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CONFRONTATION

Everything Old Is New Again in Confrontation Clause Analysis

By Alain Leibman

Converse sneakers? Check. Tight jeans? Now called ''skinny'' jeans, but you bet. Bell-bottoms? Ask your kids if you don't think so. We have a way of recycling clothing styles that had fallen out of fashion in favor of the better and the newer.

Well, the U.S. Supreme Court may now be proving that the criminal law sometimes follows the same nostalgic rhythm. For decades beginning in 1980, the court's Sixth Amendment jurisprudence had framed the application of the Confrontation Clause in criminal cases in an easy-to-understand way. The defendant's right to confront the witnesses against him or her meant that the government could rely on hearsay statements of unavailable witnesses if those statements could be fit into any traditional exception to the hearsay rule. So the government routinely offered unavailable declarants' statements of mind (''I have to leave to go pick up some drugs for defendant X to sell''), prior grand jury or plea allocution testimony, and the like.

No one who was a prosecutor in the 1980s or 1990s gave serious thought to overcoming a Confrontation Clause objection, because most of us had never been presented with one. That all changed in 2004, in an opinion written for the court by Justice Antonin Scalia, which reverted to what purported to be an original-intent reading of the text. Centuries-old English law was used to support a much more stringent test for such

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out-of-court declarations, requiring most to have undergone cross-examination prior to trial before they could be admitted in lieu of the declaring witness.

Needless to say, this development was cheered by defense counsel and rued by prosecutors.

More Hearsay May Get in

However, in the past two years, there has been stealthy circling back to bygone days. The court may be prepared, if not to jettison the original-intent approach with the makeup of the current court, at least to widen the entrance to the courtroom for old-fashioned hearsay that has never passed the crucible of cross-examination.

In *Ohio v. Roberts*,[1] the court very nearly eliminated the Confrontation Clause as a check on the admissibility of government evidence by conflating it with Fed. R. Evid. 803 and 804. The defendant had been convicted of fraud involving checks and credit cards he claimed he had been permitted to use, a story their owners denied. Roberts claimed that the victims' daughter, Anita, had given him permission. Anita testified at a preliminary hearing on behalf of the defense and denied giving Roberts any permission, but she was not declared a hostile witness and was not cross-examined by Roberts's counsel. Anita did not appear at the fraud trial, and the state used her preliminary hearing testimony to rebut the defense of permission.

The Supreme Court upheld the conviction, holding that the questioning of Anita by Roberts's counsel at the pretrial hearing sufficiently resembled cross-examination to render the testimony reliable and to comport with the purposes of the Confrontation Clause.[2]

Referring to the controlling phrase ''in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,'' Justice Harry Blackmun noted, ''If one were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial.''[3] Instead, he explained, the clause merely expressed a ''preference'' for confrontation at trial, establishing a ''rule of necessity'' that had to be met before hearsay statements could be admitted in criminal cases.[4] First, the declarant must be shown to be unavailable, and, second, the proffered hearsay statement must hold certain indicia of reliability, such as when the statement falls within a ''firmly rooted'' hearsay exception or shows particularized guarantees of trustworthiness.[5] In sum, the ''hearsay rules and the Confrontation Clause are generally designed to protect similar values.''[6]

In the ensuing period, the lower courts harmonized the import of the Sixth Amendment with traditional hearsay exceptions as they were captured in the evidence rules. Courts applied *Roberts* to admit plea allocutions, grand jury testimony, and prior trial testimony, all lacking the opportunity for the present cross-examination of the declarant or any cross-examination at all but all deemed reliable as equivalent in trustworthiness.[7] Once the prosecutor could show that he or she was unable to subpoena a witness and that the witness's out-of-court declaration met one of the many ''traditional'' hearsay exceptions, the declaration or prior testimony of that witness if relevant and not otherwise excludable came into evidence.

Scalia Consults History Books

In 2004, the court slammed on the brakes. Scalia in *Crawford* criticized ''amorphous notions of 'reliability,' ''[8] and sought a different standard for admissibility by purporting to look to history for a clear answer.

The defendant had been convicted of assaulting another man, despite arguing that he had acted in self-defense. The prosecution was allowed to play for the jury a recording of the statement by Crawford's wife to police that contradicted the claim of self-defense. The wife did not testify at trial because of a state spousal testimonial privilege. Her recorded statement was admitted under a state hearsay exception akin to Fed. R. Evid. 804(b)(3) for statements against penal interest. It passed muster under the Confrontation Clause because the statement was deemed trustworthy under *Roberts*.

The Supreme Court reversed Crawford's conviction as a violation of the Confrontation Clause, overruling *Roberts*. The opinion ranged over Roman concepts of confrontation, medieval England's practices of pretrial witness examination, and contemporary studies of Renaissance-era prosecutions to uncover a different meaning in the words of the Confrontation Clause. No longer was the clause synchronous with the hearsay evidence rules: ''Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.''[9] The reference in the clause to ''witnesses'' must mean that its focus was directed to testimony in the nature of solemn declarations for the purpose of establishing or proving some fact, such as formal statements to government officers, depositions, confessions, prior testimony, or affidavits, or statements made under circumstances that would objectively lead to the belief that they would be avail-

[1] 448 U.S. 56 (1980).
[2] Id. at 70-71.
[3] Id. at 63.
[4] Id. at 65.
[5] Id. at 65-66.
[6] Id. at 66 (quoting *California v. Green*, 399 U.S. 149, 155 (1970)).
[7] See generally cases cited in *Crawford v. Washington*, 541 U.S. 36, 63-65, 74 CrL 401 (2004).
[8] 541 U.S. at 62.
[9] Id. at 51.

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able for use at a later trial.[10] The English common law of 1791, when the Sixth Amendment was adopted, required that the admission of a testimonial statement of a witness who was not at trial be conditioned on the witness's unavailability and a prior opportunity for the defendant to have cross-examined the witness. So ''the Sixth Amendment therefore incorporates those limitations.''[11] The court's opinion explicitly declined to define the term ''testimonial'' and acknowledged that this deficiency would cause uncertainty.[12]

Examples of nontestimonial statements that were not the concern of the clause included business records or co-conspirator statements.[13] The court held that the nature of the statement as testimonial was key, and the presence or absence of an oath attending it was not dispositive.[14] (Devotees of original-intent analysis should not miss the exquisite footnote 5,[15] an exegesis of dueling citations to 17th and 18th century English authorities brought to bear by Scalia and by Chief Justice William Rehnquist in the concurrence, joined in by Justice Sandra Day O'Connor).

According to the court, ''firmly rooted'' hearsay exceptions were, with one outlier, no longer relevant to the constitutional analysis, since there was ''scant'' evidence as of 1791 that such exceptions were invoked to admit testimonial statements in criminal cases.[16] Scalia was, however, obliged to acknowledge that dying declarations were deemed admissible even in old English authorities.[17]

Court Split on *Crawford*

The *Crawford* opinion resigned the firmly-rooted-exception analysis to historical footnote status and overruled *Roberts*. The concurrence by the chief justice took issue with the historical lecture offered by the majority opinion. It said Scalia's opinion ''is not backed by sufficiently persuasive reasoning to overrule long-established precedent'' and ''is no better rooted in history that our current doctrine,''[18] i.e., the *Roberts* view. It also noted that ''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.''[19]

More important, perhaps, than its strong criticism of Scalia's presentation of historical imperative, was the defense offered in the concurrence on behalf of the *Roberts* approach focusing Confrontation Clause jurisprudence on the presence of guarantees of trustworthiness equivalent to those attributed to in-court testimony:

> Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply ''cannot be replicated even if the declarant testifies to the same matters in court.'' [citation omitted.] Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission ''actually furthers the 'Confrontation Clause's very mission,' which is to 'advance the accuracy of the truth-determining process in criminal trials.' '' [citations omitted.] Similar reasons justify the introduction of spontaneous declarations . . . , statements made in the course of procuring medical services, . . . dying declarations, . . . and countless other hearsay exceptions. That a statement might be testimonial does nothing to undermine the wisdom of one of those exceptions.[20]

Two years later, Scalia widened the divergence between the clause and the hearsay exceptions. In *Davis v. Washington* and its companion case *Hammon v. Indiana*,[21] the questions involved the admissibility in the *Davis* assault trial of the recording of a 911 call made by the victim of Davis's domestic assault during the assault, and the admissibility in the *Hammon* assault trial of the answers a domestic violence victim gave after the assault concluded in response to questioning by police officers (admitted by the state court as an excited utterance). The *Hammon* victim's statements had been admitted through an officer recounting her verbal statements and authenticating her subsequent affidavit. In both cases the declarant was unavailable at trial. Since *Crawford* had left undefined the term ''testimonial'' and since identifying statements as testimonial or not was the key to the applicability of the Confrontation Clause, Scalia again took up the meaning of the phrase. Once again, he eschewed ''produc[ing] an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial.''[22]

Under *Crawford*, formal statements to police officers were ''testimonial'' statements subject to the right of confrontation. But in *Davis*/*Hammon*, Scalia drew a new distinction, subdividing that category of statements. Statements made to police under circumstances objectively indicating that the primary purpose of the police interrogation was to meet an ongoing emergency are nontestimonial, while those made in the absence of such emergency under circumstances objectively indicating that the primary purpose is to establish or prove past events are testimonial.[23] Under that test, the 911 call in *Davis* was nontestimonial and outside the scope of the Confrontation Clause, and the after-assault interrogated statements in *Hammon* were admitted in violation of the clause.

'Agent as Expert' Theory Falters

As the court's effort to now subdivide the category of statements to police seemed somewhat contrived, its grounding of *Crawford* in seemingly unassailable evidence of historic English practices also began to strain. At one point, Scalia writes of having overruled *Roberts* by ''restoring'' to the clause the twin requirements of

[10] Id. at 51-52.
[11] Id. at 54.
[12] Id. at 68 n.10.
[13] Id. at 56.
[14] Id. at 52.
[15] Id. at 54.
[16] Id. at 56.
[17] Id. at 56 n.6.
[18] Id. at 69.
[19] Id. at 71-72.
[20] Id. at 74.
[21] 547 U.S. 813, 79 CrL 333 (2006).
[22] Id. at 822.
[23] 547 U.S. at 822.

unavailability and prior cross-examination, as if those fundamental precepts had been rescued from intervening confusion and put back in the place of primacy they had unquestionably held in English common law.

Justice Clarence Thomas argued in dissent that the historical background of the clause showed an intention to encompass as ''testimonial'' only those statements expressed formally, such as affidavits, depositions, prior testimony, or confessions.[24] Ignoring his own emphasis in *Crawford* on excluding formal out-of-court statements,[25] Scalia criticized the dissent's history-centric approach, not because it was wrong but because it failed to admit enough evidence; ''restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.''[26]

As a practical matter, defense attorneys began to utilize the *Crawford* and *Davis/Hammon* cases to advantage by arguing for the preclusion of traditionally admitted testimony of various kinds. For example, a favorite tactic of prosecutors is to rely on law enforcement agents as testifying ''experts,'' whether in the areas of the modus operandi of Ponzi schemes, the meaning of coded phrases used in recorded conversations, or the mechanisms employed to execute a check kite. Invariably, the agent-experts rely for their knowledge not only on factors such as experience and academic training but also on statements made to them by others, either witnesses in the given case or witnesses or other law enforcement officers in other cases.

Although the rules of evidence allow such reliance on hearsay, e.g., Fed. R. Evid. 703, the newly muscular Confrontation Clause posed another hurdle to admissibility. Relying on the court's new Sixth Amendment approach, appellate courts began to vacate convictions that depended on the introduction of agent-expert testimony predicated on such hearsay. E.g., *United States v. Mejia,* 545 F.3d 179, 198-99, 84 CrL 79 (2d Cir. 2008) (opinion testimony of state police officer as to the operation and structure of a violent gang violated the Confrontation Clause because it was based on hearsay statements of gang members and other law enforcement officers).

Other courts strained to uphold convictions by trying to determine from trial records whether the testifying officer was merely a conduit for the hearsay statements or truly claimed some expertise that was merely ''informed'' by the hearsay. E.g., *United States v. Johnson,* 587 F.3d 625, 635 (4th Cir. 2009) (expert testimony of police officers offered to decode intercepted calls and ascribe meaning to phrases such as ''tickets'' and ''t-shirts;'' the agent-experts attributed their knowledge to interviews of witnesses and informant statements, but the opinion testimony did not violate the Confrontation Clause because the agents' opinions could properly be ''in some part informed by their exposure to otherwise inadmissible evidence''), cert. den., 130 S. Ct. 2128 (2010).

Much as Scalia worried in *Davis/Hammon* that over-reliance on historical precedent could block too much evidence from being admitted, the Fourth Circuit was concerned in *Johnson* that giving too-broad effect to *Crawford* would ''disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases.''[27]

Circuit Courts Strive to Apply *Melendez-Diaz*

Another battleground developed over what had formerly been the routine admission of results of laboratory tests in drug cases. In *Melendez-Diaz v. Massachusetts*,[28] another Scalia opinion written for a 5-4 majority, the court held that affidavits attesting to the forensic results of state crime laboratory analysis of the chemical properties of a seized substance were ''testimonial'' and required the in-court testimony of the affiants. Laboratory-certificated test results met the ''intended for use at trial test'' of *Crawford* and so were ''core'' testimonial statements.[29]

The majority in *Melendez-Diaz* rejected the argument that the lab reports warranted different Confrontation Clause treatment because they did not capture historical events—a process subject to distortion of memory or manipulation—but instead related only neutral, scientific testing. Responding to the implication that scientist-witnesses carried greater reliability than fact-witnesses because the former had less motivation to falsify their statements, Scalia rejected it as ''little more than an invitation to return to our overruled decision in *Roberts* [and its focus on] 'particularized guarantees of trustworthiness.' ''[30]

The state also maintained that, at English common law, coroner inquest results were admitted without a right of confrontation, and that the forensic lab reports were indistinguishable from the inquest results. As he did in *Davis/Hammon*, Scalia chose incongruously to ignore evidence of historical English practices that did not fit the textual interpretation for which he advocated. ''Whatever the status of coroner's reports at common law in England,'' the opinion noted, ''they were not accorded any special status in American practice.''[31]

Following *Melendez-Diaz*, the courts of appeals struggled to differentiate among various crime laboratories and their reports offered at trial. E.g., *United States v. McGhee,* 627 F.3d 454, 459-60 (1st Cir. 2010) (it is unclear under *Melendez-Diaz* whether state chemist Tatro should have been permitted to rely on another chemist's test results and case file to testify as to sample tested by the other, but any error in doing so was harmless), sentence vacated on rehearing on other grounds, 2011 WL 2465452 (1st Cir., June 22, 2011); *United States v. Turner,* 591 F.3d 928, 933-34, 86 CrL 439 (7th Cir. 2010) (unavailable chemist analyzed drug sample; in her place, chemist Block testified that substance was cocaine, basing his opinion explicitly on the other's report—not itself offered in evidence—with which Block claimed agreement and on the other's testimonial lab summaries; since Block testified to his own conclusions and the other's report was not actually admitted, there was no Confrontation Clause violation, or any error was harmless); *United States v. Pablo,* 625 F.3d 1285, 1290-93, 1294 (10th Cir. 2010) (expert DNA testimony provided at trial by lab analyst Snider, based on the separate DNA and serology reports of two analysts

[24] Id. at 836-38.
[25] 541 U.S. at 51-52.
[26] Id. at 830 n.5 (citation omitted).
[27] 587 F.3d at 635.
[28] 129 S. Ct. 2527, 85 CrL 455 (2009).
[29] Id. at 2532.
[30] Id. at 2536.
[31] Ibid. (citations omitted).

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who did not testify; if Snider merely ''parroted'' the others' testimonial hearsay, then that would have been impermissible, but the record is unclear that Snider did so and Fed. R. Evid. 703 does allow an expert to rely on hearsay facts or data, so there was no plain error) (''The degree to which an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions of another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, even today with the benefit of *Melendez-Diaz*.'').

At least the *Roberts* approach to confrontation could readily be applied; some courts have demonstrated far less facility in applying *Crawford*. For example, in *Johnson*, where the Fourth Circuit allowed agent-experts to rely on testimonial hearsay from informants, it addressed the argument that an opportunity for the defendant to cross-examine the underlying declarants was lacking. The court of appeals rejected that argument as incorrect because the testifying experts were subject to cross-examination.[32] Of course, this is not at all what *Crawford* required, which is the opportunity to have cross-examined the *declarant*, not the witness who repeats the hearsay statement.

The Supreme Court has recently handed down two additional Confrontation Clause decisions. But rather than eliminate the confusion illustrated in decisions involving expert testimony and laboratory reports, or reconcile the alternating views of the importance (or not) of English history to the analysis, the opinions in these cases seem to reflect a retrograde movement back toward *Roberts*.

In those two decisions—*Michigan v. Bryant,*[33] and *Bullcoming v. New Mexico*[34]—the Confrontation Clause analysis is no longer being carried forward by Scalia, who dissented in *Bryant*, but is seemingly being bent back toward the hearsay rules by Justice Sonia Sotomayor.

In *Bryant*, the court reinstated a murder conviction following a trial in which statements made by the mortally injured victim were provided to the police some time after the defendant shot him. The state did not seek to qualify the statements as a dying declaration—a category of testimonial statements carved out of the Confrontation Clause by Scalia in *Crawford*—but as an excited utterance, leaving intact the Confrontation Clause question whether the primary purpose of the communication was to aid police in responding to an ongoing emergency.[35] The court concluded that the victim's statements were made under such emergency conditions and were therefore not testimonial within the meaning of the Sixth Amendment.[36]

In arriving at that conclusion, and going beyond it, Sotomayor suggested that firmly rooted hearsay exceptions might identify other statements that were nontestimonial. Statements made in an ongoing emergency were not testimonial because their purpose was not to create a record for trial. ''But there may be *other* circumstances . . . when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.''[37] The court opined that the reason ongoing-emergency statements are not testimonial is because the ''prospect of fabrication . . . is presumably significantly diminished,''[38] a standard that sounds much like *Roberts*'s circumstantial guarantees of trustworthiness. The court then boldly linked back to a firmly rooted hearsay exception:

> This logic [underlying the status of emergency-course declarations] is not unlike that justifying the excited utterance exception in hearsay law [which is] considered reliable because the declarant, in the excitement, presumably cannot form a falsehood.[39]

The *Bryant* court went on to note that ''many other exceptions to the hearsay rules similarly rest on the belief that certain statements are, by their nature, made for a purpose other than for use in a prosecution and therefore should not be barred by hearsay prohibitions.''[40] By the same token, but left unsaid, is that those hearsay-excepted statements, therefore, were not made with the primary purpose that they be used at trial and so are outside the Confrontation Clause.

A *Roberts* Resurgence?

Scalia dissented in *Bryant* but offered no direct rebuttal to the creeping re-emergence of the *Roberts* doctrine, which he thought he had put to rest in *Crawford*. In fact, an intriguing footnote suggests a shift in his own position, perhaps signaling a decrease in hostility to reliance on the rules of evidence to define the reach of the clause. His dissenting opinion noted that the justice ''remain[s] agnostic about whether and when statements to non-state actors are testimonial. *Davis v. Washington,* 547 U.S. 813, 823 n.2 (2006).''[41]

But footnote 2 in *Davis* did not express neutrality on the question; rather, in *Davis*, Scalia had written for the majority that ''our holding today *makes it unnecessary to consider* whether and when statements made to someone other than law enforcement personnel are 'testimonial.' ''[42] Deferring an issue for another day is by no means the same as being philosophically neutral on the point. An unmistakable shift in emphasis may have been signified.

In the other recent confrontation case, *Bullcoming*, the court held that a report of the results of a blood-alcohol test can be admitted at trial only through the testimony of the analyst who certified the results, and it reversed a drunken-driving conviction procured through the testimony of a noncertifying analyst.[43] More interestingly, the concurrence of Sotomayor recited *Bryant* for the proposition that the court had made the rules of hearsay relevant to the primary-purpose de-

[32] 587 F.3d at 636.
[33] 131 S. Ct. 1143, 88 CrL 629 (2011).
[34] 131 S. Ct. 2705, 89 CrL 533 (2011).
[35] 131 S. Ct. at 1153-55.
[36] Id. at 1166-67.
[37] Id. at 1155 (emphasis in original).
[38] Id. at 1157.
[39] Id. at 1157 (citation omitted).
[40] Id. at 1157 n.9 (citing to co-conspirator statements, Fed. R. Evid. 801(d)(2)(E); statements made for medical diagnosis, Fed. R. Evid. 803(4); business and official records, Fed. R. Evid. 803(6), 803(8); and statements against penal interest, Fed. R. Evid. 804(b)(3)).
[41] Id. at 1169 n.1.
[42] 547 U.S. at 823 n.2 (emphasis added).
[43] 131 S. Ct. at 2710.

termination.[44] Illustrating the point, the concurrence explained that purported business records, such as the lab reports in *Melendez-Diaz*, generated by an entity in the business of producing evidence for trial neither qualify as Rule 803(6) business records nor pass muster under the Confrontation Clause because such reports are testimonial.[45] The final conflation of evidence rules with the Sixth Amendment: ''The hearsay rule's recognition of the certificates' evidentiary purpose thus confirmed our decision that the certificates were testimonial under the primary purpose analysis required by the Confrontation Clause.''[46]

Both prosecutors and defense attorneys are left with some lack of certainty concerning the boundaries. But if the Confrontation Clause is, as Sotomayor suggests, now being defined to exclude only those testimonial statements whose primary purpose was to provide evidence in court, then *Roberts* will have been resurrected and the clause will once again recede to a position coextensive with the rules of evidence.

[44] Id. at 2720.
[45] Ibid.
[46] Ibid.

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