CONFRONTING A NEW JURISPRUDENCE: THE SIXTH AMENDMENT’S CONFRONTATION CLAUSE

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I. INTRODUCTION

The Sixth Amendment reads in part: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Known as the Confrontation Clause, this provision gives defendants the opportunity to cross-examine witnesses to test their memory, perception or credibility. Its purpose is to protect the integrity of the justice system by enshrining a faith in cross-examination as the ultimate crucible of the courts’ truth-seeking function. Despite the deep historical roots behind the notion of confronting one’s accusers, the Supreme Court of the United States has struggled to prescribe a coherent formulation of exactly what the Confrontation Clause protects.

This presentation will give an historical overview of the Confrontation Clause, explain recent developments, and provide practical tips for those practicing in the face of this still developing area of law.

II. GENERAL BACKGROUND

People have appreciated the basic concepts underlying the Confrontation Clause for centuries. According to the biblical account in Acts, the Roman governor Festus, in discussing Paul’s imprisonment, said, “[I]t is not the Roman custom to hand over any man before he has faced his accusers and has had an opportunity to defend himself against their charges.”\(^1\) Emperor Justinian’s Code, promulgated in 534, required witnesses to testify in the courtroom in the physical presence of the defendant.\(^2\)

Nonetheless, the most famous example in Anglo-American law of the principles underlying the Confrontation Clause probably comes from the trial of Sir Walter Raleigh. Raleigh, the famed sponsor of the Roanoke Colony, was imprisoned for treason and brought to trial before a special commission in 1603. At trial, the main evidence against him was a sworn confession by one of his alleged co-conspirators, Lord Cobham. Cobham had signed the confession while being interrogated in the Tower of London but had recanted it before Raleigh’s trial. After the confession was read in court, Raleigh repeatedly demanded, “[L]et my accuser come face to face and be deposed.”\(^3\) The English court denied his requests. Ultimately, the special commission convicted Raleigh based solely upon statements made by others outside of open court.

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\(^1\) Acts 25:16 (New International Version).


\(^3\) 1 Criminal Trials 427 (David Jardine ed., 1850).
The Founding Fathers were intimately familiar with similar trials by affidavit. For example, in the early eighteenth century, the Virginia Council petitioned against the Governor for authorizing several commissions to question witnesses \textit{ex parte}, thereby denying the accused the opportunity to defend themselves.\footnote{See \textit{Crawford v. Washington}, 541 U.S. 36, 47 (2004) (describing historical background of Confrontation Clause).} Shortly before the Revolution, England gave the admiralty courts jurisdiction over Stamp Act violations. Because the admiralty courts followed civil law procedures, they routinely permitted testimony by deposition and private examination.\footnote{\textit{Id.} at 47-8.} Consequently, the right for criminal defendants to confront their accusers emerged as one of the most critical protections worthy of the Founders’ attention in the Bill of Rights.

III. \textbf{EARLY INTERPRETATIONS}

One of the earliest U.S. Supreme Court decisions interpreting the Confrontation Clause was \textit{Mattox v. United States} in 1895.\footnote{156 U.S. 237 (1895).} In \textit{Mattox}, a jury had convicted the defendant of murder. However, that conviction was later set aside, and a new trial was ordered. Because two of the witnesses who had testified in the original trial had since died, the government submitted into evidence the witnesses’ transcripts from the original trial. The Supreme Court upheld this practice over the defendant’s Sixth Amendment challenge. The Court noted the primary purpose of the Confrontation Clause of forbidding \textit{ex parte} affidavits against an accused. That concern was not present here, according to the Court, because the accused already enjoyed a full opportunity to cross-examine these witnesses. Therefore, introduction of the trial transcripts did not offend the Confrontation Clause.

Other than a few isolated cases such as \textit{Mattox}, the Confrontation Clause faced little judicial scrutiny for the first 175 years of its existence. This lack of case history is not surprising given the historical absence of federal criminal law, and the Clause’s non-application to state proceedings. Even after the passage of the Fourteenth Amendment, the Supreme Court ruled that due process did not forbid a state from admitting deposition testimony but not calling the witness in a criminal trial.\footnote{\textit{West v. Louisiana}, 194 U.S. 258, 263 (1904).}

The explosion of cases dealing with the Confrontation Clause occurred after the Supreme Court’s 1965 decision in \textit{Pointer v. Texas}.\footnote{380 U.S. 400 (1965).} There, the Supreme Court held: “[T]he Sixth Amendment’s right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment.”\footnote{\textit{Id.} at 403.} Now, those convicted in state court could
challenge their convictions on Sixth Amendment grounds, giving courts at both the state and federal level many opportunities to interpret and apply the Confrontation Clause.

In the cases that followed, courts largely viewed the Confrontation Clause as a protection against inadmissible hearsay.\(^{10}\) This formulation placed primary emphasis on the reliability of the statement, not on the preservation of a particular method of truth-seeking (cross-examination). In this way, statements that courts considered inherently truthful, such as dying declarations, were admissible without confrontation.\(^{11}\) Courts unmoored the Confrontation Clause from its requirement of actual, in-court confrontation, and came to view it primarily as a rule of evidence.

IV. **OHIO V. ROBERTS**

The high-water mark of interpreting the Confrontation Clause as rule of evidence was the 1980 case of Ohio v. Roberts.\(^{12}\) Roberts was arrested and accused of forging checks and possessing stolen credit cards. At the preliminary hearing, the defense called the victim’s daughter, Anita Isaacs, and unsuccessfully attempted to elicit testimony that she had given Roberts the checks and credit cards without telling him that she did not have permission to use them. At trial, Roberts testified that Anita had given him the checkbook and credit cards with the understanding that he could use them. Anita had been subpoenaed to appear at trial a number of times but had not responded. Therefore, to rebut Roberts’s testimony, the prosecution offered the transcript of Anita’s testimony in the preliminary hearing. Despite the defense’s objection that admission of the transcript violated the Confrontation Clause, the trial court admitted the transcript into evidence.

After appeal through the state-court system, the Supreme Court agreed with the trial court’s decision. The Supreme Court noted that the Confrontation Clause existed to allow defendants to cross-examine witnesses as a means of testing the accuracy of the witness’s statement. Therefore, the Court explained, when necessary, the Confrontation Clause did not forbid the admission of out-of-court statements that bore “indicia of reliability.”\(^{13}\) To meet that test, evidence needed either to fall within a “firmly rooted hearsay exception” or “bear particularized guarantees of trustworthiness.”\(^{14}\) Here, because Robert’s counsel had thoroughly questioned Ms. Isaacs at the preliminary hearing, her testimony bore “indicia of reliability,” and, therefore, her prior testimony was admissible against Roberts despite her unavailability. Roberts reflected the Supreme Court’s focus

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\(^{10}\) See, e.g., *Bruton v. United States*, 391 U.S. 123, 127 (1968) (explaining that violation of the confrontation clause can be cured by instructing the jury to disregard inadmissible hearsay evidence.)

\(^{11}\) See *Mattox*, 156 U.S. at 243-44.

\(^{12}\) 448 U.S. 56 (1980).

\(^{13}\) *Id.* at 66.

\(^{14}\) *Id.*
on the animating *purpose* of the Confrontation Clause as opposed to focus on a particular *method* of vindicating that purpose (cross-examination).

V. THE MOVE TO A PROCEDURAL RULE

A. The Seed Is Planted — Scalia Takes the Bench

The movement away from the Confrontation Clause as rule of evidence began slowly after Justice Scalia took the bench in September 1986. Scalia's originalist approach in this area first surfaced in Maryland v. Craig.¹⁵ In that case, a criminal defendant challenged a state law that allowed an alleged victim of child abuse to testify at trial outside of the defendant's physical presence via one-way, closed-circuit television. Other than the child's physical presence outside of the courtroom, the examination would proceed as normal. The Court held that this procedure preserved elements of confrontation to "adequately ensure[] that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to live, in-person testimony."¹⁶ Therefore, the procedure did not violate the Confrontation Clause.

Scalia dissented — joined by Brennan, Marshall and Stevens — arguing that the clear text of the Sixth Amendment mandated face-to-face confrontation. Scalia objected to the Court's reasoning that the Confrontation Clause guarantees only "reliable" evidence. Instead, he said, "[The Confrontation Clause] guarantees specific trial procedures that were thought to assure reliable evidence."¹⁷ Scalia accused the Court of conducting interest-balancing in the face of clear and explicit constitutional guarantees. He agreed that the Maryland procedure was "virtually constitutional," but he dissented because he believed it was not "actually constitutional."¹⁸

B. Subsequent Events

Scalia almost immediately lost two of his fellow dissenters in Craig. Justice Souter succeeded Justice Brennan the following term, and, one year later, Justice Thomas succeeded Justice Marshall. Neither of these replacements proved to be fatal to Scalia's position, however. More importantly in retrospect, Justices White and Blackmun, both of whom had joined the Court's majority opinion in Craig, left the Court in 1993 and 1994, respectively. Justice Ginsburg succeeded Justice White, and Justice Breyer succeeded Justice Blackmun. Therefore, by October Term 1994, the remaining Craig majority consisted only of Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy.

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¹⁶ *Id.* at 851.
¹⁷ *Id.* at 862.
¹⁸ *Id.* at 870.
Scalia made a bit of headway with the new Justices in the 1999 decision *Lilly v. Virginia*.\(^{19}\) *Lilly* involved a question of the admissibility of an accomplice’s confession to police when the accomplice later asserted his Fifth Amendment right against self-incrimination at the defendant’s trial. The Virginia Supreme Court upheld the trial court’s admission of the confession, holding that it did not violate the Confrontation Clause because “the statement against penal interest of an unavailable witness is a ‘firmly rooted’ exception to the hearsay rule in Virginia.”\(^{20}\) The Supreme Court reversed. The plurality opinion of Justices Stevens, Souter, Ginsberg, and Breyer still focused on the reliability of the confession instead of the rights of the defendant. However, Justice Breyer filed a concurrence questioning the Court’s emphasis on the connection between the Confrontation Clause and hearsay rules. Scalia, concurring in part and concurring in the judgment, flatly stated that the case represented “a paradigmatic Confrontation Clause violation.”\(^{21}\)

C. *Crawford v. Washington* — The Move Is Complete

In *Crawford v. Washington*,\(^{22}\) Scalia finally assembled majority support for his originalist view of the Confrontation Clause. In that case, police interrogated Sylvia Crawford in connection with an assault allegedly committed by her husband. At her husband’s trial, Sylvia refused to testify under the state’s marital privilege. Consequently, the prosecution introduced into evidence Sylvia’s tape-recorded statements to police investigators. The trial court allowed the jury to hear the tape recordings, noting several reasons why the statements bore particularized guarantees of trustworthiness, and therefore, were admissible under the Roberts test.

Looking to the text of the Sixth Amendment and the historical purposes behind it, the Supreme Court — in an opinion authored by Justice Scalia — untied the connection between the Confrontation Clause and hearsay rules. The Court distinguished between testimonial statements — such as a formal statement to a government officer — and non-testimonial statements — such as an off-hand remark to a friend. Testimonial statements of a witness who does not appear at trial were admissible only if the witness was unavailable and the defendant had a prior opportunity to cross-examine the witness. In other words, cross-examination was the only constitutionally permissible way to test the reliability of a testimonial statement. Where non-testimonial statements were involved, however, courts were free to fashion other tests for reliability through hearsay exceptions. Therefore, the Court pronounced the Confrontation Clause a procedural rule, not a rule of evidence.

\(^{19}\) 527 U.S. 116 (1999).

\(^{20}\) *Id.* at 125.

\(^{21}\) *Id.* at 143.

Applying that rule to the facts presented, the Court held that “the State admitted Sylvia’s testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. Roberts notwithstanding, we decline to mine the record in search of indicium of reliability.”

Although the Court declined to give a comprehensive definition of what is “testimonial,” it provided several examples of evidence that clearly meets the definition. For example, the Court noted that statements made at a preliminary hearing, before a grand jury, at a former trial, or during police interrogations “are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”

D. Refining the Law

Subsequent cases have attempted to draw a more distinct line between what is testimonial and what is non-testimonial. In Davis v. Washington, the Court held,

> 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.

At issue were two separate statements to law enforcement personnel. The Court held that statements made during a 911 call to be non-testimonial because the witness was speaking about events as they were actually happening, and the statements were clearly a call for help in the face of a bona fide physical threat. The Court also considered the nature of the questions asked and the level of formality of the interaction. In contrast, the Court found statements made to police responding to a domestic disturbance call to be testimonial. There, the interrogation was part of an investigation into possible past criminal activity. There was no emergency in progress, and the victim was not facing any physical threat. The Court highlighted the contrasting nature of the questions in the non-testimonial call — “What is happening?” — to those in the testimonial interrogation — “What happened?”

23 Id. at 68
24 Id.
26 Id. at 822.
The Court attempted to further define the “ongoing emergency” distinction in considering the testimonial nature of statements in Michigan v. Bryant. There, the Court defined as non-testimonial a statement made to police by a gunshot victim as he lay mortally wounded in a parking lot. The Court determined that, although there was apparently no criminal activity occurring at the time, the police were making an interrogation to respond to an ongoing threat to the public at large. The police did not know whether the threat of violence was limited to the initial victim. Therefore, because their questions were intended to assess the current situation, not determine past events, the victim's statements were non-testimonial.

Scalia dissented from Justice Sonia Sotomayor's majority opinion in Bryant, observing that the majority “distorts our Confrontation Clause jurisprudence and leaves it in shambles.” He explained that none of the officers' or victim's actions suggested that they perceived any ongoing threat. They did not take cover or draw their guns. Additionally, the exchange between the officers and the victim resembled a routine direct examination. Therefore, in Scalia's mind, the Court's decision made the Confrontation Clause a “hollow constitutional guarantee.”

It is important to note an exception to the confrontation requirement, articulated by the Supreme Court in Giles v. California. The Court had hinted previously that there might be two situations in which testimonial evidence would be admissible even if the witness had not been cross-examined. The first was what is known as the dying declaration. In Giles, the Court dealt with the other exception, forfeiture by wrongdoing. The Court explained that the Sixth Amendment did not prohibit the introduction of testimonial statements by a witness if the witness was unavailable to testify at trial due to the actions of the defendant. However, the Court was careful to circumscribe this exception by emphasizing that it applied only if the defendant “engaged in conduct designed to prevent the witness from testifying.” Otherwise, the prosecution could offer against the defendant any statement made by an alleged murder victim, creating a substantial loophole in this constitutional protection.

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28 Id. at 1168.
29 Id. at 1173.
31 Id. at 359.
VI. KENTUCKY COURTS

The Kentucky Supreme Court severely limited its definition of “testimonial” in Grady v. Commonwealth. The police were pursuing Grady on suspicion of armed robbery. During a foot pursuit, the officers came upon a number of agitated tenants at an apartment complex. One tenant, Rapp, told police that a man had come into his apartment saying he needed a place to hide because the police were chasing him. The officers soon found Grady hiding behind the tenant’s apartment. Shortly after the arrest, the landlord for the apartments, Vickie Wheeler, came to speak with her tenants. Rapp relayed to her substantially the same story he had told the police. Another tenant, Sanchez, said that someone had tried to break down his door but was unable to get in. Neither Rapp nor Sanchez testified at Grady’s trial. However, the prosecution called Wheeler to testify about her conversations with her tenants.

Grady objected that admitting the statements of Rapp and Sanchez without putting them on the witness stand violated his rights under the Confrontation Clause. The Kentucky Supreme Court disagreed. Applying the Crawford standard, the court held the statements to be non-testimonial. The court reasoned that an objective view of the situation showed that Wheeler had solicited the statements out of a concern for the well-being of her tenants and her property, not out of a desire to obtain testimony to be used later in court. Because the primary purpose of the solicitation was not for the purpose of future prosecution, the statements were non-testimonial and not subject to the Confrontation Clause. Indeed, the court suggested that its belief was that only statements made to law enforcement or their agents could ever be testimonial in the Crawford framework.

This distinction is in accord with the Kentucky Supreme Court’s earlier decision in Hartsfield v. Commonwealth. There, the defendant was charged with first-degree rape and sodomy. Immediately after the alleged attack, the victim fled her house and yelled, “He raped me; he raped me” to a passerby. The victim then ran to her daughter’s house and told her daughter that she had just been raped. Soon after, the victim went to a hospital where a “sexual assault nurse examiner” questioned and examined her. The victim related the details of the rape to the nurse but was unavailable to testify at trial.

The defendant in Hartsfield contended that the victim’s statements to the passerby, her daughter, and the examining nurse all were testimonial, and, therefore, were inadmissible under Crawford because he had not been given the

32 325 S.W.3d 333 (Ky. 2010).
33 Id. at 356.
34 See id at 357 (statements “made to lay witnesses, do not fit within the Crawford and Davis formulation of testimonial statements . . . .”) (quoting Hartsfield v. Commonwealth, 277 S.W.3d 239, 245 (Ky. 2009)).
35 277 S.W.3d 239 (Ky. 2009).
36 Id. at 242.
opportunity to cross-examine the victim. The Kentucky Supreme Court found that the statements made to the examining nurse were testimonial because the nurse’s questions were predominantly for the purposes of information gathering.37 In that sense, the Court found, it was similar to a police interview, and the nurse was acting in cooperation with the police. On the other hand, the Court found that the victim’s statements to the passerby and her daughter were non-testimonial. The Court, however, did not give much explanation to its decision, stating simply, “[The statements] do not fit within the Crawford and Davis formulation of testimonial statements.”38

VII. THE PROBLEM WITH EXPERT WITNESSES

One area in which the “testimonial” standard of Crawford and the overruled “indicia of reliability” standard of Roberts can make a tremendous difference is statements by expert witnesses. Under the Roberts standard, statements made by expert witnesses — say, identifying the composition of a compound — could have “indicia of reliability” because they were based on neutral, scientific testing. Therefore, they could be introduced through methods other than live testimony under the Roberts rule. Nonetheless, such statements are often necessary to prove a specific element of a crime. To that extent, are they testimonial under Crawford?

The Supreme Court gave us the answer in Melendez-Diaz v. Massachusetts.39 The Massachusetts state court had admitted affidavits into evidence reporting that material connected to the defendant was cocaine, ruling the authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment.40 The Supreme Court reversed, ruling that such affidavits fall with the “core class of testimonial statements” described in Crawford.41 The Court noted that the sole purpose of the affidavits was to provide evidence that the substance connected to the defendant was cocaine, a distinct element of the crime. Therefore, the analysts were most likely aware that the statements would be available for use at a later trial.

The Court strengthened this principle in Bullcoming v. New Mexico.42 Bullcoming was charged with DWI. At trial, instead of calling the analyst who had conducted Bullcoming’s blood alcohol analysis, the state introduced the analyst’s “Report of Blood Alcohol Analysis” as a business record during the testimony of Gerasimos Razatos, an expert witness qualified to testify about the gas chromatograph machine used to make the analysis. The New Mexico Supreme Court acknowledged that the report was testimonial, yet it ruled that Bullcoming’s right

37 Id. at 245.
38 Id. at 245.
40 Id. at 320.
41 Id. at 321.
to confrontation had been satisfied. In the court’s reasoning, the “true” witness against Bullcoming was the gas chromatograph machine that gave the reading. Therefore, because he had the opportunity to cross-examine Razatos regarding the operation of the machine, the results of the test, and established laboratory procedures, there was no Confrontation Clause problem.

The Supreme Court disagreed. The Court noted that the blood alcohol report contained more than Bullcoming’s blood alcohol content. It contained certified statements that the analyst received a sealed sample, had adhered to a precise protocol, and found no circumstance that affected the integrity of the sample or the validity of the test. Therefore, to satisfy the Sixth Amendment, Bullcoming must have been given an opportunity to cross-examine the analyst on these statements. Providing a surrogate witness who did not conduct — or even observe — the test was not an adequate substitute.

But what if the state calls an expert witness to testify about the contents of an analyst’s report without actually admitting the report into evidence? The Court confronted that question earlier this Term in Williams v. Illinois. In that case, the state had called an expert to testify about the results of a DNA test conducted by an analyst, but did not admit the DNA test into evidence. According to the state (and the Illinois Supreme Court), there was no Confrontation Clause problem because only the expert’s opinions were being introduced for their truth. The statements contained in the DNA report only went to the weight of that evidence. Nonetheless, as a practical matter, the prosecution introduced the report for its truth. Given the Court’s recent strengthening of the Confrontation Clause, it is difficult to imagine that it would allow prosecutors to circumvent the Confrontation Clause so easily.

That being said, if an expert relies on a lab report prepared by multiple analysts, how many of those analysts will need to testify to satisfy the Confrontation Clause? Requiring each analyst who handled a sample to come into court to testify could make the use of DNA evidence cost- and time-prohibitive. Calling no analyst to testify could violate the Confrontation Clause. There may be a way to find a happy medium in the definition of “testimonial.” For example, some analysts may perform perfunctory steps in an analysis that really don’t go to the heart of the case, while others perform steps that uncover the information in which the prosecution needs to prove its case. If only the information needed by the prosecution is “testimonial,” then only the analysts who performed those steps would need to testify to satisfy the Confrontation Clause. In its effort to reorient the Confrontation Clause jurisprudence, the Supreme Court will likely need to address this question in the future.

VIII. PRACTICAL TIPS

There are a number of steps attorneys can take to protect their client’s constitutional right to confrontation. First, establish the testimonial nature of the statement based on the identity of the recipient. While the Supreme Court has defined a small “core” of statements that are testimonial, there remains substantial confusion as to the precise line between testimonial and nontestimonial statements. If a statement was made to law enforcement officers or mandatory-abuse reporters (nurses, child welfare officials, etc.), there are good
arguments that these statements are testimonial—and therefore, admissible only if the declarant confronts the defendant in open court. Under the Kentucky Supreme Court’s interpretation of testimonial, it may be an uphill battle arguing that any statement made to a layperson is testimonial. Still, there are strong arguments that statements made to friends or family “in case something happens” fall under the definition of testimonial statements because they contemplate future prosecutorial use.\textsuperscript{43} 

**Second**, establish that the primary purpose of the statement was investigatory rather than to address an on-going emergency. Statements made to law enforcement can be testimonial or non-testimonial depending on the circumstances under which the statement was given. Statements are non-testimonial if their primary purpose was to meet an ongoing emergency, and they are testimonial if their primary purpose was to establish past events relevant to later criminal prosecution. One of the most important factors in determining the primary purpose of an inquiry is whether there was an ongoing emergency. However, the existence of an ongoing emergency is a “highly context-dependent inquiry.”\textsuperscript{44} Use the statements and actions of the parties to establish that the emergency had passed and those involved had shifted into an “investigatory” mode.

**Third**, do not fall into the hearsay trap. \textit{Crawford} re-established the Confrontation Clause as a rule of procedure, not a rule of evidence. As a result, many deeply rooted exceptions to the hearsay rule are no longer valid. Carefully examine any proffered hearsay exception and see if it runs afoul of the Sixth Amendment. Remember, if a statement is testimonial and the defendant has not had the opportunity to cross-examine the witness, the prosecution can introduce the evidence only through the trial testimony of the witness.\textsuperscript{45} Any hearsay exception to the contrary is constitutionally invalid.

**Finally**, preserve objections where expert testimony relies on statements of non-testifying witnesses. Remember that only the opinion of the expert can be offered for its truth. Therefore, unless the prosecution otherwise lays a foundation to connect the underlying information to the defendant, preserve an objection that the expert’s opinion is irrelevant. If the court finds that the lack of testimony goes to the weight of the expert’s opinion and not to its admissibility, emphasize to the jury or judge that they cannot consider the underlying facts for their truth. Expose the weakness of the prosecution’s case if they try to present the evidence only through the expert’s opinion.

\textsuperscript{43} See Richard D. Friedman, “Grappling with the Meaning of ‘Testimonial’,” 71 Brook. L. Rev. 241, 272 (2005) (explaining circumstances under which statements to private parties arguably fall under the definition of “testimonial”).

\textsuperscript{44} Bryant, 131 S.Ct. at 1158.

\textsuperscript{45} This, of course, assumes that the doctrine of forfeiture by wrongdoing, discussed above, does not apply.
IX. CONCLUSION

Confrontation Clause jurisprudence has undergone tremendous change in the past decade and continues to evolve today. The move from conceptualizing the Confrontation Clause as a rule of evidence to (re)conceptualizing the Confrontation Clause as a rule of criminal procedure dramatically changed the landscape of how prosecutors can present their evidence against a criminal defendant. Criminal defense attorneys must not only understand the foundations of this new jurisprudence but also anticipate future development to protect their clients’ constitutional rights.
Introduction

The Confrontation Clause
“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”
—U.S. Const. amend. VI.

General Background

Sir Walter Raleigh
• Imprisoned for treason
• Tried by special commission
• Main evidence was sworn affidavit that was recanted prior to trial
Early Interpretations

Mattox v. United States, 156 U.S. 237 (1895)
- Emphasized right of cross-examination
- Noted exceptions for “public policy” and “necessities of the case”

Pointer v. Texas, 380 U.S. 400 (1965)
- Made confrontation a “fundamental right”
- Right to confrontation in state criminal trials through Fourteenth Amendment


Facts
- Roberts arrested for forging checks
- Anita Isaacs testified at preliminary hearing, denying she gave Roberts the checks
- Ms. Isaacs not available to testify at trial
- Roberts testified that Isaacs had given him the checks
- Trial court admitted Isaacs’ preliminary hearing transcript into evidence


Supreme Court Decision
- Animating principle of Confrontation Clause is reliability of evidence
- Cross-examination is one means of testing reliability
  - Confrontation Clause as Rule of Evidence
- “Indicia of Reliability”
  - Firmly rooted hearsay exception, or
  - Bears particularized guarantees of trustworthiness
The Move to a Procedural Rule

Scalia Takes the Bench – 1986

- Originalism in constitutional interpretation
- The Constitution’s “whole purpose is to prevent change -- to embed certain rights in such a manner that future generations cannot take them away.”
  – A Matter of Interpretation

The Move to a Procedural Rule

Maryland v. Craig, 497 U.S. 839 (1990)

- Child abuse victims could testify outside defendant’s physical presence via closed circuit television
- Examination of the witness proceeded as normal

The Move to a Procedural Rule

Maryland v. Craig, 497 U.S. 839 (1990)

- Court’s opinion
  - Procedure did not violate Confrontation Clause because it preserved the reliability of the testimony
- Scalia’s dissent
  - Clear text of the Sixth Amendment demands face-to-face confrontation
  - “Virtually constitutional” is not “actually constitutional”
The Move to a Procedural Rule

- Court ruled that statement against penal interest was not firmly rooted exception to hearsay rule
- Still focused on reliability of the statement

- Wife’s tape recorded statements to police introduced at husband’s trial
- State court ruled that recordings were admissible under Roberts because they bore particularized guarantees of trustworthiness
  - Statement was consistent with defendant’s own statements

Supreme Court Reversed

- Decoupled connection between Confrontation Clause and hearsay rules
- Distinction between “testimonial” statements and “nontestimonial” statements
- Cross-examination is the only constitutionally permissible way to test reliability of testimonial statements

What is “testimonial?”

- Court did not give definition, but gave examples of “modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”
  - Preliminary hearing
  - Grand jury
  - Former trial
  - Police interrogation


Two separate statements involved:

Statement #1 – 911 call reporting assault by boyfriend who had just fled the scene
Statement #2 – Statements made to police responding to ongoing domestic disturbance call

"Ongoing emergency" test

- Statement #1 is testimonial
  - Circumstances objectively indicate no ongoing emergency
  - Primary purpose is to establish past events relevant to future criminal prosecution

- Statement #2 is nontestimonial
  - Circumstances objectively indicate that primary purpose is to enable police to meet ongoing emergency

- "What happened?" v. "What is happening?"

- Key question: Whose primary purpose?

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**Refining the Law**

**Michigan v. Bryant, 131 S.Ct. 1143 (2011)**

- What is an "ongoing emergency"

- Police interrogated gunshot victim in gas station parking lot before he died
  - 25 minutes after shooting
  - Shooting happened 6 blocks away
  - Questioned by 5 different officers within 10 minutes

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**Michigan v. Bryant, 131 S.Ct. 1143 (2011)**

Court’s Opinion

- Primary purpose of police was to respond to ongoing emergency

- Totality of circumstances suggests police perceived the purpose was to respond to ongoing emergency
**Scalia Dissent**

**Michigan v. Bryant, 131 S.Ct. 1143 (2011)**

- Only purpose that matters is the declarant’s purpose. Here, declarant knew threat had passed
- Statements had little value except to ensure the arrest and prosecution of shooter

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**Refining the Law**

**Giles v. California, 554 U.S. 353 (2008)**

- Recognized an equitable exception to cross-examination requirement
- Forfeiture by Wrongdoing
  - Confrontation clause does not forbid introduction of testimonial statements if witness is unavailable due to defendant’s actions
  - Defendant’s actions must have been designed to prevent witness from testifying

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**In Kentucky Courts**

**Grady v. Commonwealth, 325 S.W.3d 333 (Ky. 2010)**

- Landlord spoke with tenants after police chased robbery suspect through apartment complex
- Landlord called to testify about tenants’ statements
**Grady v. Commonwealth, 325 S.W.3d 333 (Ky. 2010)**

Kentucky Supreme Court Decision

- Statements were not testimonial

- Landlord made interrogation out of concern for tenants and property
  - Focused on interrogator's purpose, not declarant's purpose
  - Anticipated *Michigan v. Bryant*

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**Grady v. Commonwealth, 325 S.W.3d 333 (Ky. 2010)**

Kentucky Supreme Court Decision

- Objective observer would not see primary purpose as soliciting statements for future prosecution

- Questioned whether statements to anyone other than law enforcement or their agents could ever be testimonial

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**In Kentucky Courts**

*Hartsfield v. Commonwealth, 277 S.W.3d 239 (Ky. 2009)*

- Immediately after rape, victim made statements to passerby and her daughter

- Later gave statements to sexual assault nurse examiner (SANE) during exam
Hartsfield v. Commonwealth, 277 S.W.3d 239 (Ky. 2009)

Kentucky Supreme Court Decision
- Statements to passerby and daughter were nontestimonial
  - “[D]o not fit within the Crawford and Davis formulation of testimonial statements”
- Statements to SANE were testimonial
  - Questioning was primarily for the purpose of gathering evidence with an eye toward criminal prosecution
  - Might have anticipated Allshouse v. Pennsylvania

The Problem with Expert Witnesses
- Under Roberts, scientific test results satisfied “indicia of reliability” test because they were based on objective scientific procedures
- Under Crawford, these test results are often “testimonial” because they are prepared in anticipation of litigation
- Question of who must testify under Crawford when scientific test results are used as evidence

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)
- Supreme Court reversed state court decision that “authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment”
- Sole purpose of affidavit was to prove an element of the crime
- Falls within “core class of testimonial statements”
The Problem with Expert Witnesses

**Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011)**

- State introduced blood alcohol analysis as business record during testimony of expert witness who did not make the analysis
- Expert who performed testing was unavailable because he had been placed on unpaid leave.

**Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)**

Supreme Court Reversed

- Blood alcohol analysis contained statements other than defendant’s blood alcohol level
- Defendant must be allowed to cross-examine witness on those statements

The Problem with Expert Witnesses

**Williams v. Illinois (2012)**

- State called expert witness to testify about results of DNA, but did not admit report into evidence
- Only expert’s opinion being introduced for the truth
Practical Tips

The Testimonial Nature of the Statement

• Supreme Court has defined only what is “core” testimonial

• Precise line between testimonial and non-testimonial remains unclear

Practical Tips

The Primary Purpose of the Statement

• Investigative = Testimonial
• Ongoing Emergency = Non-testimonial
• Existence of ongoing emergency is “highly context-dependent inquiry”

Practical Tips

The Hearsay Trap

• Crawford established Confrontation Clause as rule of procedure

• Hearsay exceptions are rules of evidence

• Even long-standing hearsay exceptions may now be constitutionally invalid
Practical Tips

The Testimony of Expert Witnesses

• Preserve objections where expert testimony relies on statements of non-testifying witnesses
• Object that expert’s opinion is irrelevant without the supporting evidence
• Prevent the prosecution from smuggling in inadmissible evidence through experts

Questions & Answers

Any questions?

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