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Who Said the Crawford Revolution Would Be Easy?

By Richard D. Friedman

One of the central protections of our system of criminal justice is the right of the accused in all criminal prosecutions “to be confronted with the witnesses against him.” It provides assurance that prosecution witnesses will give their testimony in the way demanded for centuries by Anglo-American courts—in the presence of the accused, subject to cross-examination—rather than in any other way. Witnesses may not, for example, testify by speaking privately to governmental agents in a police station or in their living rooms.

Since shortly after it was adopted, however, the confrontation right became obscured by the ascendance of a broader, but much weaker doctrine, the rule against hearsay. That rule is not limited to testimony—it applies to any out-of-court statement offered to prove the truth of an assertion that it makes—but it has never been absolute. Indeed, over time the expanding list of exemptions to the rule has made it seem to be more hole than cheese.
Apart from a significant loss of intellectual clarity, confounding the confrontation right with the rule against hearsay did not at first create a problem: A court that should have reached a given result by citing the confrontation right could (not necessarily would) do so by citing the rule against hearsay. But in 1965, the US Supreme Court held that the confrontation right, expressed in the Sixth Amendment to the US Constitution, is applicable to the states by virtue of the Fourteenth Amendment. Now it became important for the Supreme Court to have a theory of the confrontation right: Its rulings under the confrontation clause bind the states, but the states are free to design their own hearsay laws.

Not until 1980, in Ohio v. Roberts, 448 U.S. 56 (1980), did the court attempt to enunciate a theory of the confrontation right. As elaborated in later cases, the Roberts rule became a virtual constitutionalization of the rule against hearsay as commonly applied in American courts. Its breadth was as expansive as that of the hearsay rule. But if a statement was deemed to fit within a “firmly rooted” hearsay exception, then the confrontation right did not apply to it. And even if no well-established exception applied, a statement might avoid condemnation under the confrontation clause if it was supported by sufficient “indicia of reliability”—a doctrine that closely conformed to the so-called residual exception to the hearsay rule recognized by most American jurisdictions.

Confrontation doctrine under the Roberts regime was essentially limp; a court disposed to admit an out-of-court statement could usually articulate reasons why the statement was sufficiently reliable to be admissible. The problem was that under Roberts the confrontation clause did not enunciate a value worthy of respect. If live testimony of a witness to a given proposition would be more probative than prejudicial, then usually an out-of-court statement by that same person to the same proposition would be as well; there is no reason to suppose that in general jurors would so overvalue hearsay that their attempt to determine the truth would be aided by shutting their eyes and ears to potentially significant evidence. Accordingly, if a court loses sight of the procedural principle enunciated by the confrontation clause—that live testimony before the accused is the only acceptable manner in which prosecution witnesses may testify—then a court’s temptation will virtually always be to admit secondary evidence of an out-of-court statement, without much regard to whether it was made in contemplation of litigation.

All that changed, dramatically, with Crawford v. Washington, 541 U.S. 36 (2004). Crawford recognized that the confrontation clause does not state a general rule about hearsay; rather, it addresses how prosecution witnesses give their testimony. Crawford further recognized that within that realm the clause does not state a flexible standard. Rather, it states a categorical rule: Prosecution witnesses must give their testimony in the presence of the accused, subject to cross-examination. What is more, that confrontation must occur at trial, unless the witness is then unavailable and the accused has had an opportunity at another time to be confronted with and cross-examine the witness.

Though Justice Scalia’s opinion in Crawford was revolutionary, it gained the acceptance of seven members of the court, spanning the ideological spectrum. But Crawford provided only a framework. It left unanswered many questions, most prominently how a court should determine whether a statement is testimonial.

Most Supreme Court cases since Crawford involving the confrontation clause have fallen into two groups involving, respectively, accusatory statements made to government officials and forensic laboratory results. The law governing the first category has taken several unfortunate turns. The majority opinions in the second category have been on the mark, but they have been adopted in 5-4 votes.

**Accusatory Statements and the “Ongoing Emergency” Doctrine**

Davis v. Washington, 547 U.S. 813 (2006), decided two cases, both of which involved accusations of domestic violence made to governmental authorities shortly after the alleged incident. I represented one of the petitioners and argued that a statement made to a known law enforcement officer and accusing a person of a crime should be considered per se testimonial. But the court did not go so far. Instead—in what appeared to be an attempt to achieve consensus during a brief honeymoon period at the beginning of Chief Justice Roberts’s tenure—it enunciated a qualified test:

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. *(Id. at 822.)*

Thus, in the case I argued, Hammon v. Indiana, the
accused’s wife made the statement to a police officer in the family living room while the accused was held at bay in the kitchen. If the confrontation clause allowed the statement to be admitted without her coming to court, then we would have a system in which, by speaking to the police in her living room, a person could knowingly create evidence with the anticipation that it would be used at trial against the person she accused. Eight members of the court agreed that this was an easy case and that the clause barred use of the statement absent an opportunity for confrontation. Only Justice Thomas dissented. He pointed out—correctly, I believe—that the “primary purpose” test was riddled with ambiguity. But he contended that the statement was not sufficiently formal to be deemed testimonial. I believe that this argument misses the essential function of the clause, which is to ensure that testimony is given under proper—and formal—conditions.

The other case, _Davis_ itself, involved conversation with a 911 operator, begun while the accused was still in the house. Throughout the call, the complainant was in obvious distress and the accused remained at large. Unanimously, the court held that this statement was not testimonial; the majority concluded that it was made for the primary purpose of addressing the emergency that led to the 911 call.

_Davis_ left open the questions of how broadly the court would treat the “ongoing emergency” doctrine and how it would go about trying to determine what was the “primary purpose” of an interrogation. In _Michigan v. Bryant_, 131 S. Ct. 1143, decided in February 2011, the court began to give answers. The case centered on statements made by a shooting victim, Anthony Covington, while lying badly wounded on the pavement outside a gas station. Covington told each of several police officers as they arrived on the scene that he had been shot through a door by Bryant, half an hour earlier and six blocks away. Several hours later, Covington died of his wounds; there was no proof, however, that at the time he made his statements he anticipated imminent death.

Five justices, in an opinion by Justice Sotomayor, held that these statements were made for the purpose of addressing the emergency created by the shooting. Justice Thomas concurred, again objecting to the “primary purpose” test but continuing to insist that only formally made statements could qualify as testimonial. Justice Scalia dissented in an opinion that gave full vent to his passionate disagreement. Justice Ginsburg also dissented, more briefly and with more restraint. Justice Kagan, who as solicitor general had put her name on an amicus brief supporting the state, recused herself.

The _Bryant_ majority adhered to the “primary purpose” test. Justice Scalia applied a formulation that I believe is much better—whether the understanding at the time of the statement was “that it may be used to invoke the coercive machinery of the State against the accused.” (Id. at 1169.) But the difference between a purpose-based test and an anticipation-based test was not crucial to resolve _Bryant_. What was crucial was this question: From whose perspective should a court make the relevant assessment? Justice Scalia believed—correctly, in my view—that the decision should be made from the point of view of the speaker, the person who is assertedly a witness for purposes of the confrontation clause. But the majority chose what it called “a combined inquiry that accounts for both the declarant and the interrogator.” (Id. at 1160.) To the extent that the majority meant simply that the apparent purpose of a police questioner is an important fact in determining what the speaker’s understanding of the situation was, this seems reasonable enough. But the majority seemed, at least at times, to be saying that the purpose of a questioner is itself a critical determinant of whether a statement is testimonial. That view is troublesome. The questioner is not a witness; indeed, sometimes a witness makes a testimonial statement without any questioner at all. Furthermore, the test is highly manipulable; police interrogators can always claim that as they began questioning they were focusing on how little they knew of the situation and on how the aim of any officer in such a situation would be first and foremost to ensure the public safety. Furthermore, the majority never really answered a sharp question posed by Justice Scalia: What if the questioner and the speaker have completely different purposes or understandings of the situation?

_Bryant_ itself illustrated such a possible divergence. The majority concentrated its discussion mainly on the police officers, for as they arrived at the scene they knew little or nothing of what was going on. But Covington knew full well what had happened. Though badly hurt, he was perfectly coherent. He knew that nothing he said in describing the shooting could plausibly relieve his
Fornia, would allow them to be admitted into evidence. But, had trial or any formal proceeding. The state could prove its case based on the statements Covington made to the police while lying outside the gas station, and, so far as the confrontation clause is concerned, the state would never have to bring him to trial or any formal proceeding.

Suppose Covington had survived the attack and lived around the corner from the courthouse where the trial was held. Under the majority's analysis, that would not matter: The state could prove its case based on the statements Covington made to the police while lying outside the gas station, and, so far as the confrontation clause is concerned, the state would never have to bring him to trial or any formal proceeding.

That Covington died hours after making his accusations must have made much more appealing a ruling that would allow them to be admitted into evidence. But, had Justice Scalia not overplayed his hand three years earlier, there might have been a far more satisfactory route to achieving the same result. There was considerable, though not necessarily overwhelming, evidence that Bryant had indeed killed Covington; if so, and given that there was no time to arrange for a deposition, Bryant's own intentional wrongful act was the cause of his inability to cross-examine Covington. Thus, a court might have held that Bryant forfeited the confrontation right—except that the Supreme Court foreclosed this possibility in Giles v. California, 554 U.S. 353 (2008), when it held, in an opinion by Justice Scalia, that an accused does not forfeit the right by killing a witness unless he does so for the purpose of rendering the witness unavailable to testify. I expressed fear at the time of Giles that courts would compensate for it in part by adopting narrow conceptions of the class of testimonial statements, and now I am afraid that the Supreme Court itself has validated that prediction.

One more aspect of Bryant is potentially troublesome. Justice Sotomayor wrote, “In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” (131 S. Ct. at 1155.) Does this suggest a desire on her part to restore the ancien regime of Ohio v. Roberts? That is hard to believe, but if not it was difficult to know what to make of this language. Some basis for relief appeared in a concurrence by Justice Sotomayor in the second confrontation clause case of the last term, Bullcoming v. New Mexico, toward which we now turn.

Forensic Laboratory Reports

In Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), Justice Scalia, for a bare majority of the court, adopted what he called “a rather straightforward application” of Crawford: A forensic lab report prepared for use in prosecuting a crime, in that case attesting that a given substance contained cocaine, was a testimonial statement subject to the confrontation clause. Four justices—the same four that later concurred in Justice Sotomayor’s opinion in Bryant (the chief justice and Justices Kennedy, Breyer, and Alito)—issued a pained dissent, written by Justice Kennedy, emphasizing what they feared the practical consequences of the decision would be. They were not assuaged by Justice Scalia’s assurance that “the best indication that the sky will not fall [as a result of the decision] is that it has not done so already,” given that “there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst’s appearance at trial.” (Id. at 2540–41.)

Indeed, the four did not give up readily. Just a few days after Melendez-Diaz came down, the court granted certiorari in a case that it had been holding pending that decision, Briscoe v. Virginia. In Briscoe, the state argued that it did not have to bring the author of the report to trial because the accused could have invoked a statute providing that he could call the author to trial as his own witness. The curious aspect of the certiorari grant was that the court had apparently just decided the issue, rejecting the contention by Massachusetts in Melendez-Diaz that the accused’s constitutional right to call the author as a witness obviated the confrontation clause problem. There was widespread speculation that the four dissenters hoped to take a quick crack at Melendez-Diaz; Justice Souter, a member of the majority in that case, had announced his retirement, and Sonia Sotomayor, already nominated to replace him, was a former prosecutor. But at argument, held after she had taken her seat, it became apparent that she was not about to limit or discard Melendez-Diaz, and the court did what most observers had originally expected it to do, vacate and remand the case for reconsideration in light of that decision.

But this was nowhere near the end of the story. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011), decided this past June, was the court’s third encounter with the confrontation clause ramifications of forensic lab reports. Bullcoming involved a prosecution for driving while intoxicated; the results of a blood test were necessary to prove an aggravated form of the offense. In this case, unlike Melendez-Diaz and Briscoe, the prosecution presented a live witness from the lab rather than simply the report. But Curtis Caylor, the analyst who had actually performed the test, was on unpaid administrative leave, and the state did not bring him to court. Instead, it presented the testimony of Gerasimos Razatos, a supervisor who could speak from personal knowledge about the lab’s procedures but who had not participated in or observed performance of any part of the test on Bullcoming’s blood.
Once again, the wait for a decision was made more interesting by the fact that a member of the Melendez-Diaz majority, in this case Justice Stevens, had retired and been replaced by a new justice whose background suggested the possibility that she might join the Melendez-Diaz dissenters; as solicitor general, Justice Kagan had supported the state in Briscoe. But once again the new justice joined the majority, and the Melendez-Diaz dissenters remained a minority of four, once again with Justice Kennedy writing for them.

Justice Ginsburg wrote the majority opinion. That in itself is interesting, because she received the assignment from Justice Scalia, the senior justice in the majority and the author of the majority opinions in Crawford, Davis, Giles, and Melendez-Diaz. Justice Scalia's decision not to keep the opinion himself may have been determined by workload factors—but it may also have reflected recognition, after Bryant, that he was not persuading his colleagues sufficiently on confrontation clause issues.

The majority concluded rather easily on the basis of Melendez-Diaz that Caylor's report was testimonial, "[i]n all material respects," the court wrote, the reports in the two cases resembled each other. (131 S. Ct. at 2717.) The New Mexico Supreme Court had not denied this conclusion, but it had nevertheless held that the clause did not apply to Caylor's report, because he had transcribed the results of a gas chromatograph machine without offering any additional interpretation. Thus, it regarded him as "a mere scrivener," the true accuser being the machine itself. But Justice Ginsburg's opinion rejected this theory outright. Caylor's report did more than repeat numbers yielded by the machine; it amounted to a certification of the entire manner in which the test was conducted. More significantly, Justice Ginsburg emphasized, most witnesses testify to their observation of factual conditions or events—such as "the light was green"—without additional interpretation; the confrontation clause applies to such testimony, and lab analysts are no different in this regard from other witnesses.

The New Mexico court had also held that Razatos could substitute for Caylor because he was qualified to testify about the machine and the laboratory's procedures. No, said Justice Ginsburg. Razatos could not testify to what Caylor knew—not only about the test but about why Caylor had been put on unpaid leave. And, "[m]ore fundamentally,... [t]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (Id. at 2708.)

Speaking just for herself and Justice Scalia, Justice Ginsburg added a discussion demonstrating once again that "dire consequences" were unlikely to follow from rigorous protection of the confrontation right. Among other points, she emphasized that retesting of samples would often obviate the need for the original analyst to come to trial; Razatos could simply have conducted his own test and testified from personal knowledge about that. And, as the court had in Melendez-Diaz, she endorsed the constitutionality of notice-and-demand statutes, which provide that an accused waives the confrontation right with respect to a forensic lab report if the accused is given notice of the prosecution's intent to introduce the report but does not demand that the analyst testify live.

Once again, the four dissenters were not comforted. Justice Ginsburg noted that their objection was "less to the application of the Court's decisions in Crawford and Melendez-Diaz to this case than to those pathmarking decisions themselves." (Id. at 2713 n.5.) Indeed, Justice Kennedy's opinion contained the dark intimation that "the Crawford approach was not preordained," and suggested that "[t]he persistent ambiguities in the Court's approach are symptomatic of a rule not amenable to sensible applications." (Id. at 2726, 2728.) Are the four prepared to get rid of Crawford altogether? That is difficult to say, but Justice Kennedy claimed that Bryant stood for the proposition that "reliability is an essential part of the constitutional inquiry." (Id. at 2725.)

That statement generated a response from Justice Sotomayor, the author of Bryant. The decision in that case, she said, "deemed reliability, as reflected in the hearsay rules, to be 'relevant,' not 'essential.'" (Id. at 2720 n.1 (citation omitted).) How relevant? She explained that in some circumstances the treatment of a given statement under the hearsay rules has "confirmed" a decision as to whether the statement should be deemed to be litigation-oriented and so testimonial for confrontation clause purposes. But that is a long way away from the Roberts approach, which treated reliability as the governing standard and the hearsay rules as a principal determinant of reliability. As Justice Sotomayor explained: "The rules of evidence, note 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." (Id.)

Justice Sotomayor also highlighted several factual circumstances not presented by the case. It was not a case in which any nonlitigation purpose was suggested for the report. Nor did the in-court witness have "a personal, albeit limited, connection to the scientific test at issue." (Id. at 2722.) Nor was the testifying expert "asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." (Id.) And this was "not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph." (Id.)
The court will have a further chance to test the limits of *Melendez-Diaz* and *Bullcoming* soon enough. Five days after it decided *Bullcoming*, the court granted certiorari in *Williams v. Illinois*, 131 S. Ct. 3090 (2011), yet another case involving the confrontation clause ramifications of forensic lab reports. In *Williams*, an in-court expert testified that two DNA profiles matched; one of them was reported by an out-of-state lab, from which no witness came to testify at trial. That lab’s report was not introduced, but the essence of it—the deduction of a DNA profile that, according to both a computer program and the in-court expert, matched that of the accused—was made clearly known to the judge, sitting as trier of fact. It seems likely that the four justices who dissented in the first two cases will be eager to approve the procedure used in *Williams*. It remains to be seen whether the five members of the *Bullcoming* majority will all recognize that the out-of-state lab report was a testimonial statement, that part of its substance was effectively presented to the judge, and that this substance provided no support for the expert’s opinion unless it was true; that the expert added input of her own to form her opinion does not negate the fact that testimonial assertions made by an absent lab analyst were a crucial part of the prosecution’s case.

For now, in any event, *Melendez-Diaz* and *Bullcoming* remain the law, and those states that assumed they could prove forensic lab results simply by introducing pieces of paper or by presenting the testimony of surrogate witnesses will have to adjust. In many cases, defendants will stipulate to the admissibility of the report—as they do in states that always adhered to the rule now established as a matter of constitutional law by these two cases. Beyond that, though, more states might adopt notice-and-demand statutes—perhaps including a provision that an analyst who appears ready to testify will do so, thus diminishing the accused’s incentive to make the demand simply to impose cost on the prosecution, with the intention of stipulating to admissibility if the analyst appears. Another approach to limit such manipulative demands (but one of uncertain constitutionality) may be to tax against an accused who has been convicted and is not indigent the cost of the analyst’s appearance; statutory authorization for such taxation, which was unknown at the common law, is already on the books in some states, as well as the federal jurisdiction. Even absent statutory provisions, prosecutors might attempt to limit such game-playing on their own, by adopting a policy that they will not stipulate to admissibility of the report once the analyst appears prepared to testify. States might also find ways to satisfy the accused’s confrontation rights more efficiently than they do now. For example, if the original analyst is unavailable, often another analyst could economically retest the sample and then testify at trial. Or states might arrange for lab witnesses to give testimony in multiple cases on a given day, perhaps by deposition. They might set up facilities in labs that would enable analysts to testify by video in many cases, on consent of the accused, without the need to travel. In some cases, they might find it advantageous to rearrange the structure of the lab operation—perhaps relying on smaller labs better distributed around the state, perhaps integrating their processes so fewer technicians are involved in any given test.

**The Uncertain Path Ahead**

And so we have come to a curious juncture. The court has adopted an awkward “primary purpose” test, at least for interrogations. In applying that test, it has taken an unfortunate perspective, dependent in large part on the intent of the questioner. This may make its rather expansive view of the “ongoing emergency” doctrine highly manipulable. A robust forfeiture doctrine might have created a backdrop against which the court could develop a sound doctrine governing the determination of whether a statement is testimonial, but at least for now the court has barred that possibility. Meanwhile, four justices are suggesting that perhaps they are ready to abandon the whole project, and return to something like the reliability-based *Roberts* regime, which the court recently rejected after 25 years of failure. And one more justice severely limits the reach of the confrontation right, which was meant to protect the conditions in which testimony is given, by refusing to recognize it unless the statement in question is already characterized to a considerable degree by the formality that is one of those conditions. And yet, in the context of formal statements, even reports on routinely performed lab tests, a majority of the court still adheres to the principle that our criminal justice system gives an accused the right to insist that those who make statements creating evidence against the individual do so face-to-face and subject to cross-examination.

So how will this all turn out? I am loath to make predictions in the short run. In the long run, I believe that the court will adopt a sound view of what is testimonial, based on the reasonable anticipation of a person in the position of the speaker, and that its ability to develop a strong confrontation right will be fostered by development of a strong forfeiture doctrine. My principal reason for believing this is that I believe that over time the wrong turns the court has taken will become painfully obvious. It was clear after *Crawford* that construction of a durable framework built on its foundation would take several years at least. But now it appears the process may take decades, at least. Too bad, but, oh well. The confrontation right has been around for centuries, and will be for centuries to come. If it takes a while longer to get it right, so be it.