CONFRONTATION AT A CROSSROADS: *CRAWFORD*'S SEVEN-YEAR ITCH

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I. INTRODUCTION

In *Crawford v. Washington*,[1] the Supreme Court revolutionized the standards for admitting out-of-court testimony in criminal trials. The proper application of those standards, however, has sharply divided the Court in recent Terms and likely will continue to do so.[2] In this Article, I seek to identify some of the major factors driving that disagreement.

I first summarize the Court's confrontation decisions after

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[*] Partner, MoloLamken LLP. I am indebted to Jeff Fisher, Tom Davies, and Michael Pattillo for their thoughtful comments on drafts of this Article. The author represented the National Association of Criminal Defense Lawyers as amicus curiae in *Michigan v. Bryant*, 562 U.S. ___, 131 S. Ct. 1143 (2011), and *Giles v. California*, 554 U.S. ___, 128 S. Ct. 2678 (2008). Portions of this Article draw from the brief we filed in *Bryant*. All views expressed are solely the author's own.

1. 541 U.S. 36 (2004).

2. *E.g.*, Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705 (2011) (5–4 decision); Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S. Ct. 2527 (2009) (5–4 decision).

Crawford, which have arisen in two main contexts—witness statements to the police[3] and forensic evidence.[4] I then suggest that the divisions that have emerged can be traced largely to three issues: formality, purpose, and reliability. A case set for argument this coming Term—*Williams v. Illinois*—could add an additional factor to that mix.[5]

Although the increasing division among the Justices has not helped the clarity of the law, I conclude that those divisions should not obscure the shortcomings of the Court's pre-*Crawford* approach. While the Court's current confrontation jurisprudence will not satisfy everyone, it is still a substantial improvement over the regime it replaced.

II. THE COURT'S CONFRONTATION DOCKET

A. *Crawford* Basics

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him."[6] Prior to *Crawford*, the admissibility of out-of-court statements under that clause was governed by the reliability regime of *Ohio v. Roberts*.[7] Statements could be admitted so long as they bore sufficient "indicia of reliability," a standard met if they either fell within a "firmly rooted hearsay exception" or bore sufficient "particularized guarantees of trustworthiness."[8]

Crawford criticized that regime for both its unpredictability and its lack of historical grounding.[9] Examining the abuses that led to the Confrontation Clause, the Court discerned a focus on a particular category of "testimonial" statements.[10] Such

3. *See, e.g.*, Davis v. Washington, 547 U.S. 813 (2006).
4. *See, e.g.*, *Melendez-Diaz*, 557 U.S. ___, 129 S. Ct. 2527.
5. 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 564 U.S. ___, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).
6. U.S. CONST. amend. VI.
7. 448 U.S. 56, 65–66 (1980).
8. *Id.* at 66.
9. Crawford v. Washington, 541 U.S. 36, 62–65 (2004).
10. *Id.* at 42–53.

statements, the Court held, could be admitted only if they satisfied the common law requirements for admitting prior testimony—the declarant must be unavailable to testify in person at trial, and the defendant must have had a prior opportunity to cross-examine him.[11]

Crawford declined to set forth a comprehensive definition of what statements qualified as testimonial.[12] It identified a few types of statements that clearly qualified—"prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations."[13] It also mentioned three proposed definitions, without expressing any preference:

> [(1)] *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, [(2)] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [and (3)] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[14]

Broadly speaking, those definitions relate to one or both of two characteristics: a statement's degree of formality and its degree of intended (or anticipated) evidentiary use.

Crawford involved statements a potential codefendant had made during a custodial interrogation.[15] As the Court explained, the statements bore a striking resemblance to the ex parte

11. *Id*. at 53–56.

12. *Id*. at 68.

13. *Id*.

14. *Id*. at 51–52 (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410), *available at* http://www.oyez.org/sites/default/files/cases/2000-2009/2003/2003_02_9410/briefs/Petitioner%27s%20brief.pdf; White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment, joined by Scalia, J.); Brief for National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410), *available at* http://www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/crawford.pdf (internal quotation marks omitted)).

15. *Id*. at 38–40.

examinations by justices of the peace or other officers that helped inspire the Confrontation Clause.[16] They thus qualified as testimonial under any definition.[17]

In more recent cases, by contrast, the formulation has mattered. Those cases have arisen in two contexts—witness statements to the police and forensic evidence. I address each in turn.

B. Statements to the Police

The most fertile ground for disputes after *Crawford* has been categories of out-of-court statements that routinely qualify for a state hearsay exception but arguably meet one or more of the Court's definitions of testimonial. One such context is accusations to the police by individuals claiming to have been victims of crime. A contemporaneous statement by an alleged crime victim identifying his assailant is often powerful evidence and may be crucial where the accuser is not able, or not willing, to testify at trial. For decades before *Crawford*, courts had admitted such statements under hearsay exceptions for spontaneous declarations or excited utterances.[18] Because such accusations are often made with an eye to prosecutorial use, however, they raise substantial confrontation concerns.

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16. *Id*. at 52. The Court referred specifically to examinations under the Marian statutes, the sixteenth century enactments that governed pretrial bail and committal procedure in felony cases. *See id*. at 43–44, 52. As I have shown elsewhere, Marian committal examinations were ordinarily conducted in the prisoner's presence. *See* Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 512–16 (2007); *cf*. Thomas Y. Davies, *Revisiting the Fictional Originalism in* Crawford*'s "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 602–03 (2007) (challenging other aspects of my analysis but declining to dispute that claim). The development of the confrontation right in the eighteenth century was essentially a process of elevating that ordinary feature of Marian committal procedure to the status of a procedural right. Kry, *supra*, at 516–27. Thus, although the law surrounding Marian committal procedure was very influential in shaping the confrontation right, it is an oversimplification to conceive of Marian procedure in general as an "abuse" at which the Confrontation Clause was aimed.

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

18. *See* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1173–80 (2002).

The Court's first confrontation decisions after *Crawford* involved such statements. In *Davis v. Washington*, the Court ruled that a woman's 911 call seeking help in an ongoing domestic dispute was not testimonial.[19] By contrast, in a companion case, *Hammon v. Indiana*, the Court ruled that accusations concerning an earlier domestic assault, made to responding officers once they had arrived and secured the scene, *were* testimonial.[20] 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.[21]

While that articulation focuses on the statements' potential evidentiary use, the Court also relied, at points, on their degree of formality, broadly defined.[22] Justice Thomas dissented in *Hammon*, invoking a stricter concept of formality that the statements did not meet.[23]

The issue next arose, obliquely, in *Giles v. California*.[24] That case involved statements a woman had made to the police about an earlier altercation with the defendant, weeks before the defendant allegedly murdered her.[25] The state supreme court deemed the statements testimonial but ruled them admissible nonetheless on the theory that the defendant, by rendering the witness unavailable (by means of the very murder for which he was on trial), forfeited his confrontation rights.[26] The Supreme Court rejected that broad conception of forfeiture without passing

19. 547 U.S. 813, 817–19, 826–29 (2006).

20. *Id*. at 819–21, 829–32.

21. *Id*. at 822.

22. *Id*. at 827, 830, 830−31 n.5.

23. *Id*. at 836–38, 840–42 (Thomas, J., concurring in the judgment in part and dissenting in part).

24. 554 U.S. ___, 128 S. Ct. 2678 (2008).

25. *Id*. at ___, 128 S. Ct. at 2681–82.

26. *Id*. at ___, 128 S. Ct. at 2682.

on whether the statements were testimonial.[27] In separate opinions, however, Justices Thomas and Alito both disputed that premise.[28]

Thus things stood this past Term when the Court heard *Michigan v. Bryant*.[29] In that case, a man named Anthony Covington was allegedly shot through a door during a dispute with a drug dealer.[30] After the shooting, Covington traveled six blocks to a gas station parking lot, where he made statements to responding police officers twenty-five minutes after the shooting.[31] He told them, among other things, that the defendant, "Rick," had shot him.[32] In a 6–2 decision, the Court ruled those statements nontestimonial.[33]

Justice Sotomayor delivered the opinion of the Court.[34] As in *Davis*, the Court focused on whether the "primary purpose" of the police questioning was to "respond to an 'ongoing emergency'" rather than to "create a record for trial."[35] The Court held that it was.[36] The police arrived on the scene to find Covington gravely injured from a gunshot wound.[37] "The police did not know, and Covington did not tell them, whether the threat was limited to him."[38] Because the shooter remained at large, "[t]he potential scope of the dispute and therefore the emergency . . . encompasse[d] a threat potentially to the police and the public."[39] The Court also cited a number of other factors, including the

27. *Id*. at ___, 128 S. Ct. at 2682–88.

28. *Id*. at ___, 128 S. Ct. at 2693–94 (Thomas, J., concurring); *id*. at ___, 128 S. Ct. at 2694 (Alito, J., concurring).

29. 562 U.S. ___, 131 S. Ct. 1143 (2011).

30. *Id*. at ___, 131 S. Ct. at 1150; *id*. at ___, 131 S. Ct. at 1170 (Scalia, J., dissenting).

31. *Id*. at ___, 131 S. Ct. at 1150 (majority opinion); *id*. at ___, 131 S. Ct. at 1170 (Scalia, J., dissenting).

32. *Id*. at ___, 131 S. Ct. at 1150 (majority opinion).

33. *Id*. at ___, 131 S. Ct. at 1167.

34. *Id*. at ___, 131 S. Ct. at 1150.

35. *Id*. at ___, 131 S. Ct. at 1155.

36. *Id*. at ___, 131 S. Ct. at 1166–67.

37. *Id*. at ___, 131 S. Ct. at 1150.

38. *Id*. at ___, 131 S. Ct. at 1164.

39. *Id*.

weapon involved[40] and the declarant's medical distress.[41] It alluded to the statements' informality.[42] Finally, it noted that excited utterances were traditionally admitted as an exception to the hearsay rule because they were reliable and suggested this was also relevant to the confrontation analysis.[43] Justice Thomas concurred in the judgment, urging again that informality alone made the statements nontestimonial.[44]

Justice Scalia dissented.[45] Like the majority, he focused on whether the primary purpose of the statements was to enable a response to an ongoing emergency or to prove facts relevant to a criminal investigation.[46] But he argued that only the declarant's purpose in answering the questions, not the officers' purpose in asking them, mattered.[47] Viewing the situation from Covington's perspective, he deemed it an "absurdly easy case."[48] Covington knew the shooting had happened some time ago at a different location, and "it was entirely beyond imagination that Bryant would again open fire while Covington was surrounded by five armed police officers."[49] Moreover, "Covington knew the shooting was the work of a drug dealer, not a spree killer who might randomly threaten others."[50] Even taking the officers' view, it was obvious that the purpose of their questioning was to investigate a past crime, not to resolve an ongoing threat.[51] Finally, Justice Scalia faulted the majority for invoking reliability, noting that *Crawford* had expressly rejected judicial reliability determinations as a substitute for cross-examination.[52] Justice Ginsburg likewise dissented for similar (if less

40. *Id*. at ___, 131 S. Ct. at 1158–59, 1164.
41. *Id*. at ___, 131 S. Ct. at 1159.
42. *Id*. at ___, 131 S. Ct. at 1166.
43. *Id*. at ___, 131 S. Ct. at 1155, 1157.
44. *Id*. at ___, 131 S. Ct. at 1167–68 (Thomas, J., concurring in the judgment).
45. *Id*. at ___, 131 S. Ct. at 1168 (Scalia, J., dissenting).
46. *Id*.
47. *Id*. at ___, 131 S. Ct. at 1168–69.
48. *Id*. at ___, 131 S. Ct. at 1170.
49. *Id*.
50. *Id*.
51. *Id*. at ___, 131 S. Ct. at 1171–72.
52. *Id*. at ___, 131 S. Ct. at 1174–75.

vehemently expressed) reasons.[53]

C. Forensic Evidence

The Court's other major confrontation cases have involved forensic evidence. Like crime scene accusations, forensic evidence, such as DNA or chemical analysis, is often potent evidence of guilt. And similarly, forensic evidence was once liberally admitted under hearsay exceptions—typically as business or official records.[54]

It was thus no surprise that the Court soon confronted the issue in *Melendez-Diaz v. Massachusetts*.[55] There, police had seized bags from the defendant that appeared to contain cocaine.[56] The trial court had admitted "certificates of analysis" from state chemists attesting to that composition.[57] The Supreme Court, in a 5–4 decision, reversed.[58]

As the Court (per Justice Scalia) explained, the documents, although denominated "certificates," were "quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.'"[59] Their sole purpose was to provide evidence for trial.[60] The Court refused to exempt the evidence from confrontation because of its perceived reliability.[61] Such an approach not only threatened to resurrect the *Roberts* regime, but also ignored the fact that allowing certificates to substitute for live testimony would shield fraudulent or incompetent chemists from exposure through cross-

53. *Id*. at ___, 131 S. Ct. at 1176–77 (Ginsburg, J., dissenting).

54. *See* Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S. Ct. 2527, 2554–55, 2558–60 (2009) (Kennedy, J., dissenting, joined by Roberts, C.J., and Breyer & Alito, JJ.) (citing, *inter alia*, United States v. Garnett, 122 F.3d 1016, 1018–19 (11th Cir. 1997) (per curiam); United States v. Gilbert, 774 F.2d 962, 965 (9th Cir. 1985) (per curiam); United States v. Ware, 247 F.2d 698, 699–700 (7th Cir. 1957)).

55. 557 U.S. ___, 129 S. Ct. 2527.

56. *Id*. at ___, 129 S. Ct. at 2530.

57. *Id*. at ___, 129 S. Ct. at 2531.

58. *Id*. at ___, 129 S. Ct. at 2542.

59. *Id*. at ___, 129 S. Ct. at 2532 (alteration in original).

60. *Id*.

61. *Id*. at ___, 129 S. Ct. at 2536.

examination.[62] Justice Thomas concurred, explaining that he had joined the majority solely because the certificates were "quite plainly affidavits."[63] Four Justices dissented, urging that laboratory analysts bore little resemblance to the "ordinary witnesses" at issue in the Court's prior cases and highlighting the disruptive consequences of the Court's decision.[64]

Soon after *Melendez-Diaz*, the Court granted review in *Briscoe v. Virginia*.[65] There, a court had admitted similar certificates of analysis on the theory that, if the defendant had wanted to cross-examine the analyst, he could have subpoenaed him as a defense witness.[66] The grant of plenary review was unusual in that the Court had rejected the same argument in *Melendez-Diaz* itself.[67] After full briefing and argument, the Court evidently agreed, vacating and remanding without an opinion.[68]

The Court next considered forensic testimony this past Term in *Bullcoming v. New Mexico*.[69] There, the State had admitted a forensic laboratory report on the defendant's blood-alcohol concentration.[70] Rather than call the analyst who performed the test, the State called a *different* analyst, who had no role in the test, to explain it.[71] The Court rejected that attempt to avoid

62. *Id*. at ___, 129 S. Ct. at 2536–38.

63. *Id*. at ___, 129 S. Ct. at 2543 (Thomas, J., concurring) (internal quotation marks omitted).

64. *Id*. at ___, 129 S. Ct. at 2543–61 (Kennedy, J., dissenting, joined by Roberts, C.J., and Breyer & Alito, JJ.).

65. Magruder v. Commonwealth, 657 S.E.2d 113 (Va. 2008), *cert. granted sub nom*. Briscoe v. Virginia, 557 U.S. ___, 129 S. Ct. 2858 (June 29, 2009) (No. 07-11191).

66. *See Magruder*, 657 S.E.2d at 119–24.

67. *Melendez-Diaz*, 557 U.S. at ___, 129 S. Ct. at 2540. As Justice Scalia put it bluntly at argument: "Why is this case here except as an opportunity to upset *Melendez-Diaz*?" Transcript of Oral Argument at 58, Briscoe v. Virginia, 559 U.S. ___, 130 S. Ct. 1316 (2010) (per curiam) (No. 07-11191), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-11191.pdf.

68. *Briscoe*, 559 U.S. ___, 130 S. Ct. 1316.

69. 564 U.S. ___, 131 S. Ct. 2705 (2011).

70. *Id*. at ___, 131 S. Ct. at 2709–10.

71. *Id*.

Melendez-Diaz.[72] The testifying witness, the Court observed, was not in a position to "expose any lapses or lies on the certifying analyst's part."[73] The four *Melendez-Diaz* dissenters dissented again; much of their opinion was more a critique of that earlier case than an explanation for why the State's surrogate-analyst theory made sense.[74]

Justice Sotomayor, who joined the majority, also filed a concurrence.[75] While her reliability references in *Bryant* had seemed like a step back toward the *Roberts* regime, her *Bullcoming* concurrence made clear those comments should not be overread. Responding to the dissent's suggestion that reliability justified admitting analyst reports, no less than excited utterances, she rejoined: "*Bryant* deemed reliability, as reflected in the hearsay rules, to be 'relevant,' not 'essential.' The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation."[76] At the same time, she stressed the limits on the Court's holding.[77] Among other things, she emphasized that the testifying analyst had simply read the other analyst's report into evidence, contrasting situations where "an expert witness [is] asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence."[78]

That scenario was not a hypothetical. Less than a week after the Court decided *Bullcoming*, it granted review in *Williams v. Illinois*,[79] a case scheduled to be heard this coming Term. The defendant there was accused of rape.[80] The State introduced

72. *Id*. at ___, 131 S. Ct. at 2710.

73. *Id*. at ___, 131 S. Ct. at 2715.

74. *Id*. at ___, 131 S. Ct. at 2723–28 (Kennedy, J., dissenting, joined by Roberts, C.J., and Breyer & Alito, JJ.).

75. *Id*. at ___, 131 S. Ct. at 2719–23 (Sotomayor, J., concurring in part).

76. *Id*. at ___, 131 S. Ct. at 2720 n.1 (citations omitted).

77. *Id*. at ___, 131 S. Ct. at 2721–23.

78. *Id*. at ___, 131 S. Ct. at 2722.

79. 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 564 U.S. ___, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).

80. 939 N.E.2d at 270.

testimony of an expert who opined, based on a comparison of DNA profiles, that a sample from the victim's rape kit matched a sample from the defendant.[81] The analyst who prepared one of the two profiles did not testify at trial.[82] That profile itself was not formally introduced into evidence or read to the jury,[83] but the expert relied on it in forming her opinion that the two samples matched.[84]

The state supreme court upheld the conviction.[85] Citing a footnote in *Crawford*, it held that the Confrontation Clause does not restrict admission of out-of-court statements for a nonhearsay purpose—i.e., other than for the truth of the matter asserted.[86] That principle applied, the court claimed, because the analyst's report had not been introduced for its truth; the testifying expert had merely relied on the report as a basis for her opinion.[87]

As of this writing, *Williams* has yet to be briefed or argued. But the parties' petition-stage papers preview their arguments. Williams contends the theory that evidence is not offered for its truth when offered as a basis for an expert's opinion is "logically bankrupt."[88] The State urges in response that no such question is presented because the court never formally admitted the statement; rather, the expert merely relied on it.[89] As explained below, that debate raises a number of new issues the Court has

81. *Id*. at 270–72.

82. *See id*. at 278.

83. *See* Brief in Opposition at 9, *Williams*, 564 U.S. ___, 131 S. Ct. 3090 (Apr. 27, 2011) (No. 10-8505), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/BIO-WIlliams.pdf (stating that "no Cellmark report was admitted into evidence" and that the testifying expert "did not read from any reports or parrot the findings of another DNA analyst at trial"); Petition for Writ of Certiorari at 4, *Williams*, 564 U.S. ___, 131 S. Ct. 3090 (Dec. 17, 2010) (No. 10-8505), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/Sandy-Williams-Cert.pdf (acknowledging that "[t]he forensic report itself was not introduced into evidence").

84. *See Williams*, 939 N.E.2d at 271–72.

85. *Id*. at 282.

86. *Id*. at 277 (citing Crawford v. Washington, 541 U.S. 36, 59–60 n.9 (2004)).

87. *Id*. at 278.

88. Petition for Writ of Certiorari, *supra* note 83, at 13.

89. Brief in Opposition, *supra* note 83, at 9–10.

not yet directly addressed.[90]

III. THE FUTURE OF TESTIMONIAL STATEMENTS

As the foregoing makes clear, the Court's seven years of confrontation jurisprudence since *Crawford* have been marked by a trend from relative unanimity to deep discord. In this section, I seek to identify some of the reasons for that trend.

One factor is that the cases have gotten harder. *Crawford* itself, for example, involved the low-hanging fruit of the *Roberts* era—co-conspirator confessions, a context where admission is so obviously at odds with the history of the Confrontation Clause that no historically informed approach could countenance it. The Supreme Court's docket, however, is driven by cases where courts of appeals disagree. Once the Court sets the boundaries in relatively easier cases like *Davis*, future circuit conflicts inevitably arise in the more difficult fact patterns in the middle, where the Justices are more likely to come to different conclusions. Increasing division thus does not necessarily represent dysfunction or dissatisfaction with the state of the law. It is a predictable consequence of the Court's institutional role in resolving circuit conflicts.

Another factor, undeniably, is changing views and membership on the Court. Justice Souter's departure and replacement by Justice Sotomayor undoubtedly had some impact. While Justice Souter was generally content to sign on to Justice Scalia's confrontation decisions, Justice Sotomayor has shown a desire, in both *Bryant* and *Bullcoming*, to leave her own, more nuanced stamp on the jurisprudence.[91] Justice Breyer, for his part, seems to have contracted a serious case of buyer's remorse. As he put it at the *Bryant* argument: "I joined *Crawford*, but I have to admit to you I've had many second thoughts when I've seen how far it has extended . . . ."[92] His reservations have led him to sign on to a number of opinions seeking to narrow

90. *See infra* text accompanying notes 190–214.

91. *See supra* text accompanying notes 34–43, 75–78.

92. Transcript of Oral Argument at 35, Michigan v. Bryant, 562 U.S. ___, 131 S. Ct. 1143 (2011) (No. 09-150), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-150.pdf.

confrontation rights—a development that is particularly striking given that his concurrence in *Lilly v. Virginia* was one of *Crawford*'s progenitors.[93]

I would suggest, however, that much of the ongoing division is driven by deep theoretical disagreements over basic questions about how to determine a statement's testimonial status. In the earlier cases, like *Crawford*, the Court had the luxury of resolving the case without delving into those issues because the result was the same regardless. In more recent cases, those issues have mattered. I would categorize them as revolving around three main topics: formality, purpose, and reliability. I address each below and then discuss a fourth topic that has not yet figured prominently but will be front and center this Term in *Williams*.

A. Formality

In his concurrence in *White v. Illinois*, Justice Thomas proposed limiting the confrontation right to "statements . . . contained in *formalized* testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[94] The Court quoted this definition in *Crawford* as one of its three possibilities.[95] Justice Thomas grounded that requirement in the observation that, historically, confrontation disputes involved formal testimony.[96] "Formality" has stuck in the Court's confrontation case law ever since.[97]

Although all the Justices appear to agree that formality matters, they use the term very differently. Justice Thomas, the standard's most ardent proponent, has taken the strictest view.

93. *See* Crawford v. Washington, 541 U.S. 36, 60 (2004) (citing Lilly v. Virginia, 527 U.S. 116, 140–43 (1999) (Breyer, J., concurring)).

94. 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment, joined by Scalia, J.) (emphasis added).

95. Crawford v. Washington, 541 U.S. 36, 51–52 (2004).

96. *White*, 502 U.S. at 361–62 (Thomas, J., concurring in part and concurring in the judgment, joined by Scalia, J.).

97. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. ___, ___, 129 S. Ct. 2527, 2523 (2009); Davis v. Washington, 547 U.S. 813, 827, 830, 830–31 n.5 (2006).

Although he does not require that testimony be sworn[98] and is willing to apply the confrontation right to "technically informal statements when used to evade the formalized process,"[99] he has repeatedly refused to deem other statements testimonial for lack of formality—even responses to structured crime scene interviews designed to ascertain past criminal events.[100] On the other hand, where his formality standard is met, Justice Thomas's defense of the confrontation right since *Crawford* has been unrelenting; he provided the crucial fifth vote in cases like *Bullcoming* and *Melendez-Diaz*.[101]

Justice Scalia—like most members of the Court—treats formality differently.[102] His post-*Crawford* opinions tend to address formality as only one component of the inquiry, to be evaluated along with, or as part of, a broader analysis of a statement's purpose.[103] Although Justice Scalia is on record stating that formality is a necessary condition for testimonial status,[104] the bite of that requirement is tempered by his broad view of what counts as "formal." In *Hammon*, for example, he deemed the witness's statements to responding police officers "formal enough" because they were made "in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his 'investigat[ion].'"[105] He also wrote that "[i]t imports sufficient formality, in our view, that lies to [police] officers are criminal offenses."[106] Such a formality standard is so flexible that it does little independent work.

98. *See* Bullcoming v. New Mexico, 564 U.S. ___, ___, 131 S. Ct. 2705, 2717 (2011) (excluding unsworn analyst certificates); *Crawford*, 541 U.S. at 52 (excluding unsworn co-conspirator confession).

99. *Davis*, 547 U.S. at 838 (Thomas, J., concurring in the judgment in part and dissenting in part).

100. *See, e.g.*, *id*. at 840–42.

101. *See Bullcoming*, 564 U.S. at ___, 131 S. Ct. at 2717; *Melendez-Diaz*, 557 U.S. at ___, 129 S. Ct. at 2543 (Thomas, J., concurring).

102. *See, e.g.*, Michigan v. Bryant, 562 U.S. ___, ___, 131 S. Ct. 1143, 1168–76 (2011) (Scalia, J., dissenting); *Davis*, 547 U.S. at 826–32.

103. *See, e.g.*, *Davis*, 547 U.S. at 826–32 (considering formality only briefly, after a lengthy discussion of evidentiary purpose).

104. *See id*. at 830–31 n.5.

105. *Id*. at 830 (alteration in original).

106. *Id*. at 830–31 n.5.

Richard Friedman and other scholars have long argued for dropping the formality requirement entirely.[107] The amicus curiae brief I filed for the National Association of Criminal Defense Lawyers in *Bryant* took up that charge, arguing based on history that testimonial status should depend solely on whether a statement is made for the purpose of providing evidence in a criminal investigation or prosecution, and that a statement's formality should be relevant only to the extent it sheds light on that purpose.[108]

Our brief acknowledged that, historically, confrontation disputes generally arose in the context of formal, sworn testimony.[109] But we urged that it was a mistake to assume that only formal statements implicated the right.[110] Formality played an important role at common law, but as a *requirement of admissibility*, not a factor whose absence improved admissibility.[111] The common law required testimony to be given in a formal, solemn manner—most notably, by requiring that it be under oath.[112] Testimony not meeting those formality requirements was thus inadmissible for reasons wholly unrelated to the confrontation right.

That principle does not mean admission of informal testimony would have raised no confrontation objections. The issue simply did not arise because other legal doctrines excluded the testimony without regard to lack of confrontation. As the late Chief Justice put it with respect to the oath requirement: "Without an oath, one usually did not get to the second step of whether confrontation was required."[113]

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107. *See, e.g.*, Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 248–51 (2005).

108. *See* Brief of the National Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 3–16, Michigan v. Bryant, 562 U.S. ___, 131 S. Ct. 1143 (2011) (No. 09-150) [hereinafter NACDL *Bryant* Brief], *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_150_RespondentAmCuNACDL.authcheckdam.pdf.

109. *Id*. at 5–6. As we noted, Sir Walter Raleigh's trial was a glaring exception. *Id*. at 6 n.3.

110. *Id*. at 4–8.

111. *Id*.

112. *Id*.

113. Crawford v. Washington, 541 U.S. 36, 71 (2004) (Rehnquist, C.J.,

The principle that lack of formality was a vice, not a virtue, comes across clearly in framing-era sources. In one case, the defendant had made incriminating statements in a formal examination written down by a magistrate.[114] The court took it as a given that a prisoner's own oral statements could be used against him, but considered the argument that a different rule should apply to formal, written testimony.[115] It rejected that argument in no uncertain terms:

> [S]urely, if what a man says, though not reduced into writing, may be given in evidence against him, *a fortiori* what he says, when reduced into writing, is admissible; for the fact confessed being rendered less doubtful by being reduced into writing, it is of course [e]ntitled to greater credit; and it would be absurd to say, that an instrument is invalidated by a circumstance from which it derives additional strength and authenticity: and for this reason it is clear, that the present confession having been taken by a magistrate under a judicial examination, can be no objection to receiving it in evidence, *for it gains still greater credit in proportion to the solemnity under which it was made.*[116]

An early nineteenth century evidence treatise made a similar point in discussing the handful of hearsay exceptions that applied in civil cases.[117] It explained that, where unsworn statements fell into a hearsay exception, a sworn ex parte deposition containing such statements would be admissible "*à fortiori*."[118] Those sources clearly reflect the view that formality could only strengthen a statement's admissibility.

Given that legal context, our amicus brief urged, the evidentiary-purpose standard does a better job than the formality standard of approximating how the Framers would have applied

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concurring in the judgment, joined by O'Connor, J.).

114. King v. Lambe, (1791) 168 Eng. Rep. 379 (Surry Assizes) 379; 2 Leach 552, 552.

115. *Id*. at 380; 2 Leach at 554–55.

116. *Id*. at 380; 2 Leach at 555 (emphasis added).

117. *See* 1 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS 274 (London, J. & W.T. Clarke 1824).

118. *Id*.

confrontation principles had informal statements regularly been admitted in criminal trials under hearsay exceptions like they are today.[119] Both standards cover the sworn ex parte testimony for which we have direct evidence of original meaning. But the formality standard excludes all other statements—even those that differ from sworn testimony only in that they lack the formality the common law required. The Framers would not have exempted statements from confrontation requirements *because of* that additional defect.

The evidentiary-purpose standard, by contrast, covers both formal sworn testimony and its informal equivalent. It covers the types of testimony for which we have direct evidence of original meaning, and also those informal statements that differ from sworn testimony only in their lack of formality—in other words, only in a way that makes them unambiguously worse. As we summarized in our brief:

> An accuser who purposefully provides evidence against a defendant in a criminal proceeding is a "witness against" him, and it defies common sense to suppose that the accusation's admissibility could be improved if, rather than being delivered under oath in all the formal trappings of a courtroom, it were phoned in unsworn to the court clerk while the declarant was having breakfast at a coffee shop.[120]

Regrettably, the Court did not accept our argument. Both the majority and Justice Scalia's dissent addressed the degree of formality of Covington's accusations; they simply disagreed over which way that factor cut.[121] While the formality standard will no doubt continue to draw fire in academic circles, it seems likely to remain a fixture of the Court's jurisprudence.

How big a role it will play remains to be seen. On the one

119. NACDL *Bryant* Brief, *supra* note 108, at 9–13.

120. *Id*. at 13.

121. *Compare* Michigan v. Bryant, 562 U.S. ___, ___, 131 S. Ct. 1143, 1166 (2011) (asserting that "[t]his situation is more similar, though not identical, to the informal, harried 911 call in *Davis* than to the structured, station-house interview in *Crawford*"), *with id*. at ___, 131 S. Ct. at 1168 (Scalia, J., dissenting) (agreeing that, "[f]or an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark").

hand, most of the Court, like Justice Scalia, likely will continue to treat the formality requirement in a flexible, confirmatory fashion: where circumstances show that a speaker is making statements to provide evidence in a criminal investigation, those same circumstances will generally be cited as making the statement sufficiently formal too, even if they have only a limited relationship to formality as conventionally understood. On the other hand, Justice Thomas is likely to continue to treat formality, in the strict sense, as dispositive in most cases. The result may often be—as in *Melendez-Diaz* and *Bullcoming*—that strict formality provides the fifth vote that determines the outcome of the case, even though only a single Justice thinks it should play such a decisive role.[122]

B. Purpose

While formality has continued to play some role, the more important factor—at least in cases involving statements to the police—has been evidentiary purpose. There too, the Court has been divided.

The Court generally agrees how to handle the easy cases. At one end of the spectrum are cases like *Crawford*, where the suspect has been arrested, the police have at least a tentative theory of guilt, and the witness is being questioned primarily, if not solely, to build an evidentiary record for use in obtaining a conviction (Category One).[123] At the other end are "cry for help" cases like *Davis*, where someone is speaking to the police, or a 911 operator, to be rescued from ongoing peril (Category Four).[124]

Those two fact patterns loosely track two roles the police play in modern society. On the one hand, police have a duty to build an evidentiary record that prosecutors can use to secure a conviction. On the other hand, they also perform a public safety or peacekeeping function—a duty to intervene in affrays and provide aid to those in peril, wholly apart from the state's judicial

122. *See* Melendez-Diaz v. Massachusetts, 557 U.S. ___, ___, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring); Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705 (2011).

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

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

machinery. The Court generally seems to agree that statements made to the police in Category One situations are testimonial, while those made in Category Four situations are not. In the one case, the statements are seen as the functional equivalent of trial testimony;[125] in the other, they are not.[126]

Between those two extremes lie a variety of intermediate situations that arise because the police often wear both hats. One step away from the *Crawford* end of the spectrum are cases like *Hammon*, where the suspect has been subdued and there is no apparent danger, but the police are still investigating what happened rather than consciously building a record for trial (Category Two).[127] Even after *Bryant*, most of the Court would presumably still deem such statements testimonial. There is no "emergency" of any sort, and the statements still serve an essentially evidentiary purpose, even if that purpose is to furnish information for use in a police investigation rather than to build a record strictly for trial.

One step away from the *Davis* end are cases like *Bryant*, where the declarant himself is no longer threatened, but the suspect remains on the loose and poses a threat to the public at large (Category Three).[128] There is an "ongoing emergency" of some sort, but the witness is not crying out to be rescued from it. Instead, he is providing information to the police so they can go investigate and resolve it.

As *Bryant* demonstrates, the Category Three cases are the ones that most vex the Court. One dimension of the disagreement is the question of perspective. The *Bryant* majority ruled that both the declarant's and the questioner's perspectives matter; under that approach, an ongoing emergency can exist merely because police do not yet know all the facts.[129] Justice Scalia urged (correctly, in my view) that the speaker's purpose is what matters.[130]

125. *See Crawford*, 541 U.S. at 51–52.
126. *See Davis*, 547 U.S. at 828.
127. *See id*. at 819–21.
128. Michigan v. Bryant, 562 U.S. ___, 131 S. Ct. 1143 (2011).
129. *See id*. at ___, 131 S. Ct. at 1160–62.
130. *Id*. at ___, 131 S. Ct. at 1168–70 (Scalia, J., dissenting).

That, however, was only one aspect of the disagreement; Justice Scalia made it clear he would dissent regardless of perspective.[131] As he noted, although Covington's assailant was still at large, Covington knew he was a drug dealer, not a "spree killer" who would continue roaming the streets and shooting passersby at random.[132] The officers' actions showed that they, too, perceived no such threat.[133] The only basis the police could have had for suspecting that others were at risk was the truism that anyone armed with a gun, who has killed once, may kill again.

Justice Scalia's dissent on this point was directed not so much to the legal standard the majority applied as it was to the majority's appraisal of the facts. His main point was not that an emergency to the "public at large" was insufficient, just that it was implausible to suppose such a threat existed (or was perceived to exist) there. In other words, Justice Scalia disagreed with the majority about whether this was really a Category Two or Category Three case, but he did not clearly reject the majority's premise about how bona fide Category Three cases should be treated.

That issue warrants more consideration. Although Justice Scalia belittled the notion that violent criminals on the loose are a public emergency,[134] the majority's contrary appraisal is not wholly unrealistic.[135] Legal wisdom and Federal Rule of Evidence 404(b) notwithstanding,[136] there is something to the view that a person who has committed one violent crime may well commit more.[137] One of the basic goals of the penal system is

131. *Id*. at ___, 131 S. Ct. at 1171–72.

132. *Id*. at ___, 131 S. Ct. at 1170.

133. *Id*. at ___, 131 S. Ct. at 1171–72.

134. *Id*. at ___, 131 S. Ct. at 1172.

135. *Id*. at ___, 131 S. Ct. at 1164 (majority opinion).

136. *See* FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

137. *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948) (acknowledging that evidence of prior bad acts "might logically be persuasive that [the defendant] is by propensity a probable perpetrator of the crime," and that "[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury" (footnote omitted)).

incapacitation, which takes as its starting point that a criminal who has offended once may do so again.[138]

For that reason, the stronger argument against the majority's holding in *Bryant* may be that emergencies to the public at large, however bona fide, simply are not the sort of emergencies to which the "ongoing emergency" rule should apply. It is one thing to say that a police officer is functioning as a peacekeeper rather than an investigator when a citizen cries out to be rescued from imminent peril. It is quite another when the witness is providing information to the police solely to help them go out and apprehend a dangerous criminal on the loose. In those latter cases, the investigation may be particularly pressing, but the witness is still furnishing information to help the police investigate a crime and bring the offender to justice. The situation is an emergency only in the sense that keeping dangerous criminals off the streets is a public imperative of the highest order. I do not mean to downplay the seriousness of such emergencies or deny that police should resolve them. The point is simply that, if the State wants to use the testimonial products of those investigations as evidence, it must afford the defendant an opportunity to cross-examine his accuser.

Much historical evidence—also highlighted in our amicus brief—confirms that public emergencies did not exempt testimony from the Confrontation Clause.[139] As Justice Scalia noted, for example, the infamous English treason trials that helped inspire the Confrontation Clause involved dire public emergencies, yet the use of ex parte testimony was still viewed as a grave abuse.[140] *Raleigh's Case* involved an alleged conspiracy with Spanish forces to overthrow the government and install Arabella Stuart in the King's place.[141] A number of suspects

138. *See, e.g.*, 18 U.S.C. § 3553(a) (2006) ("The court, in determining the particular sentence to be imposed, shall consider . . . (2) the need for the sentence imposed . . . (C) to protect the public from *further crimes of the defendant* . . . ." (emphasis added)); Tapia v. United States, 564 U.S. ___, ___, 131 S. Ct. 2382, 2387 (2011) (quoting § 3553(a)(2) and noting that "incapacitation . . . [is one of] the four purposes of sentencing generally").

139. *See* NACDL *Bryant* Brief, *supra* note 108, at 17–23.

140. *Bryant*, 562 U.S. at ___, 131 S. Ct. at 1173 (Scalia, J., dissenting).

141. Raleigh's Case, (1603) 2 How. St. Tr. 1, 1–3; *see also* 1 DAVID JARDINE,

were apprehended and examined over several days as the Crown tried to ascertain the scope of the plot and identify the conspirators.[142] That chronology undermines any claim that the examinations were part of a calm, collected exercise to build a record for Raleigh's trial. Rather, the Crown was arresting and examining everyone it could get its hands on in an effort to uncover the plot and apprehend all those responsible.

Fenwick's Case involved a plot to assassinate the King and facilitate a French invasion.[143] Although a variety of ex parte testimony was introduced, the most contested was an information that a co-conspirator, Goodman, had sworn out implicating Fenwick.[144] When Goodman gave that testimony, Fenwick had not yet been arrested; he was still on the run a month later, after he was indicted.[145] Fenwick's case, like Raleigh's, was one of the most infamous confrontation abuses in English history.[146] If the mere need to apprehend dangerous offenders made confrontation principles inapplicable, both cases

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CRIMINAL TRIALS 389–99 (London, Charles Knight 1832).

142. One Anthony Copley was arrested and examined on July 12, 1603. *See* 1 EDWARD EDWARDS, THE LIFE OF SIR WALTER RALEGH 365 (London, MacMillan & Co. 1868); WILLIAM STEBBING, SIR WALTER RALEGH: A BIOGRAPHY 188 (Oxford, Clarendon Press 1899). Other arrests and examinations followed—Brooke, Watson, Grey, Markham. *See* EDWARDS, *supra*, at 365, 369–71; STEBBING, *supra*, at 188. Raleigh himself was examined while visiting Windsor between July 12 and 16. *See* EDWARDS, *supra*, at 365–68; STEBBING, *supra*, at 188–90. He then returned home, although by one account was put on house arrest. *See* EDWARDS, *supra*, at 368; STEBBING, *supra*, at 190. Information from Raleigh cast suspicion on Cobham, who was examined multiple times, culminating in a July 20 confession accusing Raleigh. *See* EDWARDS, *supra*, at 371–72; STEBBING, *supra*, at 191–92. Raleigh was then promptly imprisoned in the Tower. *See* EDWARDS, *supra*, at 373. Although Cobham's is the best known, many of those examinations were introduced at Raleigh's trial. *See Raleigh's Case*, 2 How. St. Tr. at 10–24; JARDINE, *supra* note 141, at 410–33.

143. Fenwick's Case, (1696) 13 How. St. Tr. 537 (H.C.) 547–48; *see also* 4 THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 568–70 (London, Longman, Brown, Green, & Longmans 1855).

144. *See Fenwick's Case*, 13 How. St. Tr. at 591–610.

145. *See id*. at 607 (stating the date of Goodman's examination as April 24, 1696); *id*. at 547 (stating the date of Fenwick's indictment as May 28, 1696); MACAULAY, *supra* note 143, at 714–15 (describing chronology of events); Carmell v. Texas, 529 U.S. 513, 526–27 (2000) (describing chronology of events).

146. *See* Crawford v. Washington, 541 U.S. 36, 44–46 (2004).

would have been unobjectionable.

Further support comes from the framing-era treatment of arrest warrant applications. Historically, justices of the peace had authority to issue arrest warrants based on allegations that a crime had been committed; they normally took the examination of the party applying for the warrant under oath and in writing.[147] If a public emergency were enough to render a statement admissible, those applications would have been routinely admitted. The whole point of applying for an arrest warrant was to procure the apprehension of a dangerous criminal still on the loose. Nonetheless, I have not found a single reported case where a court admitted an arrest warrant application against a criminal defendant. In the two cases where prosecutors even attempted the strategy, the evidence was soundly rejected on confrontation grounds.

In the 1835 South Carolina case of *State v. Hill*, the court refused to admit a "deposition given in evidence [that] was made on the application for a warrant to arrest the prisoner, and in his absence."[148] It explained:

> [N]o rule would be productive of more mischief than that which would allow the *ex parte* depositions of witnesses, and especially in criminal cases, to be admitted in evidence. Charges for criminal offences are most generally made by the party injured, and under the influence of the excitement incident to the wrong done, and however much inclined the witness may be to speak the truth, and the magistrate to do his duty in taking the examination, his evidence will receive a coloring in proportion to the degree of excitement under which he labors, which the judgement may detect, but which it is impossible exactly to describe, and we know too how necessary a cross examination is to elicit the whole truth from even a willing witness; and to admit such evidence without the means of applying the ordinary tests, would put in jeopardy the

147. *See* 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 111 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736); 2 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 508 (London, Henry Lintot 1755).

148. 20 S.C.L. (2 Hill) 607, 608 (App. L. 1835).

dearest interests of the community.[149]

The same point recurred in an 1853 Arkansas case, *Collier v. State*.[150] The trial court there had admitted "the affidavit of [a witness], taken before a justice of the peace, . . . to the effect that the prisoner, on the day previous, assaulted and wounded him with a knife, and praying a warrant for his apprehension," as well as a deposition taken the same day.[151] The Arkansas Supreme Court reversed.[152] The testimony, it held, was "altogether objectionable" because it was given when the defendant "was not present, [and] was in another part of the country, and had not then been arrested."[153] The evidence "violat[ed] the spirit of his constitutional right to be . . . confronted with the witnesses against him."[154]

Those authorities refute the notion that ex parte accusations could be admitted whenever a dangerous criminal was at large. I doubt they were insensitive to the danger. Rather, they simply did not deem such public emergencies relevant to a defendant's confrontation rights. The need to keep dangerous criminals off the streets is the reason we have a criminal justice system, but a doctrine that admits ex parte accusations based on such public emergencies is bound to produce results incompatible with the common law confrontation right.

Again, however, the Court was not persuaded. A threat to the public at large thus is likely to continue justifying admission, at least in some cases. The question remains where the line between Category Two and Category Three cases will be drawn. In *Bryant*, the witness was the victim himself, speaking to

149. *Id*. at 610–11. *Hill* was an influential early American decision on the confrontation right. *See, e.g*., People v. Restell, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842) (citing *Hill* for the point that "the original complaint on oath before the magistrate on applying for the warrant . . . was [n]ever received in evidence"); State v. Campbell, 30 S.C.L. (1 Rich.) 124, 130–31 (App. L. 1844) (the leading American case on coroners' depositions, relying heavily on *Hill*).

150. 13 Ark. 676 (1853).

151. *Id*. at 677.

152. *Id*. at 679.

153. *Id*. at 678.

154. *Id*.

officers shortly after the crime.[155] But what about different facts?

Suppose a gang of criminals has robbed a string of banks, and the robberies are continuing unabated. One day, the police receive an anonymous tip to a Crime Stoppers hotline accusing certain people of being members of the gang. The tipster is not in any danger; he is simply providing the information so the police can bring the criminals to justice before any more banks get robbed. If the police then arrest the accused, can they recount the Crime Stoppers call to the jury without affording an opportunity to cross-examine the caller (assuming state hearsay law permits it)? Some language in *Bryant* might suggest so. The same sort of public emergency exists. Indeed, it may be even more pressing, as the pattern of bank robberies supports a stronger inference of recidivism than the lone shooting in *Bryant*. But some language in *Bryant* cuts the other way. For example, in no sense is the caller's accusation an "excited utterance," so the reliability rationale mentioned in *Bryant* would not apply.

Courts generally have not read *Bryant* so broadly as to authorize admission of those sorts of ex parte accusations. Perhaps it is a moot point because state hearsay rules bar the statements regardless. Perhaps the statements seem more intuitively inadmissible: it is one thing to invoke the Confrontation Clause to exclude excited utterances; it is something else to apply the clause to statements most courts are accustomed to excluding. Regardless, the fact pattern seems common enough, and the legal issue obvious enough, that the Court will have to confront that scenario (which I suppose, for lack of foresight in numbering, is Category Two and a Half) sometime soon.

C. Reliability

Ohio v. Roberts allowed admission of hearsay, even sworn testimony, if it bore adequate "indicia of reliability."[156] One way statements could meet that requirement was by falling within a

155. Michigan v. Bryant, 562 U.S. ___, 131 S. Ct. 1143 (2011).
156. 448 U.S. 56, 66 (1980).

"firmly rooted hearsay exception."[157] The theory was that the hearsay rule is designed to ensure reliable evidence; customary exceptions reflect a judgment that such evidence is reliable; and reliability justifies dispensing with cross-examination.[158]

Until recently, the *Crawford* line of cases had few kind words for that mode of analysis. In part, rejection of the reliability regime reflected a healthy skepticism for judges' ability to predict when cross-examination would be futile. Before *Crawford*, for example, forensic reports were routinely admitted on the theory that they were inherently reliable because they were either routinely prepared business records or official records prepared pursuant to a public duty.[159] As *Melendez-Diaz* demonstrated, that blind confidence was unwarranted: there have been many instances of incompetence and fraud at forensic laboratories.[160]

The Court's rejection of *Roberts* also rested on a more fundamental judgment about the role of the Court in constitutional interpretation. As *Crawford* explained, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[161] Admitting unconfronted testimony merely because it is reliable in a judge's estimation amounts to a revision rather than an interpretation of that provision.[162]

That does not mean reliability never has a place in interpreting the Sixth Amendment. There is one context where it matters: dying declarations. The law has long allowed the admission of a murder victim's dying declaration concerning the circumstances of the fatal blow.[163] That exception was firmly

157. *Id*.

158. *See id*. at 65–66.

159. *See* Melendez-Diaz v. Massachusetts, 557 U.S. ___, ___, 129 S. Ct. 2527, 2554–55, 2558–60 (2009) (Kennedy, J., dissenting, joined by Roberts, C.J., and Breyer & Alito, JJ.) (collecting cases); *e.g.*, United States v. Gilbert, 774 F.2d 962, 965 (9th Cir. 1985) (per curiam) (official records); United States v. Ware, 247 F.2d 698, 699–700 (7th Cir. 1957) (business records).

160. *See Melendez-Diaz*, 557 U.S. at ___, 129 S. Ct. at 2536–38.

161. Crawford v. Washington, 541 U.S. 36, 61 (2004).

162. *See id*. at 67.

163. *See* Giles v. California, 554 U.S. ___, ___, 128 S. Ct. 2678, 2682–86

established at the framing[164] and applied even to statements that were testimonial under any conceivable definition.[165] The exception's rationale was that dying declarations are uniquely reliable, on the quaint theory that no man would meet his maker with a lie upon his lips.[166] As one framing-era court put it:

> [T]he general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.[167]

Because a defendant's "right . . . to be confronted with the witnesses against him" did not include the right to exclude dying declarations at framing-era common law, the Sixth Amendment does not include that right either. And although the *Roberts*-esque rationale of the exception may grate on some modern ears, enforcing the Bill of Rights as adopted by the people sometimes means accepting even awkward history.[168]

Of course, the fact that dying declarations were admissible as a historical exception to the confrontation right does not mean *any* out-of-court statement should be admitted merely because

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(2008).

164. *See* Brief of the National Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 16–22, *Giles*, 554 U.S. ___, 128 S. Ct. 2678 (No. 07-6053) [hereinafter NACDL *Giles* Brief] (collecting authorities); NACDL *Bryant* Brief, *supra* note 108, at 26–27 nn.12–14 (collecting authorities).

165. *See Crawford*, 541 U.S. at 56 n.6.

166. *See* NACDL *Giles* Brief, *supra* note 164, at 16–22.

167. King v. Woodcock, (1789) 168 Eng. Rep. 352 (Old Bailey) 353; 1 Leach 500, 502.

168. Professor Friedman has argued that the dying declaration cases should instead be conceptualized as an instance of the forfeiture rule, the defendant having (allegedly) rendered the witness unavailable through his own wrongdoing. *See* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506 (1997). But that was not the rationale articulated at the framing. *See* NACDL *Giles* Brief, *supra* note 164, at 16–22; *cf. id.* at 22 n.10. And the Supreme Court rejected that expansive view of forfeiture in *Giles*. *See* 554 U.S. at ___, 128 S. Ct. at 2682–88.

modern hearsay law, in its wisdom, deems it reliable. There is a world of difference between a *framing-era* hearsay exception that demonstrably applied even to testimonial statements, and the numerous exceptions found in modern day evidence codes. The failure to appreciate that distinction was one of *Roberts*'s major failings. *Roberts* did require that an exception be "firmly rooted."[169] But even that standard was so flexible that it was not much of a constraint at all.

In *White v. Illinois*, for example, the Court upheld admission of a child's accusations of sexual abuse made to an investigating police officer some forty-five minutes after the assault and repeated to medical personnel some four hours after the assault.[170] The state court had admitted the former as "spontaneous declarations" (i.e., excited utterances) and the latter under both that exception and the exception for statements seeking medical treatment.[171] The Supreme Court affirmed, stating in passing there could be "no doubt" that both exceptions are firmly rooted.[172]

The exception for "spontaneous declarations," the Court declared, "is at least two centuries old . . . and may date to the late 17th century."[173] That claim is questionable. As we showed in our amicus brief in *Bryant*, none of the discussions of the hearsay rule in the pre-framing evidence treatises contains any reference to excited utterances,[174] and the one seventeenth-century case the Court cited was not understood to stand for such an exception.[175] Even if the exception existed in some form,

169. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

170. 502 U.S. 346, 349–51 (1992).

171. *Id*. at 350–51.

172. *Id*. at 355 n.8.

173. *Id*.

174. NACDL *Bryant* Brief, *supra* note 108, at 24–25; *see also* Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349, 418 (2007) ("[N]one of the preframing sources mentioned the modern '*res gestae*' [or] 'spontaneous declaration' [exceptions] . . . .").

175. NACDL *Bryant* Brief, *supra* note 108, at 25–26 (discussing Thompson v. Trevanion, (1693) 90 Eng. Rep. 179 (Nisi Prius); Skin. 402); Davies, *supra* note 174, at 448–52 (same).

White made no effort to show that its application *to these facts*—accusations made forty-five minutes and *four hours* later—was firmly rooted. Nor could it: the nineteenth century progenitor of the exception required that statements be made so close in time as to be part of the same transaction; courts excluded statements far more proximate than these.[176]

The Court said even less with respect to the exception for statements seeking medical aid.[177] It noted that the exception was "recognized in [the] Federal Rule[s] of Evidence" and "widely accepted among the States" but said nothing about its historical pedigree.[178] The Court thus deemed an exception firmly rooted based on nothing but its current popularity.[179]

One would have thought *Crawford* put an end to such reasoning,[180] but it seems reports of *Roberts*'s death were greatly exaggerated. In *Bryant*, the majority justified admission of Covington's statements in part on the ground that they were excited utterances and thus reliable: "In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."[181] It explained:

> Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving [an] emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination. This logic is not unlike that justifying the excited utterance exception in hearsay law.[182]

Of course, that idea is not "[i]mplicit" in *Davis* at all.[183] As

176. *See* Crawford v. Washington, 541 U.S. 36, 58 n.8 (2004); NACDL *Bryant* Brief, *supra* note 108, at 27–31; Jeffrey L. Fisher, *What Happened—and What Is Happening—to the Confrontation Clause?*, 15 J.L. & POL'Y 587, 591–608 (2007); Friedman & McCormack, *supra* note 18, at 1209–24.

177. *White*, 502 U.S. at 355–56 n.8.

178. *Id.*

179. *Id.*

180. *See Crawford*, 541 U.S. at 60–65.

181. Michigan v. Bryant, 562 U.S. ___, ___, 131 S. Ct. 1143, 1155 (2011).

182. *Id.* at ___, 131 S. Ct. at 1157.

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

Justice Scalia pointed out, the only way that idea could be implicit in *Davis* is if *Davis* had jettisoned *Crawford*'s central holding that judicial determinations of reliability are not a valid substitute for cross-examination.[184] The majority's appeal to reliability, he added, was not even persuasive on its own terms: "Twenty-five minutes is plenty of time for a shooting victim to reflect and fabricate a false story."[185] One might add that cross-examination seeks to uncover *mistaken* identifications, not just fabricated ones. Even if excited utterances are unlikely to be fabricated, they are no less likely—indeed, probably *more* likely—to be mistaken.

Then along comes *Bullcoming*, and we learn that reports of *Roberts*'s resurrection were also greatly exaggerated.[186] The Court specifically reaffirmed its holding in *Crawford* rejecting the *Roberts* reliability-based approach, and refused to admit one analyst's testimony about another analyst's forensic report despite the report's purported "comparative reliability."[187] When the dissent tried to use Justice Sotomayor's own words from *Bryant* against her, she responded: "*Bryant* deemed reliability, as reflected in the hearsay rules, to be 'relevant,' not 'essential.' The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation."[188] So it seems *Roberts* has not been fully reanimated, just exhumed and placed in some episodically perambulatory state (much like the *Lemon* ghoul) where it can occasionally be brought out to help decide certain cases but not others.[189]

184. *Bryant*, 562 U.S. at ___, 131 S. Ct. at 1174–75 (Scalia, J., dissenting).

185. *Id*. at ___, 131 S. Ct. at 1174.

186. Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705 (2011).

187. *Id*. at ___, 131 S. Ct. at 2713–15.

188. *Id*. at ___ n.1, 131 S. Ct. at 2720 n.1 (Sotomayor, J., concurring in part) (citations omitted).

189. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in the judgment, joined by Thomas, J.) (criticizing the Court's "intermittent use" of the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and comparing it to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried").

Reliability's significance after *Bryant* and *Bullcoming* is unclear. Perhaps reliability will be deemed relevant only where the characteristics that make a statement reliable also confirm that the statement was made for a nonevidentiary purpose (in which case the reliability inquiry would add very little to the analysis). Perhaps reliability will serve as a sort of thumb on the scale in close cases where the statement's purpose is unclear. Either way, this is not a positive development for the coherence or administrability of the law. The *Roberts* totality-of-the-circumstances test was bad enough. The *Roberts* test superimposed on the *Crawford* test (i.e., *Bryant*) was bad enough. But now—depending on how broadly the Court interprets *Bryant*'s reliability references—courts might have to do a three-step: apply *Crawford*, decide *whether* to apply *Roberts*, and then (sometimes) apply *Roberts*. The Court will doubtless be sorting through the consequences of this development for some time.

D. Experts and the Problem of Implied Testimony

As if three grounds for disagreement were not enough, the Court is poised to take on a fourth this Term in *Williams*.[190] As noted above, the question in that case is whether an expert can offer opinions at trial based on testimonial statements that would not themselves be admissible.[191] The expert there opined that the defendant's DNA profile matched the profile of a sample from the victim's rape kit.[192] The technician who prepared the latter profile did not testify at trial.[193] Although the report was not formally introduced into evidence or read to the jury, the expert clearly relied on it in drawing her conclusions.[194]

Illinois law on expert testimony generally tracks the federal

190. People v. Williams, 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 564 U.S. ___, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8085).

191. *See supra* text accompanying notes 79–90.

192. *Williams*, 939 N.E.2d at 270–72.

193. *See id.* at 278.

194. In fairness to the State, the rape victim herself also testified at trial. *See id.* at 287 (Freeman, J., concurring). Although not relevant to the expert testimony's admissibility, that does distinguish the case from some of the more egregious "evidence-based" prosecutions.

rule.[195] Federal Rule of Evidence 703 states that "facts or data" an expert relies on "need not be admissible in evidence in order for the opinion or inference to be admitted," so long as they are "of a type reasonably relied upon by experts in the particular field."[196] Since 2000, the federal rule has also included a caveat that Illinois law does not: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."[197] Thus, under both federal and Illinois law, (1) experts can give opinions based on inadmissible evidence, and (2) the evidence, at least sometimes, can be disclosed to the jury. That latter rule was traditionally explained on the ground that evidence not offered for the truth of the matter asserted is not hearsay—the theory being that the evidence is offered, not for its truth, but solely to help explain the expert's opinion.[198]

Where the underlying evidence is testimonial, that rule can raise serious confrontation concerns. For example, suppose a defendant is charged with rape, and the only dispute is whether the encounter was consensual. Several hours after the fact, the accusing witness describes her version of events to a police investigator with extensive experience in sex crimes. At trial, the witness refuses to testify, so prosecutors qualify the investigator as a sex-crimes expert; he plays a recording of the accuser's account for the jury and opines that, based on his experience, the statement bears a number of hallmarks associated with genuine claims of assault.

Or, take a silly example: the defendant is suspected of plotting with Spanish forces to overthrow the King. The Crown directs a magistrate with extensive experience studying treasonous plots to examine his confederates. One (let's call him

195. *Id*. at 274 (majority opinion) (noting the state's adoption of former FED. R. EVID. 703); *id*. at 278 n.3 (noting that the state had not yet adopted the 2000 amendment to the rule).

196. FED. R. EVID. 703.

197. *Id*.; *see also* FED. R. EVID. 703 advisory committee's notes to 2000 amendments.

198. *See, e.g*., Boone v. Moore, 980 F.2d 539, 542 (8th Cir. 1992).

Lord Cobham) provides information that implicates the defendant. At trial, the magistrate testifies that, in his expert opinion, the information is consistent with the sorts of plots Spanish sympathizers typically hatch. And, to help the jury understand his opinion, he reads out the accomplice's confession.

Such cases might seem far-fetched. As the Second Circuit has remarked, though, the government is increasingly qualifying police officers as experts on gangs, organized crime, and the like.[199] In one gang prosecution, a police officer expert testified about firearms the gang owned, drugs it dealt, and the fact that the gang put a "tax" on non-gang drug dealers in bars it controlled.[200] Some of the officer's testimony consisted of statements other gang members had made to him under custodial interrogation during the investigation leading up to the trial.[201] The Second Circuit deemed the testimony a *Crawford* violation and reversed.[202]

Cases like the foregoing, in which the underlying statement is actually disclosed to the jury, raise the most obvious confrontation problems. The theory that such statements are not introduced for their truth, but only to explain the expert's opinion, is pretty hard to accept. As courts and commentators have pointed out, where an expert offers an opinion on a particular fact, and a supporting document is introduced to help explain how he arrived at that opinion, the supporting document serves that function *only if it is true*.[203] If the jury disbelieves it, the statement can hardly support the expert's opinion. A statement offered to explain an expert's opinion is thus still offered for its truth.

The dubious "not for the truth" theory seems particularly out of place in the confrontation context. In a pre-*Crawford* case, *Tennessee v. Street*, the Court held that the Confrontation Clause

199. United States v. Mejia, 545 F.3d 179, 189–90 (2d Cir. 2008).

200. *Id*. at 187–88.

201. *Id*. at 188 n.3.

202. *Id*. at 198–99.

203. *See, e.g.*, People v. Goldstein, 843 N.E.2d 727, 732–33 (N.Y. 2005); Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J.L. & POL'Y 791, 815–17 (2007).

does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.[204] The Court reaffirmed that principle in dicta in *Crawford*.[205] As Stephen Aslett has shown, however, at the time of the framing, hearsay law had not yet evolved to articulate the distinction between statements offered for their truth and statements offered for other purposes.[206] Rather, the term hearsay was used more generically to refer to unsworn, out-of-court statements in general.[207] Given that framing-era law had not yet explicitly articulated the "not for the truth" concept that undergirds modern hearsay law, it is especially hard to justify relying on a dubious application of that concept to admit testimonial statements.

More difficult are cases where the underlying statement is never introduced or explicitly disclosed, but the expert nonetheless relies on it. Those are the facts of *Williams*—at least in the State's view.[208] The rape kit DNA profile was never introduced or read out; the expert simply testified that she had compared the profile from the rape kit with the profile from the defendant and concluded they were a match.[209] Presumably, the jury could *infer* key facts about the profile. But it is an open question whether that sort of "implied testimony" is sufficient to render the speaker a witness against the defendant within the meaning of the Confrontation Clause.

As Richard Friedman has noted, the issue of implied testimony is not unique to experts.[210] In a recent First Circuit case, for example, a co-conspirator made statements to the police

204. 471 U.S. 409, 414 (1985).

205. Crawford v. Washington, 541 U.S. 36, 59–60 n.9 (2004).

206. Stephen Aslett, Comment, Crawford*'s Curious Dictum: Why Testimonial "Nonhearsay" Implicates the Confrontation Clause*, 82 TUL. L. REV. 297, 311–22 (2007).

207. *See id*.; *see also* Davies, *supra* note 174, at 351–52 n.9, 462–63 n.279.

208. *See* Brief in Opposition, *supra* note 83, at 9.

209. *See id*.

210. *See* Richard Friedman, *When Is a Statement Presented for Purposes of the Confrontation Clause?*, THE CONFRONTATION BLOG (June 15, 2011, 2:49 PM), http://confrontationright.blogspot.com/2011/06/when-is-statement-presented-for.html.

incriminating the defendants during custodial questioning.[211] Rather than ask the agent to repeat the co-conspirator's statements at trial, the prosecution elicited the fact that the interview had occurred and then asked: "After this interview, did the targets of your investigation at this point change?"[212] The agent responded in the affirmative, and the government then elicited testimony that the defendants had been taken to a federal detention facility.[213] The court reversed, holding that "a reasonable jury could only have understood [the agent] to have communicated that [the witness] had identified appellants as participants in the drug deal," and that the government may not "evade the limitations of the Sixth Amendment . . . by weaving an unavailable declarant's statements into another witness's testimony by implication."[214]

Williams presents essentially the same issue. The testifying expert did not expressly reveal the contents of the absent technician's DNA profile report. But her testimony certainly implied key facts about it. How *Williams* turns out could well depend on whether the Court views that sort of implied testimony as sufficient to trigger confrontation protections. That issue presents still more grounds for debate.

IV. CONCLUSION

Given the number of issues on which the Court continues to disagree, some might be tempted to write off the whole endeavor. I would not. Undoubtedly, the Court's confrontation jurisprudence has become more confused. But it is still better than what preceded it.

Crawford criticized two features of the *Roberts* regime: its

211. United States v. Meises, 645 F.3d 5, 11 (1st Cir. 2011).

212. *Id.* at 19.

213. *Id.*

214. *Id.* at 21–23; *see also* Ocampo v. Vail, No. 08-35586, 2011 WL 2275798, at *8-11 (9th Cir. June 9, 2011), *available at* http://www.ca9.uscourts.gov/datastore/opinions/2011/06/09/08-35586.pdf (citing cases for the proposition that "in-court testimony c[an] trigger Confrontation Clause concerns by describing, but not quoting, an out-of-court statement," and holding that, "if the substance of an out-of-court testimonial statement is likely to be inferred by the jury, the statement is subject to the Confrontation Clause").

unpredictability and its capacity to produce results plainly at odds with original meaning.[215] It is hard to say whether current law is better or worse than *Roberts* under the first metric. *Bryant*'s new totality-of-the-circumstances test has done grave damage to the clarity and coherence of the Court's confrontation jurisprudence. In the emergency cases covered by that test, the law is almost certainly more unwieldy than it was under *Roberts*.[216] Elsewhere, the law may still be clearer, but it remains to be seen whether *Bryant*'s approach will be adopted there too.

By contrast, under the second metric—protection of the confrontation right as originally understood—we are still better off now than under *Roberts*. While *Bryant* will result in admission of some public emergency statements the Confrontation Clause should exclude, most statements would probably come in anyway under *Roberts* as excited utterances.[217] And outside the public emergency context, there are any number of clearly testimonial statements, once routinely admitted without cross-examination, which are now kept out. Forensic reports like the one in *Melendez-Diaz* were routinely admitted under the firmly rooted hearsay exceptions for business or official records.[218] Crime scene investigative interviews like the one in *Hammon* were routinely admitted under the firmly rooted exception for excited utterances.[219] And co-conspirator confessions like the one in *Crawford* were routinely admitted as having particularized guarantees of trustworthiness.[220] All those statements are now excluded unless the defendant has the opportunity to confront the witness.

That may sound like a "half-a-loaf" defense of the Court's confrontation jurisprudence. It is. But the ongoing debates over the scope of the confrontation right should not obscure the

215. *See* Crawford v. Washington, 541 U.S. 36, 62–65 (2004).

216. *See supra* text accompanying notes 29–53.

217. *See supra* text accompanying notes 123–55.

218. *See* Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S. Ct. 2527 (2009).

219. *See* Davis v. Washington, 547 U.S. 813, 819–21 (2006).

220. *See Crawford*, 541 U.S. 36.

Court's broader progress. The Confrontation Clause remains alive and well.