



## FORDHAM LAW REVIEW

---

Volume 80, Page 1301  
Published 2011

---

### **Dead Again: The Latest Demise of the Confrontation Clause**

Michael D. Cicchini

Recommended citation:

Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301 (2011)

This article is also available at: <https://ir.lawnet.fordham.edu/flr/vol80/iss3/12/>

Other works by the author are available at: <https://cicchinilaw.com/articles>

## ESSAY

### DEAD AGAIN: THE LATEST DEMISE OF THE CONFRONTATION CLAUSE

*Michael D. Cicchini\**

*In Crawford v. Washington, the Supreme Court abandoned its Roberts “reliability” approach to the right of confrontation. The Court conceded that the Roberts decision had killed the Confrontation Clause by: (1) impermissibly tying the right of confrontation to the rule against hearsay; (2) inappropriately allowing pretrial determinations of reliability to replace actual cross-examination at trial; (3) relying too heavily on malleable, multi-factor balancing tests; and (4) completely failing to constrain judicial discretion. Since Crawford, however, the Court has decided Davis v. Washington and Michigan v. Bryant. Unfortunately, in the course of deciding those cases the Court has once again killed the Confrontation Clause. More specifically, the Court has developed yet another framework that incorporates every single one of Roberts’s flaws, including its failure to constrain judicial discretion. This Essay exposes the underlying reasons for the Court’s failure, offers a solution to the problem, and provides suggestions for the Court when deciding future cases that involve the constitutional rights of criminal defendants.*

#### TABLE OF CONTENTS

INTRODUCTION: DEAD AND DEAD AGAIN .....	1302
I. CRAWFORD V. WASHINGTON: THE COURT COMES CLEAN .....	1305
A. Roberts <i>Intermingled the Constitution with the Rules of Evidence</i> .....	1306
B. Roberts <i>Used Pretrial Judicial Determinations of Reliability as a Substitute for Actual Cross-Examination</i> .....	1306
C. Roberts’s <i>Multi-factor Balancing Test Produced Wildly Unpredictable and Inconsistent Results</i> .....	1307

---

\* J.D., summa cum laude, Marquette University Law School (1999); C.P.A., University of Illinois Board of Examiners (1997); M.B.A., Marquette University Graduate School (1994); B.S., University of Wisconsin—Parkside (1990). Michael D. Cicchini is a criminal defense lawyer, the author of numerous law review articles on criminal and constitutional law, coauthor of *But They Didn’t Read Me My Rights! Myths, Oddities, and Lies About Our Legal System* (2010), and blogger at The Legal Watchdog, <http://www.thelegalwatchdog.blogspot.com>.

D. Roberts <i>Completely Failed to Constrain Judicial Discretion</i>	1307
II. CRAWFORD-DAVIS-BRYANT: THE NEW RULE OF CONFRONTATION...	1308
III. GRADING THE COURT'S TESTIMONIAL FRAMEWORK .....	1310
A. <i>Welcome Back: The Return of the Rules of Evidence</i> <i>and Pretrial Judicial Determinations of Reliability</i> .....	1310
B. <i>Same Old Song and Dance: Another Multi-factor Balancing</i> <i>Test Leads to Continued Unpredictability</i> .....	1312
C. <i>The More Things Change, the More They Stay the Same:</i> <i>Judicial Discretion Under a Different Label</i> .....	1317
IV. THE SOLUTION: A TRIAL-BASED APPROACH TO TESTIMONIAL HEARSAY .....	1320
CONCLUSION: LESSONS TO BE LEARNED.....	1322

#### INTRODUCTION: DEAD AND DEAD AGAIN

The Sixth Amendment's Confrontation Clause guarantees, quite simply and clearly, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>1</sup> This right to cross-examine one's accuser is so basic to our fundamental sense of fairness that the U.S. Supreme Court has called it a "bedrock procedural guarantee."<sup>2</sup> Furthermore, its importance is easily understood. Few among us would have confidence in the typical criminal conviction unless, at a bare minimum, the accuser appeared at trial, took an oath (or made an affirmation) to tell the truth, and was cross-examined about his biases, motives, and ability to accurately recall the events about which he testified.

But despite its simplicity and clarity, the Confrontation Clause has been the subject of thousands of articles and court opinions, each debating or deciding its proper reach and scope in every imaginable circumstance.<sup>3</sup> And although law reviews and courts continue to publish these articles and opinions, the Confrontation Clause, for all practical purposes, died in 1980 with the Court's decision in *Ohio v. Roberts*.<sup>4</sup>

In *Roberts*, the Court held that a prosecutor could use hearsay evidence at trial to convict a defendant if a judge, using a multi-factor balancing test, first found the hearsay to be reliable.<sup>5</sup> For reasons explained later in this Essay, this highly subjective, fact-intensive, malleable standard "fail[ed] to provide meaningful protection from even core confrontation violations."<sup>6</sup> Prosecutors, with the blessing of trial judges, routinely ran roughshod over defendants' rights and often won convictions based primarily, if not entirely, on untested hearsay allegations. The Confrontation Clause was dead.

---

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

2. *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

3. For a broad sampling of relevant cases, articles, and other commentary, see Richard D. Friedman, CONFRONTATION BLOG, <http://confrontationright.blogspot.com/> (last visited Nov. 16, 2011).

4. 448 U.S. 56 (1980).

5. *See id.* at 66.

6. *Crawford*, 541 U.S. at 63.

In 2004, however, the Court decided *Crawford v. Washington*<sup>7</sup> and (temporarily) breathed new life into the Confrontation Clause. In *Crawford*, the Court conceded that it had been misinterpreting the Constitution for the past twenty-five years, in part because it had allowed trial judges to use multi-factor balancing tests and their own judgments about reliability to replace actual cross-examination at trial.<sup>8</sup> While the Court's admission was of little consolation to the many thousands of individuals who had been convicted and imprisoned (or worse) based on hearsay they could not cross-examine, it was a welcome concession nonetheless. In fact, many hailed *Crawford* as a great "sea change" in Confrontation Clause jurisprudence.<sup>9</sup> A new day, it seemed, was dawning.

But the more things changed, the more they stayed the same. Despite the Court's mea culpa, *Crawford* failed to cure the numerous ills of *Roberts*, and instead created a new standard that classified hearsay as either testimonial or nontestimonial.<sup>10</sup> If, and only if, the hearsay was testimonial, the Confrontation Clause banned its use at trial; otherwise, a prosecutor could use the nontestimonial hearsay as he wished.<sup>11</sup> But what exactly is this newly created concept—testimonial hearsay—on which the Constitution's "bedrock procedural guarantee" now turns?<sup>12</sup> The Court's answer: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"<sup>13</sup>

After *Crawford*, over the course of seven years and two cases—first *Davis v. Washington*<sup>14</sup> in 2006 and then *Michigan v. Bryant*<sup>15</sup> in 2011—the Court attempted to put some meat on the bones of its revamped Confrontation Clause.<sup>16</sup> But instead of resuscitating it as many had hoped,

7. *Id.* at 36.

8. *See id.* at 67 ("But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.")

9. *See, e.g.*, State v. Grace, 111 P.3d 28, 36 (Haw. Ct. App. 2005) ("Effecting a sea change in our understanding of the [C]onfrontation [C]lause . . ."); Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington*, 50 S.D. L. REV. 41, 61 (2005) ("This is a sea change for prosecution of cases involving child witnesses."); Andrew King-Ries, *State v. Mizenko: The Montana Supreme Court Wades into the Post-Crawford Waters*, 67 MONT. L. REV. 275, 313 (2006) ("*Mizenko*, therefore, recognizes *Crawford's* sea-change in confrontation rights . . .").

10. *See Crawford*, 541 U.S. at 51–52.

11. *See id.* at 68.

12. Testimonial hearsay was, indeed, a newly created concept. *See id.* at 71–72 (Rehnquist, C.J., concurring) ("Starting with Chief Justice Marshall's interpretation as a Circuit Justice in 1807 . . . through today, we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware." (citations omitted)).

13. *Id.* at 68 (majority opinion).

14. 547 U.S. 813 (2006).

15. 131 S. Ct. 1143 (2011).

16. The Court has issued other post-*Crawford* opinions on the Confrontation Clause, but none that are relevant to the issue addressed in this Essay. *See, e.g.*, *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (addressing a defendant's right to cross-examine the particular analyst that created the forensic laboratory report being used by the state); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) (addressing whether a forensic

the Court slowly and painfully developed yet another highly subjective, fact-intensive, malleable standard—the very thing it condemned in *Crawford*.<sup>17</sup> This, unfortunately, is the current state of Confrontation Clause jurisprudence under *Crawford-Davis-Bryant*. The Confrontation Clause is dead again.

The purpose of this Essay is not to make sense of a defendant's confrontation rights in this *Crawford-Davis-Bryant* world; that is not possible. Law professor Daniel Blinka accurately describes the Court's most recent case, *Bryant*, as “a train wreck,” and sympathizes that “[f]or the defense lawyers and prosecutors who must eat this mush . . . every day, you have my best wishes and these words of solace.”<sup>18</sup> Similarly, law professor Richard Friedman describes *Bryant* as “remarkably mushy, unjustified by any sound reasoning and virtually incoherent.”<sup>19</sup> Likewise, Justice Scalia acknowledges in his *Bryant* dissent that the Court “distorts our Confrontation Clause jurisprudence and leaves it in a shambles.”<sup>20</sup>

Rather, the purpose of this Essay is two-fold. First, I will demonstrate precisely how the Court has once again killed the Confrontation Clause, this time with its *Crawford-Davis-Bryant* triumvirate of cases.<sup>21</sup> My hope is that exposing the underlying mechanics of this debacle will prevent a similar demise of other constitutional rights in the future. Second, I will also demonstrate that these Confrontation Clause decisions are not worthy

laboratory report is testimonial); *Giles v. California*, 554 U.S. 353 (2008) (addressing when a defendant's actions constitute a forfeiture of the right of confrontation). The Court has also granted certiorari in *People v. Williams* to address whether the state can introduce a forensic laboratory report not for the truth of the matter asserted, but ostensibly to show the basis for the testifying expert's opinion. 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (2011).

17. See *infra* Part II.

18. Daniel D. Blinka, *More “Bullcoming”?* *The Court Courts Confusion in Confrontation*, MARQ. U. L. SCH. FAC. BLOG (Mar. 3, 2011), <http://law.marquette.edu/facultyblog/2011/03/03/more-“bullcoming”-the-court-courts-confusion-in-confrontation/>.

19. Richard D. Friedman, *Preliminary Thoughts on the Bryant Decision*, CONFRONTATION BLOG (Mar. 2, 2011, 12:42 AM), <http://confrontationright.blogspot.com/2011/03/preliminary-thoughts-on-bryant-decision.html>.

20. *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting). Justice Scalia should have foreseen this when he authored the *Crawford* decision in 2004, but better late than never. His hindsight criticism, although untimely and far from novel, is accurate.

21. Interestingly, the Court seems to provide greater protection for defendants when the state's proffered hearsay takes the form of a forensic laboratory report created by a scientist, as opposed to a hearsay statement created and repeated by a police officer. See *Bullcoming*, 131 S. Ct. at 2710 (holding that the defendant has the right to cross-examine the particular analyst that actually conducted the test); *Melendez-Diaz*, 129 S. Ct. at 2532 (holding that a forensic laboratory report is testimonial evidence). However, this is of little consolation for three reasons. First, forensic laboratory reports are relatively uncommon when compared to the hearsay evidence addressed in this Essay. Second, forensic laboratory reports produced by scientists, while far from error-free, are hardly “the principal evil at which the Confrontation Clause was directed.” *Crawford*, 541 U.S. at 50. And third, the right to confront the particular scientist that drafted the forensic laboratory report has little or no practical value to defendants, considering the “likely futility of cross-examining an analyst who likely had no recollection of this test among the hundreds of those routinely performed.” Daniel D. Blinka, *Bullcoming Arrives, But Where's the Path?*, MARQ. U. L. SCHOOL FAC. BLOG (June 25, 2011), <http://law.marquette.edu/facultyblog/2011/06/25/bullcoming-arrives-but-where-the-path/>.

of respect, but rather of criticism. My hope in this regard is that individual states will, under their state constitutions, provide a genuine right of confrontation that exceeds the Court's "hollow constitutional guarantee."<sup>22</sup>

#### I. *CRAWFORD V. WASHINGTON*: THE COURT COMES CLEAN

In 1980, the Supreme Court's decision in *Roberts* killed the Confrontation Clause by permitting a prosecutor nearly unrestricted use of hearsay accusations at trial, thereby completely eviscerating the defendant's right to confront his accuser.<sup>23</sup> The only prerequisites for introduction of the hearsay evidence were that the hearsay declarant be unavailable for trial<sup>24</sup>—if he were available, he would have to be called to the witness stand for live testimony—and that the judge find that the hearsay carried adequate "indicia of reliability."<sup>25</sup> This reliability test was satisfied in one of two ways. If the hearsay fell within a "firmly rooted hearsay exception," nothing more need be done; it was deemed reliable and therefore admissible.<sup>26</sup> Or, if after analyzing all of the facts and circumstances surrounding the hearsay, the judge believed the hearsay carried "particularized guarantees of trustworthiness," it too was deemed reliable and therefore admissible.<sup>27</sup>

This second, disjunctive prong—simply called the reliability test or the reliability determination—was often couched in the formality of a factor-laden framework. State courts, left to their own devices, would develop multi-factor balancing tests to decide whether a hearsay statement was reliable, and therefore admissible.<sup>28</sup> Virtually any factor was fair game for consideration. For example, one state's reliability determination depended on

- (1) whether the declarant had an apparent motive to lie; (2) whether the general character of the declarant suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness; (6) whether the statements contained express assertions of past fact; (7) whether cross-examination could not help to show the declarant's lack of knowledge; (8) whether the possibility of the declarant's recollection being faulty is remote; and (9) whether the

---

22. *Bryant*, 131 S. Ct. at 1173 (Scalia, J., dissenting).

23. See *Ohio v. Roberts*, 448 U.S. 56 (1980). *Roberts* perhaps seemed reasonable at the time in light of the particular facts before the Court; that is, the Court permitted the prosecutor to use a transcript of the *defendant's* witness from the preliminary hearing when the witness became unavailable at trial. *Id.* at 58–59, 77. It was the way that *Roberts* was broadly applied—or perhaps misapplied—thereafter that was most problematic.

24. See *id.* at 65.

25. *Id.* at 66 (citation omitted).

26. *Id.*

27. See *id.*

28. See *Crawford v. Washington*, 541 U.S. 36, 63–66 (2004).

circumstances surrounding the statements give no reason to suppose that the declarant misrepresented the defendant's involvement.<sup>29</sup>

Regardless of the particular phrasing of the test, the end result was usually the same: the judge would find the hearsay reliable, thus allowing the prosecutor to introduce it at trial and leaving the defendant without any opportunity to cross-examine his accuser.<sup>30</sup> But then, in 2004, the Supreme Court decided *Crawford* and adeptly highlighted the numerous and serious problems with this nearly twenty-five-year-old reliability test.<sup>31</sup> By identifying these problems and bringing them to the forefront, the Court seemed well on its way to implementing the long awaited "sea change" and resuscitating the Confrontation Clause. The following sections address the fundamental defects that the *Crawford* Court identified.

#### A. Roberts *Intermingled the Constitution with the Rules of Evidence*

The first problem with *Roberts* was that it intermingled the Confrontation Clause with the rules of evidence—more specifically, the rule against hearsay and its thirty or so exceptions. The Court in *Crawford* rejected the ideas that the right of confrontation should be synonymous with hearsay rules or should vary depending upon "the law of Evidence for the time being."<sup>32</sup> That is, "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant" confrontation violations.<sup>33</sup> The Court doubted that "the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."<sup>34</sup> Instead, the Confrontation Clause offers protection that is separate and distinct from the rules of evidence.

#### B. Roberts *Used Pretrial Judicial Determinations of Reliability as a Substitute for Actual Cross-Examination*

The second problem with *Roberts* was that it permitted the prosecutor to use untested hearsay to convict a defendant if the judge first conducted a hearing and found that, in his opinion, the hearsay was reliable. The Court in *Crawford* decried this approach as fundamentally flawed: "Dispensing with confrontation because testimony is obviously reliable is akin to

---

29. *State v. Rice*, 844 P.2d 416, 425 (Wash. 1993) (en banc). For an equally vague yet noticeably different set of factors, see *Bernal v. People*, 44 P.3d 184, 197–98 (Colo. 2002) (en banc), which relied upon the nature and character of the hearsay, as well as the circumstances under which the hearsay was made, in determining reliability.

30. Even the most unreliable type of hearsay—a self-serving accusation by a codefendant against a defendant—was admitted by lower courts "more than one-third of the time," despite the Supreme Court's warning "that it was 'highly unlikely' that accomplice confessions implicating the accused could survive *Roberts*." *Crawford*, 541 U.S. at 63–64. Other hearsay, of course, is admitted into evidence with far greater frequency.

31. *See id.* at 62–65.

32. *Id.* at 51 (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 101 (2d ed. 1923)).

33. *Id.*

34. *Id.* at 61.

dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”<sup>35</sup> More precisely, 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.”<sup>36</sup> Accordingly, the protections of the Confrontation Clause must not hinge on pretrial judicial determinations of reliability.

C. *Roberts’s Multi-factor Balancing Test Produced Wildly Unpredictable and Inconsistent Results*

The third problem with *Roberts* was that its results—whether analyzing cases on an inter-state basis, an intra-state basis, or even an intra-court basis—were wildly unpredictable and inconsistent. The cause of this problem was that “[t]here [were] countless factors bearing on whether a statement is reliable” and, to make matters worse, “[s]ome courts [wound] up attaching the *same* significance to *opposite* facts.”<sup>37</sup> While this will be demonstrated in greater detail in Part III.B, two brief examples will quickly illustrate this point. First, some courts would find a hearsay statement reliable, and therefore admissible, because it was detailed,<sup>38</sup> while other courts would find a hearsay statement reliable, and therefore admissible, because it was *not* detailed.<sup>39</sup> Second, some courts would find a hearsay statement reliable, and therefore admissible, because the declarant was in custody and accused of his own crime at the time he made the statement,<sup>40</sup> while other courts would find a hearsay statement reliable, and therefore admissible, because the declarant was *not* in custody and was *not* accused of a crime.<sup>41</sup> This inconsistency and unpredictability is not acceptable for a fundamental constitutional guarantee.

D. *Roberts Completely Failed to Constrain Judicial Discretion*

The fourth problem with *Roberts* is the largest and most critical of its flaws: the reliability test “reveals a fundamental failure on [the Court’s] part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.”<sup>42</sup> The Court in *Crawford* believed that “[t]he Framers would be astounded to learn” that police and other government officers could be so intricately involved in the production of accusatory statements, and then courts would allow a prosecutor to use such hearsay evidence against a defendant at trial without any opportunity for

35. *Id.* at 62.

36. *Id.* at 61.

37. *Id.* at 63 (emphasis added).

38. *See, e.g.*, *People v. Farrell*, 34 P.3d 401, 407 (Colo. 2001) (emphasizing that the declarant “provided detailed descriptions of the events and conversations,” apparently believing that a liar would be incapable of fabricating details).

39. *See, e.g.*, *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229, 245 (4th Cir. 2001) (emphasizing that the statement, in relevant part, “was fleeting at best,” apparently believing that a liar would have provided a greater level of detail).

40. *See, e.g.*, *Nowlin v. Commonwealth*, 579 S.E.2d 367, 372 (Va. Ct. App. 2003).

41. *See, e.g.*, *State v. Bintz*, 2002 WI App 204, ¶ 12, 650 N.W.2d 913, 918.

42. *Crawford*, 541 U.S. at 67.



cross-examination.<sup>43</sup> Amazingly, perhaps through decades of indoctrination, Confrontation Clause jurisprudence had evolved to include the assumption that police are “neutral”<sup>44</sup> and that judges act in “good faith.”<sup>45</sup> The problem, however, is that the Framers “would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people. . . . They were loath to leave too much discretion in judicial hands.”<sup>46</sup>

## II. CRAWFORD-DAVIS-BRYANT: THE NEW RULE OF CONFRONTATION

The focus of this Essay—and the “principal evil at which the Confrontation Clause [is] directed”—is hearsay statements that were allegedly made to police and other government agents, and then repeated by those governmental actors at a defendant’s trial.<sup>47</sup> The admissibility of this type of hearsay is currently governed by *Crawford*, *Davis*, and *Bryant*, which were decided over the course of seven years. The actual rule of law—when separated from the Court’s historical diversions, unwarranted assumptions, figurative hand-wringing, and justifications—is still convoluted.

First, the protection of the Confrontation Clause is triggered only when a prosecutor attempts to use testimonial hearsay against a defendant. That is, when the hearsay is testimonial, the Confrontation Clause prohibits its use at trial.<sup>48</sup> On the other hand, if the hearsay is nontestimonial, the defendant is only protected by the Swiss cheese-like rule against hearsay with its thirty or so exceptions.<sup>49</sup>

---

43. *Id.* at 66.

44. *Id.*

45. *Id.* at 67.

46. *Id.*

47. *Id.* at 50. Increasingly, since *Crawford* and *Davis*, the line between government-developed hearsay and other hearsay has blurred, due to law enforcement’s use of surrogate interrogators to bypass the Confrontation Clause. *See, e.g.*, Elizabeth J. Stevens, Comment, *Deputy-Doctors: The Medical Treatment Exception After Davis v. Washington*, 43 CAL. W. L. REV. 451, 472 (2007) (arguing that to end this abuse, “courts should treat health care providers as agents of the police and their interactions with the declarant as police interrogation” based on principles of agency law).

48. *See Crawford*, 541 U.S. at 68. Unless, of course, the declarant is truly unavailable for live testimony (for example, if he is deceased) and the defendant had a prior opportunity to cross-examine him (for example, at a previous trial that ended in a mistrial). *Id.* Even though the unavailability of a witness, combined with a defendant’s prior opportunity for cross-examination of that witness, satisfies the Confrontation Clause, it should not. The reason, of course, is that inherent in the right of confrontation is the cross-examination of the witness *in front of the jury*, so that jurors can decide “whether he is worthy of belief.” *Mattox v. United States*, 156 U.S. 237, 242–43 (1895). This benefit is lost, however, when a prosecutor merely reads a transcript of testimony from a prior trial or other proceeding.

49. *See Crawford*, 541 U.S. at 68. Actually, whether the Confrontation Clause provided some level of protection against even nontestimonial hearsay was still debated until the Court’s decision in *Davis*. *See, e.g.*, State v. Manuel, 2005 WI 75, ¶ 55, 697 N.W.2d 811, 825 n.10 (identifying jurisdictions that retained *Roberts* in assessing the admissibility of nontestimonial statements); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 515 (2005).

This, then, leads to the question: what is testimonial hearsay? Testimonial hearsay includes, at a minimum: (1) “prior testimony at a preliminary hearing, before a grand jury, or at a former trial”;<sup>50</sup> and (2) “[s]tatements taken by police officers in the course of interrogations.”<sup>51</sup> But what constitutes a police interrogation? Although the term is well settled and broadly defined in the Fifth Amendment context,<sup>52</sup> the definition for Confrontation Clause purposes has been modified to scaled-back constitutional protection; that is, only *some* police interrogations will produce testimonial hearsay. More specifically:

Statements are *nontestimonial* [and admissible] 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 [and not admissible] when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to *establish or prove past events* potentially relevant to later criminal prosecution.<sup>53</sup>

But the matter is not yet resolved. How does the trial judge determine the objective, primary purpose of an interrogation? Diving further down into the depths of this new, murky confrontation framework, the rule is that the primary purpose depends upon multiple factors possibly including some or all of the following: (1) whether the statement describes “what is happening” or “what happened”;<sup>54</sup> (2) if the statement describes “what happened,” the lapse of time between the incident and the statement;<sup>55</sup> (3) the nature and timing of the questions that produced the statement;<sup>56</sup> (4) the level of formality surrounding the interrogation;<sup>57</sup> (5) whether the statement fits within the “standard rules of hearsay, designed to identify some statements as reliable”;<sup>58</sup> (6) the place of the interrogation and whether the declarant was protected by police;<sup>59</sup> (7) the type of crime ultimately

50. *Crawford*, 541 U.S. at 68.

51. *Id.* at 52.

52. When deciding whether police were required to read a suspect his *Miranda* rights, “interrogation” is defined broadly as express questioning and its functional equivalent. *See, e.g., State v. Cunningham*, 423 N.W.2d 862, 864 (Wis. 1988) (adopting Rhode Island v. Innis, 446 U.S. 291 (1980)). Stated differently, an interrogation occurs whenever “the police officer’s conduct or speech could reasonably have had the force of a question on the suspect.” *Id.*

53. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (emphasis added).

54. *See id.* at 830.

55. *See id.*

56. *See id.* at 832.

57. *See id.* at 830.

58. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

59. *Davis*, 547 U.S. at 831. While this intuitively seems to be the most important factor in determining whether an emergency is ongoing, courts have also disregarded it if it interfered with their desired outcome. *See infra* Part III.C; *see also Bryant*, 131 S. Ct. at 1172 (Scalia, J., dissenting) (chastising the majority for ignoring the fact that the declarant was surrounded by five police officers who asked “the same battery of questions a fifth time . . . to see if any new details helpful to the investigation and eventual prosecution would emerge,” and instead finding the emergency to be ongoing, thus making the statements nontestimonial and admissible).

alleged;<sup>60</sup> (8) whether a weapon was involved;<sup>61</sup> and (9) the medical condition of the alleged victim.<sup>62</sup>

And the analysis goes on. The trial judge must also consider whether a statement obtained during the course of a single interrogation has morphed back and forth between testimonial and nontestimonial, depending on the objective, primary purpose of the interrogation at any given point in time.<sup>63</sup> Moreover, because there are two parties to the interrogation—the police and the hearsay declarant—there could be two different primary purposes: one of the questioner and one of the declarant.<sup>64</sup> Additionally, one or both of these individuals could have mixed motives and, therefore, may not even have a “primary” purpose.<sup>65</sup> For example, an officer may wish to determine whether an emergency is ongoing *and* to collect statements for use in a future prosecution. Similarly, a declarant may wish to seek police protection from an ongoing threat *and* to report a past crime. Therefore, the statement is to be evaluated objectively, from the perspective or perspectives of one or both of the parties, including all of their competing motives, at the trial judge’s discretion.

### III. GRADING THE COURT’S TESTIMONIAL FRAMEWORK

The Court correctly identified the problems inherent in the *Roberts* reliability framework. It acknowledged that the right of confrontation should not: (1) be intermingled with the rules of evidence; (2) be tied to a pretrial judicial determination of reliability; (3) hinge on a multi-factor balancing test; or (4) rely on judicial discretion in its application.<sup>66</sup> But the Court failed to correct those problems. Instead, in *Crawford*, *Davis*, and *Bryant*, it developed a new confrontation framework that incorporates every single one of the flaws that it had denounced.

#### A. *Welcome Back: The Return of the Rules of Evidence and Pretrial Judicial Determinations of Reliability*

For all of its faults, *Crawford* was very clear about two things. First, the right of confrontation should not vary depending upon “the law of Evidence for the time being.”<sup>67</sup> The Confrontation Clause is independent

---

60. *Bryant*, 131 S. Ct. at 1158 (majority opinion) (emphasizing that important to the “highly context-dependent” inquiry was that the crimes in *Davis* and *Hammon v. Indiana*, 547 U.S. 813 (2006), involved domestic violence). The result, of course, is that courts will have to make factual determinations about, for example, “whether rape and armed robbery are more like murder or domestic violence.” *Id.* at 1176 (Scalia, J., dissenting).

61. *Id.* at 1158 (majority opinion). In addition to deciding the relevance of the type of crime allegedly being committed, courts will also have to make factual determinations about, for example, “whether knives and poison are more like guns or fists.” *Id.* at 1176 (Scalia, J., dissenting).

62. *Id.* at 1159 (majority opinion).

63. *Davis*, 547 U.S. at 828.

64. *Bryant*, 131 S. Ct. at 1161.

65. *See id.*

66. *See Crawford v. Washington*, 541 U.S. 36, 61–64 (2004); *see also supra* Part I.

67. *Crawford*, 541 U.S. at 51 (quoting 3 WIGMORE, *supra* note 32, at 101).

of, and more substantial than, the rule against hearsay and its thirty or so exceptions.<sup>68</sup> Second, *Crawford* was clear that hearsay should not be admissible against a defendant merely because a judge determined, before trial, that it was reliable.<sup>69</sup>

Given these two very clear mandates of *Crawford*, it is unlikely that anyone could have predicted what the Court would do next. While authors were (understandably) contemplating *Crawford*'s separation of the Confrontation Clause from the rule against hearsay,<sup>70</sup> the Court was actually reversing its course. In *Bryant*, the Court reunited the Constitution with the rules of evidence, and reinstated pretrial judicial reliability determinations. Specifically, the Court stated that when determining the objective, primary purpose of an interrogation—which, in turn, determines whether the interrogation produced testimonial or nontestimonial hearsay statements—the “standard rules of *hearsay*, designed to identify some statements as *reliable*, will be relevant.”<sup>71</sup> The Court reasoned that

[t]his logic is not unlike that justifying the excited utterance exception in *hearsay law*. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” . . . are considered *reliable* because the declarant, in the excitement, presumably cannot form a falsehood. . . . An ongoing emergency has a similar effect of focusing an individual’s attention on responding to the emergency.<sup>72</sup>

Ignore, for a moment, that because the declarant is necessarily absent from trial (or there would not be a confrontation issue in the first place), the police can simply *say* that the declarant appeared excited—or fearful, or whatever buzzword a judge wants to hear—thus rendering the hearsay nontestimonial and admissible.<sup>73</sup> After all, it is this type of police-created hearsay that is “the principal evil at which the Confrontation Clause was directed.”<sup>74</sup> Also ignore that any person who makes a false allegation to the police would also make himself *appear* to be “under the stress of excitement” from the fabricated event. Finally, ignore that even if *genuine* stress and excitement did somehow conspire to prevent a person from

68. *See supra* Part I.A.

69. *See supra* note 36 and accompanying text.

70. *See, e.g.*, Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185 (2004).

71. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (emphases added).

72. *Id.* at 1157 (emphases added) (citations omitted).

73. After *Crawford* was decided, I demonstrated how routinely and easily the police do this. For example, to squeeze an absent declarant’s statement into the excited utterance hearsay exception, the prosecutor merely asks the officer to “describe [the declarant’s] demeanor when she gave the statement to you,” and the officer need only reply, “‘Um, rather excited.’” Michael D. Cicchini & Vincent Rust, *Confrontation After Crawford v. Washington: Defining “Testimonial,”* 10 LEWIS & CLARK L. REV. 531, 550 (2006) (alteration in original) (quoting *State v. Searcy*, 2006 WI App 8, ¶ 11, 709 N.W.2d 497, 502). Based on this, the hearsay exception is deemed satisfied, and the statement is then admissible. *Id.*

74. *Crawford*, 541 U.S. at 50.

lying—an untested idea developed in the eighteenth century to admit the hearsay of child declarants<sup>75</sup>—the Court’s holding still says nothing about hearsay where the declarant was honestly mistaken or delusional; such statements continue to go uncross-examined. Even ignoring these three defects in the Court’s reasoning, we are still left with the underlying, fundamental problem that has plagued the Court since *Roberts*: “reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned.”<sup>76</sup>

In fact, despite all of its bravado in *Crawford*, the Court changed nothing of substance, and only slightly modified the form of its analysis by adding an intermediate layer. That is, under *Roberts*, a trial judge would use the rules of evidence to find a hearsay statement to be reliable and therefore admissible without any cross-examination. Now, under *Crawford-Davis-Bryant*, a trial judge uses the rules of evidence to find a hearsay statement reliable, and therefore nontestimonial, and therefore admissible without any cross-examination. Despite this newly added intermediate step, however, the same Sixth Amendment problem remains.<sup>77</sup>

So, with respect to the use of hearsay rules and pretrial determinations of reliability, the Court failed to correct the problems of *Roberts*. Unfortunately, however, this was just the beginning of the Court’s failures. As the next sections illustrate, the Court also refused to replace *Roberts*’s multi-factor balancing test and neglected to replace, or even constrain, *Roberts*’s use of judicial discretion.

#### *B. Same Old Song and Dance: Another Multi-factor Balancing Test Leads to Continued Unpredictability*

While many were surprised that the Supreme Court chose to reunite the Confrontation Clause with the rules of evidence and resuscitate the pretrial determination of reliability, the Court’s other failures were both predictable and predicted.

As discussed in Part I, the *Crawford* Court condemned the multi-factor reliability test of *Roberts* for being “[v]ague,”<sup>78</sup> “malleable,”<sup>79</sup> and “entirely subjective,”<sup>80</sup> thus leading to its wild “unpredictability,”<sup>81</sup> even when applied in good faith. However, as discussed in Part II, the Court then adopted an equally vague, malleable, subjective, multi-factor test in *Crawford-Davis-Bryant*, which could only lead to equally unpredictable results.

---

75. See John E.B. Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, LAW & CONTEMP. PROBS., Winter 2002, at 3, 4. The idea underlying the excited utterance exception—“that trauma momentarily stills the capacity or motivation to lie”—is “unsupported by empirical evidence.” *Id.* at 8.

76. *Bryant*, 131 S. Ct. at 1174 (Scalia, J., dissenting).

77. See *supra* text accompanying note 35.

78. *Id.* at 68.

79. *Id.* at 60.

80. *Id.* at 63.

81. *Id.*

This is not hindsight criticism; shortly after *Crawford* was decided, I warned that the Court's new framework was nothing more than "a facts-and-circumstances analysis to determine if the proffered hearsay falls within [the] definition [of testimonial]."82 "Once again, hearsay would be admitted into evidence as the result of judges applying vague standards, but this time under a different label: testimonial rather than reliable."83 And, of course, "inconsistent and unpredictable rulings also remain."84 It was not long before this early prediction was proven correct by simply comparing the unpredictability of lower courts' *Roberts* decisions with the unpredictability of their post-*Crawford* decisions.

As demonstrated in Part I.C, under the *Roberts* test one court would find hearsay reliable because the declarant was in custody when he made the statement; another court would find hearsay reliable because the declarant was *not* in custody when he made the statement.85 Similarly, one court would find hearsay reliable because it was detailed; another court would find hearsay reliable because it was *not* detailed.86

But this *Roberts* unpredictability was not limited to an inter-court analysis; intra-court analyses would reveal similar results. For example, one court found hearsay reliable because the statement was made *immediately after* the criminal episode;87 however, in a case only four months earlier, that *same court* found hearsay reliable because the statement was made a full *two years after* the criminal episode.88

In *Crawford*, the Court even cited the case's own procedural history as a "self-contained demonstration of *Roberts*' unpredictable and inconsistent application."89 First, the state trial court found the hearsay reliable; then the state appellate court reversed the trial court, finding the hearsay unreliable; then the state supreme court reversed the appellate court, finding the hearsay reliable; and finally, the U.S. Supreme Court, had it not overruled the *Roberts* multi-factor balancing test, would have reversed the state supreme court "by simply reweighing the 'reliability factors' under *Roberts* and finding that [the declarant's] statement falls short."90

---

82. Cicchini & Rust, *supra* note 73, at 540; *see also* Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 70 (2005) ("Crawford is only another balancing test, with the balancing now being carried out in deciding whether any statement should be labeled testimonial.").

83. Cicchini & Rust, *supra* note 73, at 541.

84. *Id.*; *see also* Melissa Moody, *A Blow to Domestic Violence Victims: Applying the "Testimonial Statements" Test in Crawford v. Washington*, 11 WM. & MARY J. WOMEN & L. 387, 398 (2005) (noting that it is "apparent that the Supreme Court's refusal to articulate a definition of 'testimonial statements' has resulted in irreconcilable evidentiary rulings").

85. *See supra* notes 40–41 and accompanying text.

86. *See supra* notes 38–39 and accompanying text.

87. *People v. Farrell*, 34 P.3d 401, 407 (Colo. 2001) (noting that the statement was timely, and apparently believing that memories are sharpest shortly after the incident).

88. *Stevens v. People*, 29 P.3d 305, 315–16 (Colo. 2001) (finding it impressive that the statement was delayed, apparently believing that memories get sharper as time passes).

89. *Crawford v. Washington*, 541 U.S. 36, 66 (2004).

90. *Id.* at 67.

There is no question that *Roberts* produced wildly inconsistent results; this was, after all, one of the reasons the Court tried to change its course in *Crawford*. However, the post-*Crawford* cases told a similar story. The factors in the multi-factor balancing test changed—instead of determining whether hearsay was reliable, courts were now looking to a different set of factors to determine, for example, whether there was an ongoing emergency at the time of the statement—but the unpredictable results remained the same.

For example, *Davis* held that when a suspect leaves the scene of a domestic violence incident, the emergency has ended.<sup>91</sup> This is because the scope of potential danger in a domestic violence incident is very narrow relative to non-domestic crimes, and is nearly always limited to the domestic partner.<sup>92</sup> Consequently, with no ongoing emergency, all subsequent statements by the alleged victim-declarant to the police are testimonial, and therefore *not* admissible. Conversely, a Minnesota appellate court held that when a suspect leaves the scene of a domestic violence incident, the emergency is still ongoing.<sup>93</sup> This is because the alleged domestic abuser could, at least hypothetically, decide to attack other, unrelated parties.<sup>94</sup> Consequently, because the (faux) emergency is still ongoing, all subsequent statements by the alleged victim-declarant to the police are nontestimonial, and therefore admissible.

Interestingly, both courts are wrong. The Minnesota court is stretching to create an ongoing emergency where none exists. The Supreme Court is off base as well because statistics show that, in addition to the common domestic dispute, even non-domestic homicides have a very narrow scope of potential danger: “almost 90 percent of murders involve a single victim.”<sup>95</sup> This means that once the suspect has left the scene, and the police have responded and are safely surrounding the alleged victim, the emergency has ended.<sup>96</sup> However, the reason the Supreme Court tried to distinguish the facts of *Bryant*—the non-domestic murder case it was deciding—from the facts of *Davis*—a domestic violence case it had already decided—is that it had backed itself into a corner with its *Davis* decision. And it had to somehow escape this corner to find that the declarant’s

---

91. See *Davis v. Washington*, 547 U.S. 813, 828 (2006) (“In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when [the defendant] drove away from the premises).”).

92. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1158 (2011) (“Domestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims than cases involving threats to public safety.”).

93. See *State v. Warsame*, 723 N.W.2d 637, 641–42 (Minn. Ct. App. 2006).

94. See *id.* (“We conclude that the ‘ongoing emergency’ referred to in *Davis* . . . need not be limited to the complainant’s predicament or the location where she is questioned by police.”).

95. *Bryant*, 131 S. Ct. at 1172 (Scalia, J., dissenting) (citing 2009 FBI homicide data).

96. See *id.* at 1172–73 (“Because almost 90 percent of murders involve a single victim, it is much more likely—indeed, I think it certain—that the officers viewed their encounter with [the declarant] for what it was: an investigation into a past crime with no ongoing or immediate consequences.”).

statement in *Bryant* was made during an ongoing emergency.<sup>97</sup> Thus, it crafted a distinction between the two types of crimes.<sup>98</sup>

But this only touches the surface of the post-*Crawford* inconsistencies. In a different class of police-generated hearsay, courts are often called upon to determine whether an alleged victim's hearsay statement to a medical professional was made for a medical diagnosis—which would make it nontestimonial and therefore admissible—or a criminal prosecution—which would make it testimonial and therefore inadmissible. In this situation, one court found a declarant's statement to a government nurse (and mandatory reporter) to be nontestimonial, and therefore admissible, because a police officer first took a statement from the declarant and *then* brought her to the government nurse to repeat the statement.<sup>99</sup> However, a different court also found this type of hearsay to be nontestimonial, and therefore admissible, but so found because a police officer purposely *avoided* taking a statement from the declarant, and instead sent her directly to the government nurse to make her allegation.<sup>100</sup>

On an intra-court basis, even the Supreme Court has produced unpredictable and inconsistent results within its own decisions; that is, sometimes it reaches completely opposite conclusions despite nearly identical sets of facts. For example, in *Davis* it found that a statement was testimonial, and therefore not admissible, because the declarant described past events, rather than an ongoing incident, to police. Therefore, the Court concluded that the police were actually investigating a past crime for later criminal prosecution.<sup>101</sup> In *Bryant*, however, the Court found that a statement was nontestimonial, and therefore admissible, even though this particular declarant *also* described past events, rather than an ongoing incident, to police.<sup>102</sup> The police even admitted that their purpose for questioning the declarant was to “find out who did this, period.”<sup>103</sup> Despite this, the Court decided that the police officer's purpose was *not* to investigate a past crime for later criminal prosecution because the police officer *did not* specifically say to the declarant, “Tell us who did this to you so that we can arrest and prosecute them.”<sup>104</sup> Once the nontestimonial label was affixed to the statement, of course, it was admissible.

---

97. See *infra* notes 146–47 and accompanying text.

98. This distinction also opened up Pandora's Box: with the many hundreds of different types of crimes that each state legislature has created, courts will now have to make judgments about whether, for example, “rape and armed robbery are more like murder or domestic violence.” *Bryant*, 131 S. Ct. at 1176 (Scalia, J., dissenting).

99. See *State v. Stahl*, 111 Ohio St. 3d 186, 2006-Ohio-5482, 855 N.E.2d 834, at ¶ 46.

100. See *In re A.J.A.*, No. A06-479, 2006 WL 2474267, at \*4 (Minn. Ct. App. Aug. 29, 2006).

101. See *Davis v. Washington*, 547 U.S. 813, 830 (2006) (finding statements testimonial because police officers were “not seeking to determine . . . ‘what is happening,’ but rather ‘what happened’”).

102. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1166–67 (2011).

103. *Id.* at 1172 (Scalia, J., dissenting) (internal quotation omitted).

104. *Id.* at 1161 (majority opinion) (emphasis added). The Court essentially provided the police with a blueprint of how to handle an interrogation, including what *not* to say, so that any statements produced in that interrogation will be labeled nontestimonial, and will



These ongoing, highly inconsistent results do not happen by chance; as discussed above, they happen because the Court replaced one subjective, malleable, factor-laden standard with another subjective, malleable, factor-laden standard. As this section demonstrates, and as Justice Scalia now admits, the nine-factor balancing test of *Crawford-Davis-Bryant* is “no better than the nine-factor balancing test” of *Roberts*.<sup>105</sup>

The Court first criticized the *Roberts* reliability test for allowing judges to weigh “countless factors”<sup>106</sup> in their analysis and for leaving “too much discretion in judicial hands.”<sup>107</sup> Then, only seven years later, it criticized the Supreme Court of Michigan for not recognizing that the new testimonial standard of *Crawford-Davis-Bryant* is “a highly context-dependant inquiry”<sup>108</sup> in which judges should not be “unjustifiably restrained from consulting all relevant information.”<sup>109</sup>

Does the Court not realize that having a balancing test with “countless factors” is the same as making “a highly context-dependent inquiry”?<sup>110</sup> Either test violates the Confrontation Clause. Justice Thomas’s dissents in both *Davis* and *Bryant* acknowledged what I predicted shortly after *Crawford*: replacing one open-ended balancing test with another will continue to produce the same unpredictable results.<sup>111</sup> Furthermore, despite the Court’s claim that the complexity of its newest multi-factor balancing test increases accuracy,<sup>112</sup> the new framework is, at best, “an exercise in fiction.”<sup>113</sup> And, as the next section demonstrates, it is, at worst, a tool for

---

therefore be admissible. It is not likely that the police needed this Court-created blueprint, however, as they are quite skilled at adapting their practices to bypass constitutional protections. *See, e.g.,* Cicchini & Rust, *supra* note 73, at 545–51 (explaining the adaptability of police practices and demonstrating the phenomenon in numerous contexts).

105. *Bryant*, 131 S. Ct. at 1176 (Scalia, J., dissenting).

106. *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

107. *Id.* at 67.

108. *Bryant*, 131 S. Ct. at 1158 (majority opinion).

109. *Id.* at 1162.

110. *Id.* at 1158. Justice Scalia now matter-of-factly admits, “It can be said, of course, that under *Crawford* analysis of whether a statement is testimonial requires consideration of all the circumstances, and so is also something of a multifactor balancing test.” *Id.* at 1176 (Scalia, J., dissenting).

111. *See* Cicchini & Rust, *supra* note 73, at 541.

112. *See Bryant*, 131 S. Ct. at 1162 (majority opinion) (criticizing the dissent by stating that “we, at least, are unwilling to sacrifice accuracy for simplicity”).

113. *Id.* at 1167 (Thomas, J., concurring) (quoting *Davis v. Washington*, 547 U.S. 813, 839 (2006) (Thomas, J., concurring in part and dissenting in part)). By the time of *Davis*, Justice Thomas realized the folly in the Court’s new framework, but he still failed to appreciate the nature of the right of confrontation. That is, he wrote in his *Bryant* concurrence that the Court’s decision “illustrates the uncertainty that this test creates for law enforcement.” *Id.* There are two problems with this statement. First, the Confrontation Clause is a trial right and the Court’s decisions should not, in any way, affect law enforcement practices. Second, as discussed in the next section, the Court’s decisions do affect law enforcement testimony in pretrial hearings. However, there is nothing “uncertain” about what law enforcement has to do. They have the very clear and simple task of testifying that they were concerned for somebody’s safety—whether their own, the declarant’s, or even the general public’s—to satisfy the ongoing emergency test. *See infra* Part III.C. The police are well schooled in this type of manipulation, especially in the Fourth Amendment context. *See, e.g.,* Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence”*

judges to abuse their already overly broad discretion that *Crawford-Davis-Bryant* was supposed to constrain.

C. *The More Things Change, the More They Stay the Same:  
Judicial Discretion Under a Different Label*

Another failure of *Crawford-Davis-Bryant* that was predictable and predicted is closely related to the Court's love of multi-factor balancing tests: the new testimonial framework has completely failed to eliminate, or even constrain, judicial discretion.<sup>114</sup> Specifically, under *Roberts*, when the police are involved in the creation of accusatory statements, and the declarant of those statements is not available for trial, the police—with the help of the prosecutor and the complicity of the judge—simply reconstruct the facts and circumstances surrounding the making of the statement so that it satisfies the reliability test.<sup>115</sup>

But the Court's new framework relies just as heavily on judicial discretion, and admits police-created hearsay just as easily. The only difference is that now, the police—again with the help of the prosecutor and the complicity of the judge—simply reconstruct the facts and circumstances surrounding the making of the statement so that it is labeled nontestimonial. And, because *Bryant* held that one of the factors that makes a statement nontestimonial is whether the judge finds it to be reliable,<sup>116</sup> nothing has really changed since the days of *Roberts*.

After *Crawford*, I demonstrated how easily police and prosecutors were bypassing the Court's new testimonial framework, and warned that judicial discretion was not being constrained as intended. Once the police and prosecutors created their desired set of facts surrounding the hearsay statement, trial judges blindly accepted their version of events. I further wrote that:

Under *Crawford*, therefore, the need for judicial discretion has not been eliminated, but merely transferred from one determinative issue—whether the hearsay is reliable—to another determinative issue—whether the hearsay is testimonial. Trial judges, who “could not always be trusted to safeguard the rights of the people,” are now deciding which hearsay is testimonial and must be excluded, and which hearsay is non-testimonial and therefore may be admitted. The end result, therefore, is the same as it was under *Roberts*: the admission of hearsay is still based on judicial discretion, untested by cross-examination.<sup>117</sup>

---

*as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 249 (1998) (discussing how police perjury designed to circumvent the Fourth Amendment “is identical from one case to another”).

114. See *supra* Part I.D.

115. See Cicchini & Rust, *supra* note 73, at 548.

116. *Bryant*, 131 S. Ct. at 1155 (majority opinion) (explaining that when deciding the primary purpose of an interrogation, which in turn dictates a statement's status as testimonial or nontestimonial, “standard rules of hearsay, designed to identify some statements as reliable, will be relevant”); see also *supra* Part III.A.

117. Cicchini & Rust, *supra* note 73, at 540. Some others provided an early warning of this as well. See, e.g., David Jaros, *The Lessons of People v. Moscat: Confronting Judicial*

Unfortunately, this and similar criticisms fell on deaf ears as the Court continued down the path of its new testimonial framework when it decided *Davis*. Then, shortly after *Davis*, I again wrote about the continued abuse of judicial discretion under the testimonial framework.<sup>118</sup> For example, with respect to expanding the ongoing emergency, even in cases where an allegedly violent incident had ended, and the alleged victim-declarant was safely in the presence of police, courts would still deem the emergency to be “ongoing.”<sup>119</sup> How? “If situations can be upgraded to ongoing emergencies simply because a defendant might commit an unspecified crime at some unspecified time in the future against an unspecified victim, then every situation will be automatically transformed into an ongoing emergency.”<sup>120</sup> The result is that the hearsay statement will be labeled as nontestimonial, and will therefore be admissible.

Now, several years later, Justice Scalia realizes this precise point. In his *Bryant* dissent he writes that, with regard to the ongoing emergency, the Court’s open-ended balancing test created too much room for “judicial mischief.”<sup>121</sup> Because the police can always make a claim that there is a public threat, “a defendant will have no constitutionally protected right to exclude the uncross-examined testimony of such witnesses.”<sup>122</sup> And, just as I had warned years earlier that the means by which a court could expand the ongoing emergency would be limited only by “judicial imagination and creativity,”<sup>123</sup> Scalia now criticizes his fellow justices for their “active imagination” in finding an ongoing emergency where none exists.<sup>124</sup> This critique is remarkable, coming from the Justice who set it all in motion when he authored the *Crawford* opinion, and perpetuated it with *Davis*.

Similarly, and also shortly after *Davis*, I illustrated how courts were distorting the primary purpose test. For example, even when an alleged victim-declarant was specifically told, before making a statement, that the

---

*Bias in Domestic Violence Cases Interpreting Crawford v. Washington*, 42 AM. CRIM. L. REV. 995, 1005 (2005) (describing the “urgency, on [one] court’s part, to establish that *Crawford* does not impose an obstacle” to victimless prosecutions and discussing “judges’ predisposition to believe the prosecution’s version of domestic assaults”); Moody, *supra* note 84, at 394 (“[W]hen courts stubbornly insist on admitting hearsay evidence that they believe should be admitted despite *Crawford*’s exclusion of testimonial evidence, they must creatively circumvent the *Crawford* test with inventive evidentiary rulings.”).

118. See Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis*, 75 TENN. L. REV. 753, 767 (2008) (“Repeatedly, courts completely distort the Clause—as interpreted in *Crawford* and *Davis*—in order to accomplish a predetermined goal of admitting hearsay evidence against defendants.”).

119. *Id.* at 768–70.

120. *Id.* at 770; see also Andrew C. Fine, *Refining Crawford: The Confrontation Clause After Davis v. Washington and Hammon v. Indiana*, 105 MICH. L. REV. FIRST IMPRESSIONS 11, 12 (2006), <http://www.michiganlawreview.org/assets/fi/105/fine.pdf> (“When determining the ‘primary purpose’ of questioning, it will be difficult for courts to ignore an officer’s claim that he believed the emergency to be ongoing when he questioned the declarant.”).

121. *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting).

122. *Id.* at 1173.

123. Cicchini, *supra* note 118, at 767.

124. *Bryant*, 131 S. Ct. at 1172 (Scalia, J., dissenting).

statement would be used in “the investigation and prosecution of this crime,” courts would still find that the primary purpose of the interrogation was *not* to prove past events for later criminal prosecution.<sup>125</sup> How? By pure speculation that, despite the clear warning and purpose of the interrogator, the declarant could still (somehow) have imagined a *different* purpose for the statement.<sup>126</sup> And, with nothing more than this judicial slight-of-hand, the hearsay statement will be labeled nontestimonial, and will therefore be admissible. In light of cases like this, it was obvious that courts could simply “distort the Clause . . . in order to accomplish a predetermined goal of admitting hearsay evidence against defendants.”<sup>127</sup>

Justice Scalia now appreciates this issue as well. In his *Bryant* dissent, he writes that, regarding the primary purpose test, courts now have the discretion “to sort through two sets of mixed motives to determine the primary purpose of an interrogation.”<sup>128</sup> Specifically, he concedes that:

If the defendant “deserves” to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay non-testimonial. And when all else fails, a court can mix-and-match perspectives [of the declarant and the police officer] to reach its desired outcome. Unfortunately, under this malleable approach “the guarantee of confrontation is no guarantee at all.”<sup>129</sup>

This continued use (and abuse) of judicial discretion did not happen by chance; instead, it happened because the Court adopted a framework where, instead of deciding whether a statement is reliable, trial judges make an equally subjective determination of whether a statement is testimonial. In both situations, their finding is a prerequisite for the admissibility of the declarant’s statement. Furthermore, the *Crawford-Davis-Bryant* framework actually requires even more judicial discretion than *Roberts*. That is, trial judges not only have to decide the primary purpose of an interrogation—which determines whether the statement is testimonial—but they first have to decide whether the declarant’s or police officer’s perspective should be used,<sup>130</sup> whether there is a primary purpose at all,<sup>131</sup> and, if so, whether the primary purpose of one or both parties changed at any point during the interrogation.<sup>132</sup>

---

125. See Cicchini, *supra* note 118, at 772 (quoting *State v. Stahl*, 855 N.E.2d 834, 837 (Ohio 2006)).

126. See *id.*

127. *Id.* at 767.

128. *Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting); see also *supra* text accompanying note 20.

129. *Id.* at 1170 (citations omitted).

130. See *id.* at 1161 (majority opinion) (looking to the intentions of both parties, the Court claims, “ameliorates problems that could arise from looking solely to one participant”).

131. See *id.* at 1155 (“Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.”).

132. See *Davis v. Washington*, 547 U.S. 813, 828–29 (2006) (“This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot . . . evolve into testimonial statements.” (internal quotation marks omitted)).

The Court should have realized, as some of us did, that its initial *Crawford* framework would be no better than *Roberts* at constraining judicial discretion. And although the Court did not realize it then, it should have realized it by reading some of the lower courts' post-*Crawford* decisions before it decided *Davis*—a case in which the Court expanded judicial discretion. Or it should have finally realized it, as Justice Scalia did, by reading some of the lower courts' post-*Davis* decisions before it decided *Bryant*—a case in which, despite overwhelming evidence that lower courts continued to abuse their discretion, the Court continued to expand its multi-factor testimonial framework and give judges even more discretion.

#### IV. THE SOLUTION: A TRIAL-BASED APPROACH TO TESTIMONIAL HEARSAY

The solution to the problem was (and is) amazingly simple. The inquiry should *not* be on the facts and circumstances of how a hearsay statement was allegedly made—for example, where an officer testifies, after the fact, that the declarant appeared excited and fearful for his safety. Nor should it be on how a hearsay statement was allegedly collected—for example, where an officer testifies that he asked questions to address an ongoing emergency, rather than to investigate a past crime.<sup>133</sup> In a Confrontation Clause scenario, the details of the making or taking of a statement are only available months or years later through the interrogating officer, and are subject to his memory and manipulation; after all, such statements are almost never recorded and they are rarely witnessed by anyone other than the police.<sup>134</sup>

To acknowledge, as the *Crawford* Court did, that police-developed hearsay evidence is “the principal evil at which the Confrontation Clause

---

133. See Cicchini & Rust, *supra* note 73, at 546 (“The significant point is that any facts-and-circumstances test will, by its very nature, allow for easy circumvention of constitutional protection.”). After *Crawford*, however, most commentators were advocating for more of the same—i.e., more facts-and-circumstances balancing tests. See, e.g., Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 252–55 (2005) (advocating a facts-and-circumstances test to determine “whether the declarant understood that there was a significant probability that the statement would be used in prosecution”); Brooks Holland, *Testimonial Statements Under Crawford: What Makes Testimony . . . Testimonial?*, 71 BROOK. L. REV. 281, 289 (2005) (advocating a balancing test to determine whether “the circumstances surrounding the out-of-court statement [made] its formal, adjudicative use foreseeable to the declarant”); Whitney Baugh, Note, *Why the Sky Didn’t Fall: Using Judicial Creativity to Circumvent Crawford v. Washington*, 38 LOY. L.A. L. REV. 1835, 1868–69 (2005) (advocating a facts-and-circumstances test to determine whether a proffered statement is testimonial).

134. See Cicchini & Rust, *supra* note 73, at 548 (“The [government] agent could simply testify that the statement was not made under structured questioning, or whatever the applicable test may be at the time, and there would likely be nothing to contradict the agent’s version of events.”); see also Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 205 (2006) (“One problem with focusing on how evidence is gathered . . . is that it permits manipulation by police and police agents.”).

was directed,”<sup>135</sup> and then to rely on the police officer’s post-incident reconstruction of events (after he consults with the prosecutor, no less) to determine whether the hearsay is nontestimonial and therefore admissible, is absurd. Rather, the proper inquiry to determine whether a statement is testimonial involves the statement’s *use at trial*.<sup>136</sup> This inquiry is not only more relevant than how the statement was made or obtained, but is also immune from manipulation by police, prosecutors, and even judges. After *Crawford*, I wrote that

the term testimonial should be defined as all accusatory hearsay, i.e., hearsay that tends to establish in any way an element of the crime or the identification of the defendant. To adopt a narrower definition . . . would necessarily require a tremendous amount of judicial discretion under a facts-and-circumstances analysis.<sup>137</sup>

The Court comes frustratingly close to this realization on a number of occasions. For example, in *Davis*, the Court analyzed whether the hearsay statement was “‘a weaker substitute for live testimony’ at trial,” but, because of the facts and circumstances surrounding the statement’s making, concluded that it was not.<sup>138</sup> Similarly, in *Bryant*, the Court asked the same question, and the majority came to the same conclusion. Justice Scalia, however, felt that because the hearsay statement was made in response to “structured questioning,” it was a “‘weaker substitute[] for live testimony at trial.’”<sup>139</sup>

While Scalia reaches the right conclusion, he misses the underlying point: if the prosecutor uses a hearsay statement at trial, and that statement

135. *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

136. See Cicchini & Rust, *supra* note 73, at 543–45; see also Ross, *supra* note 134, at 196–97 (arguing similarly that the right of confrontation is a trial right, and the focus should not be on how the statements were gathered, but rather on “how the out-of-court words are being used in the particular trial”).

137. Cicchini & Rust, *supra* note 73, at 543 (emphasis added) (citing Robert Wm. Best, *To Be or Not to Be Testimonial? That Is the Question: 2004 Developments in the Sixth Amendment*, ARMY LAW., Apr. 2005, at 65; Reed, *supra* note 70, at 224). This proposed definition, which includes the phrase “tends to establish in any way,” was specifically intended to prevent another tactic by which a prosecutor can bypass the right of confrontation. Even with a trial-based focus, a prosecutor can claim to offer accusatory statements not to prove the truth of the matter asserted, but rather to show why the police investigated, and ultimately arrested, the defendant. If the judge permits this, the accusatory statement is not considered hearsay and can be admitted ostensibly for those other purposes. Obviously, this tactic is just another end around the Constitution, and sometimes courts will see through the form and focus on the substance. See, e.g., *Jones v. Basinger*, 635 F.3d 1030 (7th Cir. 2011) (reversing the trial court for allowing the prosecutor to introduce accusatory statements not for their truth, but rather under the thin guise of demonstrating for the jury why the police pursued a certain investigatory path). Interestingly, the Supreme Court recently granted certiorari in *People v. Williams*, 939 N.E.2d 268 (Ill. 2010), where it will address this end-around tactic in the very narrow context of forensic laboratory reports and expert testimony.

138. *Davis v. Washington*, 547 U.S. 813, 828 (2006) (quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986)).

139. *Michigan v. Bryant*, 131 S. Ct. 1143, 1171 (2011) (Scalia, J., dissenting) (quoting *Davis*, 547 U.S. at 828) (“Neither [the declarant’s] statements nor the colloquy between him and the officers would have been out of place at trial; it would have been a routine direct examination.”).

“tends to establish in any way an element of the crime or the identification of the defendant,”<sup>140</sup> then it *is* a substitute for live testimony at trial. For example, if a declarant tells the police that “the defendant, John Doe, punched me,” and the police later repeat that statement at John Doe’s trial to prove either the identity of the defendant or any element of the crime charged, then it *is* a weaker substitute—or, depending on the appearance and credibility of the absent accuser, a stronger substitute—for live testimony at trial.

Whether something is a substitute for live testimony at trial depends on what happens *in the courtroom*. It is irrelevant for purposes of the testimonial determination (which, in turn, determines admissibility) that a police officer says that when he questioned the declarant, the declarant was injured or appeared excited or fearful. It is also irrelevant that the police officer says that his purpose when questioning the declarant was to inquire whether the declarant feared a future attack, and not to collect evidence of a past crime. Even if “the prospect of fabrication in statements given for the primary purpose of resolving [an] emergency is presumably significantly diminished,”<sup>141</sup> the Confrontation Clause is still very clear:

It commands, not that evidence be reliable, but that reliability be assessed *in a particular manner*: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.<sup>142</sup>

Until the Court heeds its own words and focuses on the hearsay’s use at trial, instead of the manner in which the police say the statement was given or taken, we might as well go back to the *Roberts* reliability framework.

#### CONCLUSION: LESSONS TO BE LEARNED

The Supreme Court should not completely replace a framework—here, the *Roberts* reliability framework—with another framework that fails to define its key term—here, the *Crawford* framework and the term testimonial. That is, the Court should not “leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>143</sup> If the Court cannot decide on a definition for the framework’s key term, then the

140. Cicchini & Rust, *supra* note 73, at 543.

141. *Bryant*, 131 S. Ct. at 1157.

142. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (emphasis added). Although beyond the scope of this Essay, the right of confrontation should also apply with equal force to hearsay that does *not* involve the police. Perplexingly, *Crawford* held that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* at 51. However, casual remarks to acquaintances, when repeated at trial to prove the identity of the defendant or an element of the crime, are testimonial because they are being used in place of testimony. And if their casual nature (at the time of their making) were to somehow remove them from the testimonial category, then they should still be excluded from trial, but on alternative grounds: if the statements are too casual to qualify as testimony, then they cannot possibly be used to convict a defendant of a crime beyond a reasonable doubt.

143. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

uncertainty it creates is unlikely to be “interim” in nature, as it had hoped.<sup>144</sup> If a *complete* framework cannot be implemented, then the Court should not implement a new framework *at all*, especially not one that relies on the very thing—judicial discretion—that it was supposedly trying to constrain.

Nor should the Court speculate or meander when writing decisions. It should write less. For example, in *Davis*, the Court wrote the following with regard to defining an ongoing emergency: “In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended when Davis drove away from the premises.”<sup>145</sup> But then, when the Michigan court reached the same conclusion in *Bryant*, the Supreme Court had to find a way to abandon its earlier position in *Davis*. To do so, the Court chastised the Michigan court for misinterpreting *Davis*, and then craftily took the position that it had “merely assumed . . . without deciding” that the emergency in *Davis* had ended when Davis left the premises.<sup>146</sup>

But this does not ring true. The Court in *Davis* did not “assume” anything; instead, it reached its own conclusion and found that the emergency had ended.<sup>147</sup> Furthermore, if the Court knows in advance which parts of its decision are to be taken seriously and which parts are to be disregarded, then it simply should not write the parts that it wants to be disregarded. Alternatively, if the Court claims that the distinction is one of “holding” versus “dicta,” then the Court is selectively interpreting its own cases so narrowly that they would have absolutely no applicability beyond the *precise* set of facts in any particular case; this is not the role of a nation’s highest court.

Finally, the Court should not blame lower courts for the problems created by its decisions. For example, after the Michigan court followed *Davis* to the letter, the Supreme Court continually referred to the lower court’s “misunderstanding”<sup>148</sup> of *Davis*, and its “fail[ure] to appreciate”<sup>149</sup> and its “failure to focus”<sup>150</sup> on the Court’s language. The Court also stated that, because the lower court “erroneously read”<sup>151</sup> *Davis*, it would now “provide additional clarification with regard to what *Davis* meant,”<sup>152</sup> as if the lower court simply was not capable of grasping the Court’s message the first time.

What the Court should have done is simply admit that it erred in implementing another fact-intensive framework that relied almost exclusively on judicial discretion, and that five justices<sup>153</sup> would have

---

144. *See id.* at 68 n.10.

145. *Davis v. Washington*, 547 U.S. 813, 828 (2006) (parentheses omitted).

146. *Bryant*, 131 S. Ct. at 1158.

147. *See Davis*, 547 U.S. at 828.

148. *Bryant*, 131 S. Ct. at 1160.

149. *Id.* at 1158.

150. *Id.* at 1159.

151. *Id.* at 1158.

152. *Id.* at 1156.

153. Justices Scalia and Ginsburg dissented, Justice Kagan took no part in the decision, and, although Justice Thomas concurred in the Court’s ultimate judgment, he did so for



exercised their own discretion, under these particular facts, to reach a different conclusion than the lower court. Instead, the Court “resurrect[ed] *Roberts* by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*[.] After all, honestly overruling *Crawford* would destroy the illusion of judicial minimalism and restraint.”<sup>154</sup>

It is unlikely that the Court will follow these—or any—lessons from the “train wreck” it has made of the Confrontation Clause.<sup>155</sup> But all is not lost for the right of confrontation. The individual states should, under their own state constitutions, define testimonial as “all accusatory hearsay, i.e., hearsay that tends to establish in any way an element of the crime or the identification of the defendant.”<sup>156</sup>

Fortunately, individual states are not constrained “by the Supreme Court of the United States if it is the judgment of [a state] that the Constitution of [the state] and the laws of [the] state require that greater protection of citizens’ liberties ought to be afforded.”<sup>157</sup> That is, even the U.S. Supreme Court’s decisions “do not bind the individual state’s power to mold *higher* standards under their respective state constitutions.”<sup>158</sup>

With this course of action the right of confrontation can be restored, and the individual states can do what the Court could not: “[I]nterpret the Constitution in a way that secures its intended constraint on judicial discretion.”<sup>159</sup>

---

completely different reasons and criticized the majority for engaging in “‘an exercise in fiction’ that is ‘disconnected from history’ and ‘yields no predictable results.’” *Id.* at 1167 (Thomas, J., concurring) (quoting *Davis v. Washington*, 547 U.S. 813, 838–39 (2006) (Thomas, J., concurring in part and dissenting in part)). In other words, it would be rare to have a more bitterly divided Court.

154. *Id.* at 1175 (Scalia, J., dissenting).

155. Blinka, *supra* note 18.

156. Cicchini & Rust, *supra* note 73, at 543. This proposal is, admittedly, somewhat hopeful (or possibly naïve) in that many of the state courts—excluding, of course, the Michigan Supreme Court as evidenced by *Bryant*—are the very courts that are distorting the right of confrontation to begin with. The proposal is not completely far-fetched, however. In fact, the Wisconsin Supreme Court, despite numerous state-leaning decisions in different contexts, has afforded its citizens greater protection under its state constitution in at least two cases. *See State v. Knapp*, 2005 WI 127, 700 N.W.2d 899 (affording greater protection under the Wisconsin Constitution than is provided by the Fifth Amendment); *State v. Dubose*, 2005 WI 126, 699 N.W.2d 582 (affording greater protection under the Wisconsin Constitution than is provided by the Fourteenth Amendment). Differences between the United States and Wisconsin Constitutions may also exist regarding the Sixth Amendment right to counsel. *See State v. Forbush*, 2011 WI 25, 796 N.W.2d 741 (discussing relevant provisions of both the federal and state constitutions).

157. *Knapp*, 2005 WI 27, ¶ 59, 700 N.W.2d at 914.

158. *Id.* ¶ 57, 700 N.W.2d at 913 (emphasis added).

159. *Crawford v. Washington*, 541 U.S. 36, 67 (2004).