUATIONS WHERE THE RIGHT ATTACHES BUT IS NOT INFRINGED

The right to confront witnesses—the right to confront the declarant of a testimonial out-of-court statement offered to prove the truth of a fact asserted therein—is satisfied in any number of ways. It is, of course, satisfied when the out-of-court declarant testifies and can be examined by the accused at the trial where the statement is offered.<sup>160</sup> It is satisfied where the accused had a prior opportunity to cross-examine the declarant about the statement and the state can show that the declarant is unavailable to testify in person.<sup>161</sup> And, finally, in the case of out-of-court statements by experts, it does seem (though this is not yet entirely clear) that the right can sometimes be satisfied with the testimony of an expert witness who has the first-hand knowledge of a different expert: one who has no first-hand knowledge of the ultimate fact to be proved from the out-of-court statement but does have first-hand knowledge of the work of such experts. (The examples below will make this concept more concrete and easier to understand.<sup>162</sup>)

### A. THE TESTIFYING OUT-OF-COURT DECLARANT

“The [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.”<sup>163</sup> It may be trite to say so but, if the defendant can confront the

---

159. See *infra* PART VIII(B) and accompanying notes; see also *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_, \_\_\_, 129 S. Ct. 2527, 2534 n.3 (2009). (“The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.”).

160. See *infra* notes 60-62 and accompanying text.

161. See *infra* part VI(B).

162. See *infra* part VI(D).

163. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). See also *Kentucky v. Stincer*, 428 U.S. 730, 744 (1987) (not allowing the accused to be present at a hearing to determine the competency of two alleged-victim children does not violate the confrontation right; if the children are found competent and do testify, the accused can cross-examine them then).

declarant at the criminal trial, then the defendant's right to confront the witness is not denied.

The right to confront the witness is satisfied if the accused has an *opportunity* to confront the witness. Actual confrontation is not required. This constitutional right is like all others in that the right-holder need not assert its protections.

Limiting or even denying cumulative re-cross-examination does not infringe the Confrontation Clause.<sup>164</sup> So long as the disallowed testimony is cumulative, the accused is not denied a full and fair opportunity to cross-examine the witness.

The declarant need not be cooperative. A hearsay declarant who takes the stand and denies any knowledge of the statement in question<sup>165</sup> or claims not to have any memory of the events in question<sup>166</sup> is available for cross-examination.

The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.<sup>167</sup>

A particularly important unanswered Confrontation Clause question concerns the declarant who is in the courtroom and can be put in the witness box but refuses to testify. Perhaps the declarant invokes

---

164. *E.g.*, *Plascencia v. Alameida*, 467 F.3d 1190, 1202 (9th Cir. 2006) (finding that exclusion of cumulative cross-examination did not violate the Confrontation Clause and, in any event, any error would have been harmless; regarding harmless error, *see supra* Part X); *United States v. Perez-Ruiz*, 353 F.3d 1, 10-11 (1st Cir. 2003).

165. *Crawford*, 541 U.S. at 59 n.9 (“[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”); *United States v. Owens*, 484 U.S. 554, 561 (1988) (“Ordinarily a witness is regarded as ‘subject to cross-examination’ when he is placed on the stand, under oath, and responds willingly to questions.”); *State v. Simpson*, 945 A.2d 449, 463 (Conn. 2008) (the right to confront the witness is satisfied if he or she “appears at trial, takes an oath to testify truthfully, and answers the questions put to him or her during cross-examination.”) (citation omitted).

166. *Crawford*, 541 U.S. at 53-54 (“[T]he Framers would not have allowed admission of testimonial statements of a witness who *did not appear at trial* unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”) (emphasis added); *Id.* at 59 n.9 (“[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”); *Owens*, 484 U.S. at 564 (“Admission of [a] statement of a [testifying] witness who is unable, because of memory loss, to testify concerning the basis for the [statement]” does not violate the Confrontation Clause) (pre-*Crawford*); *State v. Holliday*, 745 N.W.2d 556, 567 (Minn. 2008) (discussing the issue at length and citing numerous cases).

167. *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985).

the Fifth Amendment privilege against self-incrimination. Perhaps the declarant simply refuses to testify—is ordered to do so, is held in contempt of court, but still refuses to testify. The right to confront the witness is the right to cross-examine the witness. A declarant who testifies but is uncooperative can be cross-examined; a declarant who refuses to testify at all cannot. Therefore, if the right to confront attaches and the accused did not have a prior opportunity to cross-examine the declarant (and has not forfeited the right to confront the witness<sup>168</sup>), the invocation of the Confrontation Clause bars admission of the statement.<sup>169</sup>

When the out-of-court declarant takes the stand and is uncooperative, untruthful, or unclear, that declarant's out-of-court statement can be admitted over a right-to-confront objection. When the out-of-court declarant takes the stand and refuses to testify then, unless the prosecutor can show that the accused has forfeited by wrongdoing the right to confront the witness,<sup>170</sup> that declarant's out-of-court statement cannot be admitted over the same objection.

#### B. A PRETRIAL OPPORTUNITY TO CROSS-EXAMINE AN UNAVAILABLE OUT-OF-COURT DECLARANT

The right to confront witnesses is all about confrontation through cross-examination. An opportunity to cross-examine a testifying witness at the trial of course satisfies the right. A pretrial opportunity to cross-examine a witness whose trial testimony is unavailable also satisfies the right. In the latter situation, the prosecution must satisfy the evidentiary burden of showing that the declarant's in-trial testimony is not available.<sup>171</sup>

---

168. See *infra* part IX(A).

169. Unless procedural constitutional rights, as opposed to substantive constitutional rights, are absolute (see *infra* notes 228-46 and accompanying text), there is a second way to look at this. The state has a compelling interest in preventing those accused of crimes from making witnesses against them unavailable to testify. This is of course true where witnesses are murdered to prevent them from testifying. It also seems true where witnesses are coerced with threats, bribes, or even extended vacations to remote parts of the world. If allowing their out-of-court statements into evidence is a sufficiently narrowly tailored way of achieving that compelling state end, the statements are admissible. If, however, the witness is coerced to lie on the stand, rather than to disappear altogether, the Confrontation Clause is not a problem because the witness can be confronted.

170. See *infra* Part IX and accompanying text.

171. See *e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_, \_\_\_, 129 S. Ct. 2527 at 2531 (2009) (stating “[a] witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross examination”); *Crawford*, 541 U.S. at 56 (regarding testimonial statements by an unavailable declarant the court wrote of the necessity for a “prior opportunity to cross-examine . . . .”); *State v. Cannon*, 254 S.W.3d 287, 305-06 (Tenn. 2008) (stating that “unavailability must be supported by proof, not by unsupported

It is not enough, however, that the accused *could have taken* the deposition of the witness, *but did not*. Under the Confrontation Clause that does not count as an opportunity to cross-examine the declarant.<sup>172</sup> There must have actually been a trial, hearing, deposition, or other proceeding at which the accused had an opportunity to cross-examine the declarant. (It does not matter, by the way, whether the accused took advantage of that opportunity, but just that there was such a proceeding and the accused had that opportunity.) It is not enough that the accused *could have* called for some kind of pretrial examination of the adverse witness, but chose not to do so.<sup>173</sup>

### C. LEAVING IT UP TO THE DEFENDANT TO CALL THE WITNESS

There is nothing on the face of the Confrontation Clause that says the witness necessarily and in all cases has to be called to the stand by the prosecutor, rather than by the defendant. All that is required is an opportunity to cross-examine the declarant at trial, or declarant-unavailability and a prior opportunity to have cross-examined the declarant.<sup>174</sup> In *Melendez-Diaz v. Massachusetts*<sup>175</sup> the Court recognized that a procedure that allows the prosecutor to put the out-of-court testimonial statement into evidence and leave it to the defendant to call the declarant or not, will not always satisfy the right to confront the witness: Such a procedure is “of no use to the defendant when the witness is unavailable or simply refuses to appear.”<sup>176</sup> This is certainly true. But this procedure is of use when the prosecution can assure the defense that the witness will appear and will testify; can assure the defense that it will produce the witness if the defense

---

statements of counsel;” here, “the state offered no proof to establish unavailability,” but only the Assistant District Attorney’s “unsubstantiated assertion”). Regarding testimonial unavailability under the rules of evidence, and various ways in which testimonial unavailability might be present for Confrontation Clause purposes, *see, e.g.* Fenner, *THE HEARSAY RULE* at 269-274 (2d ed.); Christopher B. Mueller & Laird C. Kirkpatrick, *EVIDENCE*, §§ 8.63-8.67 (4th ed. 2009). *See also infra* Part X (discussing the prosecutor’s burden when it comes to showing harmless constitutional error).

172. *State v. Johnson*, 982 So.2d 672, 681 n.6 (Fla. 2008) (“[T]he opportunity to depose a declarant . . . does not satisfy the opportunity for cross-examination required by the Confrontation Clause.”).

173. The Supreme Court has said that “[t]he prosecution *must* produce [the witness against the accused].” *Melendez-Diaz*, 129 S. Ct. at 2534 (emphasis in original).

174. *See Crawford*, 541 U.S. at 56 (regarding testimonial statements by an unavailable declarant the court wrote of the necessity for a “prior *opportunity* to cross-examine . . .”) (emphasis added).

175. 557 U.S. \_\_\_, 129 S. Ct. 2527 (2009).

176. *Melendez-Diaz*, 129 S. Ct. at 2553. The quotation continues: “*See, e.g., Davis*, 547 U.S. at 820 ([‘The witness] was subpoenaed, but she did not appear at . . . trial’).” *Id.*

so requests; can assure the defense it will be able to confront the witness.<sup>177</sup>

There will be cases where the prosecution can produce the witness, if requested—when, for example, the witness is an employee of a police crime lab in the prosecutor's jurisdiction. This process is of use to the defendant when the witness is a government laboratory analyst, for example. The prosecution can introduce admissible hearsay evidence in the form of an affidavit affirming that the powder at the center of the trial was tested and found to be cocaine of a certain

---

177. The usefulness of such a procedure is evidenced by the fact that nearly every state has some sort of statute(s) that allows states to introduce certain certificates of analysis and requires the accused to take some steps to cause the testimony of the witness. *Briscoe v. Virginia*, Brief in Opposition to Writ of Certiorari, 2008 WL 6485428, \*15 (Aug. 1, 2009).

Alabama: Alabama Code § 12-21-300 (2006); Alaska: Alaska Stat. § 12.45.084 (2006); Arizona: Arizona Rev. Stat. Ann. § 36-254 (2006); Arkansas: Arkansas Code Ann. §§ 5-64-707, 12-12-313 (2006); Colorado: Colorado Rev. Stat. § 16-3-309(5) (2006); Connecticut: Connecticut Gen. Stat. § 21a-283(b) (2006); Delaware: Delaware Code Ann. tit. § 10, 4330-32 (2006); District of Columbia: District Of Columbia Code Ann. § 48-905.06 (LexisNexis 2006); Florida: Florida Stat. Ann. §§ 316.1934, 327.354 (West 2006); Idaho: Idaho Code Ann. § 37-2745 (2006); Illinois: 725 Illinois Comp. Stat. § 5/115-15 (West 2000) (*but see Illinois v. McClanahan*, 729 N.E.2d 470, 478 (Ill. 2000), holding the statute unconstitutional); Iowa: Iowa Code § 691.2 (2006); Kansas: Kansas Stat. Ann. §§ 22-2902a, 22-3437 (2006); Kentucky: Kentucky Rev. Stat. Ann. § 189A.010 (West 2006); Louisiana: Louisiana Rev. Stat. Ann. §§ 15:499-15:501, 32:662-32:663 (2006); Maine: Maine Rev. Stat. Ann. tit. 5, § 9057; tit. 6, § 205; tit. 17-A, § 1112; tit. 29-A, § 2431 (2006); Maryland: Maryland Code Ann., Cts. & Jud. Proc. §§ 10-914, -1001 to -1003 (West 2006); Massachusetts: Massachusetts Gen. Laws ch. 22C, §§ 39, 41; ch. 90, § 24; ch. 90B, § 8; ch. 94C; ch. 111, § 13 (2006); Michigan: Michigan Comp. Laws §§ 257.625a, 600.2167 (2006); Minnesota: Minnesota Stat. §§ 634.15-16 (2006); Missouri: Missouri Rev. Stat. §§ 577.020, 577.037 (2006); Nebraska: Nebraska Rev. Stat. § 28-1439 (2006); Nevada: Nevada Rev. Stat. §§ 50.315, 50.320, 50.325 (2006); New Hampshire: New Hampshire Rev. Stat. Ann. §§ 215-A:11-i, 265:92-a, 270:57 (2006); New Jersey: New Jersey Stat. Ann. § 2C:35-19 (West 2006); New Mexico: New Mexico Stat. Ann. §§ 66-8-110, 66-13-11 (LexisNexis 2006); New York: New York Veh. & Traf. Law § 1195 (McKinney 2006), New York C.P.L.R. 4518, 4520 (McKinney 2006), New York Crim. Proc. Law § 190.30 (McKinney 2006); North Carolina: North Carolina Gen. Stat. §§ 20-139.1, 90-95(g) (2006); North Dakota: North Dakota Cent. Code §§ 19-03.1-37, 39-20-07 (2006); Ohio: Ohio Rev. Code Ann. § 2925.51 (West 2006); Oklahoma: Oklahoma Stat. Ann. tit. 22 §§ 751, 751.1; tit. 47, § 754 (West 2006); Oregon: Oregon Rev. Stat. §§ 40.460, 40.510, 475.235 (2006); Pennsylvania: 75 Pennsylvania Cons. Stat. Ann. § 1547 (West 2006); Rhode Island: Rhode Island Gen. Laws § 9-19-43 (2006); South Dakota: South Dakota Codified Laws § 1-49-6 (2006); Tennessee: Tennessee Code Ann. §§ 40-28-122, 40-35-311, 55-10-407 (2006); Texas: Texas Code Crim. Proc. Ann. art. 38.41 (Vernon 2006); Utah: Utah Code Ann. §§ 41-6a-515, 72-10-503 (2006); Vermont Stat. Ann. tit. 13, § 4816; tit. 23, §§ 1202, 1203, (2006); Virginia: Virginia Code Ann. §§ 18.2-268.7, 18.2-268.9, 19.2-187, 19.2-187.01, 19.2-187.02, 19.2-187.2 (2006); Washington: Washington Rev. Code § 46.20.308 (2006); West Virginia: West Virginia Code § 17C-5A-1 (2006); Wisconsin: Wisconsin Stat. § 970.03 (2006); Montana: Montana R. Evid. 803(8) (2006); South Carolina: South Carolina R. Crim. Pro. 6 (2006); Washington: Washington St. Super. Ct. Crim. R. 6.13 (2006).

*Id.* at 15-16, n.8.

weight. If the defendant objects, the prosecution can assure the defense that it will produce the analyst during the latter's presentation of evidence, should the defense so desire.

If at the time the prosecutor offers the out-of-court statement it is known that the declarant will not be available for confrontation, then the prosecution will not be able to give the defense assurances that it will produce the witness. If the witness unexpectedly becomes unavailable (by sudden death, for example) after the out-of-court statement is entered but before the defense has a chance to call the witness to the stand, then the situation is the same as when the prosecution examines the witness, court recesses for the day, and the witness dies overnight.

No one would argue that the chance that a witness might die overnight, before the defense has an opportunity to conduct a cross examination, means that the prosecution cannot call the witness in the first place (or has to call the witness early in the day and leave time during that day for the defense to cross-examine). Instead, the prosecutor bears the risk of having the prosecution dismissed because of the defendant's inability to confront the accuser. Unless the error is harmless,<sup>178</sup> or the defendant's misbehavior caused the defense to forfeit the right to confront,<sup>179</sup> jeopardy will have attached and the prosecution will have to be dismissed.

This is no different. It is no different when the prosecution introduces the exhibit and the defense confronts the declarant a day, or a few days, later. When the prosecution can produce the witness at the appropriate later time and assure the defense that the witness will testify—a lab-analyst witness, for example, who works for the same jurisdiction as the prosecution—then the defendant has the opportunity to confront the witness.<sup>180</sup>

The United States Constitution does not guarantee simultaneous confrontation. At best, the confrontation will follow right after the direct examination. When direct concludes at the end of the trial-day, cross-examination will begin the next day. It does not seem to present

178. See *infra* part X. If the constitutional error is harmless the testimony can be stricken and the jury instructed to disregard it.

179. See *infra* notes 224-27 and accompanying text.

180. The defendant will be able to cross-examine the witness. Parties do not vouch for their witnesses. The federal rules of evidence state that any party can attack the credibility of any witness. FED. R. EVID. 607. The rules also provide that "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." FED. R. EVID. 611(c) (emphasis added).

If despite the prosecution's assurance that the witness will testify, the witness refuses, then there will be constitutional error; either the error will be harmless, see *infra* part X, or the conviction, if there is one, will be reversed. This is discussed further in the main text a few paragraphs following this footnote.

a constitutional defect if the confrontation occurs two days, three days, or more after the introduction of the exhibit in question.<sup>181</sup> As a general rule there is no reason such confrontation cannot be just as useful as confrontation one or two or a few days earlier.

There may be exceptions. The bribery, racketeering, obstruction of justice, and money laundering trial of ex-Congressman William Jefferson took approximately six weeks.<sup>182</sup> The government called more than forty witnesses. The defense called two and took less than a day of the trial.<sup>183</sup> Confrontation a month-and-a-half later may not be sufficiently "useful;" it may not satisfy the right. This, however, is the exceptional case and can be dealt with as an exception. Furthermore, if the defense does not intend to put on evidence and it is not unconstitutional to require the defense to say so in advance (when making his or her Confrontation Clause objection<sup>184</sup>) then the court can order that the confrontation occur during the prosecution's presentation of its case. But these are the exceptions. They do not create the rule.

In *Melendez-Diaz*, the Court wrote that "[c]onverting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused."<sup>185</sup> This is not so in the situation described above. The consequences are on the prosecution, which must prove the error is harmless or have the case dismissed because of the constitutional violation.

The *Melendez-Diaz* opinion continues: "More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses

---

181. According to one state supreme court, *Crawford* announced "a *per se* rule: The Confrontation Clause bars the government from introducing testimonial statements at trial against a criminal defendant without calling the declarant to testify in person, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." *Long v. U.S.*, 940 A.2d 87, 93 (D.C. 2007) (quoting *Thomas v. United States*, 914 A.2d 1, 11 (D.C. 2006)). As explained in text, I do not believe this is so. I am not so sure that this is entirely true. It seems to me that the government does not necessarily have to be the one to call the declarant to the stand. In any event, during the current term of the Supreme Court of the United States we are due to learn whether it is so or not so. The Court has accepted certiorari over a case where the issue is whether the prosecutor can introduce a testimonial out-of-court statement without calling the declarant to the stand when the declarant is available and can be called to the stand by the defendant. See *supra* note 67 and accompanying text.

182. <http://www.washingtonpost.com/wpdyn/content/article/2009/07/30/AR2009073002634.html>, last visited August 9, 2009.

183. <http://www.washingtonpost.com/wpdyn/content/article/2009/07/23/AR2009072302552.html>, last visited August 9, 2009.

184. See *supra* Part V and accompanying text.

185. *Melendez-Diaz*, 129 S. Ct. at 2540.

into court.”<sup>186</sup> The Constitution states that “the accused shall enjoy the right . . . to be confronted with the witnesses against him.” A reasonable reading of “to be confronted” is that the party offering the evidence against the accused must put the witness on the stand.<sup>187</sup> A second reasonable reading of “to be confronted” is that the party offering the evidence against the accused must produce the witness for confrontation, and that can be done during the prosecution’s case-in-chief or the presentation of the defense. It seems to be a reasonable reading of the Clause to say that if the prosecution can produce the witness for confrontation during the presentation of the defendant’s case, then the “right . . . to be confronted” is satisfied. The confrontation is the same. The defendant is sitting there able to look the witness in the eye and defense counsel is there to engage in as thorough an examination of the witness as he or she chooses.<sup>188</sup>

The trial commonly thought to be the spiritual father of the Confrontation Clause is Sir Walter Raleigh’s trial for treason. The evidence against Raleigh included a formalized, written, testimonial statement from an alleged witness by the name of Lord Cobham. Though the Crown was holding Cobham prisoner in a nearby cell, they refused Raleigh’s request to produce him as a witness at the trial so Raleigh could confront him.<sup>189</sup> Those who rose up against Raleigh’s conviction would, it seems, have considered the witness confronted if Raleigh been able to call Cobham as a part of his defense—so long as the prosecution produced him (brought him over from his prison cell), the court allowed Raleigh to put him on the stand and confront him under oath, and he testified.

We are due to find out if this preceding analysis is right or not in the current term of the Supreme Court. The Court has accepted certiorari over a case wherein the issue is whether the prosecution can introduce a testimonial out-of-court statement without calling the declarant to the stand when the declarant is available and the defendant can call the witness to the stand.<sup>190</sup>

---

186. *Id.*

187. “The Confrontation Clause guarantees the accused the right ‘to be confronted with the witnesses against him.’ This language, employing the passive voice, imposes a burden of production on the prosecution, not on the defense.” *Thomas v. United States*, 914 A.2d 1, 16 (D.C. 2006), citing *State v. Snowden*, 867 A.2d 314, 332 n.22 (2005).

188. *See supra* note 180 and accompanying text.

189. *Crawford*, 541 U.S. at 44. “Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited . . . abuses [such as those at Raleigh’s trial].” *Id.*

190. *See supra* note 67.

D. TESTIMONY FROM EXPERTS OTHER THAN THOSE WHO PERFORMED THE UNDERLYING EXPERT ANALYSIS

Surely the Confrontation Clause does not mean that all expert testimony must be based on first-hand observation. Such a rule would do away with expert testimony in criminal trials, except, of course, for that which is not testimonial or is offered by the defendant. All experts base opinions on what they have read, what they have been told, work that others have done. Experts base their opinions on the work of generations of experts who came before them.<sup>191</sup>

Granted, much of what most experts rely upon is not testimonial. The expert work done by preceding generations of experts was not done for the primary purpose of establishing facts for later use in criminal prosecutions. Only the final expert in the chain will have to be presented for confrontation, *i.e.*, the expert who took the work of the preceding generations and applied it to a certain set of facts in order to establish facts for later use in a criminal prosecution.

But it might have been—the work of experts of generations past might have been done for the primary purpose of putting criminals behind bars. Perhaps it is important for the prosecutor to be able to identify the exact kind of knife used in a fatal stabbing. The prosecutor has an expert witness, an FBI agent expert in knives and knife wounds. This agent has an opinion that the knife in question is a particular kind manufactured by one particular company in the early 1950s. The agent's opinion is based on observation of the wound and an FBI reference manual. A now-unavailable agent of an earlier generation prepared the manual with the specific intent that it would be used to help catch and convict criminals.<sup>192</sup>

Even here, however, the reference work does not seem to be testimonial. Whether it is or not may depend on whether the Confrontation Clause's primary-purpose test requires a primary purpose related to a particular crime, series of crimes, or criminal enterprise. The primary purpose of the reference work and its author may have been to put criminals in prison. Assuming it was prepared for use against persons accused, it was not prepared for use against "the accused."

---

191. It has been argued that for all of us, expert or not, there is no such thing as first-hand knowledge. "I think that I shall never see a poem lovely as a tree." Joyce Kilmer, *Trees*, POEMS, ESSAYS AND LETTERS, 180 (Robert Coles Holliday ed. 1937). "[H]ow do I know it is a tree? Someone told me." G. Michael Fenner, *Law Professor Reveals Shocking Truth about Hearsay*, 62 UMKC L. REV. 24 (1993). ("And if a tree was not a tree, he wondered what it really was." *Id.* at 24 n.128 (quoting Paul Auster, *City of Glass*, THE NEW YORK TRILOGY, 43 (1985)).

192. Let us hypothesize that the agent from the 50s said in the preface to his book that was compiled and written for the sole purpose of putting criminals behind bars and he dedicated the book to "the Special Agents who catch the bad guys and see that they are locked away."

The author had no intention specific to this particular crime, its victim, or its perpetrator. The statement is not in any direct way testimonial against *the* accused. If the primary purpose was testimonial, it still may have been too general to call for the attachment of the Confrontation Clause. And yet, isn't the author of the reference manual a witness against the accused?

So, let us consider this case. The technician who prepared a lab report is unavailable. Perhaps the technician has died.<sup>193</sup> Perhaps the technician has not died, and it is rather that multiple technicians and analysts did the work that went into the report in question and the prosecution does not want to call each and every one of them. In that case the prosecution may be able to call another expert, one who can form his or her own expert opinion based on the report.<sup>194</sup> The expert called as a witness can state his or her own expert opinion and can be cross-examined about its basis, and the trier of fact can take the expert's opinion for what it is worth. This witness can be confronted.<sup>195</sup> "The vital questions—was the lab work done properly?"

---

193. If the prosecution knew the technician was dying it could consider taking the technician's deposition to preserve the testimony for trial. See FED. R. CRIM. P. 15. The defendant would have the opportunity to cross-examine the witness at the deposition.

194. The rules of evidence allow experts to testify to opinions that are based on inadmissible evidence when it is reasonable for experts in the field to form such opinions based on such evidence. See, e.g., Fenner, *THE HEARSAY RULE* at 434-36 (2d ed.).

195. Here is an example of this procedure in practice. "At trial, the government called Alyssa Bance, a forensic scientist with the Minnesota Bureau of Criminal Apprehension, to testify about DNA evidence linking [defendant] to the firearm. Specifically, Bance testified about DNA testing performed by another scientist in the office, Jacquelyn Kuriger." *United States v. Richardson*, 537 F.3d 951, 955 (8th Cir. 2008). Bance did not personally receive the evidence into the lab or "perform or witness any DNA testing of the samples in this case." *Id.* at 956. Bance did perform a thorough review of Kuriger's "case file with [her] notes and results." *Id.* at 955.

Bance "testified as to the tests Kuriger performed and the procedures and controls Kuriger used, as well as the results of Bance's own independent analysis of Kuriger's data . . . . Bance admitted her only knowledge of the tests was from reviewing the paperwork Kuriger generated, conducting a second independent analysis of Kuriger's data, and comparing her analysis of the data with Kuriger's analysis of the same data." *Id.* at 956. She testified that the defendant's "DNA evidence matched the DNA evidence found on the gun." *Id.* at 960.

"[Defendant] argues that the tests and conclusions performed by Kuriger are testimonial; therefore Bance could not testify as to these without violating the Confrontation Clause. Bance, however, testified as to her own conclusions and was subject to cross-examination. Although she did not actually perform the tests, she had an independent responsibility to do the peer review. Her testimony concerned her independent conclusions derived from another scientist's test results and did not violate the Confrontation Clause." *Id.* at 960.

In *United States v. Moon*, 512 F.3d 359 (7th Cir. 2008), one expert testified based on the work of another non-testifying expert. Defendant did not object that the testifying expert had come to an erroneous conclusion from the data. "Any competent chemist would infer from these data that the tested substance was cocaine." *Id.* at 362. Instead, defendant was concerned "with the readings taken from the instruments." *Id.* The court of appeals held that "the instruments readouts are not 'statements', so it does not mat-

what do the readings mean?—can be put to the expert on the stand. The background data need not be presented to the jury. . . . [T]he Sixth Amendment does not demand that the chemist or other testifying expert have done the lab work himself.”<sup>196</sup>

When this “other” expert is called to the stand, the objections come from the rules of evidence, not the United States Constitution. Is the expert competent? Is the testimony relevant? If the testimony survives the evidentiary objections and is admitted, then the question becomes whether this testimony, along with any other evidence, is enough to satisfy the prosecution’s burden of production; enough proof of the relevant essential-element of the crime; enough to survive a motion to dismiss and get the case to the jury. The basis evidence—the out-of-court statements prepared by the hands-on experts—may well not be admissible, but the expert opinion of the testifying expert may well be, and it may well be enough. The question becomes whether or not a conviction can be supported without the basis evidence, and not whether the testifying expert’s opinion survives the Confrontation Clause objection.

The expert to be confronted does not always have to be the exact same expert who did every piece of the leg-work, who prepared every part of the report, and it need not even be the one who prepared the report, as long as the new expert has formed a relevant and independent conclusion. The testimony is the conclusion of the new expert, who can be confronted. Just the same as expert opinion can be a “way around” the bar of the hearsay rule,<sup>197</sup> it can be a way to satisfy the demands of the Confrontation Clause.

Here is the combination required for using another expert, other than the one who did the hands-on work, as the testifying witness. First, if the only testimony is the opinion of the testifying expert and whatever relevant first-hand knowledge that expert has (say, for example, about the methodology used, how it was employed in the lab in question at the time in question, and how all of this is relevant to the case at hand), then all of the testimony on the matter is subject to confrontation. Second, for the prosecution to get past a motion to dismiss, the opinion of the testifying expert must be enough that a reasonable juror could find the essential element established. Third, if

---

ter whether they are ‘testimonial.’” *Id.* The court is correct that the readouts are not statements—at least they are not hearsay statements. Hearsay is limited to statements by persons. *E.g.*, Fenner, *THE HEARSAY RULE* at 15-16 (2d ed.). However, the non-testifying expert is a person and that person wrote those readouts into a report. That written matter is a statement, and in the context of the *Moon* case it was a testimonial statement. The court is correct insofar as its analysis goes, but its analysis does not go far enough, and its conclusion seems incorrect.

196. *Moon*, 512 F.3d at 362.

197. *See, e.g.*, Fenner, *THE HEARSAY RULE* at 429-33 (2d ed.).

the defendant wishes to bring up something—anything—about the underlying work of non-testifying experts, the defendant is free to do so in whatever possible way, including vigorously cross examining the testifying expert, calling the experts who did the work, and calling other experts to dispute the testifying expert.

## VII. THE PROBLEM OF INEFFICIENCY

The Confrontation Clause makes many a criminal prosecution much less efficient. Consider lab reports. Calling to the stand the expert who prepared a lab report that fits under an exception to the hearsay rule is not efficient, and may well seem to be a significant waste of the time and resources of the court, the expert, and the laboratory for which the expert works. The inefficiencies increase when the analysis in question required a number of different steps, each done by a different set of hands and eyes.<sup>198</sup> Must each and every person involved in the analysis be called to the stand, even those who have no independent memory of the particular test in question?

It might seem, by the way, that calling analysts and technicians who have no independent memory of the particular test in question is not just inefficient, but a total and complete waste of time and resources. Even these witnesses, however, can provide significant relevant information. Most of them will have general knowledge of how the lab in question conducts the relevant tests: chance of contamination, rate of error, expertise and experience of the technicians, quality of the equipment, standards controlling techniques, and other factors relevant to the weight, if any, the trier of fact should assign to the evidence. The analyst with no present memory of the specific test offered into evidence may still have a great deal of relevant knowledge. Furthermore, “[c]onfrontation is designed to weed out [both] the fraudulent analyst [and] the incompetent one . . . .”<sup>199</sup> As for the former, just the prospect of being called to the stand and subjected to cross-examination may well deter some fraud from ever occurring.<sup>200</sup>

Regardless, the inefficiency problem is not as great as it might first seem. As the Supreme Court of the United States has noted, not everyone “whose testimony may be relevant in establishing the chain

---

198. Dissenting in *Melendez-Diaz*, Justice Kennedy asks the reader to “[c]onsider how many people play a role in a routine test for the presence of illegal drugs.” He then takes the reader through four different steps, each performed by a different person. *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_, \_\_\_, 129 S. Ct. 2527, 2544 (2009).

199. *Melendez-Diaz*, 129 S. Ct. at 2537. Also, requiring such testimony can help assure accurate analysis by forcing the dishonest analyst to reconsider false testimony under oath in an open court. *Id.* Further, “the prospect of confrontation will deter fraudulent analysis in the first place.” *Id.*

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

of custody, authenticity of the sample, or accuracy of the testing device[] must appear in person as part of the prosecution's case."<sup>201</sup> Sometimes a prosecutor will forgo offering chain-of-custody evidence; when that is so, there is no chain-of-custody witness (in-court or out) against the accused; when there is no witness, the right does not attach.<sup>202</sup> If the defendant wishes to make chain of custody an issue, the defendant certainly can put on chain-of-custody evidence, but the right to confront does not apply because the prosecutor has not put on any such evidence against the accused.

In addition, a significant amount of what goes into laboratory analysis is nontestimonial. For example (and as discussed above), when technicians provide routine equipment maintenance, the affidavits they prepare certifying the maintenance are, by and large, nontestimonial.<sup>203</sup>

Furthermore (also as discussed above), some of the inefficiency will be reduced if the prosecutor is allowed to enter lab reports into evidence, under an exception to the hearsay rule and without calling the expert witnesses who prepared them, while standing ready to produce such witnesses if the defendant chooses to call them to the stand.<sup>204</sup>

Finally, in some cases where the prosecutor must call a witness, the prosecutor should be able to call a single expert-witness to testify and submit to confrontation—one single expert from among the four or five who did the work reflected in the report or even one single expert who had no hands-on involvement with any of the work reflected in the report.<sup>205</sup>

In the end, however, the problem of inefficiency does not matter much, it is largely irrelevant. Inefficiency is a policy argument, not a constitutional-right argument.<sup>206</sup> Efficiency may be the hallmark of

---

201. *Melendez-Diaz*, 129 S. Ct. 2532 n.1.

202. *Id.*

203. See *supra* note 125 and accompanying text.

204. See *supra* part VI(C).

205. See *supra* part VI(D).

206. The efficiency argument is only relevant to constitutional interpretation if it is part of an argument that a particular interpretation of the clause is so inefficient that it cannot be the interpretation the Framers intended. *Melendez-Diaz* puts to rest the argument that the Framers meant to restrict the application of the right in any way based on government efficiencies. *Melendez-Diaz*, *passim*; see, e.g., *id.* at 2540 ("It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.").

One may argue that we should do away with one rule of evidence or another, perhaps the hearsay rule or the character evidence rules, because they are too inefficient. One may not very well argue that we should do away with the separation of powers,

good policy, but it certainly is not the hallmark of individual rights, most of which mean to make government less efficient.<sup>207</sup> In fact, a large part of the reason the United States Constitution protects individual rights at all is to prevent government from taking the most efficient approach—the cheapest and easiest approach—when doing so infringes fundamental values. Efficiency should not need constitutional protection; the fundamental values that create inefficiency do.

## VIII. THE TRAUMATIZED VICTIM WHO WILL BE FURTHER TRAUMATIZED IF MADE TO TESTIFY

### A. THE TRAUMATIZED-WITNESS PROBLEM

One of the most important issues yet to be considered is that of the traumatized victim who will likely suffer serious additional trauma if forced to testify in the typical confrontational setting. Take the child who has been a victim of abuse. Assume that the child's father is on trial for the abuse, that the father is in fact the perpetrator, and that the experts consulted say that the child will be seriously further traumatized if forced to testify in open court while being confronted by the father. The same could apply to any number of other

---

procedural due process, or the prohibition against any one person being "elected to the office of the President more than twice," U.S. CONST. amend. XXII, because these are not efficient ways to run a government. One may not very well argue that we should do away with the right to be free from unreasonable searches and seizures, the right to a trial by jury, or the right to confront witnesses because things would be cheaper and quicker if we did away with them—because more criminals would be behind bars (and more of the innocent as well, but, still, it would be a more efficient way to check more of the guilty into the Graybar Hotel). One may use these arguments to try to change the Constitution but not to override constitutional protection in existence.

In *United States v. Qualls*, the court noted that in complex cases involving a lot of "business records from numerous sources, including foreign entities," it would be inefficient to have "to call a live witness or to accompany the defendant on a deposition abroad to lay the foundation for the business records of each foreign entity it sought to introduce." 553 F. Supp. 2d 241, 246 (E.D.N.Y. 2008). This is a policy argument, not a constitutional argument.

207. "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Bowser v. Synar*, 478 U.S. 714, 736 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)). "The choices . . . made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Chadha*, 462 U.S. at 959.

This is not a new idea. "[F]or although the unthinking multitude—crying today for this reform, and to-morrow for that; pursuing with hot blood one class of offenders today; another, to-morrow—desire oftentimes almost the entire removal of the obstruction of a formal trial and conviction between the offense committed and the punishment following; wise men we, that what serves to impede in some instances the rapidity of the course of justice, in other cases is the protection of innocence in its hour of peril and of anguish. And surely innocence needs protection as truly as guilt merits punishment." 1 J. BISHOP, CRIMINAL LAW § 23 (2d ed. 1872).

victims—abused spouses, victims of particularly brutal crimes, persons afraid of gang retribution meted out on them or their families.

Add to that the majesty of some courtrooms, the solemnity of most court proceedings, the elevated bench with the black-robed, gavel-wielding judge, the tables of lawyers facing the young victim, the isolation and vulnerability one feels while sitting alone in the witness box, and, in a jury trial, the strangers staring out of the jury box. Given all of that, put the child in the box and put the child's alleged victimizer a few feet away, at a sturdy oak table with his defender armored in pinstripes, both focused on the child. If we did not know better, we might think that all of this was designed to victimize the child, to make the child afraid to testify.<sup>208</sup>

## B. COMMON WAYS AROUND THE TRAUMATIZED-WITNESS PROBLEM

### 1. *Are the Traumatized Victim's Statements Nontestimonial?*

Sticking with the child-victim-of-abuse example, I suppose that the ultimate question is whether the trauma that traditional testimony would inflict on the child can ever justify keeping the child off of the stand and instead entering into evidence the child's un-cross-examined out-of-court statement? On the way to that question, however, there are a couple of other things to be discussed. First, we must not lose sight of the fact that many out-of-court statements by victims of child abuse are not "testimonial" and, therefore, the Confrontation Clause does not apply at all.<sup>209</sup> The primary purpose of a child victim's statement to a parent or teacher will often be to get the situation under control, "to meet an ongoing emergency,"<sup>210</sup> or to get medical treatment—not to punish the perpetrator but to protect the victim.

The call to the 911 operator to get help, the statement to the police to contain a continuing danger, and the inquiry to assess the situation and protect the victim from further harm are not testimonial statements.<sup>211</sup> Many child-abuse victim statements are the same.<sup>212</sup> The primary purpose of the speaker (the child) and the primary purpose of the listener (the mother or doctor, for example, or even sometimes the police) will be to assess and contain a continuing danger to

---

208. In fact fear is intentional in this design. The proceeding is designed, in part, to impress upon all of the participants that this is serious business and upon the witnesses that they must tell the truth or they will be held accountable by God or the state—damnation or a perjury conviction—or both.

209. See *supra* part IV(C).

210. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

211. See *supra* part IV(C).

212. See Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 944-56 (2007). See generally *supra* part IV(C).

the child. There is a continuing danger to a child victimized by a parent, an uncle or aunt, a stronger sibling, a continuing danger equivalent to that faced by the victim of a home intrusion while the intruder is in the next room. In many such situations the perpetrator is always "in the next room," the threat is, for the child, perpetually near at hand.

In addition, as a general rule victim statements made for purposes of medical treatment are not testimonial. Not only are such victim statements not testimonial, but "medical reports created for treatment purposes [are] not testimonial."<sup>213</sup> If the victim tells a family member and the family member tells a doctor, as long as each statement in the chain had the primary purpose of medical treatment, each is nontestimonial. When the doctor prepares a written report and includes what the family member said, as long as the primary purpose of putting that statement in the report was medical treatment, that part of the doctor's report is nontestimonial. The statement does not have to be made to a family member or medical personnel. A child can make a medical-treatment statement to a babysitter, who calls and repeats the statement to the child's mother, who rushes home with the father and, on the way, repeats the statement to the father, who rides with the child in the ambulance and repeats the statement to an EMT, who tells an emergency room doctor. As long as each retelling of the event is for the primary purpose of medical treatment, each out-of-court statement is nontestimonial and the right to confront does not attach to any of the speakers in the hearsay chain.<sup>214</sup>

For purposes of the Confrontation Clause, the communication chain can be as long as you can imagine, so long as each link is nontestimonial. At some point the chain may be so long that the evidence is no longer relevant or is inadmissible under Federal Rule of Evidence 403—its probative value is substantially outweighed by the danger of unfair prejudice. The statement may be inadmissible, but the Confrontation Clause will not be the reason.

Often present sense impressions,<sup>215</sup> excited utterances,<sup>216</sup> statements of then existing mental, emotional, or physical condition,<sup>217</sup> statements for purposes of medical diagnosis or treatment,<sup>218</sup> and on

---

213. *Melendez-Diaz v. Massachusetts*, 577 U.S. \_\_\_, \_\_\_, 129 S. Ct. 2527, 2533 n.2 (2009).

214. Regarding these variations of statements made for purposes of medical diagnosis or treatment, *see generally, e.g.*, Fenner, *THE HEARSAY RULE* at 187-93 (2d ed.).

215. *FED. R. EVID.* 803(1); *See* Fenner, *THE HEARSAY RULE* at 137-41 (2d ed.).

216. *FED. R. EVID.* 803(2); *See* Fenner, *THE HEARSAY RULE* at 141-62 (2d ed.).

217. *FED. R. EVID.* 803(3); *See* Fenner, *THE HEARSAY RULE* at 162-84 (2d ed.).

218. *FED. R. EVID.* 803(4); *See* Fenner, *THE HEARSAY RULE* at 184-99 (2d ed.).

and on, are not testimonial statements and the Confrontation Clause does not apply at all.<sup>219</sup> When statements are nontestimonial and the rules of evidence do not keep them out, they are admissible against the accused during his or her criminal prosecution and without the presence of—without the opportunity to confront—the out-of-court declarant.

The prosecutor's problem of the choice between traumatizing the victim and forgoing the victim's testimony at the risk of losing the conviction, while quite real, is not often as great a problem as it may seem at first glance. Many out-of-court statements by victims of child abuse, spousal abuse, brutal rape, gang violence, and the like, are not testimonial and therefore do not implicate the Confrontation Clause.

2. *Can the Trauma of Testifying Be Reduced Enough to Allow the Victim to Testify?*

Still working our way to the ultimate question—whether further trauma to the victim can ever justify the prosecutor's use of a testimonial out-of-court statement without producing the declarant—there is a second point to be made. If additional trauma to the victim leaves the prosecutor reluctant, or even unwilling, to subject the victim to the most common form of in-court testimony, there may be ways around the trauma. A lot of the trauma inducing circumstances commonly associated with in-court testimony can be avoided. The right to confront witnesses is the right to cross-examine them. It is not the right to get in their face, to bully or to instill fear in them. The child's testimony, staying with the example of the child-abuse victim, need not be taken in the courtroom or in any such solemn place. The judge need not be wearing a judicial robe (or even a suit and tie) or sitting behind an elevated bench (or even a desk), and there does not have to be a gavel anywhere in sight. The lawyers need not be lined up "across" from the child, the child need not be sitting all alone, and the judge can exercise control over the cross-examination. Short of preventing a full and fair opportunity to cross-examine, the judge does have discretion to prevent cumulative questions, bullying, and the like. Finally, the jury may not need to be present at the confrontation.

In some cases, all or some combination of the above can be an effective way to ameliorate the stress on the child to a point where there is no compelling reason to keep the child from testifying and from being cross-examined. Picture the child sitting next to, even

---

219. "Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." *Crawford v. Washington*, 541 U.S. 36, 56 (2004). Regarding testimonial versus nontestimonial statements, see generally *supra* part IV(C).

holding hands with, his or her mother, on a sofa in the judge's chambers, with the judge sitting out from behind the desk, not wearing a robe, and with the accused and counsel present, but not the jury. This child can be cross-examined. The child's in-chambers statement, including the cross-examination, can be recorded. With sufficient medical evidence that the presence of a "then existing physical or mental illness or infirmity"<sup>220</sup>—perhaps a physical or mental infirmity resulting from the abuse on trial—renders the child unavailable to testify, the recorded testimony can be introduced and played for the jury.<sup>221</sup> It is not that the right to confront witnesses does not attach in these situations or that there is a compelling state interest in limiting the right to confrontation,<sup>222</sup> but that the *witness is confronted* and the

---

220. FED. R. EVID. 804(a)(4).

221. The in-court testimony of witnesses too infirm to travel to the courtroom is unavailable. FED. R. EVID. 804(a)(4). See generally Fenner, *THE HEARSAY RULE* at 272 (2d ed.). The testimony of witnesses too infirm to travel to the courtroom has been taken in hospital rooms. *E.g.*, *Di Battisto v. State*, 480 So.2d 169, 171 (Fla. Dist. Ct. App. 1985). There is no reason that the testimony of a child victim too "infirm," too traumatized to testify in the traditional manner cannot be considered unavailable. "The fear, nervousness or excitement that renders the child unable to testify in court, though it may be quite normal for someone his age, may fall within the scope of the term 'mental . . . infirmity' as that term is used in Rule 804(a)(4)." *Virgin Islands v. Riley*, 754 F. Supp. 61, 64 (D.V.I. 1991) (finding the child's in-court testimony unavailable and allowing his videotaped deposition to be used as former testimony); see also *Vigil v. Tansy*, 917 F.2d 1277, 1280 (10th Cir. 1990) ("While there may not be a clear consensus as to the degree of trauma which must be shown before a child witness can be deemed unavailable to testify, the majority of courts have held that showing a traumatic effect to the child is sufficient to render the child unavailable." (citing *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989) (citing cases))). Take the testimony out-of-court; administer the oath and allow both sides' questions to be asked, make a transcript for use at trial; if the child's in-court testimony is unavailable, introduce the cross-examined out-of-court statement.

If this cannot be done, then "*Crawford* can be satisfied most easily by the prosecution working diligently to prepare the child for examination and producing a willing and able child for testimony at trial. If the child takes the stand, testifies against the defendant, and is subject to cross-examination, then there is no Confrontation Clause objection to the admission of prior hearsay statements by the child. End of issue." Robert P. Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 *BROOK L. REV.* 411, 414 (2005).

222. Though this seems more problematic, the Supreme Court has said that use of one-way closed circuit television might be appropriate as necessary to protect a child from the trauma of a face-to-face confrontation with the accused. *Maryland v. Craig*, 497 U.S. 836 (1990). "Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause." *Id.* 857. The problem here is that after *Crawford*, decided 14 years later, it does seem clear that the confrontation must be face to face, and not face to television-screen. The opinion for the Court in *Crawford* relies quite heavily on the common law at the time of the ratification of the Confrontation Clause, from England and the Colonies, and repeats a number of times that it required face-to-face confrontation. *Crawford*, 541 U.S. at 43, 44, 57. The opinion for the Court in *Crawford* was written by Justice Scalia. He wrote a dissenting opinion in

right is satisfied, and the out-of-the-courtroom statement is admissible.<sup>223</sup>

### 3. *Has the Accused Forfeited the Confrontation Objection?*

There is one final stop along the way to the ultimate question of whether a compelling state interest in protecting the victim or the witness can ever override the accused's right to confront witnesses. As discussed below, an accused can forfeit the right to confront a witness when the accused procures the witness's absence in part, at least, to keep the witness from testifying.<sup>224</sup> This does not mean that the accused has to have the witness killed. It can be enough if the accused procures the witness's absence through intimidation. This is not to suggest that the trauma inflicted by the crime for which the accused is on trial can be used to forfeit that right. That would be the equivalent of saying that the statement is admissible against the accused because the accused is guilty of the crime charged.<sup>225</sup> In some cases, on some facts, specific subsequent acts by an accused abusive parent, abusive spouse,<sup>226</sup> or gang member will be intended to intimidate the child, spouse, or witness to a gang killing, from testifying—and they will succeed. Their right to confront is forfeited; it does not apply; absent hearsay or other evidentiary infirmities, the witness's statement can be used.

### 4. *Does the Compelling State Interest Test Apply?*

In cases where none of the above works, what will happen seems to depend on whether the right to confront witnesses is an absolute

---

*Craig*, 497 U.S. at 862 (Scalia, J., dissenting), wherein he stated that the Confrontation Clause guarantees "face-to-face" confrontation "always and everywhere."

If it is possible for the child to testify outside of the presence of the accused, by closed-circuit television, for example, it would not have to be because the right to confront the witness is not absolute, but is subject to the compelling state interest test. This possibility is discussed below. See *infra* note 227 and accompanying and following text.

223. The defendant was able to cross-examine the unavailable witness, so the Confrontation Clause does not bar the evidence. The former testimony exception to the hearsay rule applies, so the hearsay rule does not bar the evidence.

224. See *infra* part IX(A).

225. See *Giles v. California*, 554 U.S. \_\_\_, \_\_\_, 128 S. Ct. 2678, 2694 (2008) (Souter, J., concurring in part), quoted *infra* note 246.

226. "The historical record [regarding the forfeiture by wrongdoing exception to the right to confront adverse witnesses] . . . simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its culminating act; today's understanding of domestic abuse had no apparent significance at the time of the Framing, and there is no early example of the forfeiture rule operating in that circumstance." *Giles*, 128 S. Ct. at 2694-95 (Souter, J., concurring in part).

right.<sup>227</sup> If it is absolute, then we are faced with five choices, and, it seems, only five: somehow get a plea bargain; apply some creative new procedure that satisfies right of the accused;<sup>228</sup> find other evidence upon which to try the accused; force the traumatized victim to suffer the trauma of facing the accused and being cross-examined in some format, whether in the courtroom or not; or set the accused free. If the right is not absolute but, like other constitutional rights, is subject to infringement when the state can prove that the infringement in question is a sufficiently narrowly tailored way of achieving a compelling state interest, then there will be cases where the out-of-court statement can be allowed into evidence and the witness against the accused can be kept off the stand.

Staying with the abused child for a sentence longer, of all of the compelling state interests recognized by the courts, protecting children may be the most common.<sup>229</sup> Another commonly asserted com-

---

227. Substantive constitutional rights are not absolute. If the state can show that the infringement is in service of a compelling state interest and is sufficiently narrowly tailored, it can infringe one's right to freedom of speech (*e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 108 (1990) (finding a compelling state interest in "safeguarding the physical and psychological well-being of a minor") (internal quotation marks omitted)), equal protection of the law (*e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751-52 (2007); *Johnson v. California*, 543 U.S. 499, 505-14 (2005)), or substantive due process (*e.g.*, *Reno v. Flores*, 507 U.S. 292, 301-02 (1993)).

Unless this procedural right—confrontation—is absolute, then there will be situations where the state can satisfy strict scrutiny test in the face of an assertion of the right to confront witnesses. Justice Scalia, who authored the majority opinion in *Crawford*, wrote a dissenting opinion in *Craig*, 497 U.S. at 862 (Scalia, J., dissenting), wherein he stated that the Confrontation Clause guarantees "face-to-face" confrontation "always and everywhere."

228. This seems the most unlikely of the four choices since the court has stated that the right to confront witnesses is the right to a face-to-face confrontation. As noted *supra* notes 222 and 227, Justice Scalia, author of the majority opinion in *Crawford*, wrote a dissenting opinion in *Craig*, 497 U.S. at 862 (Scalia, J., dissenting), wherein he stated that the Confrontation Clause guarantees "face-to-face" confrontation "always and everywhere." *See also* *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (stating "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.") (citing *Kentucky v. Stincer*, 482 U.S. 730, 748, 749-750, (1987) (Marshall, J., dissenting)); *United States v. Medjuck*, 156 F.3d 916, 919 (9th Cir. 1998). If the mitigation of the trauma from the face-to-face confrontation suggested in the text above does not work and only face-to-face confrontation satisfies the constitutional right, it is difficult to imagine creative face-to-face confrontation that would get the testimony and satisfy the right.

229. *E.g.*, *Reno v. ACLU*, 521 U.S. 844, 869 (1997) (the "compelling interest in protecting the . . . well-being of minors . . .") (internal quotation marks omitted); *New York v. Ferber*, 458 U.S. 747, 776 (1982) (the state's special and compelling interest in protecting children); *United States v. Rouse*, 111 F.3d 561, 567-68 (8th Cir. 1997) ("the court must . . . protect the State's paramount interest in the welfare of the child"; the Sixth Amendment confrontation right "must accommodate the State's 'compelling' interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment.'") (pre-*Crawford*) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)); *United States v. Barror*, 20 M.J. 501, 503 (A.F.C.M.R. 1985) (regarding the residual exception in child abuse cases: "[S]ociety has a deep and compelling inter-

elling state interest is national security.<sup>230</sup> Take a suspected terrorist who is an American citizen detained within the United States. Assume this person is put on trial—perhaps a full-blown criminal trial or some kind of newly created trial where procedural and evidentiary rules are relaxed, but the Constitution is not. Assume also that much of the persuasive evidence against the accused comes from the lips of a covert operative who is a foreign national living with family overseas. In any event, assume the trial of a terrorist where, if the confrontation right is absolute, there are these two choices: Make the operative testify at some kind of proceeding where the accused can confront the operative at great risk that secrets will be revealed and the operative and his or her family will be assassinated; or dismiss the charges against the accused.

There can be national-security criminal prosecutions where the state has a compelling interest in keeping secrets and protecting the lives of operatives and their families, and where keeping the operative off the stand (even if the operative is in physical and vocal disguise and the testimony is by deposition) is the least restrictive way of achieving either or both compelling interests. Just as there are terrorism cases where the government has a compelling interest and the lack of face-to-face confrontation is the least restrictive alternative, there are child-abuse cases where the same thing is true. If this right is not absolute, then, absent some other problem with the out-of-court statement, it can be used in lieu of live testimony.

In 1990, in *Maryland v. Craig*,<sup>231</sup> a holding called into question by *Crawford v. Washington*,<sup>232</sup> the Supreme Court of the United States held that the right of confrontation is not absolute. A trial court had allowed the six-year-old victim of sexual abuse to testify by one-way closed circuit television. The Supreme Court held that the Confrontation Clause did not necessarily prohibit this procedure. It held that face-to-face confrontation is not an indispensable element of the right.<sup>233</sup> The Court applied a test much like the compelling state in-

---

est in protecting the welfare of its children.”). See also *United States v. De Noyer*, 811 F.2d 436, 438 (8th Cir. 1987) (admission of child-victim’s statement rather than live testimony serves the interest of justice).

230. *Hamdan v. Rumsfeld*, 548 U.S. 557, 634-35 (2006) (per curiam) (Part D iv is found within Justice Steven’s opinion for the Court; this particular Part is, however, only joined by two other Justices.); *id.* at 723 (Thomas, J., dissenting), citing *Haig v. Agee*, 453 U.S. 280, 307 (1981); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1964) (per curiam); *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 320 (1936).

231. 497 U.S. 836 (1990).

232. 541 U.S. 36 (2004).

233. “Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” *Craig*, 497 U.S. at 857 (quoting *Chambers v. Mississippi*, 410 U.S. 284,

terest test. It held that face-to-face confrontation is not required when the alternative procedure "is necessary to further an important [state end] and . . . where the reliability of the testimony is otherwise assured."<sup>234</sup>

The problem with the holding from *Craig* is that fourteen years later, in *Crawford*, the Court's interpretation of the Confrontation Clause changed radically. After *Crawford*, "the reliability of the testimony" can only be "assured" in one way: cross-examination.<sup>235</sup> So, while the *Craig* decision states that face-to-face confrontation is not required when the alternative procedure is necessary to further an important end and "the reliability of the testimony is otherwise assured," the law of the Confrontation Clause now is that reliability can only be assured by cross-examination.

The Court's opinion in *Crawford* puts *Craig* further in doubt by quite heavily relying on English and Colonial common law at the time of the ratification of the Confrontation Clause in order to establish the meaning of the Clause. The opinion repeats a number of times that each required *face-to-face* confrontation.<sup>236</sup> Today the quotation above from *Craig* would have to read, "when the alternative procedure 'is necessary to further an important [state end] and . . . where the relia-

---

295 (1973)). "The Confrontation Clause reflects a *preference* for face-to-face confrontation at trial." *Id.* at 849 (emphasis in original) (multiple quotation marks and citation omitted). "[T]hrough we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Id.* at 849-50.

Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

*Id.* at 857.

234. "[O]ur precedents confirm that a defendant's 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 reliability of the testimony is otherwise assured." *Id.* at 850. Of course, those precedents have changed in significant and relevant ways. See also *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (stating "[o]f course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process") citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

235. In addition, as noted above, Justice Scalia dissented in *Craig*, writing that the Confrontation Clause guarantees "face-to-face" confrontation "always and everywhere." *Id.* at 862 (Scalia, J., dissenting). Justice Scalia is the author of the majority opinion in *Crawford*.

236. *Crawford*, 541 U.S. at 43-44, 57. See also *Iowa*, 487 U.S. at 1016 ("We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (citing *Kentucky v. Stincer*, 482 U.S. 730, 748, 749-50, (1987) (Marshall, J., dissenting))).

bility of the testimony is otherwise assured [by the opportunity for cross-examination].”

If more is needed, there is this additional problem with *Craig*. In the process of holding that there is not an absolute right to face-to-face confrontation, the Court noted that other Sixth Amendment rights are not absolute. “We see no reason,” the Court concluded, “to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so.”<sup>237</sup> The problem is that none of the cases cited stands for the proposition for which it is cited. The Court cites four cases.

— *Perry v. Leeke*<sup>238</sup> is cited for the proposition that right to effective assistance of counsel is not an absolute right because it was not violated where a trial judge prevented a testifying defendant from conferring with counsel during a short break in testimony. This does not mean that the right to effective assistance of counsel is not absolute, but just that denying this particular conference with counsel did not deny the right to effective assistance.

— *Taylor v. Illinois*<sup>239</sup> is cited for the proposition that the right to compulsory process was not violated where a trial judge precluded the testimony of a surprise defense witness. This does not mean that the right to compulsory process is not absolute, but just that courts do have some flexibility when it comes to setting the procedures for asserting such rights, procedures such as announcing in advance of trial the intention to exercise the right.<sup>240</sup>

— *Pennsylvania v. Ritchie*<sup>241</sup> is cited for the proposition that denying a defendant access to investigative files did not violate that defendant’s right to cross-examination. This does not mean that he was denied cross-examination, but just that the Sixth Amendment does not constitute a constitutional rule of pretrial discovery and that “the right to confront one’s accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses.”<sup>242</sup>

---

237. *Craig*, 497 U.S. at 850.

This part of the *Craig* argument is weakened by the fact that in addition to citing *Illinois v. Allen*, 397 U.S. 337 (1970) in support of the proposition that other Sixth Amendment rights are not absolute, the opinion also cites these three other cases.

238. 488 U.S. 272, 280-85 (1989).

239. 484 U.S. 400, 410-16 (1988).

240. See *supra* Part V.

241. 480 U.S. 39 (1987) (plurality opinion).

242. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987). See also, e.g., *United States v. Owens*, 484 U.S. 554, 561 (1988) (“Ordinarily a witness is regarded as ‘subject to cross-examination’ when he is placed on the stand, under oath, and responds willingly to questions.”).

— *Illinois v. Allen*<sup>243</sup> is cited for the proposition that removing a defendant from his trial did not violate his right to be present at his trial. The problem here is that the defendant was removed for disruptive behavior. This does not mean that the right is not absolute. Rather, it means either the common-law right to be present did not include the right to be present and disruptive or the defendant forfeited the right when he engaged in disruptive behavior.<sup>244</sup>

The best argument in favor of the application of the compelling state interest test seems to be the simple one that none of the United States Constitution's individual rights is absolute and none was meant to be absolute. Each individual right is limited at least in situations where the state has a compelling reason for its action infringing the right and its action restricts the right as little as is necessary to achieve that compelling state interest.<sup>245</sup> If, however, that principle applies only to substantive constitutional rights, and not procedural, then that is not a good argument either.

## IX. FORFEITURE OR WAIVER OF THE RIGHT TO CONFRONT ADVERSE WITNESSES

### A. FORFEITURE OF THE CONFRONTATION RIGHT

The right to confront witnesses is forfeited when the accused procures the unavailability of a witness and does so, in part at least, with the intent to make the witness unavailable.<sup>246</sup>

243. 397 U.S. 337, 342-43 (1970).

244. See *infra* Part IX and accompanying text.

245. See, e.g., note 228 and accompanying and following text.

246. *Giles v. California*, 554 U.S. \_\_\_, \_\_\_, 128 S. Ct. 2678, 2686 (2008) (holding that defendant's conduct must be "designed to prevent a witness from testifying."). See also *Crawford v. Washington*, 541 U.S. 36, 62 (2004) ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds."); *Reynolds v. United States*, 98 U.S. 145, 158 (1879) (regarding the Confrontation Clause, "[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.").

In *Giles*, the defendant was on trial for the murder of one Avie. "Prosecutors sought to introduce statements that Avie had made to a police officer responding to a domestic-violence report about three weeks before the shooting," *Giles*, 128 S. Ct. at 2681. The prosecutors argued that the defendant forfeited his confrontation right when he intentionally committed the act that made her unavailable to testify. The Court held that intentionally committing the act is not enough. The prosecutor must show that the defendant committed the act with the intent to keep the witness from testifying. (The statements were not made under belief of impending death. The prosecutors could not argue that exception. See *supra* note 115.)

The majority in *Giles* relied on the historical record regarding forfeiture. Justice Souter relied instead on the following rationale in support of the requirement that the prosecutor must show that the defendant intended to prevent declarant's testimony.

[T]he confrontation right as understood at the Framing and ratification of the Sixth Amendment was subject to exception on equitable grounds for an absent witness's prior relevant, testimonial statement, when the defendant brought

The burden of establishing forfeiture is on the party offering the evidence and attempting to overcome the Confrontation Clause objection, that is, the prosecutor.<sup>247</sup> The prosecutor's burden is to establish the elements of forfeiture (that the defendant procured the unavailability; that the defendant did so, in part, at least, to make the witness unavailable to testify) by a preponderance of the evidence.<sup>248</sup> That is,

---

about the absence with intent to prevent testimony. . . . The importance of that intent in assessing the fairness of placing the risk on the defendant is most obvious when a defendant is prosecuted for the very act that causes the witness's absence, homicide being the extreme example. If the victim's prior statement were admissible solely because the defendant kept the witness out of court by committing homicide, admissibility of the victim's statement to prove guilt would turn on finding the defendant guilty of the homicidal act causing the absence; evidence that the defendant killed would come in because the defendant probably killed. The only thing saving admissibility and liability determinations from question begging would be (in a jury case) the distinct functions of judge and jury: judges would find by a preponderance of evidence that the defendant killed (and so would admit the testimonial statement), while the jury could so find only on proof beyond a reasonable doubt. Equity demands something more than this near circularity before the right to confrontation is forfeited, and more is supplied by showing intent to prevent the witness from testifying.

*Giles*, 128 S. Ct. at 2694 (Souter, J., concurring in part). Justice Souter added that "[t]he historical record . . . simply does not focus on what should be required for forfeiture when the crime charged occurred in an abusive relationship or was its culminating act; today's understanding of domestic abuse had no apparent significance at the time of the Framing, and there is no early example of the forfeiture rule operating in that circumstance." *Id.* at 2694-95 (Souter, J., concurring in part).

Forfeiture under the Confrontation Clause is similar to the forfeiture by wrongdoing exception to the hearsay rule. FED. R. EVID. 804(b)(6). The details of that evidentiary rule might provide useful background for interpreting this constitutional rule. For those details, see Fenner, *THE HEARSAY RULE* ch. 4(IV), at 322-29 (2d ed.). And see *Giles*, at 2687-88 (2008).

247. Uncross-examined testimonial out-of-court statements offered to prove facts stated, offered against the accused in a criminal prosecution, and objected to under the Confrontation Clause are presumptively inadmissible. The statements cannot be admitted into evidence unless the prosecutor overcomes that presumption. Statements supporting this placement of the burden include *Colorado v. Connelly*, 479 U.S. 157 (1986); *Nix v. Williams*, 467 U.S. 431 (1984); *United States v. Matlock*, 415 U.S. 164 (1974); and *Lego v. Twomey*, 404 U.S. 477 (1972), each of which is cited and summarized in relevant part in the final paragraph of the next footnote. See also *supra* note 187 (discussing the fact that when the prosecutor is trying to admit a previously cross-examined testimonial out-of-court statement over a confrontation objection, the prosecutor has the burden of establishing the declarant's unavailability). Regarding shifting burdens and the introduction of evidence in compliance with the rules of evidence, see, e.g., Fenner, *THE HEARSAY RULE* at 49-50 (2d ed.).

248. *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987) makes it clear that as regards a judge's rulings "regarding admissibility determinations that hinge on preliminary factual questions, [the predicate facts must] be established by a preponderance of proof. . . . The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case or a civil case." *Id.* at 175 (citations omitted).

This discussion in *Bourjaily* concerns the Federal Rules of Evidence and the evidentiary burden on a prosecutor in a criminal case who is trying to establish that evidence

the burden of producing enough evidence of the forfeiture of the right is different than the burden on the substantive issues. The prosecution must establish the forfeiture by a preponderance of the evidence, but the prosecutor must establish the elements of the crime beyond a reasonable doubt.

## B. WAIVER OF THE CONFRONTATION RIGHT

The accused can waive the right to confront witnesses by “failure to object to the offending evidence”<sup>249</sup> either during the trial or in response to a pretrial notice of an intention to use a statement coupled with a requirement that the defendant object to the admission of the statement without the live testimony of the declarant.<sup>250</sup>

### 1. Waiver by Failure to Object During Trial

“The right to confrontation may, of course, be waived, including by failure to object to the offending evidence.”<sup>251</sup> This is nothing new. A defendant can waive the other Sixth Amendment rights. The right to a speedy<sup>252</sup> and a public trial,<sup>253</sup> to be tried by a jury of peers<sup>254</sup> in

---

is admissible under those rules. In so far as it deals with the Confrontation Clause, *Bourjaily* states that “[t]he Court of Appeals held that the requirements for admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause, and since the statements were admissible under the Rule, there was no constitutional problem. We agree.” *Id.* at 182. The Confrontation Clause is no longer so directly linked to the hearsay rules. It is no longer true that whenever the definitional exclusion for statements by coconspirators is satisfied the Confrontation Clause is as well. *Crawford* changes that. *See supra* part II.

*Bourjaily* notes that prior cases had applied the preponderance of the evidence standard to the prosecutor’s burden when it comes to surmounting other constitutional bars to the receipt of evidence against a defendant. Quoting *Bourjaily*’s explanation of those cases, “[s]ee, e.g., *Colorado v. Connelly*, [479 U.S. 157, 167-69 (1986)] (preliminary fact that custodial confessant waived rights must be proved by preponderance of the evidence); *Nix v. Williams*, 467 U.S. 431, 444, n.5 (1984) (inevitable discovery of illegally seized evidence must be shown to have been more likely than not); *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974) (voluntariness of consent to search must be shown by preponderance of the evidence); *Lego v. Twomey*, [404 U.S. 477, 488 (1972),] (voluntariness of confession must be demonstrated by a preponderance of the evidence).” *Bourjaily*, 483 U.S. at 176.

While *Bourjaily*’s statements regarding the requirements of the Confrontation Clause are no longer good law, there is no reason to doubt its conclusions regarding the prosecutor’s burden.

249. *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_\_, \_\_\_, 129 S. Ct. 2527, 2534 n.3. (2009).

250. *Id.* at 2541.

251. *Id.* at 2534 n.3. “The defendant *always* has the burden of raising his Confrontation Clause objection.” *Id.* at 2541 (emphasis in original).

252. This is a Sixth Amendment right. U.S. CONST. amend. VI. It can be waived. *See generally Vermont v. Brillou*, 129 S. Ct. 1283, 1290 (2009).

253. This is a Sixth Amendment right. U.S. CONST. amend. VI. It can be waived. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979).

the district where the crime was committed,<sup>255</sup> and to be represented by counsel<sup>256</sup> can all be waived.<sup>257</sup> In any event, this point is not controversial.<sup>258</sup>

## 2. Waiver by Failure to Object Before Trial

In addition, prosecutors should be giving defendants pretrial notice of their intention to use testimonial out-of-court statements and require that the defendants object to the admission of the statements without live testimony of the out-of-court declarants, or forever hold their peace.<sup>259</sup> It is the defendant's burden to raise the bar of the Confrontation Clause; requiring that it be raised before the trial is simply a procedural rule controlling the timing of the objection; requiring the objection be made before trial does not affect the substance of the right.<sup>260</sup> Whether the defendant makes the objection or waives it—often times the accused will not want a particular out-of-court declarant to be called as a witness<sup>261</sup>—the prosecution has better information upon which to base its preparation for trial.<sup>262</sup>

---

254. This is a Sixth Amendment right. U.S. CONST. amend. VI. It can be waived. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (stating, “[t]he short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury . . .”).

255. This is a Sixth Amendment right. U.S. CONST. amend. VI. It can be waived. *Singer v. United States*, 380 U.S. 24, 34-35 (1965) (acknowledging that, in certain circumstances, a defendant can “waive his right to be tried in the State and district where the crime was committed . . .”).

256. This is a Sixth Amendment right, U.S. CONST. amend. VI, and it can be waived. *Iowa v. Tovar*, 541 U.S. 77, 81 (2004).

257. Another Sixth Amendment right is the right “to have compulsory process for obtaining witnesses in [defendant’s] favor.” U.S. CONST. amend. VI. By its very nature, this only kicks in when the defendant seeks compulsory process. Outside of defendant’s request it has no meaning. This right can be waived by not asking. In addition to the right to call the witness, the defendant also has the burden of calling the witnesses “in his favor.” *Melendez-Diaz*, 129 S. Ct. at 2533-34.

258. Failure to assert the right to confront witnesses waives that right, but it does not waive the right to counsel. U.S. CONST. amend. VI. A judgment of conviction appealed on the basis of a failure to assert the confrontation right will be reversed if the failure constitutes ineffective assistance of counsel. See *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) and cases cited therein.

259. *Melendez-Diaz*, 129 S. Ct. at 2534 n.3, 2541.

260. *Id.*

261. “It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon [facts in the out-of-court statement].” *Id.* at 2542 (the out-of-court statements here were those of forensic analysts).

262. Regarding pretrial motions, see also, *supra* Part V.

## X. HARMLESS CONSTITUTIONAL ERROR

Denial of the accused's right to confront witnesses is not always cause for reversal of the judgment of conviction.<sup>263</sup> As long as the defendant " " "had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." ' "264 This includes Confrontation Clause violations.<sup>265</sup>

A violation of the Confrontation Clause is harmless error if the appellate court concludes beyond a reasonable doubt that the constitutional error "did not contribute to the verdict."<sup>266</sup> Phrasing is critical here. The question the appellate court asks must be whether it can

263. "We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "most constitutional errors can be harmless.'" *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991))).

264. *Id.* at 218 (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986))).

265. *Melendez-Diaz*, 129 S. Ct. at 2542 n.14; *Washington*, 548 U.S. 218; and additional cases cited *infra* note 266.

266. *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003) ("A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.") (internal quotation marks omitted); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (the question is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error."); *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Gonzales Flores*, 186 P.3d 1038 (Wash. 2008); *Fields v. United States*, 952 A.2d 859 (D.C. 2008) (applying an "overwhelming evidence" standard).

"[S]ome constitutional errors . . . in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Chapman*, 386 U.S. at 22. *See also*, Fed. R. Crim. P. 52(a). It is not that the constitutional rights are "unimportant and insignificant," but that their impact on the defendant's conviction is "unimportant and insignificant." A constitutional error subject to the harmless error rule is called a "trial error."

Errors in the structure of the trial, cannot be apportioned; their effect on the trial cannot be measured. Structural "error 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence,'" *Washington v. Recuenco*, 548 U.S. 212, 218-19 (2006); *accord, e.g.*, *Rivera v. Illinois*, 556 U.S. \_\_\_, \_\_\_, 129 S. Ct. 1446, 1455 (2009), and calls for automatic reversal. *E.g.*, *Recuenco*, 548 U.S. at 218; *Sullivan*, 508 U.S. at 279. A constitutional error subject to automatic reversal is called a "structural defect."

Sixth Amendment structural defects include denying the accused's right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984), to a trial by jury, *Duncan v. Louisiana*, 391 U.S. 145 (1968), and to be represented by counsel, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Other structural defects include using a coerced confession, *Payne v. Arkansas*, 356 U.S. 560 (1958), conducting the trial before a judge or jury that is not impartial, *Gomez v. United States*, 490 U.S. 858, 876 (1989); *Tumey v. Ohio*, 273 U.S. 510 (1927), compelling an accused "to wear identifiable prison clothing at his trial by a jury," *Carey v. Musladin*, 549 U.S. 70, 75 (2006) (multiple quotation marks and citation omitted), and giving a constitutionally defective reasonable doubt instruction (as the verdict is surely attributable to the reasonable doubt instruction), *Gonzalez-Lopez*, 548 U.S. at 149 (2006); *Sullivan*, 508 U.S. at 279.

say beyond a reasonable doubt that the constitutional error *did not contribute* to the verdict. The question cannot be whether the defendant *would have been convicted* anyway, that is, “in a trial that occurred without the error. . . [The latter would] hypothesize a guilty verdict that was never in fact rendered [and] no matter how inescapable the findings to support that verdict might be [it] would violate the jury-trial guarantee.”<sup>267</sup>

Harmless-error review takes the measure of, on the one hand, the evidence that was the product of constitutional error and, on the other, the rest of the evidence and asks how much of an effect each had on the verdict. The party who was “the beneficiary of the error,” *i.e.*, the prosecutor, is the party who has the burden of convincing the appellate court that the error was harmless.<sup>268</sup>

If the prosecutor meets this burden, then the judgment of conviction will not be reversed.<sup>269</sup>

## XI. CONCLUSION

Starting with something on which everyone can agree, the Supreme Court of the United States’s understanding of the Confrontation Clause has changed radically in the past five years. This change

---

These rights are often referred to as fundamental or important rights. In this context, that means they are fundamental or important in terms of their impact on the conviction and, for that reason, a violation calls for automatic reversal.

267. *Sullivan*, 508 U.S. at 279.

268. *Chapman*, 386 U.S. at 24.

Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

*Id.*

269. *Plascencia v. Alameida*, 467 F.3d 1190, 1202 (9th Cir. 2006) (exclusion of cumulative cross-examination did not violate the Confrontation Clause and, in any event, any error would have been harmless); *Recuenco*, 548 U.S. at 218 (citing cases); *Schneble v. Florida*, 405 U.S. 427, 430 (1972) (appellant’s codefendant did not take the stand; admission of codefendant’s confession violated the Confrontation Clause; this was harmless constitutional error and does not call for reversal of appellant’s conviction); *Chapman*, 386 U.S. at 24; *United States v. Goldberg*, 538 F.3d 280, 287 (3d Cir. 2008) (The prosecutor violated defendant’s “rights guaranteed by the Confrontation Clause. As a result, we . . . will reverse unless the Government proves this misstep was harmless beyond a reasonable doubt.”); *Smith v. State*, 947 A.2d 1131, 1134 (D.C. 2008) (admission of the part of the out-of-court statement that was testimonial violated the Confrontation Clause; that error was harmless the essential information conveyed “had already been disclosed during the first moments of the call when the nontestimonial statements were made”); *Turner v. Commonwealth*, 248 S.W.3d 543, 547 (Ky. 2008) (admission of the statement in question did not violate the defendant’s confrontation right; even if it did, it was harmless error). *See also Melendez-Diaz*, 129 S. Ct. at 2542 n.14.

started with the Court's decision in *Crawford v. Washington*,<sup>270</sup> which dissolved the partnership between the Confrontation Clause and the hearsay rule. Post-*Crawford*, and according to four Justices, the confrontation right applies to almost all *testimonial* hearsay statements offered against the accused in a criminal prosecution.<sup>271</sup>

Moving to something apparently less obvious, because most courts seem to have missed it, Justice Thomas's understanding of the scope of the confrontation right is that it does not apply to almost all *testimonial* hearsay statements, but only to almost all *formalized testimonial* hearsay statements. His vote is the fifth (and controlling) vote necessary to this change.

Moving on to something that fogs the whole issue, Justice Souter was another member of the five-Justice majority supporting this new understanding of the Clause. He has retired; Justice Sotomayor has taken his seat on the Court; we do not know her understanding of the Confrontation Clause.

The 2009 Term of Court may shed light onto how far the Court will go with the expansion of the right to confront. *Briscoe v. Virginia*,<sup>272</sup> scheduled for the 2009 term, may answer two important questions: Must the prosecution call the out-of-court declarant to the stand in order to get the hearsay statement into evidence, or can the State satisfy the right to confront witnesses with some variation of a procedure where the prosecution can introduce the hearsay statement and make the declarant available for the defendant to call (and examine) during defendant's case. What will be Justice Sotomayor's understanding of the Confrontation Clause and will it shift the five-to-four majority, moving it back the other direction?

Stay tuned!

---

270. 541 U.S. 36 (2004).

271. Almost all: It does not apply when the declarant's in-court testimony is unavailable and the accused had the opportunity to cross-examine the declarant about the matter or when the accused has forfeited the right to confront the declarant. It does not seem to apply to hearsay statements that fit under the dying-declaration exception.

272. *Briscoe v. Virginia*, Petition for a Writ of Certiorari, 2008 WL 6485425, at \*i (May 29, 2008) (No. 07-11191), *cert. granted*, *Briscoe v. Virginia*, 2009 WL 1841615 (June 29, 2009) ("Motion of petitioners for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Virginia granted.").