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THE NEW CONFRONTATION CLAUSE
by
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INTRODUCTION

The Sixth Amendment to the Constitution of the United States guarantees that “in all criminal prosecutions, the accused shall enjoy the right to...be confronted with the witnesses against him.”¹ This portion of the Sixth Amendment is referred to as the Confrontation Clause. The Confrontation Clause has been interpreted by the Supreme Court of the United States to bar certain evidence in criminal trials.

This paper will address the genesis of the Confrontation Clause in Western society, briefly track its development in England and the Colonies, outline the Supreme Court’s pre-20th Century interpretation, and then analyze four recent Supreme Court cases that have fundamentally altered the Supreme Court’s Confrontation Clause jurisprudence: *Crawford v. Washington*,² *Davis v. Washington*,³ *Giles v. California*,⁴ and *Melendez-Diaz v. Massachusetts*.⁵ After outlining the history of the Confrontation Clause and current state of the law, the paper will argue that the Court’s new interpretation of the Confrontation Clause is wrong because it contradicts the original intent of the Framers and too lightly disregards over 200 years of Supreme Court precedent. Finally, this paper will describe how this interpretation will affect the prosecution of criminal defendants before concluding with several potential solutions to the problems created by *Crawford* and its progeny.

I. THE HISTORY OF THE RIGHT TO CONFRONT ONE’S ACCUSERS

The right to confront one’s accusers dates back to at least ancient Roman times. In approximately A.D. 50, a Roman Governor named Porcius Festus explained to King Agrippa that “it was not the custom of the Romans to give up anyone before the accused met the accusers

¹ U.S. Const. amend VI.

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

³ *Davis v. Washington*, 547 U.S. 813 (2006).

⁴ *Giles v. California*, 554 U.S. 353 (2008).

⁵ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

face-to-face and had opportunity to make his defense concerning the charge against him.”⁶ Furthermore, Emperor Justinian codified the right to confront one’s accusers in Roman law in A.D. 534.⁷ The Roman code eventually required that the prosecution’s witnesses had to testify in court and before the accused.⁸

The execution of Sir Walter Raleigh in 1618 had profound influence on the development of the right to confront one’s accusers. Raleigh was charged with High Treason.⁹ The only evidence presented against him was a sworn confession by Raleigh’s alleged co-conspirator, Lord Cobham.¹⁰ When the prosecution attempted to read Cobham’s affidavit, Raleigh unsuccessfully demanded that Cobham be produced.¹¹ While Raleigh was allowed to introduce a letter supposedly written by Cobham that denied any conspiracy, the prosecution countered the letter with a rebuttal letter and a rebuttal witness.¹² Based on this evidence, Raleigh was convicted and executed.¹³ The execution caused great unrest in England and eventually led to reform of the English law.¹⁴ While the execution of Raleigh caused a great stir in England, scholars debate its influence on the American Colonies.¹⁵

The American Colonies seem to have developed the right to confront somewhat independently of England. In the 17th Century, there is little mention of the right in the Colonists’ charters and declarations.¹⁶ However, in the mid-18th Century, Sir William Blackstone published *Commentaries on the Laws of England*, a four volume work that was read and accepted by many

⁶ Acts 25:16, *The Holy Bible*.

⁷ Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. Rev. 537, 544 (2003).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 542.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 543.

¹⁵ Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 Tex. Tech L. Rev. 67, 69-70 (1969).

¹⁶ *Id.* at 70.

of the Colonists.¹⁷ Blackstone hailed the merit of having witnesses appear in court before the parties, judge, and jury, and he criticized the English practice of taking depositions in private and then reading them before the court.¹⁸ The publication of Blackstone's work came at a time when the Colonists were generally becoming more and more dissatisfied with their legal treatment from England, and not at a time when the colonies were looking favorably on the English government and legal system.

A few years after Blackstone published *Commentaries on the Laws of England*, Parliament passed the Stamp Act, which the Colonists reacted to with violence.¹⁹ Parliament opted to take a stern approach toward the Colonists and thus passed resolutions which would allow accused Colonists to be tried in England.²⁰ Such trials would deprive those Colonists of a trial by a jury composed of their neighbors and would require a trial by deposition.²¹ These resolutions were met with predictable disdain by the Colonists and contributed to the push for independence.²² Shortly thereafter, seven of the Colonies that adopted their own Constitutions incorporated the right to meet one's accusers face-to-face.²³ Once independence was won and the Constitution was published for ratification, the strongest objection raised by the Anti-Federalists was that it omitted a bill of rights. These objections to the proposed Constitution demonstrate the concern many Colonists had about criminal procedure protections. Thus, it was England's deficient legal protection and the Colonists' fear of lapsing back into a similar situation that led to the enumeration of the right to confront one's accusers in the Bill of Rights.

¹⁷ *Id.* at 72.

¹⁸ *Id.* at 73, (quoting Sir William Blackstone, 3 *Commentaries on the Laws of England*, 373-74 (1968)).

¹⁹ Larkin, *supra*, at 72.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 75-76.

II. ORIGINAL UNDERSTANDING OF THE RIGHT TO CONFRONTATION

The Framers' understanding of what the Sixth Amendment was supposed to guard against is necessarily linked to the social and legal context of the late 18th Century. The Colonists' development of the rule was more of a response to inadequate legal protections by the English Parliament than a right modeled after English practice. As Murl L. Larkin noted:

the immediate and perhaps paramount impetus for the inclusion of the right of confrontation in the Virginia Bill of Rights of 1776 was the legislatively expressed intentions of the British to try colonists in England for crimes allegedly committed in the colonies, which would inevitably have involved the use of depositions or *ex parte* affidavits by the prosecution. The use of a deposition does not, of course, necessarily deny to the accused the right to face the witness and to test his testimony by cross-examination. Instead, the vice of a deposition is that it does not compel the witness to 'stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.'²⁴

The Framers wanted to avoid a trial by affidavit or deposition.²⁵ The right to confrontation was more about meeting one's accusers in open court than the right to cross examination.²⁶ Unfortunately, unlike other provisions in the Bill of Rights, the Framers did not extensively debate the Confrontation Clause and thus did not provide a record of what they expected in terms of the scope of the right.²⁷

III. EARLY SUPREME COURT INTERPRETATIONS

Reynolds v. United States,²⁸ was the first case with a Confrontation Clause issue to reach the Supreme Court. In *Reynolds*, the defendant was charged with bigamy.²⁹ His second wife testified at the first trial and the defendant had the ability to cross-examine her.³⁰ On appeal after

²⁴ Larkin, *supra*, at 76-77 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)). James Madison modeled the wording of the Sixth Amendment after the Virginia Constitution. White, *supra*, at 552.

²⁵ Larkin, *supra*, at 76; *Mattox*, 156 U.S. at 243.

²⁶ Larkin, *supra*, at 78.

²⁷ White, *supra*, at 552.

²⁸ *Reynolds v. United States*, 98 U.S. 145 (1878).

²⁹ *Id.* at 146.

³⁰ *Id.* at 159.

conviction, the indictment for the first trial was found invalid and a new trial ordered.³¹ When the sheriff went to deliver the subpoena to the second wife for the second trial, the defendant said the second wife was not present, had not been for a while, and would not be available for the second trial.³² After several return trips by the sheriff, the trial court allowed the trial to continue by having the second wife’s testimony from the first trial read into evidence.³³ The defendant claimed this violated his Sixth Amendment right to confront the witnesses against him.³⁴ The Court held that the admission of such evidence was not erroneous because “[t]he Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.”³⁵ The Court found that since the defendant had the opportunity to account for his wife’s absence or deny under oath that he had kept her away but failed to do so, it was proper to admit the evidence.³⁶

In *Mattox v. United States*, the Court provided significant insight into the nature of the Sixth Amendment right to confront one’s accusers.³⁷ In that case, the defendant was tried and convicted of murder.³⁸ On appeal, the Supreme Court reversed and remanded for a new trial.³⁹ Before the second trial, two of the prosecution’s witnesses died.⁴⁰ The district court judge allowed the testimony of the deceased witnesses to be read at the second trial and the defendant was convicted.⁴¹ The Supreme Court held “a copy of the stenographic report of the [deceased witness’s] entire former testimony, supported by the oath of the stenographer that it is a correct

³¹ *Id.*

³² *Id.* at 159-60.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 158.

³⁶ *Id.* at 160-61.

³⁷ *Mattox v. United States*, 156 U.S. 237 (1895).

³⁸ *Id.* at 239.

³⁹ *Id.* at 237.

⁴⁰ *Id.* at 240.

⁴¹ *Id.*

transcript...is competent evidence.”⁴² The Court stated that “[a]s to the practice of this country, we know of none of the states in which such testimony is now to be held inadmissible.”⁴³ “The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness...”⁴⁴ After it recognized the importance of the right, the Court said that “rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to consideration of public policy and the necessities of the case.”⁴⁵ “The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.”⁴⁶

In *Kirby v. United States*, the Court affirmed that the rules of evidence should be considered in Confrontation issues, but unlike in *Mattox* it emphasized the supremacy of Constitutional principles.⁴⁷ In that case, the defendant was charged with receiving stolen property.⁴⁸ The prosecution sought to prove the “stolen” element through a court record that demonstrated the men who gave the defendant the property in question had been convicted of larceny.⁴⁹ The Court held that the defendant’s right to confrontation was violated when the trial court admitted the record because:

a fact which can be primarily established only by witnesses cannot be proved against an accused...except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and

⁴² *Id.* at 244.

⁴³ *Id.* at 241.

⁴⁴ *Id.* at 243.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Kirby v. United States*, 174 U.S. 47, 55 (1899).

⁴⁸ *Id.* at 49.

⁴⁹ *Id.*

whose testimony he may impeach in every mode authorized by the established rules governing the trial.⁵⁰

The Court noted that dying declarations were a common law exception to this rule because those declarations were the equivalent of testimony under oath.⁵¹ The Court did not explain what type of facts can primarily be established solely by witnesses.

Five years later, the Court addressed the issue of whether the reading of a deposition in a State criminal trial was a violation of the defendant's right to due process of law under the Fourteenth Amendment.⁵² In *West*, the Court declined to incorporate the Sixth Amendment to the States and then went on to hold that no federal right was violated by reading the transcript from a preliminary hearing of a witness who was not available at the trial.⁵³ The Court emphasized that “[a]t common law, the right existed to read a deposition upon the trial of the defendant, if such deposition had been taken when the defendant was present and when the defendant's counsel had had an opportunity to cross-examine” and if the witness was now dead, insane, too ill, kept away by the defendant, or generally unavailable.⁵⁴ Toward the end of its opinion, the Court cited several cases in support of its holding and noted that all of these cases recognized some exceptions to the general rule.⁵⁵

IV. INCORPORATION TO *CRAWFORD*: IN SEARCH OF A STANDARD

After deciding several cases with Confrontation Clause issues in less than 30 years, the Court did not decide another one for 60 years. Part of the reason for the extended silence in the first half of the 20th Century was due to the fact that the Court did not incorporate the Sixth

⁵⁰ *Id.* at 55.

⁵¹ *Id.* at 61.

⁵² *West v. Louisiana*, 194 U.S. 258, 262 (1904) (overruled by *Pointer v. Texas*, 380 U.S. 400 (1965)).

⁵³ *Id.* at 262-63.

⁵⁴ *Id.* at 262.

⁵⁵ *Id.* at 265-68 (citing *Reynolds v. United States*, 98 U.S. 145 (1878), *Mattox v. United States*, 156 U.S. 237 (1895), *Kirby v. United States*, 174 U.S. 47 (1899), and *Motes v. United States*, 178 U.S. 458 (1900)).

Amendment until the 1965 term. Incorporation of the Sixth Amendment eventually led to fundamental changes in the Supreme Court's interpretation of the Confrontation Clause.

In *Douglas v. Alabama*, the Court emphasized the importance of cross-examination in Confrontation Clause analysis.⁵⁶ In that case, the defendant was charged with assault with intent to murder.⁵⁷ The man he allegedly conspired with, Loyd, was tried first and convicted.⁵⁸ At the defendant's trial, the prosecutor called Loyd and attempted to question him about a confession Loyd had made.⁵⁹ When Loyd invoked the privilege against self-incrimination, the prosecutor went through Loyd's confession line by line and asked if Loyd had made the statement.⁶⁰ After each question, Loyd invoked the privilege.⁶¹ While the confession was never admitted, it was the only direct "evidence" linking the defendant to the crime.⁶² The defendant was convicted but the Court held that the defendant's "inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause."⁶³ The Court cited and qualified *Mattox* by noting that "an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."⁶⁴

The Supreme Court applied the Sixth Amendment to the States via the Fourteenth Amendment in *Pointer v. Texas*.⁶⁵ After expounding on how the right to confrontation and cross-examination is essential to the due process of law, the Court recognized two exceptions to the right of confrontation: dying declarations and testimony given at a former trial.⁶⁶ The Court

⁵⁶ *Douglas v. Alabama*, 380 U.S. 415 (1965).

⁵⁷ *Id.* at 416.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 416-17.

⁶¹ *Id.*

⁶² *Id.* at 419.

⁶³ *Id.* at 419.

⁶⁴ *Id.* at 418.

⁶⁵ *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

⁶⁶ *Id.* at 407.

held that the defendant's right to confrontation was violated when the trial court admitted a witness's preliminary examination testimony because the defendant was not represented by counsel at that examination.⁶⁷

In *California v. Green*, the Court attempted to remove some of the confusion regarding the Confrontation Clause's connection to the rules of evidence.⁶⁸ The Court stated that "[w]hether admission of the statement would have violated federal evidentiary rules against hearsay...is a wholly separate question."⁶⁹ The Court clarified that the Confrontation Clause may be violated even though the evidence is admissible under the rules of evidence and that merely because evidence violates the hearsay rules does not mean it violates the Confrontation Clause.⁷⁰ The Court held where a defendant represented by counsel had opportunity to cross-examine a witness at a preliminary hearing, the witness's preliminary hearing statements were admissible at trial if the witness was absent.⁷¹

Justice Harlan concurred in the *Green* decision.⁷² He agreed that the hearsay rules are not in complete congruence with the right to confrontation.⁷³ He wrote separately to warn against equating confrontation with cross-examination and to argue that the confrontation right should be understood to mean that "a State may not in a criminal case use hearsay when the declarant is available."⁷⁴ Justice Harlan's first point is technically accurate. However, as Justice Brennan noted in dissent, "[a] face to face encounter...is important, not so that the accused can view at trial his accuser's visage, but so that he can directly challenge the accuser's testimony before the

⁶⁷ *Id.* at 407-08.

⁶⁸ *California v. Green*, 399 U.S. 149, 164 (1970).

⁶⁹ *Id.* at 164 n.15 (citation omitted).

⁷⁰ *Id.* at 155-56.

⁷¹ *Id.* at 170.

⁷² *Id.* at 172 (Harlan, J., concurring).

⁷³ *Id.* at 473.

⁷⁴ *Id.* at 174, 187.

factfinder.”⁷⁵ Indeed, Justice Harlan’s warning is not followed by any express statement of what else the right could include beyond cross-examination. The second part of Justice Harlan’s opinion may have established a basis for the Court to alter its interpretation of the Confrontation Clause in *Crawford v. Washington*.⁷⁶

Justice Brennan dissented in *Green* and attempted to show the inadequacy of using a preliminary examination transcript at trial when the witness becomes unavailable.⁷⁷ He articulately demonstrated how the strategy used by defense attorneys at preliminary examinations did not allow for the confrontation right to be satisfied at trial and how merely reading former testimony does not give the jury the chance to evaluate the witness’s demeanor.⁷⁸

In *Ohio v. Roberts*, the Supreme Court synthesized recent precedent with important aspects of *Mattox* to put forth a two-part test: to admit hearsay against a criminal defendant under *Roberts*, the prosecution had to show necessity and that the hearsay had adequate indicia of reliability.⁷⁹ The first step in the Court’s analysis was to state what the text could not mean: an unequivocal right to confrontation at trial.⁸⁰ The Court reasoned that the Confrontation Clause could not be read absolutely literally because that would require “the exclusion of any statement made by a declarant not present at trial.”⁸¹ Such an interpretation “would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.”⁸² The Court grounded this analysis on the statement in *Mattox* that dying declarations were an exception to the Confrontation Clause.⁸³ Furthermore, the Court noted that as early as *Mattox*, the Court had

⁷⁵ *Id.* at 192 (Brennan, J., dissenting).

⁷⁶ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁷⁷ *Id.* at 189-90 (Brennan J., dissenting).

⁷⁸ *Id.* at 195.

⁷⁹ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (overruled by *Crawford v. Washington*, 541 U.S. 36 (2004)).

⁸⁰ *Id.* at 62-63.

⁸¹ *Id.* at 63.

⁸² *Id.*

⁸³ *Id.*

recognized that the right would yield when public policy or the necessities of a particular case so demanded.⁸⁴ The idea that “competing interests...may warrant dispensing with confrontation at trial” was also supported by the Court in *Chambers v. Mississippi*.⁸⁵ After recognizing that a literal interpretation was not what the Framers intended, or at least not how the Court had interpreted the Clause since its earliest decisions, the Court moved to what it believed the Framers did intend: a mere “preference for face-to-face confrontation at trial.”⁸⁶ At this point the Court articulated what it believed the Confrontation Clause is truly about in a single word: reliability.⁸⁷ To justify reliability as the standard, the Court once again turned to the section of *Mattox* that recognized confrontation gave the accused the opportunity to test the recollection and conscience of the witness while giving the jury the chance to evaluate his credibility.⁸⁸ After listing the reasons for giving accused the right to confront their accusers, the Court summarized its interpretation of the Confrontation Clause by saying, “the Sixth Amendment demands: ‘substantial compliance’ with the purposes behind the confrontation requirement.”⁸⁹

Once the Court established the purpose and limitations of the Sixth Amendment in *Roberts*, it developed the two-part rule. The first step for the prosecution to prove was necessity.⁹⁰ Typically, the prosecution had to demonstrate that the witness whose testimony it sought to use was unavailable; however, “a demonstration of unavailability, is not always

⁸⁴ *Id.* at 64.

⁸⁵ *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Mattox*, 156 U.S. at 340).

⁸⁶ *Roberts*, 448 U.S. at 63 (citing *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

⁸⁷ *Id.* at 65.

⁸⁸ *Id.*

⁸⁹ *Id.* at 69 (quoting *California v. Green*, 399 U.S. 149, 166 (1970)).

⁹⁰ *Roberts*, 448 U.S. at 78-79.

required.”⁹¹ Absent this exception, the prosecution had to make a good-faith effort to obtain the witness’s presence at trial.⁹²

After showing necessity, the prosecution had to prove that the statement “bears adequate ‘indicia of reliability.’”⁹³ The Court explained that “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”⁹⁴ By defining reliability in this way, the Court moved away from its approach in *Green*, where it had attempted to put distance between the Confrontation Clause and the rules of evidence.⁹⁵ The Court left for another day which hearsay exceptions were “firmly rooted.”⁹⁶

A few years after *Roberts* was decided, the Court reiterated that unavailability was not required to satisfy the first prong of the *Roberts* rule in *United States v. Inadi*.⁹⁷ In reaching its conclusion, the Court conducted a benefits-burden analysis and found that “admission of coconspirators’ declarations...actually furthers the Confrontation Clause’s very mission which is to advance the accuracy of the truth-determining process in criminal trials.”⁹⁸ Once again, the Court restated what it had said in *Green* concerning the Confrontation Clause’s connection to the rules of evidence: “[w]hile it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, the overlap is not complete.”⁹⁹

⁹¹ *Id.* at 64 n.7; *See* *Dutton v. Evans*, 400 U.S. 74, 95-96 (1970) (holding that the utility of trial confrontation may be so remote that the prosecution is not required to produce a seemingly unavailable witness).

⁹² *Roberts*, 448 U.S. at 74

⁹³ *Id.* at 66.

⁹⁴ *Id.*

⁹⁵ *See* *California v. Green*, 399 U.S. at 164 n.15.

⁹⁶ *Roberts*, 448 U.S. at 66.

⁹⁷ *United States v. Inadi*, 475 U.S. 387, 391-92 (1986).

⁹⁸ *Id.* at 396 (quoting *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89, 91 (1970) (internal quotation marks omitted)).

⁹⁹ *Inadi*, 475 U.S. at 394 n.5 (quoting *Green v. California*, 399 U.S. at 155) (internal quotation marks omitted).

Bourjaily v. United States, gave the Court the opportunity to expound on the second *Roberts* prong.¹⁰⁰ In an opinion joined by Justice Scalia, the Court held that independent indicia of reliability is not mandated by the Constitution when, as in *Bourjaily*, the statement falls within a firmly rooted hearsay exception.¹⁰¹ Since co-conspirator's statements had been admissible for over 150 years and since the Court had repeatedly affirmed this exception as "accepted practice," the Court found it was a firmly rooted hearsay exception and that courts no longer needed to conduct an evaluation as to whether such statements would satisfy the second *Roberts* prong.¹⁰²

Three Justices, one of which was the author of *Roberts*, disagreed that the co-conspirator exception should be considered a firmly rooted hearsay exception for a couple of reasons.¹⁰³ First, the three dissenters believed that the Court fundamentally altered the exception by removing the independent evidence requirement of the co-conspirator exception.¹⁰⁴ Second, the co-conspirator exception is not based on its propensity for trustworthiness, something that is inherent to hearsay exceptions and the basic purpose of the Confrontation Clause.¹⁰⁵

The Court took a step toward a more literal interpretation in *Coy v. Iowa*.¹⁰⁶ In that case, it held the defendant's right to Confrontation was violated when the trial court allowed the child witnesses to testify behind a screen.¹⁰⁷ Justice Scalia, writing for the majority, reasoned "that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"¹⁰⁸ The Court repeated what it had said in *Pennsylvania v. Ritchie*, "[t]he Confrontation Clause provides two types of

¹⁰⁰ *Bourjaily v. United States*, 483 U.S. 171 (1987).

¹⁰¹ *Id.* at 183.

¹⁰² *Id.* at 183-84.

¹⁰³ *Id.* at 186 (Blackmun, J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

¹⁰⁷ *Id.* at 1020.

¹⁰⁸ *Id.* at 1017 (quoting *Pointer*, 380 U.S. at 404).

protections for a criminal defendant: the right to physically face those who testify against him, and the right to conduct cross-examination.”¹⁰⁹ The Court admitted that the rights conferred by the Confrontation Clause are not absolute and may be overridden if public policy so demanded, but attempted to curb some of its recent decisions by segregating the rights conferred by the Confrontation Clause from “the right narrowly and explicitly set forth in the Clause.”¹¹⁰ The Court failed to explain how the right to cross-examine, the right to exclude out-of-court statements, and the right to face-to-face confrontation were somehow conferred and thus separate from “the right narrowly and explicitly set forth in the Clause.”¹¹¹

For some time, the Justices of the Supreme Court had been forming two distinct views of what the Confrontation Clause guaranteed. The line between these two views was clearly drawn in *Maryland v. Craig*.¹¹² Before this opinion, few if any Justices called for a strict literal reading of the text; it seemed widely accepted that the right must be checked by exceptions or a need to balance policy and practical considerations. The Court seemed to take a step toward a more literal interpretation in *Coy*.¹¹³ However, whatever ground was gained for the literal view was lost and more in *Craig*.¹¹⁴ In *Craig*, the Court held that when:

the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits the child witness...to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.¹¹⁵

In reaching this conclusion the Court pointed out that it has never held that “the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses

¹⁰⁹ *Coy*, 487 U.S. at 1017 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)).

¹¹⁰ *Id.* at 1020-21.

¹¹¹ *Id.*

¹¹² *Maryland v. Craig*, 497 U.S. 836 (1990).

¹¹³ 487 U.S. at 1017-1018.

¹¹⁴ 497 U.S. at 844-45.

¹¹⁵ *Id.* at 855.

against them at trial.”¹¹⁶ It also repeated that a literal interpretation of the Confrontation Clause is inappropriate and that exceptions to the right are allowed only “when necessary to further public policy.”¹¹⁷ Finally, it made a bold, yet supported, statement about the nature of the right: “[i]t is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation.”¹¹⁸

The holding of *Craig*, which neatly sidestepped around the factual similarities of *Coy* was met with vehement disapproval by the author of *Coy*, Justice Scalia, as well as Justices Brennan and Marshall.¹¹⁹ Justice Scalia responded to the majority opinion with a dissenting opinion that called for a strict literal reading of the Sixth Amendment.¹²⁰

The fragmentation of the Court was demonstrated by *Lilly v. Virginia*.¹²¹ In that case, a majority of Justices were only able to agree on the narrow factual holding that the confession of the defendant’s alleged co-conspirator was not admissible under the Confrontation Clause.¹²²

V. THE TESTIMONIAL STANDARD

The Court set upon a new path in the early part of the 21st Century. The first step was taken in *Crawford v. Washington*.¹²³ In *Crawford*, the Court abrogated *Roberts* because the reliability test was “amorphous” and “unpredictable.”¹²⁴ Starting afresh, the Court turned to a word-by-word, plain meaning evaluation of the text:

[The Confrontation Clause] applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’ 2 N. Webster, *An American Dictionary of the English Language* (1828). ‘Testimony,’ in turn, is typically ‘[a] solemn

¹¹⁶ *Id.* at 844.

¹¹⁷ *Id.* at 845, 848.

¹¹⁸ *Id.* at 849-50 (quoting Michael H. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 *Crim. L. Bull.* 99, 107-08 (1972)).

¹¹⁹ *Id.* at 860 (Scalia, J., dissenting).

¹²⁰ *Id.* at 863.

¹²¹ *Lilly v. Virginia*, 527 U.S. 116 (1999).

¹²² *Id.* at 139-40.

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

¹²⁴ *Id.* at 63.

declaration or affirmation made for the purpose of establishing or proving some fact.’ *Ibid.* An 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.¹²⁵

Based on this strict literal reading of the text, the Court went on to hold that “where testimonial hearsay is at issue, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”¹²⁶ While the Court left the definition of “testimonial” for another day, it concluded that a core class of testimonial statements exist, some of which include “affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”¹²⁷

The Court defined “testimonial” in *Davis v. Washington*, and its companion case *Hammon v. Indiana* by way of example and non-example.¹²⁸ In *Davis*, Michelle McCottry called 911 when she was attacked by her former boyfriend, Adrian Davis.¹²⁹ When McCottry failed to appear at Davis’s trial, the Prosecution had the 911 tape admitted.¹³⁰ The Court found that McCottry’s statements were not testimonial because McCottry was frantically speaking about events as they were actually happening to meet an on-going emergency so that the police could resolve the emergency.¹³¹ Conversely, police responded to a general domestic violence call in *Hammon*.¹³² Once at the Hammon home, one officer met with Amy Hammon in the living room while the other officer met with Amy’s husband Hershel in the kitchen.¹³³ The Court found Amy’s statements to the officer were testimonial because they described past events,

¹²⁵ *Id.* at 51.

¹²⁶ *Id.* at 68.

¹²⁷ *Id.* at 51.

¹²⁸ *Davis v. Washington*, 547 U.S. 813 (2006).

¹²⁹ *Id.* at 817.

¹³⁰ *Id.* at 818-19.

¹³¹ *Id.* at 813-14.

¹³² *Id.* at 819-20.

¹³³ *Id.*

were not said in the face of an on-going emergency, were not stated for the purpose of resolving some conflict, and were not made in a frantic environment.¹³⁴ Summarizing its holding, the

Court said:

[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.¹³⁵

In *Giles v. California*, the Court reiterated that the right to confrontation is a common law right and thus only exceptions to the right recognized at common law apply.¹³⁶ In that case the defendant allegedly murdered a woman named Avie.¹³⁷ The prosecution sought to admit statements made by Avie that suggested the defendant had abused her.¹³⁸ The Court found that forfeiture by wrong-doing was a common law exception to the confrontation right but that the facts of this case did not qualify for that exception because the defendant's alleged action of murdering the witness was not designed to keep her from testifying.¹³⁹

The Court applied *Crawford* and *Davis* to laboratory certificates in *Melendez-Diaz v. Massachusetts*.¹⁴⁰ The Court quickly found that the certificates were similar to affidavits and were thus within the core class of testimonial statements prohibited by the Confrontation Clause.¹⁴¹ The certificates constituted a solemn declaration or affirmation made for the purpose of proving a fact; specifically, the fact in question was the precise testimony that the analysts

¹³⁴ *Id.* at 830-31.

¹³⁵ *Id.* at 822.

¹³⁶ *Giles v. California*, 554 U.S. 353, 358 (2008).

¹³⁷ *Id.* at 356.

¹³⁸ *Id.* at 356-57.

¹³⁹ *Id.* at 359.

¹⁴⁰ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009).

¹⁴¹ *Id.* at 2532.

would be expected to provide if called at trial.¹⁴² Accordingly, the analysts were witnesses for Sixth Amendment purposes and their certificates could not be admitted unless the analysts were unavailable and the defendant had a prior opportunity to cross-examine the analysts.¹⁴³

VI. PROBLEMS WITH THE NEW CONFRONTATION CLAUSE

First, *Crawford* misstates one of the earliest, and thus most important, Supreme Court decisions that addressed the Confrontation Clause: *Mattox v. United States*.¹⁴⁴ The Court cited *Mattox* several times in *Crawford* but artfully omitted key sections of the opinion that undercut the rigid testimonial rule.¹⁴⁵ After recognizing the importance of the right to Confrontation, *Mattox* qualified the right:

rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to consideration of public policy and the necessities of the case.... The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.¹⁴⁶

To demonstrate, the *Mattox* Court noted that many of the provisions of the Bill of Rights are checked by long-standing exceptions that “were obviously intended to be respected.”¹⁴⁷ Furthermore, “technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant.”¹⁴⁸ Rather than taking a strict literal approach, *Mattox* expressly criticized such an approach and established a framework for later courts to conduct a benefits-burden analysis if the circumstances of the case warranted.¹⁴⁹

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See* *Crawford*, 541 U.S. at 54, 56, 57 (citing *Mattox v. United States*, 156 U.S. 237 (1895)).

¹⁴⁵ *Id.*

¹⁴⁶ *Mattox*, 156 U.S. at 243.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *White, supra*, at 559.

Mattox was correct in holding that the right to confront was not meant to be absolute. Commentators and judges have reached similar conclusions. “There is universal agreement that this provision was not intended by its drafters to be absolute and complete.”¹⁵⁰ According to J. Chitty, “the statutes which authorize the justices to take [depositions] extend only to cases of manslaughter and felony; and therefore they are not admissible in case of a mere misdemeanour [sic], or for punishing a libel.”¹⁵¹ “The 6th Amendment was intended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule.”¹⁵²

The *Mattox* approach is not inconsistent with how the Framers viewed the right. The fact that there is little commentary from the Framers about this rule does not mean they necessarily intended it to be applied in strict adherence. The criminal procedure protections extended in the Bill of Rights were about necessity and fairness. Many of the Framers were lawyers – men who were familiar with the trial process. They were also rebels who risked much in chartering the early waters of America’s independence. They were thus particularly sensitive to protection from the federal government. However, they were also men of reason and common sense and thus it was appropriate for *Mattox* to allow for a benefits-burden analysis in the Confrontation Clause context.

Refusing to interpret a provision of the Constitution literally is not a novel concept for the Court. The Eleventh Amendment is not read literally because the Court understood that the circumstances under which it was adopted compel a non-literal interpretation.¹⁵³ Furthermore,

¹⁵⁰ Larkin, *supra*, at 68.

¹⁵¹ J. Chitty, *A Practical Treatise on the Criminal Law*, 401 (Edward Earle pub., William Brown 1819).

¹⁵² *Kay v. United States*, 255 F.2d 476, 480 (4th Cir. 1958) *abrogated by* *Melendez-Diaz*, 129 S. Ct. 2527 at 2533.

¹⁵³ *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-56 (1996); *Alden v. Maine*, 527 U.S. 706, 727 (1999).

the Fourteenth Amendment is not read in a strict literal fashion.¹⁵⁴ If the Fourteenth Amendment was interpreted literally, the Privileges and Immunities Clause would offer some additional protection for United States citizens.¹⁵⁵

Four years after *Mattox* left the door ajar for exceptions in appropriate circumstances, the Court emphasized that the door was not completely open and that the right needed to be fiercely guarded.¹⁵⁶ The new interpretation is thus not completely wrong. The Court's fierce defense of the right is consistent with the strong "preference for face-to-face confrontation."¹⁵⁷ *Crawford* was wrong in the sense that it slammed the door shut on any necessity exception.

As mentioned before, after *Mattox* and *Kirby*, the Court did not accept a Confrontation Clause case for several decades. That changed when the Court accepted two Confrontation Clause cases for the 1965 term.¹⁵⁸ In the first of those cases, *Pointer*, the Court incorporated the Sixth Amendment to the States via the Fourteenth Amendment.¹⁵⁹ Once the Sixth Amendment was incorporated, a host of factual scenarios implicating confrontation issues became available, and the Court predictably began accepting more Confrontation Clause cases.

In *Roberts*, the Court attempted to put the language of *Mattox* and the general understanding that the Clause was not absolute into a more workable framework for the trial courts.¹⁶⁰ When it adopted the two-part rule, the *Roberts* Court recognized the uncertainty surrounding the Confrontation Clause:

[c]onvinced that no rule will perfectly resolve all possible problems...we reject the invitation to overrule a near-century of jurisprudence. Our reluctance to begin anew is heightened by the Court's implicit prior rejection of principal alternative

¹⁵⁴ See Slaughter-House Cases, 83 U.S. 36, 53 (1872).

¹⁵⁵ *Id.*

¹⁵⁶ See *Kirby*, 174 U.S. at 55.

¹⁵⁷ *Douglas v. Alabama*, 380 U.S. at 418.

¹⁵⁸ See, e.g., *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965).

¹⁵⁹ *Pointer*, 380 U.S. at 406.

¹⁶⁰ *Roberts*, 448 U.S. at 67.

proposals, see *Dutton v. Evans*, 400 U.S., at 93-100...(concurring opinion), and *California v. Green*, 399 U.S., at 172-189...(concurring opinion).¹⁶¹

The *Roberts* rule did not go beyond what *Mattox* and the original understanding of the Confrontation Clause allowed in theory. However in practice, the Court quickly stretched the framework beyond the exception contemplated in *Mattox*. For example, in *Inadi* the Court allowed the prosecution to admit the confession of the defendant's co-conspirator when the co-conspirator failed to appear at trial.¹⁶² The practical necessities language of *Mattox* did not seem warranted by the circumstances in *Inadi* for two reasons. First, *Mattox* seemed to anticipate a situation where the facts and interests so pulled against rigid adherence to the right that principles of justice demanded exception.¹⁶³ Prosecutorial inconvenience does not seem to fall in that category. Second, the facts in *Inadi* were similar to *Douglas*, which found the Confrontation Clause prohibited the co-conspirator's statement.¹⁶⁴ While the confession in *Inadi* may have lacked the formality found in *Douglas*,¹⁶⁵ the cases were similar enough to warrant denying the confession. Furthermore, in *Bourjaily*, the Court categorically held that statements made during a conspiracy could be admitted without violating the Confrontation Clause.¹⁶⁶ Such categorical exceptions as this also conflict with the implied case-by-case analysis suggested in *Mattox*.¹⁶⁷ The downfall of *Roberts* may be linked to its allowance for firmly rooted hearsay exceptions to trump the right to Confrontation.¹⁶⁸ Allowing firmly rooted hearsay exceptions to take precedence over a Constitutional guarantee likely led to confusion and too much leeway in applying the necessity exception anticipated in *Mattox*.

¹⁶¹ *Roberts*, 448 U.S. at 68 n.9 (quoting Louis M. Natali, Jr., *Green, Dutton, and Chambers: Three Cases in Search of a Theory*, 7 Rutgers-Camden L.J. 43, 73 (1975) (internal quotation marks and citations omitted).

¹⁶² 475 U.S. at 400.

¹⁶³ See *Mattox*, 156 U.S. at 243.

¹⁶⁴ See, e.g., *Inadi*, 475 U.S. at 388-90; *Douglas*, 380 U.S. at 419.

¹⁶⁵ See *Id.*

¹⁶⁶ 483 U.S. at 183-84.

¹⁶⁷ 156 U.S. at 243.

¹⁶⁸ 448 U.S. at 66.

In *Coy*, the Court appropriately attempted to redirect the Court back to a more traditional reading of the Clause.¹⁶⁹ The potential exception in necessary circumstances was becoming too common and the right too exposed.¹⁷⁰ Furthermore, the Court was blurring the line between the rules of evidence and the right to confront.¹⁷¹ In two cases decided shortly after *Coy*, the Court exercised the balancing exception appropriately.¹⁷² The need in those cases was not merely prosecutorial convenience but rather an actual interest of justice that merited a non-literal application of the text.¹⁷³

With four cases in fifteen years invoking the judicial bypass, *Roberts* was stretched beyond what the Clause allowed.¹⁷⁴ Accordingly, when the Court accepted a case that would have easily been decided before *Roberts*, the Court was so fragmented as to the rationale to be employed, little consensus was achieved.¹⁷⁵

The lack of restraint in *Inadi* and *Bourjaily* led to the rigid backlash of *Crawford*. In an attempt to avoid the complete dissolution of the Confrontation Clause protection, the Court overreacted by foreclosing any possibility of a necessity exception.¹⁷⁶ This rigid application of the Sixth Amendment may have been seen as a necessary act of self-control by the Court to some. However, the strict approach taken by the Court allows for no leeway in situations that may merit excuse of the rule, even though *Mattox* and the Framers intended as much. The Court has

¹⁶⁹ 487 U.S. at 1017.

¹⁷⁰ *See, e.g., Inadi*, 475 U.S. 387; *Bourjaily*, 483 U.S. 171.

¹⁷¹ *See Roberts*, 448 U.S. at 66.

¹⁷² *See Maryland v. Craig*, 497 U.S. 836, 855 (1990) (holding that “the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits the child witness...to testify...in the absence of face-to-face confrontation with the defendant”) and *White v. Illinois*, 502 U.S. 346, 357 (1992) (holding that statements made by a child sexual abuse victim could be admitted under the spontaneous declaration and medical examination exceptions to the hearsay rule).

¹⁷³ *Id.*

¹⁷⁴ *See, e.g., Inadi*, 475 U.S. 387; *Bourjaily*, 483 U.S. 171; *Craig*, 497 U.S. 387; *White*, 502 U.S. 346.

¹⁷⁵ *See Lilly*, 527 U.S. at 139-40.

¹⁷⁶ *See Crawford*, 541 U.S. at 67.

had opportunities to hedge its interpretation in subsequent cases, but it has continued with the absolute approach.¹⁷⁷

The non-majority opinions in *Crawford*, *Davis*, and *Melendez-Diaz* recognized many of the problems with the new approach.¹⁷⁸ Chief Justice Rehnquist's concurring opinion in *Crawford* pointed out that the Court has never made testimonial the standard and criticized the Court for departing from precedent.¹⁷⁹ Justice Thomas has criticized the new interpretation as unworkable and also inconsistent with precedent.¹⁸⁰ Justice Thomas believes the Confrontation Clause should apply only to statements that fall within the core classes of testimonial statements.¹⁸¹ Finally, in Justice Kennedy's concurring opinion in *Melendez-Diaz*, four Justices pointed out many of the practical problems of the new interpretation.¹⁸² Unfortunately, none of these minority opinions failed to recognize a truly viable solution based on the original understanding of the right and the Court's precedent.

The Confrontation Clause guarantees criminal defendants the right to require the prosecution to call its witnesses to the stand and testify in open court. This right is not absolute. There are three situations where the Confrontation right must yield. First, dying declarations are a long-standing exception to the confrontation right that has been recognized since the earliest Supreme Court cases addressing the issue.¹⁸³ Second, the equitable doctrine of forfeiture by wrong-doing prevents a criminal defendant from benefiting from his own wrongful acts.¹⁸⁴

¹⁷⁷ See *Giles*, 554 U.S. at 358; *Melendez-Diaz*, 129 S. Ct. at 2532.

¹⁷⁸ See *Crawford*, 541 U.S. at 69-76 (Rehnquist C. J., concurring); *Davis*, 547 U.S. at 834-42 (Thomas, J., concurring); *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring); *Id.* at 2543-61 (Kennedy, J., dissenting).

¹⁷⁹ *Crawford*, 541 U.S. at 69-76 (Rehnquist C. J., concurring).

¹⁸⁰ *Davis*, 547 U.S. at 834-42 (Thomas, J., concurring).

¹⁸¹ *Id.*

¹⁸² *Melendez-Diaz*, 129 S. Ct. at 2543-61 (Kennedy, J., dissenting).

¹⁸³ See *Mattox* 156 U.S. at 243-44.

¹⁸⁴ See *Reynolds*, 98 U.S. 158-59.

Third, in rare cases, necessity and justice warrant exception to the general confrontation right.¹⁸⁵ Situations that may merit exception by necessity must be scrutinized through a balancing test that evaluates the benefits and burdens of applying the rule in light of America's strong preference for face-to-face confrontation.¹⁸⁶

One of the important counter-arguments to the necessity exception is that such an exception is too amorphous, thus giving courts more discretion than they are due. The fear is that such discretion is sometimes abused and puts the courts in a situation where they are making too many decisions based on policy. The developments after *Roberts* certainly gave credence to arguments for a more rigid rule. While the Court may be uncomfortable with how the courts could stretch the exception, it does not excuse deviating from precedent and the original understanding of the right. Bright line rules may be favored by some Justices, but the Framers were likely more concerned with fairness and protection from the federal government than making easy-to-apply rules. While consistency is essential in the court system, the Court must be willing to trust the system when the Constitution so demands. The Court can guard the necessity exception by building precedent that hems the rule into appropriate circumstances.

Another problem with the recent line of cases, specifically *Crawford*, relates not to the substance of the Court's rationale, but rather to the Court's failure to adequately explain how it was justified in departing from precedent. *Stare decisis* is Latin for "to stand by things decided."¹⁸⁷ In *Payne v. Tennessee*, the Court emphasized the importance of this doctrine: "[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes

¹⁸⁵ See *Mattox*, 156 U.S. at 339-40.

¹⁸⁶ See *Mattox*, 256 U.S. at 243; *Inadi*, 475 U.S. at 396.

¹⁸⁷ Black's Law Dictionary 712 (9th ed. 2009).

to the actual and perceived integrity of the judicial process.”¹⁸⁸ The Court stated that “adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.”¹⁸⁹

The following term, the Court expounded on the importance of precedent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, by declaring that “[l]iberty finds no refuge in a jurisprudence of doubt.”¹⁹⁰ The Court then pooled “a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”¹⁹¹

These considerations include:

whether the rule has proven to be intolerable simply in defying practical workability...whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation...whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine...or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.¹⁹²

The Court has recognized that “*stare decisis* is not an inexorable command.”¹⁹³ Nonetheless, the Court should have at least considered the doctrine of *stare decisis* in *Crawford*. The fact that the majority opinions in *Crawford*, *Davis*, and *Melendez-Diaz* never mention the doctrine undermines the validity, integrity, and consistency of the Court. The Court’s failure to more fully discuss its departure from precedent seems especially reproachable given that the

¹⁸⁸ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citations omitted).

¹⁸⁹ *Id.* at 827 (citation omitted).

¹⁹⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992).

¹⁹¹ *Id.* at 855.

¹⁹² *Casey*, 505 U.S. at 854-55 (quoting *Swift & Co v. Wickham*, 382 U.S. 11, 16 (1965), *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924), *Patterson v. McLean Credit Union*, 491 US 164, 173-74 (1989), and *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

¹⁹³ *Casey*, 505 U.S. at 828.

author of the majority opinions in *Crawford*, *Davis*, and *Melendez-Diaz* criticized the Court for not giving more thought to the doctrine in his dissenting opinion in *Lawrence v. Texas*.¹⁹⁴

The Court did address why it thought *Roberts* should be overruled in *Crawford*.¹⁹⁵ It did so by tracing the history of the right and then carefully proceeding through the Court's precedent.¹⁹⁶ The Court framed past decisions in a way that allowed them to say "[a]lthough the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."¹⁹⁷ While it is true many of the Court's results would have come to the same conclusions under the Court's new testimonial analysis, it was dishonest to assume that the new framework was what the Court was unsuccessfully trying to say all along. The fact that most of the cases' results would be the same under the new analysis does not mean those old decisions support the new one. The Court painted the precedent landscape in a way that made *Roberts* stand out by focusing on the results and not the means.¹⁹⁸ It also carefully avoided phraseology in early decisions like *Mattox*. After showing how *Roberts* purportedly drifted outside the line of a purportedly steady flow of precedent in favor of *Crawford*, the Court criticized *Roberts* as amorphous and too narrow to protect "core testimonial statements that the Confrontation Clause plainly meant to exclude."¹⁹⁹

While the Court adequately addressed how it believed *Roberts* was an incorrect interpretation of the Confrontation Clause, it failed to demonstrate how reversing 22-year old precedent was warranted under the *Payne* factors. The Court failed to discuss how "the rule has proven to be intolerable simply in defying practical workability."²⁰⁰ The Court also gave no

¹⁹⁴ *Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting).

¹⁹⁵ *Crawford*, 541 U.S. at 60-61

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 60.

¹⁹⁸ *See Id.* at 57-61.

¹⁹⁹ *Crawford*, 541 U.S. at 63.

²⁰⁰ *Swift & Co v. Wickham*, 382 U.S. 11, 116 (1965).

consideration to “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.”²⁰¹ The reliance interest here was likely significant as police officers and prosecutors had to change their investigative and trial techniques after the new interpretation was announced. Furthermore, while the Court arguably discussed “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine...or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification,”²⁰² as mentioned before, it misconstrued the legal landscape surrounding the Confrontation Clause.²⁰³

VII. EFFECTS OF THE NEW CONFRONTATION CLAUSE AND POTENTIAL SOLUTIONS

The new interpretation of the Confrontation Clause has created questions and problems. Since the Court has developed a new analytical framework and rule for courts to apply, there are many unanswered questions about its application.²⁰⁴ Some of these questions will be addressed by the Court in future decisions.²⁰⁵ Thus, this paper will focus more on the potential costs of the interpretation.

The new interpretation may stymie the prosecution of “cold cases.” If a case is not prosecuted quickly, the analyst who prepares a report may die or move. The new interpretation would thus serve as an informal statute of limitations on criminal cases.²⁰⁶ The new interpretation might affect more than just cases that involve laboratory reports. For example, one

²⁰¹ United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924).

²⁰² Patterson v. McLean Credit Union, 491 U.S. 164, 173-74 (1989).

²⁰³ See Crawford, U.S. 546 at 60.

²⁰⁴ See *Melendez-Diaz*, 129 S. Ct. at 2543-61 (Kennedy, J., dissenting).

²⁰⁵ The Supreme Court has granted certiorari in *Bullcoming v. New Mexico*, 226 P.3d 1 (N.M. 2010), *cert. granted*, 79 U.S.L.W. 3158 (U.S. Sept. 28, 2010) (No. 09-10876).

²⁰⁶ *Melendez-Diaz*, 129 S. Ct. at 2546 (Kennedy, J., dissenting) (quoting Carolyn Zabrycki, *Toward a Definition of “Testimonial”: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Cal. L. Rev. 1093, 1094, 115 (2008)).

key piece of evidence used in the prosecution of old murder cases is the autopsy report. In *Crawford*, the Court held that evidence is testimonial if it was “made under circumstances which would have led an objective witness to reasonably believe that they were made for use in a criminal trial.”²⁰⁷ Whether a certain autopsy report is testimonial may depend on the facts of a given case, such as whether the jurisdiction requires autopsies in all situations or merely in suspicious ones. Regardless, since coroners are usually state employees and since autopsy reports are often generated for use at a criminal, autopsy reports will probably be considered “testimonial” and thus inadmissible. Assuming the coroner who prepared an autopsy report must testify at trial, the prosecution would need to bring the case and elicit the testimony of the coroner before the coroner dies or becomes otherwise unavailable.

Second, the new interpretation will allow those charged with crimes to demand better plea agreements because of the added financial cost of trial to prosecutors. Many crime laboratories are already significantly understaffed without having to report to court several times a week.²⁰⁸ To reduce these costs, prosecutors may be more willing to offer better plea deals. Prosecutors may also be concerned about the inability of the witness to appear at trial. This is a real concern as many jurisdictions share crime laboratories.²⁰⁹ Scheduling conflicts may prevent analysts from being at all the trials in which they are scheduled to testify. Scheduling conflicts could lead to delays if trial judges choose to reschedule or wait for the analysts to appear at trial. Increased delays could detract from defendants’ right to a speedy trial and ultimately lead to dismissals based on violations of that right.²¹⁰ If trial judges do not want to wait or reschedule,

²⁰⁷ 541 U.S. at 52.

²⁰⁸ *Melendez-Diaz*, 129 S. Ct. at 2550 (Kennedy, J., dissenting).

²⁰⁹ Amber N. Gremillion, *I’ll be Seeing You in Court: Melendez-Diaz v. Massachusetts’ Flawed Decision and its Impact on Louisiana*, 37 S.U. L. Rev. 255, 274 (2010).

²¹⁰ Gremillion, 37 SU L. Rev. at 273-74.

they could dismiss cases altogether. Thus, the new interpretation may allow defendants to go unprosecuted on mere technicalities.²¹¹

There are several potential solutions to these problems. States may eliminate criminal procedure protections by making some criminal offenses civil offenses. For example, States may decriminalize certain drug offenses. Similar to ticketing, States could punish the possession of certain drugs with monetary fines.²¹² Several States have already decriminalized the possession of marijuana to some extent.²¹³ The Department of Justice reports that in 2009 there were 1,663,582 arrests for drug violations.²¹⁴ Making certain drug crimes civil offenses could thus dramatically reduce the number of criminal cases. Decriminalizing some drug offenses would also free up jail cells, thus reducing costs for States in that way as well.

States could also amend their statutes to allow greater flexibility in who may testify and how they may testify. For example, States could allow officers to testify as to the results of field tests.²¹⁵ Since the officer who makes an arrest will likely be testifying at trial anyway, this would save States from having to bring the laboratory analysts in to court for every trial. States could also broaden the scope of people allowed to testify to the contents of a laboratory report. An analyst's supervisor or peer may now testify to a report's contents, although the Supreme Court has granted certiorari on a case that will address this issue.²¹⁶ Another alternative for States is to allow analysts to testify via a live video feed. *Maryland v. Craig* has not been

²¹¹ Melendez-Diaz, 129 S. Ct. at 2550 (Kennedy, J., dissenting); Gremillion, 37 SU L. Rev. at 274.

²¹² Bradley W. Hines, *Melendez-Diaz v. Massachusetts: Forcing America to Pay the Premium for the Nation's New Confrontation Clause*, 21 Geo. Mason U. C.R. L.J. 123, 146-47 (2010).

²¹³ Alaska: *Ravin v. State*, 537 P.2d 494 (Alaska 1975); California V C Section 23222; Colorado, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio and Oregon: http://norml.org/index.cfm?Group_ID=3383

²¹⁴ U.S. Dep't of Justice, *Crime in the United States 2009*, FBI Uniform Crime Report (2010), available at http://www.fbi.gov/ucr/cius2009/data/table_29.html.

²¹⁵ Hines, 21 Geo. Mason U. C.R. L.J. at 146-47.

²¹⁶ *Bullcoming v. New Mexico*, 226 P.3d 1 (N.M. 2010), cert. granted, 79 U.S.L.W. 3158 (U.S. Sept. 28, 2010) (No. 09-10876).

overruled by the Supreme Court and is thus technically still good law.²¹⁷ Accordingly, States could adopt provisions and court rules allowing these analysts to testify through live streaming technology.

Finally, if the new interpretation proves too burdensome, the Sixth Amendment could be amended. This would obviously be a difficult, but not impossible solution. Four Supreme Court decisions have been overturned through Constitutional Amendment.²¹⁸

CONCLUSION

The right to confront one's accusers has a long history in Western society. Unfortunately, its beginnings in American jurisprudence are somewhat unclear; thus, determining what the Framers intended the Sixth Amendment Confrontation Clause to mean is uncertain. Since original intent is difficult to ascertain, the Court should look to history and precedent. Early interpretations of the right to confront suggest that the right was never meant to be absolute. Indeed, American courts have recognized automatic exceptions as well as utilized a balancing test to determine whether the right should yield to other interests. Unfortunately, the Court was unable to articulate the functionality of these exceptions in the late 20th Century. In response, the Court adopted a strict literal approach to the Confrontation Clause. This new approach comes at a great cost. As the Court continues to define and refine this new interpretation, States will adjust. If the new rule proves too unworkable, the Court will hopefully have the courage to return to its early interpretations and attempt to fashion a rule that is consistent with the earliest cases that interpreted this right.

²¹⁷ 497 U.S. 836 (1990),

²¹⁸ Michael J. Gerhardt, *The Power of Precedent*, 9 (Oxford University Press 2008).

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