2004

Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule

Thomas J Reed

CRAWFORD V. WASHINGTON AND THE IRRETRIEVABLE BREAKDOWN OF A UNION: SEPARATING THE CONFRONTATION CLAUSE FROM THE HEARSAY RULE

THOMAS J. REED*

I. INTRODUCTION

On March 8, 2004, the United States Supreme Court divorced the Confrontation Clause from the hearsay rule, overruling *Ohio v. Roberts*,[1] the

* I am grateful for the instructive comments of my colleagues, Professor Jules Epstein and Professor John F. Nivala, who helped me improve this Article.

1. 448 U.S. 56 (1980).

opinion that married them. *Crawford v. Washington*[2] reflects a retreat to the Confrontation Clause jurisprudence prior to *Roberts*. In *Roberts*, the Court held that, despite a Confrontation Clause objection, hearsay was admissible against the accused in a criminal prosecution whenever offered under a firmly rooted hearsay exception.[3] From *Roberts*, the Court generated seven major, irreconcilable Confrontation Clause decisions between 1980 and 1999,[4] and the marriage between the hearsay rule and the Confrontation Clause reached the verge of an irretrievable breakdown in 1999 when the Court failed to produce a majority opinion in *Lilly v. Virginia*.[5] *Crawford* simply ratified the *fait accompli*; the marriage was a failure.

Part II of this article examines the United States Supreme Court's rationales for admission or exclusion of out-of-court statements against the accused in criminal prosecutions since *Mattox v. United States*,[6] the ancestral Confrontation Clause case. In Part III, the paper discusses the judicial rhetoric that supported the Court's interpretation of the Confrontation Clause, identifies the strengths and weaknesses in each rationale, and documents the Court's progression toward consideration of hearsay admissibility overlapping with Confrontation Clause analysis. Part IV of this Article recounts *Lilly v. Virginia* and discusses that decision's role in separating the Confrontation Clause from the hearsay rule. Part V explains the impact *Crawford v. Washington* will have on the relationship between the Confrontation Clause and hearsay, and the reason the *Crawford* rationale for excluding some hearsay statements on Confrontation Clause grounds supports the Supreme Court's policy position. Finally, it proposes a rationale derived from *Bruton v. United*

---

2. 124 S. Ct. 1354 (2004).

3. 448 U.S. at 66.

4. *See, e.g.*, Lilly v. Virginia, 527 U.S. 116 (1999) (holding that confessions of co-perpetrators offered to inculpate the defendant violate the Confrontation Clause and therefore should be excluded); Williamson v. United States, 512 U.S. 594 (1994) (holding that only the portion of the co-perpetrator's declaration against penal interest that implicated the declarant was admissible, and excluding any part of the statement that implicated the defendant since such statement violated the defendant's Confrontation Clause right); White v. Illinois, 502 U.S. 346 (1992) (holding that a child's unsworn statement, offered under a well-recognized hearsay exception, was sufficient to satisfy the Confrontation Clause reliability requirement); Idaho v. Wright, 497 U.S. 805 (1990) (holding that a child's unsworn statement, not offered under a well-recognized hearsay exception, is insufficient to satisfy the Confrontation Clause reliability requirement—the catchall exception under Rule 807 is not a firmly rooted hearsay exception); Bourjaily v. United States, 483 U.S. 171 (1987) (holding that confessions of co-defendants were admissible as substantive evidence against the other co-defendants if the statements were made during a conspiracy, in furtherance of that conspiracy, and such facts can be proven by independent evidence); Lee v. Illinois, 476 U.S. 530 (1986) (holding that cross-implicating confessions of co-defendants were inadmissible as substantive evidence against the other co-defendant unless the statements had sufficient guarantees of trustworthiness so as not to offend the Confrontation Clause); United States v. Inadi, 475 U.S. 387 (1986) (holding that unavailability of the declarant was not required in order to admit conspirators' statements because co-conspirator's statements usually had some "independent evidentiary significance" that did not affront the Confrontation Clause).

5. 527 U.S. 116 (1999).

6. 156 U.S. 237 (1895).

States[7] that would institute a sliding scale that weighed probative value against prejudice to the accused to determine when the Confrontation Clause would block admission of hearsay in criminal prosecutions.

Before the inquest into the breakdown of the marriage begins, there are four unstated but significant assumptions behind the Court's modern Confrontation Clause jurisprudence. First, a trial is both a historical reconstruction of some past event and a search for historical truth.[8] Second, trial by jury is the paradigm for a criminal trial.[9] Third, the proper method of searching for the true reconstruction of

---

7. 391 U.S. 123 (1968).

8. *See, e.g.*, Banks v. Dretke, 124 S. Ct. 1256, 1275 (2004) ("We have several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'"); Portuondo v. Agard, 529 U.S. 61, 77 (2000) (Ginsberg, J., dissenting) (discussing the sometimes questionable testimony of defendants as it relates to the truth-seeking function of trials); Danner v. Kentucky, 525 U.S. 1010, 1010 (1998) (Scalia, J., dissenting) (asserting that a defendant's opportunity to be confronted with the witnesses against him is a Sixth Amendment right covering all witnesses in all criminal prosecutions); Mathews v. United States 485 U.S. 58, 72 (1988) (White, J., dissenting) (stressing that a criminal trial is a search for the truth rather than a game or sport); Nix v. Whiteside, 475 U.S. 157, 166 (1986) ("[T]he very nature of a trial [i]s a search for the truth.").

Although it may seem self-evident, a glance at the major Confrontation Clause cases supports the assumption that a trial is both probing and reconstructive. For instance, in *Crawford*, Justice Scalia analyzed the need for reliability in criminal adjudication:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. 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.

Crawford, 124 S. Ct. at 1370.

Reliability is the type of concern that a historian will have about historical data he uses to reconstruct an event. Other Confrontation Clause cases also show a high level of concern with accurate historical reconstruction. For example, Justice Stewart, in his concurring opinion in *Bruton v. United States*, 391 U.S. 123 (1968) stated:

> A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give.

Id. at 138 (citations omitted). Justice Stewart was concerned that a jury of lay people might err in making a historical reconstruction because of its inability to disregard a co-principal's confession so far as it incriminated the defendant. *See id.*

9. *See, e.g.*, U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); Ring v. Arizona, 536 U.S. 584, 599 (2002) (discussing the jury's power to determine whether a criminal defendant is guilty and the degree of the offense); Apprendi v. New Jersey, 530 U.S. 466 (2000) (expounding the historical foundation of trial by jury); Jones v. United States, 526 U.S. 227, 248 (1999) (expressing concern that diminution of the jury's role in a criminal trial by removing control over facts determining a statutory sentencing range would raise genuine Sixth Amendment issues); Singer v. United States, 380 U.S. 24, 36 (1965) (explaining that "[a] defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. . . . [and that it is this method] the Constitution regards as most likely to produce a fair result.").

a past event is an adversarial dialectic.[10] Fourth, the best means of extracting the truth is cross-examination of witnesses under oath in the courtroom in the presence of the jury.[11] These commonplace assumptions of popular United States jurisprudence are seldom questioned and are treated by the Court as if they were propositions in Euclidian geometry. They constitute part of the ideological support for our system of processing persons accused of antisocial conduct.

The Confrontation Clause has a special place in the structural support of these received theorems because it is a constitutional prop for the dialectical trial by jury. By construction over the past 130 years, the Supreme Court has insisted on the court appearance of accusatory witnesses[12] in criminal prosecutions. It is time to look at

---

10. *See, e.g.*, Castro v. United States, 124 S. Ct. 786, 794 (2003) (Scalia, J., concurring) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."); Portuondo v. Agard, 529 U.S. 61, 70 (2000) ("The adversary system surely envisions—indeed, it requires—that the prosecutor be allowed to bring to the jury's attention the danger that the Court was aware of."); Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

The best statement of this maxim may be found in *Singer v. United States*, in which Chief Justice Warren, speaking for a unanimous court, said:

> In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.

Singer, 380 U.S. at 36.

11. *See* 5 WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974). *See, e.g.*, California v. Green, 399 U.S. 149, 158 (1970) ("Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.") (footnote omitted).

12. "Accusatory witness" is a term of art. An accusatory witness makes an assertion about the defendant's relationship to one or more elements of a crime charged in the indictment, or an assertion about the identity of the accused. An accusatory witness is a witness "against the accused within the meaning of the Confrontation Clause." It is a better term than "testimonial evidence" as used by Justice Scalia, who stated that the Confrontation Clause applies only to "testimonial" evidence. He then laid out examples of "testimonial evidence": testimony in prior hearings in the same criminal prosecution, depositions, and unsworn statements made to police officials. Crawford v. Washington, 124 S. Ct. 1354, 1364 (2004).

the way in which the Court has structured its invocation of the Confrontation Clause as the bedrock support for the adversarial dialectic.

II. THE CONFRONTATION CLAUSE CASES: *MATTOX* TO *ROBERTS*

The Supreme Court implicitly believes that law is evolutionary: legal rules evolve from a simple prohibition into a complex organization of prohibitions, exceptions, exclusions and exceptions to exclusions, and exceptions as the result of decisions by appellate courts.[13] Legal doctrine accretes like barnacles on a piling as jurists construe concrete situations in which the legal doctrine is thought to apply. The evolution of law from a simple command to complex multi-tiered commands via judicial interpretation was easier to defend in the nineteenth century than it is today. *Crawford* is a fine example of judicial lawmaking by mutation and by

---

Justice Scalia wrote:

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 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.

Id. (citations omitted).

By inference, then, that testimonial hearsay is a formal declaration made to prove a fact. *See id.* That definition seems to exclude informal statements, such as spontaneous utterances, but includes any formal declaration that proves or disproves a fact, thereby requiring testimony to consist of assertive statements. Since Scalia includes unsworn statements to police officers and dying declarations as testimony, "formal" does not mean a statement given under oath. *See id.* at 1364, 1367 n.6. Moreover, "formal" excludes any casual remark or explanation, such as spontaneous utterances or present sense impressions, because these hearsay declarations are inherently casual statements made at or shortly after perceiving some event. *See id.* at 1367. Additionally, "formal" does not mean declarations in business or government records, because Justice Scalia refused to characterize such hearsay declarations as "testimonial," irrespective of how solemn the secretary recording the business or government record happened to be at the time of making the entry. *Id.* at 1367. For all these reasons, I choose to describe the kind of statement affected by the Confrontation Clause as an accusation and the witness who makes the statement in court or outside of court as an accusatory witness.

13. See *Rogers v. Tennessee*, 532 U.S. 451 (2001) for an example of the belief that law evolves:

> 'The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles. It was on account of concerns such as these that *Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'

Id. at 461 (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)). *See also* Desist v. United States, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting) ("One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation.").

natural selection. To understand why this is so, one must go back to *Mattox v. United States*.[14]

A. Mattox

Mattox was a routine murder prosecution for a homicide committed in 1889 in Indian Territory, which was "part of the . . . judicial district of Kansas."[15] Mattox's first trial resulted in a conviction the U.S. Supreme Court overturned.[16] His second trial ended in a hung jury, and Mattox was retried a third time.[17] Two of the Government's witnesses who had testified in the first trial died before the second trial.[18] The United States moved certified copies of the deceased witnesses' testimony from the first trial into evidence over defense counsel's objections that doing so violated Mattox's rights under the Confrontation Clause of the Sixth Amendment.[19] Although the Court did not report the substance of the dead witnesses' testimony, the abstract of record submitted to the Court by the plaintiff in error showed that Thomas Whitman (deceased) identified Mattox as the perpetrator of the homicide and said Mattox shot the victim without provocation.[20] Deputy United States Marshal George Thornton (deceased) took Whitman's oral statement shortly after the homicide and instructed Whitman not to tell anyone that he had identified Mattox as the murderer.[21] Thornton then corroborated Whitman's in-court identification with Whitman's out-of-court oral statement identifying the perpetrator.

The plaintiff in error and the United States did not spend much time or effort briefing the Confrontation Clause issue. Nonetheless, the Supreme Court chose this case to construct a judicial foundation for admitting out-of-court statements accusing the defendant of criminal acts despite the Confrontation Clause's insistence on live confrontation in court.

In his opinion, Justice Brown reviewed some of the English precedent for in-court confrontation of the accused. He reasoned that the use of prior sworn evidence at trial of the same case by a person now dead was not excluded by a 1696 House of Lords decision in the case of Sir John Fenwick, because English precedent was "clearly the other way." Justice Brown indicated that Peake cited the case

---

14. 156 U.S. 237 (1895).

15. Mattox v. United States, 146 U.S. 140, 141 (1892).

16. *Id.* at 153. The Court reversed the first conviction because the lower court ignored juror affidavits of misconduct in the jury room. The jurors had been tainted by a bailiff's comment on the defendant's guilt and by a newspaper article that condemned Mattox and was circulated among the jury members. *Id.* at 147-51.

17. Brief of Plaintiff in Error at 2, Mattox v. United States, 156 U.S. 237 (1895) (No. 667).

18. *Mattox*, 156 U.S. at 240.

19. *See id.* at 239.

20. Brief of Plaintiff in Error at 5, 7, Mattox v. United States, 156 U.S. 237 (1895) (No. 667).

21. *Id.* at 27-29.

incorrectly in his work on evidence.[22] Although Justice Brown did not explain the necessity of reviewing ancient English case law to decide Mattox's claim that the prosecution was barred from using sworn testimony from a dead witness, he reviewed case law from several states that had interpreted similar confrontation clauses in their state constitutions. He concluded that former sworn testimony from a witness now dead was admissible in many states.[23]

Justice Brown then characterized the purpose of the Confrontation Clause:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him 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. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. 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.[24]

Justice Brown was an originalist. In his view, the guarantees contained in the Bill of Rights were immutable; they were forever fixed in granite in 1791 when

---

22. *See Mattox*, 156 U.S. at 240-41 (discussing Peake's work); *see also* Crawford v. Washington, 124 S.Ct. 1354, 1361-62 (2004) (discussing admission of a witness examination where the witness was "spirited away").

23. *Mattox*, 156 U.S. at 241-44.

24. *Id.* at 242-43.

ratified by the states.[25] Despite this position, Justice Brown approved of a form of "exigent circumstances" reasoning: if the Constitution apparently required all accusative testimony against the accused to be delivered at trial by live witnesses under oath, that constitutional right must be balanced against the other demands of society, especially when considering the admissibility of evidence from witnesses who are dead.[26] He concluded that former testimony of a dead witness under oath in a prior proceeding in the same case was admissible because the accused had an opportunity to confront and cross-examine the witness in a former proceeding.[27]

Mattox is the foundation for all modern Confrontation Clause law. The Court laid down a general rule that witnesses who accuse the defendant of wrongdoing must appear in court to give testimony and be cross-examined in order to satisfy the Confrontation Clause.[28] It also laid down an exception: If an accusatory witness is dead, but gave sworn testimony subject to the right of cross-examination during a prior hearing in the same criminal prosecution, the former testimony of the dead witness may be admitted for the truth of the matter contained therein.[29] This compromise was better than acquitting the accused for lack of sufficient evidence. Justice Brown did not discuss the hearsay rule and its relationship with the

---

25. Justice Brown stated:

> We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected.

Mattox v. United States, 156 U.S. 237, 243 (1895).

26.

> Justice Brown acknowledged that dying declarations were admitted despite the lack of confrontation, but that this admission was a historical anomaly. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.

Id. at 243-44.

27. *Id.* at 244.

28. *Id.* at 243.

29. *Id.* at 244. Justice Brown did not consider any generalized statement relating to unavailability of a witness from any cause other than death.

Confrontation Clause probably because defense counsel did not contend that the Confrontation Clause excluded all hearsay.[30]

B. Pointer *through* Mancusi v. Stubbs

For more than sixty years after *Mattox*, criminal defendants were prosecuted and convicted using unsworn hearsay statements by absent witnesses. In federal practice, the exclusionary rule following from the Confrontation Clause lay virtually dormant until the 1960s.[31] A notable series of cases decided between 1965 and 1972 revived the rule.

In 1965, the Supreme Court reconsidered the Confrontation Clause objection to former testimony in *Pointer v. Texas*.[32] Pointer and his accomplice, Dillard, were charged with armed robbery. At their preliminary hearing, neither Pointer nor Dillard had a lawyer. The State called Phillips, who identified Pointer as the man who robbed him at gunpoint, but Pointer did not cross-examine Phillips.[33] Because Phillips was unavailable as a State's witness at trial, the State introduced a transcript containing Phillips' damaging testimony from the preliminary hearing.[34] The jury convicted Pointer, and the Texas Court of Criminal Appeals affirmed the conviction.[35] In his petition for certiorari, Pointer asserted his conviction was unconstitutionally obtained because the Fourteenth Amendment incorporated the standards of the Sixth Amendment, including right to counsel and effective cross-examination, into state criminal trials.[36] The United States Supreme Court agreed and reversed the Court of Criminal Appeals.[37]

Justice Black's opinion stressed the importance of cross-examination and the fundamental unfairness associated with denial of the right to cross-examine an accusatory witness: "[t]he decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases."[38]

---

30. *See id.* at 240, 248-50.

31. *Salinger v. United States*, 272 U.S. 542, 547-48 (1926), is one exception to this dormancy. The Court, over a Confrontation Clause objection, sustained the admission of letters sent to the accused in the ordinary course of business to show the nature and extent of the accused's fraudulent scheme. *Id.*

32. 380 U.S. 400 (1965).

33. The District Attorney presented the State's case against the two men before the court in what was known as an "examining trial" under then-current Texas criminal procedure. Phillips, a witness, moved to California before the trial and arguably was beyond the reach of process. The State offered the transcript of Phillips' testimony at trial under the former testimony exception to the hearsay rule, despite defense counsel's Confrontation Clause objections. *Id.* at 401-02.

34. *Id.* at 401.

35. *Id.* at 402.

36. *See id.* at 402-03.

37. *Id.* at 406-08.

38. Pointer v. Texas, 380 U.S. 400, 404 (1965) (footnote omitted).

Justice Black made no historical analysis of the original reasons for including the Confrontation Clause in the Bill of Rights, but he indicated that the right to confront and to cross-examine one's accusers was part of federal constitutional law, applicable to the states via the Fourteenth Amendment.[39] Consequently, Pointer was entitled to have a lawyer cross-examine his accusers.[40] The Court held that because Pointer did not have a lawyer at the preliminary hearing, the testimony of the unavailable accusatory witness was inadmissible.[41] Justice Black acknowledged that other circumstances may warrant different treatment, but this case did not present those circumstances.[42]

> This Court has recognized the admissibility against an accused of dying declarations, and of testimony of a deceased witness who has testified at a former trial. Nothing we hold here is to the contrary. The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. There are other analogous situations which might not fall within the scope of the constitutional rule requiring confrontation of witnesses.[43]

The Court concluded that Pointer was not confronted by his accuser because Pointer was denied the right to counsel at the preliminary hearing. As a result, the Court reversed and remanded the case for a new trial.[44]

Three years later, the Supreme Court dealt with a similar issue in *Barber v. Page*.[45] Barber was indicted in Oklahoma state court for armed robbery. His accomplice, Woods, turned state's evidence and testified against him in a preliminary hearing. Although Barber had appointed counsel at the hearing, he did not cross-examine Woods.[46] At trial, the State did not produce the accomplice, who was incarcerated in a federal penitentiary in Texarkana, Texas. Instead, the State offered the accomplice's testimony from the preliminary hearing.[47] Barber was convicted and subsequently exhausted his state and federal appellate rights. Barber

---

39. *Id.* at 403, 406.

40. *Id.*

41. The Court reasoned: "Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Id.* at 406-07 (citation omitted).

42. *Id.* at 407.

43. *Id.*

44. Pointer v. Texas, 380 U.S. 400, 407-08 (1965).

45. 390 U.S. 719 (1968).

46. *Id.* at 720.

47. *Id.*

then petitioned the district court for a writ of habeas corpus, which the district court denied and the Court of Appeals for the Tenth Circuit affirmed.[48] On certiorari, the United States Supreme Court reversed Barber's conviction because the State did not make a good faith attempt to produce the accomplice witness at trial.[49] The Court required that the prosecution's foundation for admission of former testimony of an unavailable witness includes evidence that the prosecution made a good faith effort to locate and produce the witness before offering former testimony.[50] The Court did not engage in a historical analysis of the original intent of the Framers, or the customs and practices of our supposed English forebearers prior to 1791 in order to reach this *Mattox* corollary.

California v. Green[51] was the third case in the series reasserting the fundamental principles underlying the Confrontation Clause. Green was charged with possession of marihuana with intent to sell. The State's primary witness, sixteen year-old Melvin Porter, had been arrested for selling marihuana. After being taken into custody, Porter gave a police officer an unsworn statement[52] identifying Green as the person who asked him to sell "some 'stuff'" over the phone and as the person who delivered the shopping bag containing the marihuana.[53] Porter was a witness at Green's preliminary hearing; however, Porter retracted some of his earlier unsworn statement. Nevertheless, Porter testified that he received a call from Green asking him to sell "some 'stuff'" and that a little while later he obtained the marihuana from a bag located in the backyard of Green's parents' home.[54] At trial, Porter stated he was unable to recall any of the events of the sale.

---

48. *Id.* at 724-26.

49. *Id.* at 724-25.

50. The Court stated:

> [T]he state authorities made no effort to avail themselves of either of the above alternative means of seeking to secure Woods' presence at petitioner's trial. The Court of Appeals majority appears to have reasoned that because the State would have had to request an exercise of discretion on the part of federal authorities, it was under no obligation to make any such request. Yet as Judge Aldrich, sitting by designation, pointed out in dissent below, "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. The State made no such effort here, and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly.

Id. (citation omitted).

51. 399 U.S. 149 (1970).

52. *Id.* at 190-91 (Brennan, J., dissenting).

53. Police officer Wade recounted a portion of Porter's statement as follows: "Porter claimed that Green had called him earlier that month, had asked him to sell some 'stuff' or 'grass,' and had that same afternoon personally delivered a shopping bag containing 29 'baggies' of marihuana. It was from this supply that Porter had made his sale to the undercover officer." *Id.* at 151.

54. *Id.* at 152.

Thus, he was "unavailable" as a witness under California law.[55] As a result, the State introduced his preliminary hearing transcript and his unsworn statement at trial.[56] Green was convicted, but his conviction was overturned by the California District Court of Appeals and affirmed by the California Supreme Court on Sixth Amendment grounds because Green's right to confront Porter at trial was violated.[57] On certiorari, the United States Supreme Court restored the conviction, holding that Green's right to confrontation under the Confrontation Clause was not violated because Porter was a live witness who appeared at the preliminary hearing, and he was subject to cross-examination.[58] Justice White, writing for the majority, reasoned that the Confrontation Clause did not mandate that an effective cross-examination take place, only that the court extend the opportunity to the defendant to conduct cross-examination.[59] Therefore, Green's accuser confronted him in court.[60]

The Court did not make a lengthy examination of the original grounds for the Confrontation Clause. Justice White related, however, that the Clause was linked to the revulsion of the English people to the secret trial of Sir Walter Raleigh, against whom the perjured confession of Cobham was introduced without opportunity for cross-examination.[61] The Court admonished the petitioner's suggestion that Porter's unsworn testimonial statement should not have been admitted just because a majority of states excluded such statements. The Court declared that it did not sit in judgment on evidence issues, only on the constitutional

---

55. *Id.*

56. *Id.*

57. California v. Green, 399 U.S. 149, 153 (1970).

58. *Id.* at 158.

59. Justice White stated:

> Second, the inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial. The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant. We cannot share the California Supreme Court's view that belated cross-examination can never serve as a constitutionally adequate substitute for cross-examination contemporaneous with the original statement. The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness's "[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth."

Id. at 159 (alteration in original) (quoting State v. Saporen, 285 N.W. 898, 901 (1939)).

60. *See id.* at 162-64.

61. *Id.* at 157 n.10. *See also* Crawford v. Washington, 124 S.Ct. 1354, 1360 (2004) (discussing the emergence of a right to confrontation after Sir Raleigh's conviction and death sentence when a letter and examination from his alleged accomplice were read to the jury).

principles underlying the trial.[62] Finally, the Court held that the Fourteenth Amendment did not mandate exclusion of Porter's unsworn statement, which was admissible under Section 1235 of the California Evidence Code.[63]

The fourth case in the series, *Mancusi v. Stubbs*,[64] involved different procedural matters. Stubbs was convicted of a felony in New York and received an enhanced sentence as a second offender because he had a prior Tennessee murder conviction in 1964.[65] He exhausted his appellate rights and filed a federal habeas corpus petition. In his petition, Stubbs claimed his 1964 conviction was in violation of his Sixth and Fourteenth Amendment rights, and as a result, he argued the New York court could not give him an increased sentence under the second offender statute.[66] In 1954, Stubbs kidnaped Mr. and Mrs. Alex Holm in their car at gunpoint. Near Bristol, Tennessee, Stubbs shot both victims, then fled the car. As a result of the gun shot wounds, Mrs. Holm died[67] and Stubbs was apprehended and tried for her murder.[68] Mr. Holm testified at the trial and Stubbs was convicted.[69] The verdict and judgment of conviction were set aside on appeal and a second trial was scheduled for 1964. Meanwhile, Mr. Holm had taken up permanent residence in Sweden and the state of Tennessee made no attempt to contact Mr. Holm in Sweden to see if he would travel to the United States to testify at the second trial.[70] Instead, the State offered a transcript of Mr. Holm's testimony from the 1954 trial over defense counsel's Constitution-based objection.[71]

Stubbs' counsel mistakenly argued that 28 U.S.C. § 1783(a) permitted the State to obtain a subpoena from a United States District Court to compel Mr. Holm to testify.[72] Justice Rehnquist revisited *Barber*, and said the State was not required to ask the Swedish government to compel Mr. Holm to cross the Atlantic to demonstrate its good faith.[73] The Court briefly considered the adequacy of the

---

62. *See Green*, 399 U.S. at 155-56.

63. California v. Green, 399 U.S. 149, 164 (1970) (citing CAL. EVID. CODE § 1235 (Deering 1966)).

64. 408 U.S. 204 (1972).

65. *Id.* at 205.

66. *Id.* at 208.

67. *Id.*

68. *Id.*

69. *Id.* at 209.

70. Mancusi v. Stubbs, 408 U.S. 204, 209 (1972).

71. See *id.* at 207-09 for a complete discussion of the 1954 trial and conviction. Stubbs' 1954 conviction was overturned in 1964 because the district court held that he had been denied effective assistance of counsel since his attorney only had four days to prepare for a murder trial. *Id.* at 209 (citing Stubbs v. Bomar, Civil Action No. 3585 (M.D. Tenn. 1964)).

72. *Id.* at 211-12 (citing 28 U.S.C. § 1783(a) (1958) (amended 1964)).

73. *Id.* at 210-13. The Court said:

> The Uniform Act to secure the attendance of witnesses from without a State, the availability of federal writs of habeas corpus *ad testificandum*, and the established practice of the United States Bureau of Prisons to honor state writs of habeas corpus *ad testificandum*, all supported the Court's conclusion in *Barber* that the State had not met its obligations to make a good faith effort to obtain the

direct questioning and cross-examination of Mr. Holm in the 1954 trial and concluded that Stubbs' Confrontation Clause rights were protected during his first murder trial.[74] As a result, Stubbs' conviction was upheld.[75]

The Court decided four cases between 1965 and 1972 where the prosecution offered the former sworn testimony of an unavailable witness from another hearing in the same criminal prosecution. The Court did not make a searching originalist inquiry into the underlying history of the Confrontation Clause in any of the four cases. Instead, the Court reviewed each case on two issues: (a) adequacy of the former testimony and (b) unavailability of the witness at trial.[76] "Adequacy" meant that the former testimony was given under oath at a hearing where the defendant was present and represented by counsel having an opportunity to cross-examine the witness. "Unavailability" meant that, at the time of trial, the prosecution could not compel the witness to testify. A witness was "unavailable" if he was beyond the jurisdiction and not amenable to subpoena power or other means of taking the witness' evidence, or if the witness appeared at trial and claimed to have no memory of the events at issue. The former testimony exception to the hearsay rule required that (a) the witness be unavailable and that (b) the former testimony come from a prior hearing in the same criminal prosecution. The Court required the prosecution to make a showing of good faith before using former testimony but failed to conclude that the Confrontation Clause and the hearsay rule were soul mates.

In *Pointer*, the accused was constitutionally entitled to legal counsel, yet he did not have counsel at his preliminary hearing. As a result, the witness's testimony at the preliminary hearing was constitutionally inadequate to preserve confrontation. Therefore, the former testimony was inadmissible at trial because the witness did not "confront" Pointer.[77] The dialectical truth-finding process required a cross-examiner. In *Barber*, the former testimony of the accomplice was adequate because Barber had counsel at the preliminary hearing and, thus, had the opportunity to cross-examine the witness. However, the witness was not "unavailable" at trial because the State made no effort to obtain the absent witness's presence by using one of the available compulsory processes. The Court held the former testimony

---

> presence of the witness merely by showing that he was beyond the boundaries of the prosecuting State. There have been, however, no corresponding developments in the area of obtaining witnesses between this country and foreign nations. Upon discovering that Holm resided in a foreign nation, the State of Tennessee, so far as this record shows, was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government. We therefore hold that the predicate of unavailability was sufficiently stronger here than in *Barber* that a federal habeas court was not warranted in upsetting the determination of the state trial court as to Holm's unavailability.

Id. at 212-13 (internal citation omitted).

74. Mancusi v. Stubbs, 408 U.S. 204, 214-16 (1972).

75. *Id.* at 216.

76. *See supra* Part II.B.

77. *See supra* notes 32-44 and accompanying text.

inadmissible because the prosecution used the hearsay exception in bad faith.[78] In *Mancusi*, according to the Court, the witness was "unavailable" because no compulsory process existed to compel Mr. Holm to return to the United States to testify. Stubbs was present and represented by counsel who cross-examined Mr. Holm at the 1954 trial. Mr. Holm's 1954 testimony was therefore adequate and admissible at the second trial.[79] In *Green*, Porter gave "adequate" testimony at Green's preliminary hearing. Green was present at the preliminary hearing and was represented by counsel who had an opportunity to cross-examine Porter. Furthermore, Green's attorney could have cross-examined Porter at the trial on both the statements he made in his unsworn statement and his preliminary hearing testimony. Porter was "unavailable" at trial because he claimed to have no recollection of any of the events that he described in his preliminary hearing testimony. His former testimony and his voluntary, out-of-court statement to the police were admissible, in part, because Porter took the stand at trial, and the accused could cross-examine Porter about his two out-of-court statements.[80]

In each case, the Court protected the dialectical truth-finding process against the specter of unilateral untested evidence. The evidence was deemed sufficiently reliable to satisfy the hearsay exception for former testimony. The implicit policy behind the Confrontation Clause—the belief in the adversarial dialectic as the best means of ascertaining truth—outweighed the need for efficient use of trial time or speedy retribution for offenders in *Pointer* and *Barber*. However, the Court opted for efficiency in *Mancusi* and *Green*. The Court perceived a relationship between the former testimony exception to the hearsay rule and the Confrontation Clause but did not articulate any theoretical unity of purpose that covered the hearsay rule and the Confrontation Clause. An enhanced former testimony exception in criminal prosecutions resulted from these cases; the courtship ensued.

III. *OHIO V. ROBERTS* AND ITS OFFSPRING

In 1980, the Court compelled a shotgun wedding between the hearsay rule and the Confrontation Clause through *Ohio v. Roberts*[81] by rewriting the rationale for excluding evidence based on the Confrontation Clause.[82] Roberts was charged with check forgery and possession of stolen credit cards belonging to Bernard Isaacs and his wife. Roberts was a guest of the Isaacs' daughter, Anita, and claimed that Anita gave him her parents' checks and credit cards without telling him that she lacked permission to use them.[83] At the preliminary hearing, Roberts' lawyer called Anita as a defense witness. She testified that she did not authorize Roberts to use her

78. *See supra* notes 45-50 and accompanying text.
79. *See supra* notes 64-75 and accompanying text.
80. *See supra* notes 51-63 and accompanying text.
81. 488 U.S. 56 (1980).
82. *Id.* at 63-66.
83. *Id.* at 58.

father's checks and credit cards. Roberts' lawyer did not request permission to treat Anita as a hostile witness.[84] By the time Roberts' trial started in March of 1976, Anita was not living in Ohio, and her whereabouts were unknown.[85] Despite Roberts' Confrontation Clause objection, the prosecution moved her former testimony into evidence under Ohio's version of the former testimony exception to the hearsay rule.[86] The jury in the Court of Common Pleas convicted Roberts and judgment was entered, but the Ohio Court of Appeals reversed the judgment because the State failed to make a good faith effort to find Anita Isaacs.[87] The Ohio Supreme Court affirmed the court of appeals' ruling, but for a different reason: the defendant's failure to cross-examine Anita at the preliminary hearing made her testimony inadmissible because defense counsel did not in fact cross-examine her.[88] However, the United States Supreme Court in reversing the Ohio Supreme Court and reinstating Roberts' conviction, found that Roberts' confrontation rights had been adequately protected at the preliminary hearing.[89] That holding alone was neither revolutionary nor surprising.[90] The revolution occurred in the decision's rationale.

---

84. *Id.*

85. *Id.* at 59-60. Roberts' trial was scheduled four different times between November 1975 and March 1976. Each time a trial was scheduled, a subpoena was issued for Anita Isaacs, and she never responded. A diligent search produced no results and the only clue as to her whereabouts was her parents' report that, a year earlier, she had spoken to them by phone from San Francisco with the assistance of a social worker. *Id.*

86. Ohio v. Roberts, 448 U.S. 56, 59 (1980). Ohio's former testimony exception to the hearsay rule is as follows:

> Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

Id. at 59 n.2 (quoting OHIO REV. CODE ANN. § 2945.49 (Anderson 1975)).

87. *Id.* at 60.

88. State v. Roberts, 378 N.E.2d 492, 496 (Ohio 1978). *See also Roberts*, 448 U.S. at 60-62 (discussing the procedural history of the cases leading up to the grant of certiorari).

89. *Id.* at 77. Under the rationale of *Mancusi*, Anita Isaacs' statement during the preliminary hearing was a fair substitute for her in-court testimony at trial since she was unavailable as a witness, and because the statement was made under oath when defense counsel had the opportunity to use leading questions with the court's permission to test Isaacs' truthfulness. *Id.* at 70-73.

90. *See* Mancusi v. Stubbs, 408 U.S. 204 (1972).

The Court married the Confrontation Clause to the hearsay rule.[91] Acknowledging that the Confrontation Clause was meant to exclude some kinds of hearsay, the Court also emphasized that cross-examination was so important to the reconstruction of the events at trial that its absence "calls into question the ultimate 'integrity of the fact-finding process.'"[92] In addition, the Court insisted that confrontation ensures evidence is given under oath while the jury processes the testimony, and it discourages witnesses from lying.[93] Having made a strong case for in-court confrontation, the Court did an about-face and claimed that "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial."[94] The Court asserted that it balanced the competing interests of confrontation with public policy favoring effective law enforcement and the development of precise rules of evidence.[95] Jumping from this assertion without segue, the Court declared that the Confrontation Clause is intimately related to the hearsay rule because both rules curb the admissibility of hearsay.[96] First, the Confrontation Clause curbs hearsay by requiring the declarant's unavailability.[97] Second, the prosecution must establish that the hearsay is "marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'"[98] These two principles were a restatement of Dean Wigmore's general theory of admissibility for hearsay rule exceptions, promulgated in his 1912 treatise on evidence.[99] An astute reader could infer that any hearsay that met Dean Wigmore's admissibility test could also satisfy the Confrontation Clause. The Court noted that

---

91. The Court expressed this union:

> The historical evidence leaves little doubt . . . that the Clause was intended to exclude some hearsay. Moreover, underlying policies support the same conclusion. The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that "a primary interest secured by [the provision] is the right of "cross-examination." In short, the clause envisions "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him 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."

Ohio v. Roberts, 448 U.S. 56, 63-64 (1980) (quoting Mattox v. United States, 156 U.S. 237, 242-43 (1895) (alteration in original) (internal citations and footnotes omitted)).

92. *Id.* at 64 (internal quotation marks omitted) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (quoting Berger v. California, 393 U.S. 314, 315 (1969))).

93. *Id.* at 63-64 n.6.

94. *Id.* at 64 (citation omitted).

95. *Id.*

96. *Id.* at 65-66.

97. Ohio v. Roberts, 448 U.S. 56, 65 (1980). However, the Court contradicted its general statement: "A demonstration of unavailability, however, is not always required. In *Dutton v. Evans*, 400 U.S. 74 (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness." *Id.* at 65 n.7.

98. *Id.* at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)).

99. 3 WIGMORE, EVIDENCE § 1420-22 (2d ed. 1922).

the hearsay rule and the Confrontation Clause "protected similar values."[100] It held that firmly-rooted hearsay-exception evidence satisfied the Confrontation Clause because such evidence had an appropriate "indicia of reliability" to offset the absence of face-to-face confrontation.[101] Since the former testimony exception to the hearsay rule was part of the common law and the Federal Rules of Evidence, it was just that kind of firmly rooted hearsay that was immune from Confrontation Clause objections.[102]

The Court rewrote its Confrontation Clause jurisprudence in *Roberts* without any historical exegesis on the original intent and meaning of the Sixth Amendment. The vigorous dissent by Justice Brennan was based on the prosecution's inability to show that Anita Isaacs was truly unavailable as a witness.[103] Nonetheless, the dissent did not disagree with the majority's new formula for admitting hearsay statements of witnesses against the accused.[104] For better, or for worse, the hearsay rule and the Confrontation Clause were intimately joined.

This shotgun wedding made all hearsay declarations subject to the Confrontation Clause. The Confrontation Clause required either face-to-face confrontation of the accuser and the accused, or a foundation showing of (a) the accuser's unavailability, and (b) information otherwise admissible under one of the traditional common-law hearsay exceptions or exclusions. Almost immediately, the Court encountered difficulty with its new doctrinal formula when it was applied to a conspirator's hearsay statements offered by the prosecution when the conspirator was available as a witness.

A. Conspirator's Admissions and the Confrontation Clause

United States v. Inadi[105] involved a drug conspiracy prosecution of members of a methamphetamine ring operating in Cape May, New Jersey, and Philadelphia,

---

100. *Roberts*, 448 U.S. at 66 (quoting California v. Green, 399 U.S. 149, 155 (1970)).

101. *Id.* The Court concluded:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability 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.

Id. at 66 (footnote omitted).

102. The Court quickly determined that the Confrontation Clause only required the opportunity to conduct effective cross-examination, not that a defendant actually conducts effective cross-examination during a former hearing in the same case. It also determined the prosecution, in good faith, could not have made Anita Isaacs available as witness. *See* Ohio v. Roberts, 448 U.S. 56, 70-77 (1980).

103. *Id.* at 79-80 (Brennan, J., dissenting).

104. *Id.* at 77-79.

105. 475 U.S. 387 (1986).

Pennsylvania.[106] Cape May County police made a warranted search of a Cape May house, allegedly the site of a methamphetamine lab, and removed from the house a tray containing methamphetamine that had been set out to "dry."[107] The police then placed a wire tap on the house's phone and intercepted five telephone calls between the alleged conspirators.[108] Three of those calls involved Inadi and other unindicted conspirators. These calls contained Inadi's own statements in furtherance of the conspiracy, but one call between Marianne Lazaro and Michael McKeon accused Inadi of "setting up" the other conspiracy members. This constituted an identification statement showing Inadi was part of the ring.[109] At trial, the United States Attorney introduced the wire tap recordings of the five telephone conversations even though the conspirators who made the statements were available as witnesses.[110] Defense counsel made a Confrontation Clause objection, arguing the United States failed to show the conspirators were unavailable.[111] Counsel made this objection despite the fact that some courts, pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, have admitted a conspirator's statement in furtherance of a conspiracy without a foundation showing unavailability of the conspirator.[112] The district court overruled the objection, but the Third Circuit reversed, holding that *Roberts* required that the unindicted co-

---

106. According to the statement of facts in the Third Circuit's decision in *Inadi*, Joseph Inadi was indicted for conspiring to manufacture and distribute methamphetamines. His unindicted conspirators were John Lazaro, Jr., his wife, Marianne Lazaro, Michael McKeon, and William Levan. United States v. Inadi, 748 F.2d 812, 814 (3d Cir. 1984).

107. *Id.*

108. *Id.* at 815.

109. *Id.*

110. According to the Third Circuit:

> The linchpins of the government's case were five telephone conversations recorded between May 23 and May 27, 1980 by the Cape May County Prosecutor's Office as part of their own investigation of Lazaro. The jury heard three conversations between Inadi and John Lazaro—one recorded on May 23, in which Lazaro seems to ask, in code, for a quantity of methamphetamine for the weekend, and reports on the residue missing from the Cape May house, suggesting that "Mike" probably took it; another recorded on the morning of Sunday, May 25 arranging the meeting at Frankie Masters; and one recorded on May 27 in which Lazaro reports that he kicked "that piece" under his car during the May 25 DEA stop, and wonders how the agents were tipped off.
>
> In a conversation between McKeon and Marianne Lazaro recorded on May 27, she describes the May 25 incident and suggests that Inadi might have set them up. McKeon assures her that Inadi was not an informant. In a May 27 conversation between John Lazaro and William Levan, there is further discussion of the missing Cape May residue (with Lazaro again suggesting that "Mike" took it), and more speculation over who set Lazaro up for the May 25 stop.

Id.

111. *Id.*

112. *See* FED. R. EVID. 801(d)(2)(E) (stating an admission by a party-opponent manifesting an adoption or belief in its truth is not hearsay).

conspirators confront the accused in court if available as witnesses.[113] The Court in *Roberts* said that unavailability of a witness was a condition precedent to the use of hearsay.[114] The Department of Justice filed a certiorari petition and the U.S. Supreme Court accepted certiorari.[115]

The majority held that unavailability of the declarant was not required in order to admit co-conspirators' statements.[116] The opinion made an unsupportable distinction between the statements of co-conspirators and former testimony. Former testimony required a foundation showing the declarant was unavailable as a witness because it was intended to replace live testimony, but unavailability of the witness was not a part of the foundation for admitting co-conspirators' statements because co-conspirators' statements usually had some "independent evidentiary significance."[117]

Apparently, the Court believed nothing could be gained by demanding that the co-conspirator be unavailable as a witness before admitting the co-conspirator's statement. Moreover, the Court acknowledged that co-conspirators' statements could be replicated even if the co-conspirator was available as a witness and

---

113. United States v. Inadi, 478 F.2d 812, 819 (3d Cir. 1984).

114. *See* Ohio v. Roberts, 448 U.S. 56, 65 (1979).

115. United States v. Inadi, 475 U.S. 387, 391 (1986).

116. *Id.* at 400.

117. The Court's language is difficult to understand and difficult to reconcile:

> There are good reasons why the unavailability rule, developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements. Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. But if the declarant is unavailable, no "better" version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point.
>
> Those same principles do not apply to co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court. When the Government—as here—offers the statement of one drug dealer to another in furtherance of an illegal conspiracy, the statement often will derive its significance from the circumstances in which it was made. Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand. Even when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy.

Id. at 394-95 (citation omitted).

testified at trial.[118] The Court recognized that a statement by one conspirator was imputed by law to all other conspirators if made during the life of the conspiracy and in furtherance of the conspiracy, regardless of whether any of them were aware of the act.[119] This blinded the Court to the fact that each accusing conspirator was giving testimony without the onus of an oath and against the accused, without any opportunity for cross-examination. Although the prosecution offered the out-of-court statement as a conspiratorial utterance, it could just as well have been offered as a declaration against the utterer's penal interest.

B. *Victim Statements Identifying the Perpetrator in Child Sexual Assault Cases*

In *Idaho v. Wright*,[120] the prosecution introduced a child victim's hearsay identification statement made to a physician in order to prove the accused was the perpetrator. Although the statement was admissible under Idaho's version of Rule 803(4) of the Federal Rules of Evidence, it was admitted as a special exception to the rule—a unique form of hearsay meeting a three-pronged test under Rule 803(24), the predecessor of Rule 807.[121] Wright was charged with sexually assaulting his two minor children, and his wife was charged with being an accessory to the sex crimes. The Wrights' youngest daughter had identified her father as her attacker to a pediatrician who examined her for signs of sexual abuse.[122] However, she was not able to give testimony during trial because "[t]he court concluded, and the parties agreed, that [she] was not capable of communicating to the jury."[123] As a result, the prosecution offered her statement to the pediatrician under Idaho's version of the catch-all exception to the hearsay rule over defense counsel's Confrontation Clause objections.[124] The Idaho Supreme Court reversed Wright's conviction because she was not confronted by her accuser, and the U.S. Supreme Court sustained the decision on certiorari.[125] The Court found that hearsay offered under the catch-all exception was presumptively unreliable because it was not offered under a firmly rooted hearsay exception, and as a result, the prosecution had to supply a special guarantee of trustworthiness to satisfy the Confrontation

---

118. *Id.* at 396-98.

119. *See id.* at 395-96; FED. R. EVID. 801(d)(2)(E).

120. 497 U.S. 805 (1990).

121. *Id.* at 811-12, 817; *see also* IDAHO R. EVID. 807 (formerly rules 803(24) and 804(b)(5)) (permits admission of hearsay that does not fit into one of the specific hearsay exceptions or exclusions under Rules 801(d), 803, or 804 when (1) there is no other more accessible source for the information; (2) there is a special guarantee of reliability for the hearsay; and (3) the interests of justice will be served by admission of the statement).

122. *Wright*, 497 U.S. at 809-11.

123. *Id.* at 809.

124. *Id.* at 809-12.

125. *Id.* at 812-13.

Clause.[126] In other case law, the Court described some factors that qualify as special intrinsic guarantees of trustworthiness, such as spontaneity, consistent repetition, use of terminology unexpected for a youngster, lack of a motive to fabricate, and the child's overall mental state when giving the statement.[127] After applying these factors to the youngest daughter's statements, the Court acknowledged the unreliablity and inadmissibility of such statements.[128] Even though the Court did not mention that two of the three prongs of the test for hearsay admissibility contained in Idaho Rules of Evidence Rule 803(24) included a substantial guarantee of trustworthiness and a showing that the hearsay was required in the interest of justice, once the Confrontation Clause and the hearsay rule were married, the Court quietly adopted the general test for hearsay admissibility and explained what would have established the reliability of the statement.

The admissibility of a child victim witness identification statement resurfaced in *White v. Illinois*.[129] A very young victim of a sexual assault identified the perpetrator in statements made to her aunt, to an examining physician, and to a social worker at the time she was examined for rape-trauma. The prosecution offered the statement made to the aunt as a spontaneous declaration, and the statements to the physician and social worker as statements made for medical treatment—two long-time hearsay exceptions recognized by Illinois law.[130] At trial, even though the child witness was not called, and the prosecution made a poor showing of unavailability, the trial court admitted the statements over defense counsel's Confrontation Clause objections. Moreover, the Illinois Appellate Court and the United States Supreme Court sustained the admission.[131] The Court's rationale was predictable: the prosecution offered the child sex offense victim's unsworn statement under well-recognized hearsay exceptions such that the Confrontation Clause was satisfied.[132] Unavailability of the witness was not a condition precedent to admitting hearsay against the accused in a child sex abuse prosecution.[133]

Wright and *White* show that pigeonholes matter. Both cases dealt with admissibility of child victim statements identifying perpetrators. Both victims were

---

126. Idaho v. Wright, 497 U.S. 805, 817-18 (1990).

127. *Id.* at 821-22. *See, e.g.*, State v. Robinson, 735 P.2d 801, 811 (Ariz. 1987) (noting spontaneity and consistent repetition as factors that qualify as special intrinsic guarantees of trustworthiness); Morgan v. Foretich, 846 F.2d 941, 948 (4th Cir. 1988) (considering mental state of the declarant in determining guarantees of trustworthiness); State v. Sorenson, 421 N.W.2d 77, 85 (Wis. 1988) (stating that use of terminology unexpected of a child of similar age should be considered in determining trustworthiness); State v. Kuone, 757 P.2d 289, 292-293 (Kan. 1988) (acknowledging that lack of motive to fabricate is a factor in analyzing trustworthiness).

128. *Wright*, 497 U.S. at 826-27.

129. 502 U.S. 346 (1998).

130. *Id.* at 348-49.

131. *Id.* at 351, 355-56.

132. *Id.* at 355-56.

133. *Id.*

at or below the minimum mental qualifications to be witnesses. Both victims identified the perpetrator to helping professionals during initial diagnosis and treatment. Neither victim was able to give coherent testimony at trial. The victims' prior statements became essential to the prosecution of the alleged sex offender. The prosecution in *White* used two traditional hearsay exceptions for its victim's statement, whereas in *Wright*, the prosecutor chose the catch-all exception to introduce the victim's statement. The outcome of the Confrontation Clause objection should not turn on the prosecution's selection of a hearsay exception for this evidence.

C. *The Baffling Contradictory Handling of Declarations Against Penal Interest*

Although the rule since 1975 has been that an unavailable witness's declaration—one that would subject the witness to prosecution for criminal behavior—is universally admissible,[134] prior to 1975, many jurisdictions refused to admit declarations against penal interest at common law on grounds of lack of reliability.[135] At times, when a witness is also the accused, the witness may make a statement to law enforcement authorities that is a declaration against penal interest and an admission of guilt. Incidentally, the statement may also accuse another as a co-perpetrator or co-conspirator. Until the 1960s, the confession of a co-defendant that also implicated the other defendant was admitted with a cautionary instruction telling the jury not to use the confession in weighing the guilt of the other defendant.[136] The confessing co-defendant was "unavailable" as a witness because the Fifth Amendment affords him the right not to take the stand and testify against himself. Implicitly, the confessing co-defendant's testimony was admitted against the other defendant even though that other defendant had no opportunity to cross-examine him. Consequently, the non-confessing defendant might very well be convicted without being afforded his right to cross-examine an accusatory witness.[137]

The United States Supreme Court finally addressed this issue in *Bruton v. United States*.[138] Bruton and Evans were accused of postal robbery. Evans confessed to a postal inspector that he and Bruton committed the armed robbery. At a joint trial, Evans' confession was admitted against him with a cautionary instruction to the jury not to use the confession against Bruton.[139] Nonetheless, both

---

134. Once a foundation showing the unavailability of the declarant has been laid, then the declarant's statements, that arguably would subject the declarant to criminal liability, are admissible. FED. R. EVID. 804(b)(3).

135. *See* 5 WIGMORE, EVIDENCE § 1476-77 (Chadbourn rev. 1974).

136. *See* Delli Paoli v. United States, 352 U.S. 232, 237-38 (1957).

137. *See id.*

138. 391 U.S. 123 (1968).

139. *Id.* at 124-125.

defendants were convicted. The United States Supreme Court set aside Bruton's conviction, however, on the ground that Bruton was substantially prejudiced by the inability to cross-examine his co-defendant about the alleged confession.[140] In other words, the Supreme Court overruled *Delli Paoli v. United States*.[141] The Court stated that the Sixth Amendment guarantees effective cross-examination of adverse testimonial witnesses.[142] The Court noted that when a co-defendant's confession is offered at a joint trial, cross-examination of the accuser—an elemental part of Confrontation Clause rights—is foreclosed.[143] The resulting conclusion: either sever the trials of joint perpetrators or exclude confessions of the perpetrators.

The Court's logic was that the defendant's Sixth Amendment confrontation rights were slight because the confessing co-defendant's statement incriminated the confessor and simultaneously pointed a guilty finger at his co-defendant.[144] Similar logic should exclude statements made by a co-conspirator that identified his part in the conspiracy and also accused another person as a member of the conspiratorial plot. However, that was not the view taken by the Court in *Dutton v. Evans*.[145] Evans, Williams, and Truett were charged with the murder of three Gwinnett County police officers. Evans and Williams were tried separately. Truett turned state's evidence and was not tried.[146] At Evans' trial, the prosecution called Shaw, a prisoner in the federal penitentiary with Williams, to testify about a conversation he had with Williams where Williams incriminated himself and Evans.[147] The prosecution chose to offer this statement as a co-conspirator's statement rather than as Williams' declaration against penal interest, because Georgia law extended the

---

140. *Id.* at 137.

141. *Id.* at 126.

142. *Id.* (quoting Pointer v. Texas, 380 U.S. 400, 404, 406-07 (1965)).

143. The Court stated:

> We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse.

Id.

144. Bruton v. United States, 391 U.S. 123, 131 (1968) (citing People v. Aranda, 63 Cal. 2d 518, 528-29 (1965)).

145. 400 U.S. 74 (1970).

146. *Id.* at 76.

147. The Court described this episode as follows:

> One of the 20 prosecution witnesses was a man named Shaw. He testified that he and Williams had been fellow prisoners in the federal penitentiary in Atlanta, Georgia, at the time Williams was brought to Gwinnett County to be arraigned on the charges of murdering the police officers. Shaw said that when Williams was returned to the penitentiary from the arraignment, he had asked Williams: "How did you make out in court?" and that Williams had responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now."

Id. at 77.

conspirator's statement exception to include co-conspirators' statements made during the "cover-up" phase of the conspiracy. Subsequently, Evans was convicted and sentenced to death.[148] After exhausting his appeals, Evans applied for federal habeas corpus on Confrontation Clause grounds, which was denied by the district court.[149] The Fifth Circuit reversed, however, finding that Evans' Confrontation Clause rights had in fact been violated.[150] The Supreme Court overturned the Fifth Circuit on certiorari.[151] In holding that the Sixth Amendment did not require the states to follow the federal rule for admissibility of co-conspirator's statements, the Court indicated that Georgia was free to have a different kind of hearsay exception for conspirators that was more extensive than the federal rule.[152] Thus, Georgia's evidentiary rule did not violate the Constitution. Surprisingly, the Court did not comment on the fact that Evans had no opportunity to confront and cross-examine his co-defendant. If the *Bruton* decision meant anything at all, it meant that the accusatory statement of an unavailable co-conspirator should have been excluded.

In the last decade of the twentieth century, two cases tackled the question of whether the Confrontation Clause would exclude otherwise admissible declarations against penal interest. The first case, *Lee v. Illinois*,[153] was consistent with *Bruton*. Lee and his accomplice, Thomas, were accused of the murder of Lee's aunt, Beedie, and her companion Odessa Harris. Both Lee and Thomas gave the police signed confessions to the murders. Not only did the confessions implicate the declarant, but they also implicated the other as a co-perpetrator.[154] The co-defendants were tried together, yet each had separate counsel. At trial, both confessions were admitted with the understanding that each confession would only be considered as evidence against the declarant.[155] Despite the trial judge's agreement to "consider the evidence separately for each defendant," he admitted that he "expressly relied on Thomas' confession and his version of the killings" when determining Lee's guilt.[156] As a result, Lee was found guilty and sentenced to prison.[157] Lee appealed to no avail, through the state court system, alleging a violation of her Confrontation Clause right.[158] On July 1, 1985, the Supreme Court granted certiorari.[159]

---

148. *Id.* at 76.
149. *Id.*
150. *Id.*
151. Dutton v. Evans, 400 U.S. 74, 80 (1970).
152. *See id.* at 80-81. "We cannot say that the evidentiary rule applied by Georgia violates the Constitution merely because it does not exactly coincide with the hearsay exception applicable in the decidedly different context of a federal prosecution for the substantive offense of conspiracy." *Id.* at 83.
153. 476 U.S. 530 (1986).
154. *Id.* at 532-36.
155. *Id.* at 536.
156. *Id.* at 536, 538.
157. *Id.* at 538.
158. *Id.* at 538-39.
159. Lee v. Illinois, 473 U.S. 904, 904 (1985).

The Court held that cross-implicating confessions of co-defendants were inadmissible as substantive evidence against the other co-defendant unless the statements had sufficient "indicia of reliability."[160] Although an admission was firmly rooted in the law of evidence, the Court felt very uncomfortable with a per se rule admitting any declaration by an accused that also implicated a co-defendant. A per se rule would undercut *Roberts*, which had come perilously close to redefining the Confrontation Clause as a clone of the hearsay rule.[161] Going one step further, the Court acknowledged that the purpose of the Confrontation Clause was to protect the accused from conviction on presumptively unreliable evidence and insisted that the prosecution produce more particularized internal guarantees of trustworthiness to justify admission of the cross-confessions: corroboration was not enough.[162] Incidentally, the co-defendant's cross-confessions were also declarations against penal interest, though not offered under that exception.

Williamson v. United States[163] was a second case addressing declarations against penal interest and the Confrontation Clause. Williamson was convicted of possessing cocaine with intent to distribute, based on the statement of Harris. Harris was apprehended by North Carolina state police while driving a carload of controlled substances to a North Carolina rendezvous on behalf of Williamson. After his arrest, Harris gave to DEA Agent Walton a statement implicating himself and Williamson.[164] Harris was called as a witness at trial, but refused to answer any questions even after a grant of use immunity. Consequently, the district court allowed DEA Agent Walton to repeat Harris's story.[165] Williamson was convicted,

---

160. Lee v. Illinois, 476 U.S. 530, 542 (1986).

161. This was one of the salient points made by Professor Richard D. Friedman in a Georgetown Law Journal article cited in the *Crawford* decision. *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1019 (1998).

162. *Lee*, 476 U.S. at 543. The Court reasoned:

> Our cases recognize that this truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally . . . . More than this, however, the arrest statements of a co-defendant have tradition traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence."

Id. at 541 (quoting *Bruton*, 391 U.S. at 141 (White, J., dissenting) (citations omitted)).

163. 512 U.S. 594 (1994).

164. *Id.* at 597.

165. *Id.* The district court concluded:

> The ruling of the Court is that the statements . . . are admissible under [Rule 804(b)(3)], which deals with statements against interest.
>
> First, defendant Harris' statements clearly implicated himself, and therefore, are against his penal interest.
>
> Second, defendant Harris, the declarant, is unavailable.
>
> And third, as I found yesterday, there are sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony.

and his conviction was affirmed by the Eleventh Circuit.[166] After considering the real meaning of "declaration against interest," the United States Supreme Court vacated the judgment of the Court of Appeals and remanded the case.[167]

Although the Court refused to decide whether Williamson's Confrontation Clause rights were abridged, the plurality opinion specifically stated: "We note, however, that the very fact that a statement is genuinely self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause."[168]

In summary, *Lee* and *Williamson* struggled with the admissibility of a witness's or an accomplice's statement that pointed an accusatory finger at the defendant and at the declarant. The *Bruton* decision excluded the confession of an accomplice or co-perpetrator on Confrontation Clause grounds, despite the requisite indicia of reliability.[169] Finally, the *Roberts* opinion married the Confrontation Clause and the hearsay rule. Apparently, since the confession of the accomplice in *Bruton* was inadmissible even though it came within a well-recognized hearsay exclusion or exception, and *Roberts* permitted admission of hearsay under a well-recognized exception, *Bruton* was overruled *sub silencio* in 1980.[170] The Court in *Williamson* decided that only the portion of the co-perpetrator's declaration against penal interest that implicated the declarant was admissible, and it excluded any part of the statement that implicated the defendant. The jury, properly instructed, would not be allowed to consider any part of the declaration against interest against the accused, except for the portions of the statement that accused the declarant. In *Lee*, the Court rejected cross-implicated confessions of co-perpetrators, which were also declarations against the penal interest of the declarants, because of a desire to ensure reliability. The Court seemed to be searching for a way to reject reliable hearsay brought against the accused in a criminal prosecution, and to tie Confrontation Clause issues to a higher degree of reliability than the hearsay rule exception required. This was a partial repudiation of the *Roberts* doctrine that hearsay offered under a well-recognized hearsay exception satisfied the Confrontation Clause. The ensuing struggle faced by the Court was the inability to digest and process the contradiction between *Bruton* and *Roberts*.

> Therefore, under [*United States* v. *Harrell*, 788 F. 2d 1524 (11th Cir. 1986)], these statements by defendant Harris implicating [Williamson] are admissible.

Id. at 597-98 (alterations in original) (citation omitted).

166. Williamson v. United States, 981 F.2d 1262, 1262 (11th Cir. 1992).

167. *Williamson*, 512 U.S. at 599-605.

168. *Id.* at 605.

169. *See supra* Part III.C.

170. *See supra* Part III.

IV. THE BREAKDOWN IN *LILLY V. VIRGINIA*

Lilly v. Virginia[171] was the "irretrievable breakdown" between the Confrontation Clause and the hearsay rule. The chasm was induced by the unresolved tension between the Court's attempt to marry the Confrontation Clause to the hearsay rule and to preserve the *Bruton*-based doctrine that admissible hearsay could be excluded by the Confrontation Clause when the danger of misuse by the jury was too great. Benjamin Lilly, his brother Mark, and Mark's roommate, Gary Barker, burglarized a home on December 4, 1995. They came away with three loaded guns, nine bottles of liquor, and a safe. After drinking the liquor, the three men robbed a country store, kidnaped Alex DeFilippis, and murdered him.[172] The police apprehended the perpetrators, and Mark Lilly made a tape-recorded statement where he admitted committing the initial home burglary and participating in a liquor store robbery. Mark's statement claimed that he had nothing to do with shooting DeFilippis and that Benjamin was the mastermind behind DeFilippis's murder.[173]

Benjamin was tried separately for murder. Mark was called to testify for the prosecution, but he refused to answer questions on Fifth Amendment, self-incrimination grounds. The Commonwealth promptly offered Mark's audiotaped confession into evidence as a declaration against penal interest.[174] The Virginia version of the declaration against penal interest exception to the hearsay rule required a preliminary showing of the declarant's unavailability, which was satisfied by Mark's refusal to answer questions. This hearsay exception was well-recognized in Virginia.[175] Defense counsel objected on two grounds. First, the statements did not fit within the "against penal interest" definition since they merely shifted blame to the other co-perpetrators and; second, admission of the statements violated the defendant's Confrontation Clause right.[176] Both objections were overruled because the trial judge, and later, the Supreme Court of Virginia, concluded that Mark's confession met the foundation requirements for the declaration against interest hearsay exception, and de facto, satisfied the Confrontation Clause at the same time.[177] The United States Supreme Court accepted certiorari because it was concerned that the Virginia courts made "a significant departure from our Confrontation Clause jurisprudence."[178] The Court reversed and remanded,[179] although the rationale for the decision is nearly unintelligible.

---

171. 527 U.S. 116 (1999).
172. *Id.* at 120.
173. *Id.* at 120-21.
174. *Id.* at 121.
175. *See id.* at 122.
176. *Id.* at 121-22.
177. Lilly v. Virginia, 527 U.S. 116, 122 (1999).
178. *Id.* at 123.
179. *Id.* at 140.

Lilly is a fragmented decision in five parts. All Justices concurred in Part I, the statement of facts.[180] Part II analyzed Virginia's contention that the Court lacked jurisdiction to review the admission of Mark Lilly's declaration against penal interest because it was a matter of state law.[181] All Justices concurred that the Court had jurisdiction to review the admissibility of the declaration.[182] Part III analyzed Virginia's contention that the issue of admissibility was determined by Virginia's declaration against interest exception to the hearsay rule, a firmly rooted hearsay exception; however, the Court concluded that the constitutional validity of admitting a declaration against penal interest was a federal constitutional issue for the Court.[183] Part IV defined a "firmly rooted" hearsay exception as one that: "if, in light of 'longstanding judicial and legislative experience,' it 'rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the 'substance of the constitutional protection.'"[184]

The plurality opinion, written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, examined the kinds of declarations against penal interest generally admitted in criminal prosecutions and broke them down into three kinds. Type One consisted of those declarations against interest which are voluntary admissions against the out-of-court declarant;[185] Type Two consisted of statements of an unavailable declarant confessing to the commission of the crime offered by the defendant to support a claim that the declarant actually committed the crime;[186] and Type Three consisted of evidence offered to prove the guilt of the defendant's accomplice.[187] Type One declarations against interest are routinely admitted and do not violate the Confrontation Clause. Type Two statements have been routinely admitted since *Chambers v. Mississippi*,[188] because the statements are exculpatory and are part of the defendant's right to conduct a meaningful defense.[189] Type Three statements are confessions of co-perpetrators offered to inculpate the defendant and are not generally admissible.[190] The plurality found that Mark Lilly's confession fell into Type Three and should be excluded.[191]

Part V of the opinion challenged the Supreme Court of Virginia's finding that Mark's confession was reliable.[192] The plurality held the confession unreliable,

180. *Id.* at 119.
181. *Id.* at 123.
182. *Id.* at 119.
183. Lilly v. Virginia, 527 U.S. 116, 123-25 (1999).
184. *Id.* at 126 (alteration in original) (citations omitted).
185. *Id.* at 128.
186. *Id.* at 129.
187. *Id.* at 130.
188. 410 U.S. 284, 299 (1973).
189. *Lilly*, 527 U.S. at 130.
190. Lilly v. Virginia, 527 U.S. 116, 134 (1999).
191. *Id.*
192. *Id.* at 135-39.

even though corroborated by other evidence at trial and voluntarily made.[193] Part VI reversed and remanded the case to the Supreme Court of Virginia for further proceedings.[194] Justices Scalia and Thomas, and Chief Justice Rehnquist each wrote separate concurring opinions.[195]

Justice Breyer, writing his own concurring opinion, asserted it was time for the Court to revisit its jurisprudential support for the modern interpretation of the Confrontation Clause.[196] He said: "*Amici* in this case, citing opinions of Justices of this Court and the work of scholars, have argued that we should reexamine the way in which our cases have connected the Confrontation Clause and the hearsay rule."[197] Justice Breyer noted that the Court's marriage of the Confrontation Clause and the hearsay rule was a byproduct of *Roberts*. He then asserted that the Confrontation Clause was an ancient common-law principle inherited from England that appeared in the plays of Shakespeare and the Bible, as well as in acts of Parliament.[198] Justice Breyer claimed that the Court's current Confrontation Clause doctrinal support is "both too narrow and too broad."[199] First, the doctrinal rule would permit admission of an accomplice's confession as an admission or a declaration against interest because the confession fits a well-recognized hearsay exception.[200] Second, the same rule would exclude a hearsay statement that is "only tangentially related to the elements in dispute," such as a business record, unless it met a well-recognized hearsay exception.[201] Justice Breyer then concluded that the doctrinal foundation did not have to be reexamined in order to decide *Lilly* and thus left that reexamination to another time and place.[202]

Justice Scalia's separate opinion concurred in the remand to determine whether admission of Mark Lilly's confession was harmless error.[203] Justice Thomas's concurring opinion stressed his agreement with Chief Justice Rehnquist's view that

---

193. *Id.* at 137-38.
194. *Id.* at 139-40.
195. *Id.* at 130.
196. Lilly v. Virginia, 527 U.S. 116, 140-43 (1999).
197. *Id.* at 140 (citation omitted).
198. Justice Breyer stated that:

> [t]he Court's effort to tie the Clause so directly to the hearsay rule is of fairly recent vintage [compare *Roberts* with *California* v. *Green*], while the Confrontation Clause itself has ancient origins that predate the hearsay rule . . . . The right of an accused to meet his accusers face-to-face is mentioned in, among other things, the Bible, Shakespeare, and 16th- and 17th-century British statutes, cases, and treatises. As traditionally understood, the right was designed to prevent, for example, the kind of abuse that permitted the Crown to convict Sir Walter Raleigh of treason on the basis of the out-of-court confession of Lord Cobham, a co-conspirator.

Id. at 140-41 (citations omitted).
199. *Id.* at 141.
200. *Id.*
201. *Id.* at 142.
202. Lilly v. Virginia, 527 U.S. 116, 141-42 (1999).
203. *Id.* at 143.

the Confrontation Clause did not exclude all statements of accomplice witnesses.[204] He criticized the plurality's holding that a declaration against interest, admissible under a firmly rooted hearsay exception, required special, extra guarantees of trustworthiness in order to be admissible under the Confrontation Clause. He also disagreed with the command to lower appellate courts to conduct an independent, non-deferential review of the factual basis of the Government's proof of special guarantees of trustworthiness.[205] The Chief Justice argued that Mark's fifty-page confession was simply not a declaration against penal interest as described in the law of evidence.[206] Mark's confession simply consisted of statements implicating Benjamin in the murder of DeFilippis and in no way incriminated himself.[207] Therefore, according to the Chief Justice, Mark's confession was inadmissible under the *Bruton* rule.[208]

In sum, the Court was unable to agree on the proper doctrinal rule to support the exclusion of Mark Lilly's confession. The Chief Justice believed that the confession should have been excluded under the *Bruton* rule because an accomplice has the motive to clear himself of blame by implicating the other offenders as principal perpetrators of the crime charged. The plurality decided that declarations against penal interest made by an accomplice, although admissible under a firmly rooted hearsay exception, require special guarantees of reliability to conform to the strictures of the Confrontation Clause. Justice Breyer seemed to share the plurality's viewpoint, but called for a wholesale review of the doctrinal foundation for the marriage of the Confrontation Clause and the hearsay rule. He seemed to be asking for a divorce, or more properly, an annulment, based on a mistaken historical analysis in *Roberts*. The *Lilly* decision virtually guaranteed a reexamination of *Roberts* the next time a Confrontation Clause case came before

---

204. *Id.*

205. *Id.* at 149. "We have said that 'deferential review of mixed questions of law and fact is warranted when it appears that the district court is "better positioned" than the appellate court to decided the issue in question.'" *Id.* (citation omitted).

206. *Id.* at 145.

207. Lilly v. Virginia, 527 U.S. 116, 146 (1999).

208. The Chief Justice explained:

> Not only were the incriminating portions of Mark Lilly's confession not a declaration against penal interest, but these statements were part of a custodial confession of the sort that this Court has viewed with "special suspicion" given a codefendant's "strong motivation to implicate the defendant and to exonerate himself." Each of the cases cited by the plurality to support its broad conclusion involved accusatory statements taken by law enforcement personnel with a view to prosecution. These cases did not turn solely on the fact that the challenged statement inculpated the defendant, but were instead grounded in the Court's suspicion of untested custodial confessions. The plurality describes [*Dutton* v. *Evans*] as an "exception" to this line of cases, but that case involved an accomplice's statement to a fellow prisoner, not a custodial confession.

Id. at 146-47 (alteration in original) (citations omitted).

the Court, and thus compelled the Court to grant certiorari in the case of Michael D. Crawford on his conviction for assault and attempted murder.[209]

V. *CRAWFORD V. WASHINGTON*

In *Crawford v. Washington*,[210] the United States Supreme Court finally overruled *Ohio v. Roberts*,[211] divorcing the Confrontation Clause and the hearsay rule because of an irreconcilable breakdown of the relationship.

On August 5, 1999, Michael Crawford and his wife Sylvia went to Kenneth Lee's apartment. Sometime that night Michael Crawford and Lee argued, and as a result, Michael Crawford stabbed Lee.[212] When Mr. and Mrs. Crawford were arrested that evening, the police took two taped statements from both suspects.[213] According to this first set of statements, the Crawfords and Lee had met at Lee's apartment; Michael Crawford left to buy liquor; and when he returned, he caught Lee making sexual advances toward his wife. The altercation and stabbing followed.[214]

The second set of statements, taken five hours after the first round of questioning, elicited a different story. According to the Crawfords' second version of the stabbing, Lee sexually assaulted Mrs. Crawford several weeks earlier. The assault provoked Michael Crawford's anger and he decided to seek out Lee. The Crawfords then went to Lee's apartment, and after a short interlude of talk, Michael Crawford stabbed Lee. In the second statement, Michael Crawford stated that Lee had something in his hand *at the time*, indicating that Lee had a weapon. Mrs. Crawford, however, stated that Lee may have grabbed something *after* he was stabbed, not before.[215]

---

209. *See* Crawford v. Washington, 124 S. Ct. 1354 (2004).

210. *Id.*

211. 448 U.S. 56 (1980).

212. State v. Crawford, 54 P.3d 656, 658 (Wash. 2002).

213. *Id.*

214. *Id.*

215. *Id.* at 658. The second statement of Michael Crawford regarding the fight was as follows:

> Q. Okay. Did you ever see anything in [Lee's] hands?
> A. I think so, but I'm not positive.
> Q. Okay, when you think so, what do you mean by that?
> A. I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.

Crawford v. Washington, 124 S. Ct. 1354, 1357 (2004) (alteration in original) (internal quotation marks omitted).

Mrs. Crawford's statement, although similar in many respects to her husband's, contained the following contradiction about the fight:

The State charged Michael Crawford with attempted first-degree murder while armed with a deadly weapon and first-degree assault while armed with a deadly weapon.[216] At trial, he claimed he acted in self-defense. The prosecution called Mrs. Crawford, but her husband asserted the Washington privilege for confidential communications between spouses.[217] The prosecution then introduced her two statements under the declaration against interest exception to the hearsay rule.[218] Crawford objected on hearsay and Confrontation Clause grounds, but the objections were overruled[219] and he was convicted. On appeal, the Washington Court of Appeals reversed Crawford's conviction in an unreported opinion. The prosecution appealed to the Washington Supreme Court, which reinstated Crawford's conviction, finding that his wife's two statements—made as an accessory or

---

> Q. Did Kenny do anything to fight back from this assault?
> A. (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.
> Q. After he was stabbed?
> A. He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).
> Q. Okay, you, you gotta speak up.
> A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).
> Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?
> A. Yeah, after, after the fact, yes.
> Q. Did you see anything in his hands at that point?
> A. (pausing) um um (no).

Id. (alteration in original) (internal quotation marks omitted).

216. State v. Crawford, 54 P.3d 656, 658 (Wash. 2002).

217. The Washington marital privilege reads as follows:

> A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian, nor to a proceeding under chapter 70.96A, 71.05, or 71.09 RCW: *PROVIDED*, That the spouse of a person sought to be detained under chapter 70.96A, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

WASH. REV. CODE ANN. § 5.60.060(1) (West 2003).

218. Crawford v. Washington, 124 S. Ct. 1354, 1358 (2004).

219. *Id.*

accomplice—were declarations against penal interest that satisfied the reliability standards of the Confrontation Clause because her statements interlocked with her husband's two statements.[220]

The Court granted Crawford's certiorari petition, reversed his conviction, and remanded his case for further proceedings.[221] As Chief Justice Rehnquist pointed out in his concurrence, the wife's declaration against penal interest could have been excluded under existing post-*Roberts* precedent,[222] but the majority chose to decree a divorce between the Confrontation Clause and the hearsay rule, as called for by Justice Breyer in *Lilly*.[223]

Justice Scalia delivered a long, deliberate, citation-studded presentation of the "original position" of the Confrontation Clause in the legal history of the United States and England. Echoing and elaborating on Justice Breyer's paragraph-long legal history note in *Lilly*, Scalia asserted that the principles behind the Confrontation Clause were older than the hearsay rule and the United States Constitution.[224] The roots of the Confrontation Clause go back to the inception of

---

220. *Id.* The Washington Supreme Court adopted a very complex test for indicia of reliability respecting declarations against penal interest and the Confrontation Clause:

> First, the statements must be admissible under the rules of evidence. Second, the statements must contain a sufficient indicia of reliability and trustworthiness to satisfy the requirements of the confrontation clause. A firmly rooted exception to the hearsay rule will satisfy this requirement. If the exception is not firmly rooted, then the court will consider nine nonexclusive factors to determine the relative reliability of the hearsay statements. (n.3 The nine factors include: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.) Alternatively, the indicia of reliability test can be met if the statements "interlock" in accordance with our decision in *Rice*.

State v. Crawford, 54 P.3d 656, 661 (Wash. 2002) (citations omitted).

221. *Crawford*, 124 S. Ct. at 1354.

222. *Id.* at 1378 (Rehnquist, C.J., concurring).

223. *Id.* at 1374. *See* Lilly v. Virginia, 527 U.S. 116, 141-43 (1999) (Breyer, J., concurring).

224. The majority opinion unfolded the confrontation principle's history:

> The right to confront one's accusers is a concept that dates back to Roman times. The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.
>
> Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before

pretrial examinations of witnesses conducted by justices of the peace under two statutes enacted during the first and second years of Philip and Mary's reign.[225] Then, pretrial examinations under oath were admitted at subsequent trials of the accused, even if the accused demanded that the Crown produce the witness in court. The King's courts, after the Glorious Revolution of 1688, limited the use of pretrial examinations of accusatory witnesses at trial to occasions where a witness was unavailable.[226] Justice Scalia's legal history commentary also detailed the lack of legislative history behind the Sixth Amendment and the recognition of in-court confrontation by the states before 1900, and ventured another look at *Mattox*.[227]

Justice Scalia used this originalist inquiry to show that the Confrontation Clause was never intended to be the unwilling groom to the hearsay rule. The English antecedents of the Confrontation Clause were limits on canonical proof of facts in the English court system.[228] Justice Scalia also disengaged the Confrontation Clause from the rules of evidence, claiming that if the law of evidence controlled issues of confrontation, the Confrontation Clause would be disabled.[229] Of course, that was the practical effect of the *Roberts* decision and its progeny.[230] If the hearsay rule and the Confrontation Clause were identical, then the Confrontation

---

> trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.* the witnesses against him, brought before him face to face." In some cases, these demands were refused.
>
> Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century. These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. Whatever the original purpose, however, they came to be used as evidence in some cases, resulting in an adoption of continental procedure.

Crawford v. Washington, 124 S. Ct.1354, 1359-60 (2004) (citations omitted).

225. *Id.* at 1360.

226. *Id.*

227. *Id.* at 1362-69.

228. Justice Scalia examined Confrontation Clause history:

> First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Id. at 1363.

229. *Id.* at 1364-67.

230. *See supra* Part III.

Clause would disappear when out-of-court accusatory statements were offered against the accused.[231]

Justice Scalia's second proposition was that unavailability of the witness is the only excuse for failing to confront the accused with accusatory witnesses.[232] Nothing else will suffice to meet a constitutionally-sanctioned exception to a universal confrontation requirement.[233] At this point, *Roberts'* linking of the Confrontation Clause to firmly rooted hearsay exceptions is about to break. Justice Scalia argued that testimonial evidence cannot be introduced when the declarant is unavailable unless taken under oath at a proceeding where the defendant was present and able to cross-examine the declarant.[234] However, Justice Scalia acknowledged that a dying declaration does not offend the Confrontation Clause, despite the fact that a declaration identifying the perpetrator or the cause of death is surely testimonial and confrontation is impossible.[235]

---

231. The Court reasserts the Confrontation Clause's independent impact on proceedings:

> [W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 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. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

Crawford v. Washington, 124 S. Ct. 1354, 1364 (2004) (citations omitted).

232. *Id.* at 1366-67.

233. The Court asserts:

> The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.

Id. at 1365-66 (alteration in original) (citations and footnote omitted).

234. *Id.* at 1374.

235. Justice Scalia addressed this exception to the general rule and stated:

> The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

Id. at 1367 n.6.

Justice Scalia laid down a rationale to support admission or exclusion of out-of-court statements under the new Confrontation Clause rule. First, he proposed that the Court's Confrontation Clause decisions since *Mattox* are supported by a new rationale: testimonial hearsay is inadmissible under the Confrontation Clause unless (a) the witness is unavailable, and (b) the defendant had a prior opportunity to cross-examine the witness.[236] This is the most interesting part of the *Crawford* opinion, because it is an attempt to show that the Court "got it right" even though the premise is wrong.[237] Justice Scalia claimed that post-*Roberts* decisions would have come out the same had the new rule been the rule of decision.[238] Starting with *Lee v. Illinois*, the new rationale would support the Court's decision: the new rationale would have excluded the accomplice's declaration against penal interest because it was testimonial, not made under oath, and not subject to an opportunity for cross-examination.[239]

Justice Scalia claimed that the Court's *Lilly* decision excluded a testimonial statement when the accused had no opportunity to cross-examine the declarant.[240] Scalia also characterized *Bourjaily v. United States* as a case where the Court admitted a co-conspirator's "blurt" statement made to an FBI informer "after applying a more general test that did *not* make prior cross-examination an indispensable requirement"; however, Justice Scalia did not indicate why the "more general test" waived the accused's right to testimony under oath with contemporary cross-examination.[241]

Furthermore, Justice Scalia asserted that even *White v. Illinois* was not a decision in violation of the new rationale. The case involved admissibility of child victim hearsay that probably would not have been admitted in 1791. If one assumed that the spontaneous utterance exception to the hearsay rule existed in 1791, it required a nearly contemporaneous utterance, not one delayed by hours or days. Justice Scalia stopped short of saying that *White* would not survive the new

---

236. *Id.* at 1369.

237. Crawford v. Washington, 124 S. Ct. 1354, 1369 (2004).

238. *Id.*

239. Justice Scalia acknowledged:

> *Lee v. Illinois*, on which the State relies, is not to the contrary. There, we *rejected* the State's attempt to admit an accomplice confession. The State had argued that the confession was admissible because it "interlocked" with the defendant's. We dealt with the argument by rejecting its premise, holding that "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted."

Id. at 1368 (citations omitted).

240. Lilly v. Virginia, *supra*, Part III; *see Crawford*, 124 S. Ct. at 1368.

241. *Crawford*, 124 S. Ct. at 1368 (emphasis in original) (citing Bourjaily v. United States, 483 U.S. 171, 181-84 (1987)).

rationale. Instead, he stated the only issue in *White* was whether unavailability of the declarant was required.[242]

Applying the new rationale to the admission of Sylvia Crawford's out-of-court statement, Justice Scalia and the majority held that her statement was not admissible because it was testimonial, and was not taken under oath in the presence of the defendant with opportunity to cross-examine the witness:

> In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.[243]

VI. A CRITIQUE

Without doubt, Justice Scalia's excursion into English legal history was a learned examination of the injustices perpetrated by Royal Courts during the reigns of Queens Mary and Elizabeth I. The Williamite reforms at the end of the seventeenth century confirmed the right to confront one's accusers in open court. They were directed, not at the excesses of the Courts of King's Bench and Exchequer Chamber, but at the abuse of Royal prerogative in the Court of Star Chamber in criminal libel prosecutions using canonical methods of proof from the

---

242. Justice Scalia said:

> One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We "[took] as a given . . . that the testimony properly falls within the relevant hearsay exceptions."

Id. at 1368 n.8 (citations omitted).

243. Crawford v. Washington, 124 S. Ct. 1354, 1374 (2004).

Continent instead of the usual English method of proof.[244] Justice Scalia's examination of pre-*Mattox* nineteenth century case law is accurate. State courts came to believe that the accused must be confronted by his or her accusers in open court in all but the most unusual circumstances. Death of the witness was the only exception to confrontation generally recognized in state courts before *Mattox*. Since the cases Justice Scalia cited were post-1791 decisions based on state constitutional provisions, they do not constitute a definitive body of case law directly supporting his viewpoint.[245]

Like Justice Brown in *Mattox*, Justice Scalia thought that only the evil originally sought to be eradicated by Bill of Rights proponents was affected by the Sixth Amendment.[246] In his view, the evil entailed the use of *ex parte* testimony—in the form of depositions or similar sworn statements—against the accused when the accusatory witnesses were available to testify at trial. Justice Scalia did not resolve whether all nontestimonial hearsay would be admissible or inadmissible with regard to the Confrontation Clause, but he stated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the [s]tates flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statement from Confrontation Clause scrutiny altogether."[247]

The *Crawford* decision leaves a host of unanswered questions in its wake. What is "testimonial" hearsay evidence? Is nontestimonial hearsay freely admissible if it meets a hearsay exception or exclusion? Can the Court be serious about excluding unsworn identification statements given by child victims to others? How can the Court harmonize dying declarations, for example, with its categorical requirement for sworn evidence subject to actual cross-examination as the only substitute for in-court testimony?

The key to these questions lies in the unstated assumptions about the criminal trial process at the beginning of this article. If a criminal trial is an exercise in the historical reconstruction of an event, then the party responsible for making the reconstruction needs all the relevant information unless some external public policy measure prohibits the use of otherwise relevant information. The premier public

---

244. *See* Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299 (1982).

245. *Crawford*, 124 S. Ct. at 1362-63.

246. Justice Scalia stated:

> First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Id. at 1363.

247. *Id.* at 1374.

policy reasons for restricting access to information at trial are the needs to have an adversarial engagement with the witness and exhibits, and to give the trial the credibility associated with fundamental fairness to the accused. Both principles require cross-examination of witnesses by a trained lawyer acting for the accused. Dialectical resolution is impossible without conflict; conflict is impossible without cross-examination; and fundamental fairness is generally not achieved without conflict and cross-examination.

A. Testimony

Justice Scalia offered an unpolished definition of "testimony" that deserves full attention:

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 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. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.[248]

"Testimony" is not unequivocal: it is analogous. It signifies a statement made under oath or similar formal obligation to tell the truth that proves or disproves a fact at issue in a criminal prosecution.[249] It also means a statement that is offered as a substitute for in-court proof or disproof of fact by solemn declaration. It includes statements given under oath and statements not given under oath but made to a government official. In a criminal prosecution, "testimony" would include any solemn in-court statement or out-of-court substitute that identifies the perpetrator of the offense, or directly proves an element of any offense charged in the indictment.[250] "Testimony" would not include a hearsay declaration that is relevant to the credibility of a witness alone, or a hearsay declaration relating to a neutral fact that is not direct proof of the identity of the accused or an element of the offense charged. *Crawford* applied the Confrontation Clause's exclusionary rule

---

248. *Id.* at 1364 (alteration in original) (citations omitted).

249. Justice Scalia comes very close to adopting Dean Wigmore's definition of "testimonial evidence." Wigmore equated direct proof with "testimonial evidence" and defined it as ". . . the assertions of human beings regarded as the basis of inference to the propositions asserted by them." 1 JOHN H. WIGMORE, EVIDENCE AT TRIALS AT COMMON LAW § 25 (2d. ed. 1921).

250. For a general discussion of what constitutes "testimonial statements" according to Justice Scalia, see *Crawford*, 124 S. Ct. at 1364-65.

to "testimonial" hearsay and thus makes hash out of the past twenty-four years of Confrontation Clause jurisprudence. The only acceptable substitute for "testimonial" evidence is former testimony of the absent witness in the same criminal prosecution taken when the witness was under oath with opportunity for cross-examination by the accused. Other guarantees of trustworthiness will not suffice.

B. Nontestimonial Statements

Justice Scalia did not define "nontestimonial" evidence. However, he did mention that business records, for example, were nontestimonial hearsay.[251] The Alabama Court of Criminal Appeals followed this dicta when it held a coroner's protocol report showing the cause of death of a homicide victim was not "testimonial."[252] A "nontestimonial" out-of-court statement is one that does not directly prove the identity of the accused or an element of the offense. Justice Scalia would like conspirators' statements to be "nontestimonial," but, his opinion does not show how that can be so in all cases. The "testimonial" quality of an out-of-court statement would depend on its relevance: a statement that is direct proof of identity or an element of the offense is "testimonial," but if it is circumstantial proof of the same issues, it is "nontestimonial."[253] Establishing a workable set of pigeonholes for "testimonial" and "non-testimonial" hearsay in criminal prosecutions may be impossible.

Although Justice Scalia believed that conspirators' statements were not "testimonial," the Court's own test contradicts any blanket assertion that this is so. For instance, a conspirator's statement that only identifies a third person as a member of the conspiracy is an identity statement and it is "testimonial," and even though the statement may meet the hearsay admissibility requirements under Rule 801(d)(2)(E), the statement was not under oath in the presence of the accused represented by counsel and is thus inadmissible. Moreover, a conspirator's statement that directly proves another conspirator committed an act in furtherance of the conspiracy would also be "testimonial" and thus inadmissible. Worse yet, even if the conspirator were available as a witness because he was offered immunity from prosecution, the "testimonial" statements would still be inadmissible. The result: *Crawford* threatens *Inadi.*

---

251. Crawford v. Washington, 124 S. Ct. 1354, 1367 (2004) (mentioning nontestimonial hearsay also includes statements in furtherance of a conspiracy).

252. Perkins v. State, No. CR-021779, 2004 Ala. Crim. App. LEXIS 87, at *18-19 (Apr. 30, 2004).

253. *Crawford*, 124 S. Ct. at 1368.

C. *Dying Declarations*

Justice Scalia also acknowledged that a dying declaration, although "testimonial," was an admissible Confrontation Clause exception, though he offered no plausible reason other than history for this immunity.[254] In order to make his doctrinal rule work to cover all cases of out-of-court statements held admissible despite the Confrontation Clause, Justice Scalia must concede that a dying declaration is an illogical exception to the rule. He does not adequately explain why a dying declaration should be admissible when a statement made to an adult by a child victim of sexual abuse, is inadmissible. Saying that history demands admissibility of dying declarations, but not identification statements by child victims is a poor excuse.

D. *Child Sexual Abuse Hearsay*

Despite Justice Scalia's attempt to save *White*, child sexual abuse victim identification statements to social workers, physicians, and family members are "testimonial." Since child sexual abuse victims may be unavailable as witnesses at trial, due to incompetence or because of statutory privilege not to testify in court, it follows that unsworn identification statements are inadmissible under *Crawford*. The Maryland Court of Special Appeals has already reached this conclusion, less than two months after *Crawford* was handed down.[255] This result is unacceptable. Child sexual abusers will be set free to prey on other children because the unsworn, accusatory statements of their victims who are unavailable to testify will be excluded. In cases such as *State v. Ironshell*[256] and *White v. Illinois*,[257] where physical "trace" evidence identifying the perpetrator was inconclusive or absent, the prosecution may fail to meet its burden of proof because the victim's statement identifying the perpetrator is inadmissible. This results in an inaccurate historical reconstruction of the events of the child sexual abuse and thus produces a socially-unacceptable directed verdict of acquittal. This outcome does not meet current social, cultural, or political standards of fundamental fairness to the victim of a sex crime.

The Court was unsatisfied with the *Roberts* rationale for admitting hearsay statements under the Confrontation Clause. The Court struggled with hearsay statements of co-defendants offered as admissions, conspirator's statements, and declarations against interest. It could not find a single satisfactory way to admit child victim witness statements in sex crimes. The Court made the Sixth Amendment dependent on the hearsay rule and its exceptions and exclusions, and as a result, it had a very hard time harmonizing the truth-finding goal of the criminal

254. *Id.* at 1367.
255. Snowden v. State, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004).
256. 191 N.W.2d 803 (S.D. 1971).
257. 502 U.S. 346 (1992).

trial with the adversarial dialectic and fundamental fairness. Because the Supreme Court was waffling, the lower courts often reached inconsistent and varying results in co-defendant declaration and victim statement cases because the courts searched for additional indicia of reliability for statements introduced under firmly rooted hearsay exceptions. This inconsistency was attributable to the tension between *Wright* and *White*, reflecting inconsistent views on child victim witness statements, and the tension among *Bruton*, *Roberts*, and *Lilly*. *Lilly* highlighted the impossible position relating to declarations against penal interest: on the one hand, recognizing that declarations against penal interest were firmly rooted, but requiring additional guarantees of trustworthiness when the declaration against penal interest involved an accusation directed at a co-perpetrator. The Court found a way out of this dilemma by returning to an originalist version of the Confrontation Clause. However, that path is also fraught with unacceptable choices that the Court will surely confront in later decisions.

VII. A WAY OUT

Bruton hinted at a way out of the baffling, contradictory position more than thirty years ago. The Court there held that one co-defendant's statement could not be offered in a joint trial because of excessive prejudice to the other defendant.[258] The Court used the calculus, later made concrete in Rule 403, at a constitutional level. Whatever may have been the case in seventeenth century English criminal libel trials, a twenty-first century criminal prosecution must make use of hearsay statements of witnesses or fail to satisfy the public's need for retribution and fundamental fairness to crime victims. In other words, the Confrontation Clause cannot exclude all hearsay. Some hearsay, if admitted, would violate the public perception of fundamental fairness to the accused. Currently, it has not adopted the public's concern for fairness to crime victims. Since the public perception of fundamental fairness will change over time, the Court needs a rule that is flexible enough to accommodate future changes of perspective. There must be a solution to this impossible situation: if the probative value of a hearsay declaration is less than its fundamental unfairness to the accused, the Confrontation Clause excludes the statement. On the other hand, if the probative value of the declaration is substantially greater than its unfairness to the accused, it is admissible. The evaluation of probative value includes an evaluation of the reliability of the out-of-court declarant at the time the statement was made. Sworn victim statements would have a high degree of probative value, whereas by-stander statements merely repeating what another person said would have a low degree. Statements of co-perpetrators would fall somewhere in between these poles. Unfairness to the accused would start with lack of contemporaneous cross-examination and inability to observe demeanor. Unfairness to the accused would be substantially reduced if

258. Bruton v. United States, 391 U.S. 123, 137 (1968).

the hearsay statement was given under oath at a hearing where the accused was present and represented by counsel.[259] This type of thinking would produce a sliding scale for measuring the value of hearsay and the prejudice to the accused resulting from its admission. The Court has already shown a preference for a similar sliding scale to evaluate the underlying scientific process behind expert opinion evidence.[260]

Although some may be offended by raising the standard of a Rule 403 evaluation of probative value and prejudice to a constitutional level, the truth is that the Confrontation Clause, like the other guarantees contained in the Sixth Amendment, protects a U.S. citizen from a palpably unfair trial. In the context of fair trials, the right is one among many others, including notice of the charges against the accused, the right to a speedy trial, and the right to legal counsel. The Court has upheld the right of a criminal defendant to put together a meaningful defense, and the value of cross-examination is an implicit assumption behind such a concept.[261] The right to cross-examination does not obliterate admissibility of out-of-court statements of witnesses when a fair trial can be had without cross-examination. After all, wasn't that Sir Walter Raleigh's complaint at his trial in 1610?

259. Such a solution was even suggested in *Bruton*. The Court brought up the amendments to Rule 14 of the Federal Rules of Criminal Procedure that dealt with severance of trial of joint offenders on the ground of excessive prejudice to each accused. *Bruton*, 391 U.S. at 131-32.

260. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993).

261. *See, e.g.*, Davis v. Alaska, 415 U.S. 308 (1974) (holding that witness may be impeached by juvenile conviction, despite state evidence rule forbidding use of juvenile adjudication for any purpose); Rock v. Arkansas, 483 U.S. 44 (1987) (holding that defendant may testify even though hypnotically refreshed); Chambers v. Mississippi, 410 U.S. 284 (1973) (holding that state hearsay exclusion cannot bar presentation of defense story identifying another perpetrator).