March 24, 2012

DESPITE BRYANT, WHY BRUTON CAN NO LONGER SURVIVE IN A POST-CRAWFORD WORLD

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ABSTRACT

In 2004, the Supreme Court of the United States decided one of its most controversial cases in recent memory: Crawford v. Washington. In Crawford, the Court held that the Confrontation Clause in the Sixth Amendment to the United States Constitution requires that every criminal defendant be afforded the procedural right to cross-examine certain witnesses against them. Although this likely overruled the prior Roberts standard, something more subtle was also lurking in its background. Decided almost forty years earlier, Bruton v. United States forbid the use of hearsay evidence against a defendant, absent cross-examination, unless the applicable rules of evidence provided an exception. Bruton thus held the Confrontation Clause to be a substantive guarantee of evidentiary and factual reliability. However, Crawford decided that the Confrontation Clause is only a procedural guarantee of cross-examination, not a guarantee of evidentiary reliability. Thus, although one of the most established constitutional doctrines, Bruton can no longer be applied consistently with Crawford. Bruton would impermissibly expand the scope of the Confrontation Clause and guarantee criminal defendants the right to have factually reliable evidence presented against them. As this is no longer the place of the Confrontation Clause, there can no longer be a place for Bruton.

INTRODUCTION

In 2004, in Crawford v. Washington, the Supreme Court changed much of what we knew about the Confrontation Clause and held that ‘testimonial’ statements are inadmissible against a criminal defendant absent cross-examination, despite their factual reliability. It used to be quite the opposite—under Ohio v. Roberts, the Confrontation Clause required an out of court statement to be reliable in order to be admissible in the absence of cross-examination. But Crawford’s most important implication lay not in the new test it formulated, but rather in the

2 See id. at 53 (2004) ("[T]he 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.").
4 Id. at 64.
5 This refers of course to the issue of what a ‘testimonial’ statement is. For a discussion of exactly what a testimonial statement is, see Gary M. Bishop, Testimonial Statements. Excited Utterances and the Confrontation Clause: Formulating a Precise Rule After Crawford v. Davis, 54 CLEV. ST. L. REV. 559 (2006); David H.
particular rights of which it affects. *Crawford* held that the Confrontation Clause is a procedural
guarantee of confrontation, not a substantive right of reliable evidence.\(^6\) In light of this new
formulation, a critical issue has arisen: What of *Bruton*?\(^7\) Under *Bruton v. United States*, an out
of court statement made by a co-defendant, implicating another co-defendant, but which is
inadmissible against that other co-defendant under the Federal Rules of Evidence, cannot be read
into evidence, despite a limiting instruction to the jury.\(^8\)

However, ever since *Crawford* was handed down, many courts of appeals have been
superseding *Bruton*’s analysis with *Crawford*’s.\(^9\) Not only is this approach correct, but
furthermore *Bruton* is entirely inconsistent with *Crawford*, and should not be applied at all.\(^10\)

*Bruton* is substantive in nature, i.e., it protects substantive rights. However, *Crawford* held that
the Confrontation Clause is *only* a procedural guarantee, meaning that everyone has an absolute
procedural right to confront certain witnesses against them, (and does not have a substantive

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\(^6\) See *Crawford*, 541 U.S. at 61. See also Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & POL’Y 553, 581 (2007) (“*Crawford* makes clear that the confrontation right is not a mere rule of evidence but a fundamental principle of procedure.”).

\(^7\) *Bruton* v. United States, 391 U.S. 123 (1968). *Bruton* held that a statement inadmissible under the Federal Rules of Evidence cannot be introduced against a defendant if the person who made the statement does not testify at trial. *Id.* at 127–28.

\(^8\) *Bruton*, 391 U.S. at 128–29.

\(^9\) See infra Part V.

\(^10\) It should be noted that *Crawford* may protect a defendant in a *Bruton* situation in a similar way that *Bruton* would: where an out of court confession to police (likely testimonial) is sought to be introduced against a defendant, that statement is not admissible unless its declarant is subject to cross-examination. Compare Criminal Law—Joint Trials—Nevada Supreme Court Reverses Conviction on the Basis of Spillover Prejudice—Stewart v. State, NO. 53100, 2010 WL 4226456 (Nev. Oct. 22, 2010) 124 HARV. L. REV. 1596, 1602 (2011) (“In *Bruton v. United States*, for example, the United States Supreme Court held that a defendant’s Confrontation Clause rights are violated when a nontestifying codefendant’s confession that facially incriminates the defendant is introduced at their joint trial, regardless of whether the jury has been properly instructed to ignore these statements in relation to the defendant.”), with Tung Yin, “Anything but Bush?”: The Obama Administration and Guantanamo Bay, 34 HARV. J.L. & PUB. POL’Y 453, 482 (2011) (“[T]he Supreme Court’s bombshell decision in *Crawford v. Washington* overruled decades of precedent and held that the Sixth Amendment’s Confrontation Clause requires that the criminal defendant have an opportunity to cross-examine every witness offering testimony against him.”).
Thus, as *Bruton* is only concerned with substantive reliability, it, as with *Roberts*, can no longer be applied consistently with the Confrontation Clause.\(^\text{12}\)

### I. *THE CONFRONTATION CLAUSE BEFORE BRUTON*

The Confrontation Clause is located within the Sixth Amendment to the United States Constitution and provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”\(^\text{13}\) Despite its relatively simple phrasing, Confrontation Clause jurisprudence is historically marred with a mixture of different theories and rules which have given rise to much confusion in terms of its actual purpose.\(^\text{14}\) Thus, a survey of

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\(^\text{11}\) See Bullcoming v. New Mexico, No. 09-10876, slip op. at 11 (June 23, 2011) (“This Court settled in *Crawford* that the ‘obvious reliability’ of a testimonial statement does not dispense with the Confrontation Clause. (quoting *Crawford*, 541 U.S. at 62)). *See also* Michigan v. Bryant, 131 S. Ct. 1143, 1153 (2011) (“[*Crawford*] limited the Confrontation Clause’s reach to testimonial statements.”); Samuel M. Duncan, “Qualified” Notice-and-Demand Statutes Unconstitutionally Eliminate a Criminal Defendant’s Sixth Amendment Right to “True” Confrontation—Live Testimony From Witnesses, 34 HAMLINE L. REV. 51, 69 (2011) (“The scope of the Confrontation Clause has always been limited to a subset of the evidence offered against a defendant, namely witnesses’ testimony. While *Crawford* further limited the confrontation right by categorizing witnesses as ‘testimonial’ or ‘non-testimonial,’ it simply redefined the set of witnesses to which the right attaches; in rejecting the *Roberts* standard, it shifted from a substantive to a procedural interpretation of the confrontation right.” (footnotes omitted)). The Confrontation Clause enforces the Sixth Amendment’s substantive right to a fair trial. *See* Delaware v. Van Arsdall, 475 U.S. 673, 686 (1986) (Marshall, J., dissenting) (noting that the Confrontation Clause is “an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal”). The issue is whether reliable evidence is part of the Confrontation Clause’s substantive guarantee or whether the Clause is truly a procedural right, i.e., whether it guarantees the right to cross-examine certain kinds of witnesses. It is obvious, of course, that at the least the aim of the Confrontation Clause is to assure, not necessarily guarantee, reliable evidence. *See* Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (noting that the purpose of the Confrontation Clause is to assure reliable evidence); Kelly J. Minor, *Prohibiting the Death Penalty for the Rape of a Child While Overlooking Wrongful Execution*: Kennedy v. Louisiana, 54 S.D.L. REV. 300, 331 (2009) (“The purpose of the Confrontation Clause is to guarantee a fair trial by allowing only reliable evidence to be admitted.”). Thus, whether or not *Crawford* holds that the Confrontation Clause only protects testimonial statements is not an issue for this discussion (although it likely does). *See* *Bryant*, 131 S. Ct. at 1153 (“[*Crawford*] limited the Confrontation Clause’s reach to testimonial statements.”). The real question is whether or not the Confrontation Clause only protects procedural rights, not substantive rights. *But see* United States v. Williams, No. 1:09cr414, 2010 WL 3909480, at *3 (E.D. Va. 2010) (holding that the Confrontation Clause does not only protect against testimonial statements).

\(^\text{12}\) See Whorton v. Bockting, 549 U.S. 406, 413 (2007) (holding that *Crawford* overruled *Roberts*). There are fine differences between substantive and procedural rights. Generally, substantive law creates rights giving rise to a cause of action for the violation thereof, whereas procedural law creates the mechanisms and the manner in which substantive law is enforced. *See* JOHN DVORSKE ET AL., CORPUS JURIS SECUNDUM § 41 (2011). There are certain procedural aspects about the Federal Rules of Evidence, but there are also substantive ones. For a discussion of the differences in the Federal Rules, see Lindsay C. Boney, IV, *Forum Shopping Through the Federal Rules of Evidence*, 60 ALA. L. REV. 151 (2008).

\(^\text{13}\) U.S. CONST. amend. VI.

\(^\text{14}\) *See e.g.* Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998) (“Current Confrontation Clause doctrine is confused—in its reasoning more than in its results.”);
some important Confrontation Clause case law is useful before focusing on the special challenges posed by the intersection of Crawford and Bruton.

In Douglas v. Alabama,15 one of the earliest Confrontation Clause cases,16 the Court incorporated the Sixth Amendment into the Due Process clause thereby applying it against the states and held that “a primary interest secured by [the Sixth] is the right of cross-examination.”17 The Court further noted that the purpose of the Confrontation Clause is “to prevent depositions or ex parte affidavits being used against the prisoner in lieu of a personal examination and cross-examination of the witness,” and thus require that the witness “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.”18

Then, in Pointer v. Texas19 the Court noted again that the main purpose of the Confrontation Clause is to “give a defendant charged with crime an opportunity to cross-examine the witnesses against him.”20 In Pointer, the prosecutor sought to introduce the transcript of a preliminary hearing in which the defendant’s attorney did not have a chance to cross-examine the declarant.21 The declarant now being unavailable, the issue for the Court was whether its
introduction violated the defendant’s right of confrontation. The Court held that the introduction of the transcript denied the defendant an opportunity to cross-examine the witness against him, and thereby violated his confrontation clause rights.\(^{22}\)

Thus, early notions of the Confrontation Clause were concerned with preventing certain types of ex parte statements from being admitted against the defendant, without granting the defendant the opportunity to cross-examine their speaker.\(^{23}\) The Court did not focus so much on the similarities between the Confrontation Clause and the hearsay rules, but rather was concerned with providing a defendant with face-to-face confrontation in certain situations.\(^{24}\)

II. \textit{The Bruton Doctrine}

\textit{Pointer} and \textit{Douglas} were both decided in 1965. \textit{Bruton} was decided only three years later, and set forth an important principle which held true until \textit{Crawford} was decided almost forty years later.

At trial in \textit{Bruton}, a postal inspector testified that one co-defendant, Evans, confessed to him that he and the other co-defendant, Bruton, committed an armed robbery.\(^{25}\) The judge allowed the testimony, although it was only admissible under the applicable rules of evidence

\(^{22}\) Id. at 406. Note that \textit{Pointer} was not decided based on the substantive unreliability of the proffered testimony, but rather on the procedural deprivation of the defendant’s right to cross-examine the witnesses against him. See Wolf v. McDonnell, 418 U.S. 539, 567 (1974) (citing \textit{Pointer} for the proposition that cross-examination and confrontation are essential in criminal trials where the accused, if found guilty, may be subjected to the most serious deprivations”).

\(^{23}\) See Kerry R. Callahan, \textit{Protecting Child Sexual Abuse Victims in Connecticut}, 21 CONN. L. REV. 411, 423 (1989) (noting that the purpose of the Confrontation Clause was to prevent the use of ex parte affidavits from being admitted against a defendant who did not have a prior opportunity to cross-examine the affiant).

\(^{24}\) See id. (“The word ‘hearsay’ is not even mentioned . . . in most of the other early confrontation cases.”). See also BERNARD SCHWARTZ, \textit{The Burger Court: Counter-Revolution or Confirmation}? 294 (1998) (explaining that the \textit{Douglas} Court held that the Confrontation Clause guarantees an “opportunity for cross-examination”); Penny J. White, \textit{Rescuing the Confrontation Clause}, 54 S.C. L. REV. 537, 602 (2003) (explaining that \textit{Pointer} recognized the value in actual confrontation and cross-examination); Evan Y. Semerjian, \textit{The Right of Confrontation}, A.B.A. J., Feb. 1969, at 152, 152 (“The Court in \textit{Pointer} and \textit{Douglas} emphasized that the fundamental aspect of the confrontation requirement is cross-examination.”).

substantively against Evans. 26 On appeal, the court upheld Bruton’s conviction because the trial judge had instructed the jury to disregard the confession as to Bruton. 27 The Supreme Court reversed and held that “[d]espite the concededly clear instructions to the jury to disregard Evans’ inadmissible hearsay evidence incriminating [Bruton], in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner’s constitutional right of cross-examination.” 28 Bruton recognized that the Confrontation Clause is meant to provide “a defendant charged with [a] crime an opportunity to cross-examine the witnesses against him.” 29 This is violated when the jury is allowed to hear statements admissible against one defendant, but not the other, and the other has no opportunity to cross-examine the declarant. 30

At first glance, one may argue that the Bruton decision was not decided on the premise that the proffered evidence against Bruton was merely unreliable, 31 but rather was based on a premise, as in Crawford, that the jury cannot hear evidence untested by the cross-examination of the defendant. 32 This is a fundamental misunderstanding of Bruton though. Bruton, at its core,

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26 Id. at 124–25.
27 Id.
28 Id. at 137.
29 Id. at 126 (quoting Pointer v. Texas, 380 U.S. 400, 406–07 (1965)).
30 Id. at 137.
31 See e.g., James B. Haddad & Richard G. Agin, A Potential Revolution in Bruton Doctrine: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of a Codefendant’s Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use?, 81 J. CRIM. L. & CRIMINOLOGY 235, 261 (1990) (explaining that an “essential premise” of Bruton is that in a joint trial a jury will misuse evidence it is allowed to hear, but is inadmissible as to one co-defendant); Bryan M. Shay, “So I Says to ‘the Guy,’ I Says…”: The Constitutionality of Neutral Pronoun Redaction in Multidefendant Criminal Trials, 48 WM. & MARY L. REV. 345, 387 (2006) (“Bruton’s premise was that some extrajudicial statements are so ‘powerfully incriminating’ that juries may be unable to follow instructions to ignore them when deciding the guilt of the nonconfessing defendants they implicate.” (quoting Bruton v. United States, 391 U.S. 123, 135 (1968))).
32 As the Crawford court held:

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 but about how reliability can best be determined.

is based on the rules of evidence,\textsuperscript{33} (which as applied to this paper, are the Federal Rules of Evidence (FRE)), which are rules designed to guarantee a certain level of reliability and accuracy, and are not necessarily concerned with a right or the value of cross-examination.\textsuperscript{34} 

Bruton even recognized that Evans’ confession was largely inadmissible because it was unreliable: “The unreliability of [Evans’ out of court confession] is intolerably compounded when the alleged [confessor], as here, does not testify and cannot be tested by cross-examination.”\textsuperscript{35} Bruton, in a footnote, further exclaimed that this confession is inadmissible because the hearsay rule on which it is excluded is meant to guarantee reliability.\textsuperscript{36}

Thus, at its true core Bruton provides that where a confessor in a joint trial does not testify, but his or her confession inculpating the other defendant in the crime is admissible under

\textsuperscript{33} See William G. Dickett, Sixth Amendment—Limiting the Scope of Bruton, Richardson v. Marsh, 107 S. Ct. 1702 (1987), 78 J. CRIM. L. & CRIMINOLOGY 984, 1000 n.50 (1988) (“The Bruton Court stressed that the co-defendant’s confession was clearly inadmissible evidence against the defendant under traditional rules of evidence.”).

\textsuperscript{34} See Bullcoming v. New Mexico, No. 09-10876, slip op. at 2 n.1 (June 23, 2011) (Sotomayor, J., concurring) ("The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation."). See also Fed. R. Evid. 1 ("[The FRE] shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."); George Fisher, Evidence 16 (2008) ("[S]ince we don’t scrutinize the [jury’s] deliberative process, we have to scrutinize and regulate the quality of the evidence that goes into that process."); Thomas J. Gardner & Terry M. Anderson, Criminal Evidence: Principles and Cases 29 (2009) ("The purpose of the rules of evidence is to ensure that each adversary’s version of the truth is put before the jury by relevant, reliable, and competent evidence."); Charles Alan Wright, et al., Federal Practice and Procedure § 5064.2 (2d ed. 2011) ("Bruton starts from the assumption that co-defendant’s statement could not be used as evidence against the defendant because it was unreliable hearsay and asks if the defendant is adequately protected against the jury’s use of it by a limiting instruction."); William J. Horvath, No More Splitting: Using a Factual Inquiry to Determine Similar Motive Under Federal Rule of Evidence 804(B)(1), 45 Val. U. L. Rev. 157, 159 (2010) ("The purpose of the Federal Rules of Evidence is to promote fairness and to provide consistency in determining what evidence is admissible during trial"); Reliable Evidence is Required, The INSTITUTE FOR CREATION RESEARCH, http://www.icr.org/reliable-evidence/ (last visited Aug. 4, 2011) ("The focus of the Federal Rules of Evidence is evidentiary reliability."); J.E. Scanlan, Why Some Evidence is Excluded, COURTS OF NOVA SCOTIA (Nov. 2003), http://www.courts.ns.ca/bench/evidence.htm ("[R]ules or statutes which limit the admissibility of evidence are rooted in the decision to ensure that accused persons have a fair trial based only on the most reliable evidence available.").

\textsuperscript{35} Bruton v. United States, 391 U.S. 123, 135 (1968). See also Jones v. Basinger, 635 F.3d 1030, 1050 (2011) (citing Bruton for the proposition that accomplice confessions inculpating the defendant are inherently unreliable).

\textsuperscript{36} See id. at 135 n.12. The Bruton Court held that “inculpatory statements against penal interest are insufficiently reliable” to meet Confrontation Clause scrutiny. Andre R. Keller, Inculpatory Statements Against Penal Interest and the Confrontation Clause, 83 Colum. L. Rev. 159, 178 (1983). See also Lilly v. Virginia, 527 U.S. 116, 134 (1999) ("The decisive fact . . . is that accomplices’ confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.").
the FRE only against the confessor (and thus, is unreliable as to the other co-defendant), the admission of this confession, despite limiting instructions to the jury, violates the other co-defendant’s right of cross-examination secured by the Confrontation Clause.37

Therefore, the defendant does not have an absolute procedural right of cross-examination under Bruton, but rather, one that is essentially dictated by the terms of the FRE.38 If a hearsay statement is deemed admissible, and thus reliable, under the FRE as to both co-defendants, then the Bruton doctrine is satisfied.39

37 Bruton, 391 U.S. at 136–37. Put another way: “Where a non-testifying codefendant’s confession incriminating the defendant is not directly admissible against the defendant, the confrontation clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant’s own confession is admitted against him.” Cruz v. New York, 481 U.S. 186, 193 (1987).

38 See CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 5064.2 (2d ed. 2011) (“Since Bruton does not apply to admissible hearsay, the reader will doubtless see that the scope of Bruton can be reduced by expanding the admissibility of hearsay.”). Furthermore, the fact that Bruton is also based on the idea that the jury cannot disregard testimony admissible against one defendant but not the other further solidifies this paper’s premise. See United States v. Morales, 477 F.2d 1309, 1314 (1973) (“The Bruton Court openly rejected the rationale of Delli Paoli v. United States, that encroachment on the right to confrontation could be avoided by an instruction to the jury to disregard the confessor’s statement incriminating the nonconfessor in determining the nonconfessor’s guilt. Instead, the Court ruled that such an admonition is intrinsically ineffective and held that admission of the codefendant’s inculpatory statement was reversible error in spite of the trial court’s cautionary charge.”) (citations omitted.). This simply means that the jury cannot hear evidence against one defendant that the FRE hold inadmissible against that defendant (because the FRE hold it to be unreliable). See Kjirstin Graham, Accomplice Confessions and the Confrontation Clause: Crawford v. Washington Confronts Past Issues With a New Rule, 32 PEPP. L. REV. 315, 320 (2005) (“The hearsay rule has been codified in the evidence laws of American jurisdictions, but there are many exceptions and hearsay is often allowed in certain circumstances where the hearsay evidence is deemed ‘sufficiently reliable to permit its introduction at trial. . . .’” (quoting Andrew R. Keller, Inculpatory Statements Against Penal Interest and the Confrontation Clause, 83 COLUM. L. REV. 159, 161 (1983)); Eleanor Swift, A Foundation Fact Approach to Hearsay, 75 CAL. L. REV. 1339, 1341 (1987) (noting that the hearsay rule is meant to exclude unreliable evidence and admit reliable evidence). In the context of Bruton, an out of court statement, barred by the federal rules of hearsay evidence, cannot be heard against a defendant unless the defendant can cross-examine the declarant (and cure the FRE violation). See Bruton, 391 U.S. at 129 (“The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.” (quoting Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting))).

39 An example would be where a co-defendant makes a statement to an undercover officer that he and another co-defendant participated in a drug deal, and the initial co-defendant refuses to testify at trial. In such a situation the first co-defendant would be unavailable within the FRE, and the statement would likely be a statement against that co-defendant’s interest, and thus, be excepted from the hearsay rule. See Fed. R. Evid. 804(a)(2) (“Unavailability as a witness includes situations in which the declarant . . . persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.”); Fed. R. Evid. 804(b)(3) (“The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.”). See also United States v.
III. **ANALYZING THE CONFRONTATION CLAUSE: DOES IT PROTECT PROCEDURAL OR SUBSTANTIVE RIGHTS?**

Once the Confrontation Clause applied against the states, confrontation cases arose much more frequently in the Supreme Court. This increase in cases also gave rise to a debate over whether the Confrontation Clause’s true purpose was a procedural or a substantive guarantee of confrontation. In *Ohio v. Roberts*, the Court held it was for the latter.

**A. The Roberts’ Regime**

In *Ohio v. Roberts* the Court, as in *Bruton*, noted that “the Clause envisions a personal examination and cross-examination of the witness” which is secured by face-to-face confrontation. But then the Court held that this is not a procedural guarantee, but rather a substantive right:

Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that “there is no material departure from the reason of [this] general rule.”

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Johnson, 581 F.3d 320, 325 (2009) (holding that the Confrontation Clause does not apply to non-testimonial hearsay and therefore, the admission of a defendant’s confession implicating the other co-defendant did not violate the Confrontation Clause); CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 5064.2 (2d ed. 2011) (“Even in a joint trial, *Bruton* does not apply if the co-defendant’s statement is admissible against the defendant under some hearsay exception; e.g., as a declaration against interest.”).

40 See John C. O’Brien, *The Hearsay Within Confrontation*, 29 ST. LOUIS U. PUB. L. REV. 501, 505 (2010) (“From 1791 to 1965, there were relatively few decisions by the United States Supreme Court dealing with the Sixth Amendment’s Confrontation Clause. During this period, the Confrontation Clause applied to the federal government, but not to the States, which may help explain the relative paucity of decisions during this long, 174-year period.”).


42 Id. at 64 (quoting Mattox v. United States, 156 U.S. 237, 242–43 (1895)).

43 Id. at 65 (emphasis added) (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)). Thus, once having shown that a witness is not available, the prosecution need only show that the hearsay evidence is reliable, should be deemed trustworthy by the court, and thus, the defendant’s right to effective cross-examination can be dispensed with. See Lindsay Brewer, *Testimonial? What the Heck Does that Mean?:* Davis v. Washington, 58 MERCER L. REV. 1097, 1100–01 (2007). The effective aspect of cross-examination, exemplified by the *Roberts* Court above, is part of the procedural/substantive debate over the Confrontation Clause. As will be shown below, those members of the Court who believe the Confrontation Clause guarantees effective cross-examination, or otherwise trustworthy evidence, hold the clause as a substantive guarantee of reliable evidence. See Maryland v. Craig, 497 U.S. 836, 857 (1990) (upholding Maryland law allowing child victims to be cross-examined via closed circuit television because the procedure still “preserve[d] the essence of effective confrontation” guaranteed by the Sixth Amendment); United States v. Owens, 484 U.S. 554, 569 (1988) (Brennan, J., dissenting) (arguing that the Confrontation Clause guarantees a level of effective cross-examination). But see Owens, 484 U.S. at 559 (“The Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever
Roberts is more akin to an additional rule of evidence than to an actual guarantee of confrontation. This is clearly seen in the Roberts rule of admissibility: hearsay statements are admissible if the declarant was unavailable and the statement “bears adequate ‘indicia of reliability.’”\textsuperscript{44} “Such ‘indicia of reliability’ could be inferred if a statement fell within a ‘firmly rooted hearsay exception’ or showed ‘particularized guarantees of trustworthiness.’”\textsuperscript{45} Thus, under Roberts “hearsay rules and the Confrontation Clause are generally designed to protect similar values,” and “stem from the same roots.”\textsuperscript{46} And from this analysis comes two principles: (1) normally the Confrontation Clause guarantees the production of hearsay declarants; or (2) if the declarant is unavailable, the proffered testimony must be reliable.\textsuperscript{47} Thus, after Roberts the Confrontation Clause was “a substantive right of cross-examination on the criminal defendant” which only barred the admission “of certain unreliable hearsay evidence.”\textsuperscript{48}
showing that the evidence in question fit within a firmly rooted hearsay exception.” Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 276 (2006). “[T]he Roberts Court saw only instrumental value in cross-examination, so confrontation seemed superfluous when a time-honored hearsay exception necessarily admitted only reliable evidence.” Id. This lack of dependency on the value of cross-examination essentially transformed the Federal Rules of Evidence into the Confrontation Clause. Id. at 277. See also Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 576 (1988) (“The Court’s decisions are controlled by the proposition that ‘the Confrontation Clause’s very mission is to advance the ‘accuracy of the truth-determining process in criminal trials.’”); John M. Spires, *Testimonial or Nontestimonial? The Admissibility of Forensic Evidence After Crawford v. Washington*, 94 KY. L.J. 187, 191 (2006) (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”). This is because the Roberts Court was not concerned with confrontation as a right in and of itself, but rather was focused on providing the jury with reliable and trustworthy evidence. See Michael D. Cicchini, *Confrontation After Crawford v. Washington: Defining ‘Testimonial’*, 10 LEWIS & CLARK L. REV. 531, 531 (“Under the test expressed in *Ohio v. Roberts*, that right to confrontation could be overcome by a judicial determination that the state’s proffered hearsay was reliable.”); Daniel Huff, *Confronting Crawford*, 85 NEB. L. REV. 417, 418 (2006) (“[T]he controlling Supreme Court precedent on the [confrontation clause] question was *Ohio v. Roberts*, under which courts could admit any hearsay they deemed reliable.”); Won Shin, Crawford v. Washington: *Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 HARV. C.R.-C.L. L. REV. 223, 233 (2005) (“The Roberts reliability test ensured that cross-examination was available to test hearsay that either is unreliable or had not been demonstrated to be reliable, while reliable hearsay still could be admitted as evidence in an effective truth-seeking process.”); Fred O. Smith, Jr., Crawford’s Aftershock: *Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1517 (2008) (“A close look at the Roberts test demonstrates that, above all else, it most effectively tests statements for sincerity.”). This is certainly “unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application.” Bush v. Gore, 531 U.S. 98, 106 (2000). *See also Crawford v. Washington*, 9 NO. 5 CRIM. PRACT. GUIDE 2 (2008) (“Because there were no standards to guide the trial courts in making determinations on the reliability and trustworthiness of statements, the rulings often were unpredictable and many were made without any sensible basis or authority” (quoting Sherrie Bourg Carter & Bruce Lyons, *Child Abuse, Elderly Abuse and Domestic Violence Litigation*, THE CHAMPION, Sept.–Oct. 2004)); Brian Nye, *Forfeiting the Right to Confrontation: Why Victim's Statements Should be Evaluated Differently Than Witness’s*, 18 KAN. J.L. & PUB. POL’Y 320, 326 (2009) (“When the reliability test of Roberts was overruled by the Crawford decision, the Court’s adherence to the common law, as well as enumerated rationales within the decision regarding hearsay determinations, demonstrate the Court’s recognition that the reliability test is often unfair to criminal defendants.”). But confrontation is more than simply providing the jury with what the court deems ‘trustworthy’ evidence. See Fred O. Smith, Jr., Crawford’s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause, 60 STAN. L. REV. 1497, 1517 (2008). Literally speaking, the right should provide at least a “‘face-to-face’” confrontation with a defendant’s accusers. See Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (quoting California v. Green 339 U.S. 149, 1943–44 (1970)). *See also Bullcoming v. New Mexico, No. 09-10876, slip op. at 13 (June 23, 2011) ([T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.”); Morgan Cloud, *A Conclusion in Search of a History to Support It*, 43 TEX. TECH. L. REV. 29, 37 (2010) (explaining that by its “plain language,” the Confrontation Clause must at least require a face to face meeting with one’s accusers); Joseph Henn, Melendez-Diaz v. Massachusetts: The Future of the Confrontation Clause, 15 BARRY L. REV. 121, 130 (2010) ("[T]he Framers of the Constitution included the Confrontation Clause to ensure that criminal defendants would face their accusers."); Amy Ma, Mitigating the Prosecutors’ Dilemma in Light of Melendez-Diaz: Live Two-Way Videoconferencing for Analyst Testimony Regarding Chemical Analysis, 11 NEV. L.J. 793, 795 (2011) (“The Court has often construed the Confrontation Clause to require physical, face-to-face confrontation.”). Thus, the Clause recognizes that certain facts can only be established, not by their mere presentation by the prosecution, but by their scrutinization by the defendant. See Kirby v. United States, 174 U.S. 47, 55 (1899) (“[A] fact which can be primarily established only by witnesses cannot be proved against an accused, charged with a different offense, for which he may be convicted without reference to the principal offender, except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the
B. Bruton & Roberts Were Consistent With Each Other

When compared, Bruton and Roberts reflect the same principle: The Confrontation Clause is a substantive guarantee of evidentiary reliability and accuracy for a criminal defendant.49 This is why Bruton and Roberts could co-exist for so long. Bruton was merely an application of the principle articulated in Roberts (albeit, an application before Roberts was decided): An out of court confession by a non-testifying defendant, implicating a co-defendant and inadmissible as to that co-defendant, is unreliable and cannot be admitted without effective cross-examination.50 Alternatively, Roberts can be viewed as an extension of the Bruton principle: The Confrontation Clause guarantees that unreliable hearsay statements be effectively cross-examined in order to be admissible.51 As a further illustration of the argument that Bruton and Roberts are based on the same reliability premise, under Bruton, a non-testifying defendant’s statement implicating a co-defendant could be admitted if that statement bears “adequate indicia

49 See Kentucky v. Spincer, 482 U.S. 730, 736 (1987) (“The right to cross-examination, protected by the Confrontation Clause, thus is essentially a ‘functional’ right designed to promote reliability in the truth-finding functions of a criminal trial.”); Judd Anderton, Constitutional Law—Confrontation—Laboratory Reports Prepared for Use in Criminal Prosecution are Testimonial and Subject to the Confrontation Clause Demands of the Sixth Amendment. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), 40 CUMB. L. REV. 593, 598 (2010) (“The [Roberts] Court reasoned that the Confrontation Clause provides a substantive guarantee that only reliable hearsay statements should be admitted.”).

50 It should be noted that there were two situations in which the Roberts rule did not recognize an FRE hearsay exception as ‘firmly rooted’: “the Rule 807 ‘residual’ or ‘catch-all’ hearsay exception, and accomplice confessions inculpating the defendant [Bruton].” Rebecca Sims Talbott, What Remains of the “Forfeited” Right to Confrontation? Restoring Sixth Amendment Values to the Forfeiture-by-Wrongdoing Rule in Light of Crawford v. Washington and Giles v. California, 85 N.Y.U. L. Rev. 1291, 1301 n.54 (2010). In a situation where a non-testifying co-defendant’s confession is inadmissible against the other defendant, the statement is always unreliable. This means that the Roberts test will always fail. Thus, Roberts and Bruton could easily co-exist. That is why there have been no cases where Roberts would hold a confession, standing by itself, which inculpated a co-defendant, was reliable and thus, trumped Bruton. See Lilly v. Virginia, 527 U.S. 116, 134 (1999) (“The decisive fact, which we make explicit today, is that accomplices’ confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.”).

51 See Lee v. Illinois, 476 U.S. 530, 545 (1986) (“As we have consistently recognized, a codefendant’s confession is presumptively unreliable as to the passages detailing the defendant’s conduct or culpability because those passages may well be the product of the codefendant’s desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.”).
of reliability.” Although “accomplice confessions inculpating the defendant” were not held to be a firmly rooted exception within Roberts, “Lee v. Illinois, and Ohio v. Roberts, suggest that a codefendant’s interlocking confession will often be admissible against the defendant,” as that confession will likely be reliable, and Bruton and Roberts will both be satisfied.\(^5\)

Thus, Bruton and Roberts both held that the Confrontation Clause is a substantive guarantee of reliability. Therefore, when Crawford declared Roberts’ substantive reliability premise invalid, it also must have impliedly overruled part of Bruton as well.\(^6\)

\(^5\) See Toni M. Massaro, The Dignity Value of Face-To-Face Confrontations, 40 U. Fla. L. Rev. 863, 891 n.98 (1988) (explaining that a statement which is “reliable” under Roberts is admissible, despite Bruton; but where the statement lacks reliability, “then Bruton requires a court to ask whether jury instructions will provide adequate protection of the confrontation guarantee”). See also Thomas J. Reed, Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule, 56 S. C. L. Rev. 185, 211 (2004) (“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.”).

\(^6\) United States v. Koistinen, 27 M.J. 279, 282 (1988) (citations omitted). See also Kjirstin Graham, Accomplice Confessions and the Confrontation Clause: Crawford v. Washington Confronts Past Issues with a New Rule, 32 PEPP. L. REV. 315, 337 (2005) (“[T]he Cruz Court allowed for the possibility that, where an accomplice confession is directly admissible against the defendant (e.g., through the against penal interest hearsay exception), interlock between the accomplice’s and the defendant’s confessions could be used to satisfy the second ‘reliability prong’ of the Roberts Test.”). Thus, Bruton is truly about reliability, not harmlessness. For an argument to the contrary, see Colin Miller, Avoiding a Confrontation? How Courts Have Erred in Finding that Nontestimonial Hearsay is Beyond the Scope of the Bruton Doctrine 3–4 (Mar. 15, 2011) (unpublished manuscript), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1787563 (“Like its predecessor, Ohio v. Roberts, it should have had no effect on the Bruton doctrine. Because Crawford, like Roberts, sets forth a test for Constitutional reliability, it has no bearing on the Bruton doctrine, which sets forth a test for Constitutional harmlessness. It is thus easy to see why the Crawford Court concluded that in Cruz it answered an ‘entirely different question’ than the one before it: The Bruton doctrine ‘makes no claim to be a surrogate means of assessing reliability.’” (quoting Crawford v. Washington, 541 U.S. 36, 59, 62 (2004))).

\(^6\) This is especially true considering England’s trial of Sir Walter Raleigh which acted as the backdrop for the Crawford decision. See Jeffrey L. Fisher, Originalism as an Anchor for the Sixth Amendment, 34 HARV. J.L. & PUB. POL’Y 53, 58 (2011). In 1603 Raleigh was tried for treason, and an out of court confession made by an alleged co-conspirator in the treason, Cobham, accused Raleigh of participation. Id. at 58–59. Although available, the court did not allow Raleigh to cross-examine his accuser. Id. at 59. Instead the court agreed with the prosecution who argued that the “statements were reliable because [the prosecution] had not made Cobham any promises of leniency, Cobham had implicated himself in the treason, and Cobham had not made his statements under pressure from the authorities.” Id. See also Kjirstin Graham, Accomplice Confessions and the Confrontation Clause: Crawford v. Washington Confronts Past Issues With a New Rule, 32 PEPP. L. REV. 315, 319 (2005) (“Even though Raleigh was denied an opportunity to confront Lord Cobham in court, the confession letter was deemed sufficiently reliable evidence because the confession was self-inculpatory, voluntary, and consistent with parts of Raleigh’s pre-trial statements.”). Thus, insofar as Bruton is founded on a premise that a defendant need not cross-examine otherwise reliable statements, that element of Bruton cannot survive Crawford.
C. The Importance of United States v. Owens & Maryland v. Craig in Laying the Groundwork For A Future Crawford Holding

United States v. Owens and Maryland v. Craig, decided after Bruton/Roberts, but before Crawford, highlight the Court’s struggle over whether the Confrontation Clause is a procedural or a substantive right. In so doing, they illustrate why the Court’s eventual adoption of Crawford must lead to the demise of Bruton.

In United States v. Owens, a prison guard was brutally assaulted while on duty and was sent to the hospital. While there, he was interviewed by FBI agents, but at first he was unable to identify who attacked him due to his “lethargic” condition. On a later return, the officer was able to identify his attacker as the defendant. However, at trial he could only testify to having remembered identifying the defendant in the hospital. On cross-examination, he could not remember who attacked him and could not remember if any of his visitors had pointed out the defendant as his attacker. The defendant was convicted and argued on appeal that the officer’s lack of memory deprived him of effective cross-examination, and thereby his Confrontation Clause rights.

The Court held it did not. The Scalia authored opinion held that “[t]he Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” The Confrontation Clause is not a substantive right conferred on the defendant, but rather a procedural one which will not always be successful, “but successful cross-examination is not the

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56 Id. at 556.
57 Id.
58 Id.
59 Id.
61 Id. at 559 (quoting Kentucky v. Stincer, 482 U.S. 730 (1987). The Court declined to apply, and thus address, the validity of Roberts. Id. at 568–69.
constitutional guarantee.” Thus, according to Craig, it is the simple ability to have an opportunity to cross-examine certain witnesses that the Clause guarantees, not that the proffered evidence is so reliable that it can be admitted in lieu of cross-examination, or that the actual cross-examination is so subjectively ineffective that the evidence should not be heard at all.

The Owens opinion is important for its majority and its dissent which debate the nature of the confrontation right as either procedural or substantive. Scalia, noting that the Confrontation Clause only guarantees an “opportunity for cross-examination,” argues that the clause is only a procedural right.

In his dissent, Brennan, with Marshall joining, argue to the contrary. First, they take issue with the fact that “the Court . . . reduce[d] the right of confrontation to a purely procedural protection.” Brennan and Marshall would hold that “the Sixth Amendment guarantees criminal defendants the right to engage in cross-examination sufficient to ‘afford the trier of fact a satisfactory basis for evaluating the truth of a prior statement.'”

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62 Id. at 560. See also Crawford v. Washington, 541 U.S. 36, 61 (2004) (“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.”); 91 ABRAHAM CLARK FREEMAN, THE AMERICAN STATE REPORTS: CONTAINING THE CASES OF GENERAL VALUE AND AUTHORITY SUBSEQUENT TO THOSE CONTAINED IN THE “AMERICAN DECISIONS” AND THE “AMERICAN REPORTS” DECIDED IN THE COURTS OF LAST RESORT OF THE SEVERAL STATES 486 (1903) (“The chief purpose in requiring that the accused shall be confronted with the witnesses against him is held to be to secure to the defendant an opportunity for cross examination; so, that if the opportunity for cross-examination has been secured, the test of confrontation is accomplished.”); 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 163d (1899) (explaining that the Confrontation Clause is violated where the witness bearing testimony against a criminal defendant refuses to testify, but not where the defendant chooses not to cross-examine the witness as “all that the principle requires is that there should have been an opportunity of cross-examination”); JOHN HENRY WIGMORE, SELECT CASES ON THE LAW OF EVIDENCE 543 (1913) (“[Confrontation] is the preliminary step to securing the opportunity of cross[-]examination.”).

63 Id. at 565. See also Richard v. Marsh: Codefendant Confessions and the Demise of Confrontation, 101 HARV. L. REV. 1876, 1885 n.59 (1988) (explaining that Owens eliminated part “of the confrontation clause’s substantive content”).

64 Owens, 484 U.S. at 565.

65 Id. (quoting California v. Green, 399 U.S. 149, 161 (1970)).
Brennan argues that the majority turned the confrontation right into a mere “opportunity” for cross-examination, instead of “cross-examination that is effective . . .”66 Thus, the dissent would create a substantive guarantee of “effective cross-examination.”67 According to Brennan, in the absence of effective cross-examination “the Sixth Amendment permits the introduction of out-of-court statements only when they bear sufficient independent ‘indicia of reliability,’” i.e., when the judge, not the jury or the defendant, determine that the statements are sufficiently reliable that cross-examination is not required.68

D. Owens as a Guarantee of Procedural Rights

It should be noted that in Owens, Roberts was not at issue as the declarant testified and thus was subject to cross-examination. The true implication of Owens’ backdrop principle would not come to full fruition until Crawford. But Owens’ efforts to “eliminate[e] . . . the confrontation clause’s substantive content” does make clear that the Confrontation Clause (at least according to Justice Scalia) does not guarantee reliable evidence.69 This is certainly

66 Id. “[T]he touchstone of effectiveness is whether the cross-examination affords ‘the trier of fact . . . a satisfactory basis for evaluating the truth of the prior statement.’” Id. at 568 (quoting California v. Green, 399 U.S. 149, 161 (1970)).
67 Id. (emphasis added). This is similar to Bruton and Roberts’ analysis of the Confrontation Clause, which guarantee that only reliable out of court statements be admitted against the defendant, absent cross-examination. See supra Part III(B).
68 Owens, 484 U.S. at 568. See also Steven R. Houchin, Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?, 36 PEPP. L. REV. 823, 841 (2009) (“[In Owens] Justices Brennan and Marshall dissented, arguing that the Confrontation Clause guarantees more than just the procedural right of cross-examination.”); Josephine Ross, What’s Reliability Got to Do With the Confrontation Clause After Crawford?, 14 WIDENER L. REV. 383, 409–10 (2009) (explaining that Brennan believed that the Confrontation Clause should guarantee the reliability of statements); Andrew E. Taslitz, Daubert’s Guide to the Federal Rules of Evidence: A Not-So-Plain-Meaning Jurisprudence, 32 HARV. J. ON LEGIS. 3, 20 n.81 (1995) (“Justice Brennan joined by Justice Marshall, did indeed challenge the majority’s conclusion that Owens had been offered a meaningful opportunity for challenge, but did so under the rubric of the Confrontation Clause.”).
69 Richard v. Marsh: Codefendant Confessions and the Demise of Confrontation, 101 HARV. L. REV. 1876, 1885 n.59 (1988). See also Pennsylvania v. Ritchie, 480 U.S. 39, 53 (1987) (holding that defendant’s confrontation clause rights were not violated when the state refused to disclose confidential records about the victim which would have provided the defendant with a more effective cross-examination). Justice Scalia has further noted that “any erosion of the implicit right to exclude hearsay under the Confrontation Clause cannot justify the outright elimination of face-to-face confrontation, which is ‘a constitutional right unqualifiedly guaranteed.’” Cornelius M. Murphy, Justice Scalia and the Confrontation Clause: A Case Study in Originalist Adjudication of Individual Rights, 34 AM. CRIM. L. REV. 1243, 1257 (1997) (quoting Maryland v. Craig, 497 U.S. 836, 865 (1990). See also RICHARD A. BRISBIN,
inconsistent with *Bruton* whose purpose is to guarantee that only reliable evidence be heard by the jury.70

E. Scalia Loses One: Maryland v. Craig

This procedural/substantive dichotomy is more squarely presented in *Maryland v. Craig*.71 In *Craig*, at the trial of a defendant charged with the sexual abuse of a child, the prosecution invoked a Maryland procedure which allowed the child to testify via one way closed circuit television.72 This meant that the prosecutor, defense counsel, and child would go to one room, separate from the defendant, and conduct examinations.73 The judge, jury, and defendant could all watch this live on a television, but the child could not see the defendant.74 The Court upheld the law and noted that “[w]e have never held . . . that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial.”75 This is because “[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant.”76 Thus, the Court construed the clause,
similarly to Roberts and Bruton, as a substantive guarantee of reliability, not an absolute right of cross-examination.\textsuperscript{77}

\textbf{F. Scalia’s Dissent & the Forthcoming Crawford Holding}

Justice Scalia set forth a scathing dissent in \textit{Craig} and argued that the true purpose of the Confrontation Clause is “to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his or her accusers in court.”\textsuperscript{78} As reminiscent of the future Crawford holding, Scalia noted that the “Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial \textit{procedures} that were thought to assure reliable evidence, undeniably among which was ‘face-to-face’ confrontation.”\textsuperscript{79}

But in \textit{Craig} the majority, paralleling with that of Roberts and Bruton:

\begin{quote}

declared that the testimony’s \textit{reliability} \textsuperscript{[was]} assured by “the combined effect of the elements of confrontation,” which consist of a personal examination, opportunity for cross-examination, testimony under oath, and opportunity to assess witness demeanor. Applying this standard, \textit{Craig} deemed the video procedure sufficiently reliable because, despite the absence of a face-to-face
\end{quote}

\textsuperscript{77} Compare U.S. v. Roberts, 448 U.S. 56, 66 (1980) (“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.’”), with Bruton v. United States, 391 U.S. 123, 141–42 (holding that co-defendant’s confession implicating other defendant is unreliable, and thus barred by the Confrontation Clause). See also \textsc{Andrew E. Taslitz}, \textit{Rape and the Culture of the Courtroom} 125 (1999) (“[\textit{Craig} recognized] the confrontation clause’s function in enhancing testimonial reliability.”). Furthermore, \textit{Craig} holds that “[a]lthough face-to-face confrontation forms ‘the core of the values furthered by the Confrontation Clause,’ we have nevertheless recognized that it is not the \textit{sine qua non} of the confrontation right.” \textit{Craig}, 497 U.S. at 846 (citations omitted) (quoting California v. Green, 399 U.S. 149, 157 (1970)).

\textsuperscript{78} \textit{Craig}, 497 U.S. at 861 (Scalia, J., dissenting). Hence, Bruton, based on statutory law, is inconsistent with this core purpose (which was later reiterated in Crawford). See Crawford v. Washington, 541 U.S. 36, 61 (2004) (“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.”). See also Gayle Parlee Fisher, \textit{Constitutional Law—Restricting an Accused’s Sixth Amendment Right to Confront Child Witnesses in Child Abuse Cases—Maryland v. Craig, 110 S. Ct. 3157 (1990), 25 Suffolk U. L. Rev. 1224, 1232 (1991) (“The \textit{Craig} Court found that the state’s interest in protecting the child witness outweighed the defendant’s interest in the confrontation right. In balancing the interests, the Court minimized the deprivation of the constitutional right to confrontation by requiring only that statutory procedures permitting alternative means of testimony preserve most elements of the right and its ultimate purpose. The \textit{Craig} decision, therefore, leaves defendants’ constitutional rights more vulnerable and subject to judicial interpretation.”).

meeting between accuser and accused, the remaining three elements of confrontation were each preserved.  

However, according to Scalia, although there may be certain implications of the Confrontation Clause, one rule which is not merely implied, but explicitly guaranteed by the Confrontation Clause is the defendant’s “‘right to meet face to face all those who appear and give evidence at trial [against him or her].’”  

**G. A Summary Thus Far**

Before delving into the *Crawford* progeny, we can firmly establish one general rule about Confrontation Clause jurisprudence up to this point. The *Roberts, Bruton,* and *Craig* Courts were mainly concerned with ensuring the defendant either effective cross-examination or that only reliable out of court statements would be admitted against him or her, while the *Owens* Court and the Scalia dissent in *Craig* would only allow such out of court statements if the defendant were provided an opportunity for face to face cross-examination. The culmination of

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81 *Craig,* 497 U.S. at 862. *See also* Marx v. Texas, 120 S. Ct. 574, 575 (1999) (Scalia, J., dissenting) (“I [Scalia] dissented in *Craig,* because I thought it subordinated the plain language of the Bill of Rights to the ‘tide of prevailing current opinion.’” (quoting *Craig,* 497 U.S. at 860)); Danner v. Kentucky, 119 S. Ct. 529, 530 (1998) (Scalia, J., dissenting) (“It is a dangerous business to water down the confrontation right so dramatically merely because society finds the charged crime particularly reprehensible.”). Furthermore, in *Coy v. Iowa,* (a Scalia authored opinion) the defendant was charged with sexually assaulting two girls who were allowed to testify against him behind a screen at trial. *See Coy v. Iowa,* 487 U.S. 1012, 1015 (1988). In striking down the procedure the Court held that “[w]e have never doubted . . . that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.” *Id.* at 1016. “[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution.’” *Id.* at 1017 (quoting *Pointer v. Texas,* 380 U.S. 400, 404 (1965)). Thus, according to Scalia, the right to actual confrontation, engrained in the Confrontation Clause, is so powerfully important to a criminal defendant’s right to a fair trial that the public’s opinion regarding the audacity of certain crimes or the vulnerability of certain victims cannot ever be so prevalent as to overcome the guarantee of face to face confrontation. *See* Richard K. Sherwin, *Constitutional Purgatory: Shades and Presences Inside the Courtroom,* in *LAW AND THE IMAGE* (Daniela Carpi and Klaus Stierstorfer, eds.) (forthcoming 2012) (“[In *Coy,*] [t]he countervailing policy objective of safeguarding the well being of the victims was deemed insufficient to mitigate the offense to the defendant’s Sixth Amendment right.”). *But see* Troy Fuhriman, *State v. Foster: Washington State Undermines Confrontation Rights to Protect Child Witnesses,* 36 Gonz. L. Rev. 7, 13 (2001) (“The Court adopted a public policy exception to the face-to-face requirement in *Maryland v. Craig.*”).
this debate over the fundamental nature of the Confrontation Clause finally came to a close in
*Crawford v. Washington.*

IV.  **CLOSING THE DOOR ON ROBERTS & BRUTON: THE RISE OF THE CRAWFORD REGIME**

In *Crawford*, the defendant was charged with attempted murder and a dispute arose as to whether or not it was in self-defense. The prosecutor wanted to introduce an out of court statement made by the defendant’s wife while she was being interrogated by the police, but the wife was unavailable, and had never been cross-examined by the defendant. The primary issue then was whether the admission of the statement violated the defendant’s Confrontation Clause rights.

In turning prior Confrontation Clause jurisprudence on its head, the Court held that the reliability of evidence is not a concern of the Confrontation Clause, rather “[t]he principal evil at which the confrontation clause is aimed was the civil law’s use of ex parte examinations as evidence against the accused.” The Court noted that the term ‘witnesses’ within the Sixth Amendment means “those who bear testimony”—testimony in the sense of providing a

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83 Id. at 40.
84 Due to a state rule based on marital privilege. Id.
85 Id. at 50. Thus, the reliability of out of court statements is a concern for the rules of evidence, not the Confrontation Clause. *See id. at 51. See also id.* (“An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.”); Karim Khan, Caroline Buisman & Chris Gosnell, Principles of Evidence in International Criminal Justice 119 (2010) (explaining that the Confrontation Clause, after *Crawford*, no longer guarantees reliable evidence); Benjamin Wittes, Legislating the War on Terror: An Agenda for Reform 165 (2009) (same); Jennifer B. Sokoler, Between Substance and Procedure: A Role for States’ Interests in the Scope of the Confrontation Clause, 110 Colum. L. Rev. 161, 171 (2010) (“*Crawford* made clear that the nature of the right embodied by the Confrontation Clause is a procedural constitutional requirement that cannot be dispensed with simply because a judge has decided that proffered evidence is reliable.”).
86 U.S. Const. VI amend. (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).
formalized statement to police, not merely an off-hand remark to a friend. Thus, “even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object.”

In declining to provide a complete definition of what ‘testimonial’ means, the Court did provide us with three ‘core’ types of testimonial statements:

[1] pretrial statements that declarants would reasonably expect to be used prosecutorially . . . , [2] “extrajudicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions . . . ,” [and] [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

The Court lastly stated its central holding which should ultimately lead to Bruton’s demise:

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 but about how reliability can best be determined.

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87 Crawford, 541 U.S. at 51.
88 Id. at 53.
89 Id. at 51–52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., dissenting). The 6th amendment would only allow such testimonial statements in if the declarant were “unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Id. at 54.
90 Id. at 61 (emphasis added). See also MARK M. DOBSON, EVIDENCE IN FLORIDA: HEARSAY EXCEPTIONS § 9.6 (8th Ed. 2011) ("Crawford declared that the protection that the Confrontation Clause seeks to give an accused ‘is a procedural rather than a substantive guarantee.’ Thus, the reliability of testimonial hearsay requires that it be tested by cross-examination, not some other method.” (citations omitted) (quoting Crawford, 541 U.S. at 61)); David H. Kwasniewski, Confrontation Clause Violations as Structural Defects, 96 CORNELL L. REV. 397, 424 (2011) (“Since Crawford, however, the Court has largely recast the Sixth Amendment primarily as a set of procedural rights designed to prevent the perceived evils of an inquisitorial system.”); Aviva Orenstein, Sex, Threats, and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence Cases, 79 FORDHAM L. REV. 115, 135 (2010) (“Crawford focused on the procedural nature of the confrontation right, explaining: ‘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.’” (quoting Crawford, 541 U.S. at 61)). See also Whorton v. Bockting, 549 U.S. 406, 417 (2007) (“Crawford announced a ‘new rule’ and . . . it is clear and undisputed that the rule is procedural and not substantive.”); id. at 415 (“Crawford announced a ‘new rule’ of criminal procedure.”).
In applying these rules to the facts of Crawford, the Court held the statements at issue were testimonial as they were made during “police interrogations;” situations always involving testimonial statements.91

Thus, Roberts and Bruton’s failure lie not in their purpose (Crawford, Roberts, and Bruton all aim to provide reliable evidence), but rather in their formulation of the Confrontation Clause as substantive (guaranteeing reliability), rather than procedural (guaranteeing cross-examination).92 Therefore, the true “result of Crawford is found in its dismissal of any concern for substantive reliability of hearsay statements,” and thereby in its dismissal for any concern with Roberts and Bruton.93

A. Further Into the Procedure: Davis & Hammon

Via Justice Scalia, the Supreme Court further solidified the Confrontation Clause as a procedural guarantee of cross-examination in Washington v. Davis (which consisted of two cases: Davis and Hammon).94 In Davis, a woman made a 911 call in which she told the operator that the defendant was assaulting her.95 The state’s only witnesses were the two police officers

91 Crawford, 541 U.S. at 68.
92 See Marc C. McAllister, The Disguised Witness and Crawford’s Uneasy Tension With Craig: Bringing Uniformity to the Supreme Court’s Confrontation Jurisprudence, 58 Drake L. Rev. 481, 511 (2010) (“According to Crawford, dispensing with confrontation because testimony is obviously reliable mischaracterizes the confrontation right as a substantive rather than a procedural guarantee, thus threatening to undermine the right.”). But see Ohio v. Roberts, 448 U.S. 56, 66 (1980) (“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.”’”).
93 Jules Epstein, Avoiding Trial by Rumor: Identifying the Due Process Threshold for Hearsay Evidence After the Demise of the Ohio v. Roberts Reliability Standard, 77 UMKC L. Rev. 119, 120 (2008). See also Justin Chou, Melendez-Diaz v. Massachusetts: Raising the Confrontation Requirements for Forensic Evidence in California, 14 Berkeley J. Crim. L. 439, 449 (2009) (“[T]o the Court, although the scientific nature of the evidence may increase its reliability, the Crawford decision shifted the focus away from substantive reliability and towards the Constitution’s historically-based procedural guarantees.”); Michael D. Pepson & John N. Sharifi, 43 Akron L. Rev. 1, 34 (2010) (“At least regarding testimonial evidence, the majority in Crawford was troubled both by the substantive focus of the admissibility standard delineated by the Court in Roberts and the discretionary aspects of that framework.”).
95 Id. at 817–18.
who responded to the 911 call, but neither had seen who injured her. Thus, the issue was whether the 911 tape could come in (the 911 caller refused to testify). In *Hammon*, two officers responded to a domestic violence situation where they observed that a woman had been beaten. The officers had separated the man from the woman, and proceeded to take a statement from the woman who described the man’s violent acts towards her. However, she refused to testify at trial, and so the prosecution admitted the affidavit she gave to the police.

We know that statements given during the course of police interrogations are testimonial, but ‘police interrogations’ was not defined in *Crawford*. Thus, the issue here was what kinds of police interrogations produce testimonial statements, and hence must be cross-examined by the defendant. The Court produced the following guidance:

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

In applying this ‘primary purpose’ test to the facts of *Davis*, the Court held that the 911 tape was non-testimonial because the caller was speaking about events as they actually were.

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96 Id. at 818–19.
97 Id. at 819.
98 Id. at 820.
99 Id.
101 See Judge Daniel B. Shanes, *Confronting Testimonial Hearsay: Understanding the New Confrontation Clause*, 40 LOY. U. CHI. L.J. 879, 895 (2009) (“To determine whether a statement made during police interrogation (as that term is used for confrontation purposes) constitutes testimonial hearsay, the *Davis* Court established a ‘primary purpose’ test.”); Eleanor Simon, *Confrontation and Domestic Violence Post-Davis: Is There and Should There Be a Doctrinal Exception?*, 17 MICH. J. GENDER & L. 175, 181 (2011) (“The [*Davis*] Court thus created the ‘primary purpose’ and ‘ongoing emergency’ test to classify statements to law enforcement.”).
102 *Davis*, 547 U.S. at 822. The *Davis* Court made clear though that “these rules do not imply that statements made in the absence of any interrogation are necessarily non-testimonial. And even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Clause requires us to evaluate.” Id. at 822 n.1.
happening, rather than describing some past event.\textsuperscript{103} “[T]he elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past.”\textsuperscript{104}

Conversely, in \textit{Hammon} the Court held that the officers were questioning the declarant about what \textit{had} happened, rather than what \textit{is} happening. The sole purpose was to investigate a past crime, and thus the statements were testimonial and inadmissible absent an opportunity to cross-examine the declarant.\textsuperscript{105}

\textbf{B. How Does Davis Fit Into the Procedural Guarantee of Crawford?}

In \textit{Crawford}, the Court noted that the Confrontation Clause is “acutely concerned with a specific type of out-of-court statement:”\textsuperscript{106} statements by “those who bear testimony, hence the clause applies only to testimonial statements.”\textsuperscript{107} \textit{Davis} provided a further understanding that the purpose of the Confrontation Clause is to guarantee a criminal defendant the right to cross-examine those specific statements elicited by police \textit{solely} for the purpose of being later used at trial against the defendant.\textsuperscript{108} It is \textit{Davis} that makes clear that the Confrontation Clause does not allow the mere “gather[ing] of ex parte statements” by police and judges to be later admitted

\begin{footnotesize}
\textsuperscript{103} \textit{Id.} at 827.
\textsuperscript{104} \textit{Id.} The Court did note that a conversation which begins to determine the need for emergency assistance can evolve into testimonial statements once that purpose has been achieved. \textit{Id.} at 828.
\textsuperscript{105} \textit{Id.} at 829.
\textsuperscript{107} \textit{New York Court of Appeal, supra} note 107, at 909 (quoting \textit{Crawford}, 541 U.S. at 68).
\textsuperscript{108} \textit{See} Sarah M. Buel, \textit{Davis and Hammon: Missed Cues Result in Unrealistic Dichotomy}, (Working Paper 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647004&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647004 (“If the officer seeks information about past events only for future use in a criminal prosecution, a victim’s responses are testimonial and inadmissible at trial without her presence.”). \textit{See also} Michael H. Graham, Crawford/Davis “Testimonial” Interpreted, Removing the Clutter; Application Summary, 62 U. MIAMI L. REV. 811, 829 (2008) (“To properly interpret ‘testimonial,’ it is necessary to return to the principal evil the Confrontation Clause was designed to address as reflected in both \textit{Crawford} and \textit{Davis}. That principal evil was and is government officials eliciting or receiving solely ‘accusatory statements’ from third parties.”)
\end{footnotesize}
against a defendant, even if the statements are factually reliable.\textsuperscript{109} \textit{Davis} provides criminal defendants with “real protection” against statements made for the sole purpose of aiding in their conviction.\textsuperscript{110}

Thus, \textit{Davis} and \textit{Hammon} simply further showed us that without a statement made with the purpose of aiding in the prosecution of a criminal defendant, the procedural guarantees of the Confrontation Clause do not apply, and we revert back to standard rules of evidence.\textsuperscript{111}

\section*{C. Melendez-Diaz As a Solidification of Crawford’s Procedural Guarantee}

\textit{Crawford}’s procedural guarantee was clearly laid forth in \textit{Melendez-Diaz v. Massachusetts}.\textsuperscript{112} The defendant in \textit{Melendez-Diaz} was charged with numerous drug crimes.\textsuperscript{113} At the defendant’s trial, the prosecution placed into evidence plastic bags and submitted three certificates of analysis with the results of a forensic analysis performed on the substances which

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\item \textsuperscript{111} The \textit{Roberts} test would not apply as it was overruled in \textit{Bockting}. See Whorton v. Bockting, 549 U.S. 406, 414 (2007). \textit{See also} Thomas M. Forsyth III, Just Don’t Say You Heard It From Me: Bridging the Davis v. Washington Divide of Indistinguishable Primary-Purpose Statements, 35 HASTINGS CONST. L.Q. 263, 271 (2008) (“\textit{The Davis} Court held that the Constitution requires confrontation to ensure reliability when statements are made for the primary purpose of establishing facts relevant to prosecution. The \textit{Davis} case is merely the most recent step in an attempt to return the Confrontation Clause to its original role in criminal procedure.” (footnotes omitted)); Roger W. Kirst, \textit{Confrontation Rules After Davis} v. Washington, 15 J.L. & POL’Y 635, 677 (2007) (“\textit{Crawford} described the principal evil as the civil-law mode of criminal procedure that used ex parte examinations as evidence against the accused. \textit{Davis} reemphasized that ‘it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends [the Confrontation Clause].’” (quoting Davis v. Washington, 547 U.S. 813, 831 n.6 (2006)).
\item \textsuperscript{112} Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009).
\item \textsuperscript{113} \textit{Id.} at 2530.
\end{itemize}
\end{footnotesize}
concluded that the bags contained cocaine.\textsuperscript{114} The defendant objected to this asserting that the Sixth Amendment guaranteed him the right to have the analysts testify in person and be cross-examined by him.\textsuperscript{115}

The Court held that “[t]here is little doubt that the certificates of analysis at issue in this case fall within the core class of testimonial statements.”\textsuperscript{116} The certificates were simply facts asserted by the analysts which the analysts knew would be used prosecutorially against the defendant. Thus, the evidence could not be admitted substantively against the defendant unless the defendant’s procedural guarantees were first had; namely, the opportunity to cross-examine the analysts.\textsuperscript{117}

\textsuperscript{114} Id.
\textsuperscript{115} Id. at 2531. The Court restated Crawford’s core class of testimonial statements:

\textit{Ex parte} in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements… contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

\textsuperscript{116} Id.
\textsuperscript{117} Id. at 2542. Recently, the Supreme Court held that not only are certifications of analysis testimonial, but in order to cure the Confrontation Clause violation, the state must produce the analyst who actually performed the analysis and cannot produce a substitute to testify that the results were accurate. See Bullcoming v. New Mexico, No. 09-10876, slip op. at 8 (June 23, 2011). In Bullcoming, the defendant was charged with driving while under the influence of intoxicating liquor, and the state (New Mexico) sought to introduce a blood alcohol report concluding that the defendant’s blood alcohol content was over the legal limit. \textit{Id.} at 3–4. The analysis was signed by the individual who actually tested the blood, but at trial the state declined to call that analyst and instead called an individual unconnected with the defendant’s sample, but familiar with the process of testing blood for alcohol content. \textit{Id.} at 5–6. The New Mexico Supreme Court upheld the conviction holding that the actual analyst who performed the report merely transcribed the results of the analysis given by the computer, and the state had provided an expert witness who could be cross-examined regarding the process and conclusions of a blood alcohol test. \textit{Id.} at 7. The United States Supreme Court overruled and held that the only way to introduce testimonial statements is to have the actual person who produced the testimony available for cross-examination (unless that person is unavailable but was subject to prior cross-examination by the defendant). \textit{Id.} at 8. An analyst must certify that he or she received the blood sample, that it was the correct blood sample, and that it remained uncompromised throughout the test. \textit{Id.} at 10. Thus, “surrogate testimony of the kind [the expert] was equipped to give could not convey what [the actual analyst] knew or observed about the events his certification concerned, \textit{i.e.,} the particular test and testing process he employed.” \textit{Id.} at 12. Producing an individual who can merely testify \textit{about} testimonial statements, but did not actually construct the testimonial statements at issue does not ensure the defendant an opportunity to confront and cross-examine his or her actual accusers. \textit{Id.} at 13.
Melendez-Diaz furthers the Court’s treatment of the Confrontation Clause as a procedural right. The Court rejected the argument that since the affidavits do not recount historical facts (subject to manipulation), but rather are “neutral” testimony, that the Clause should not apply.118 The Court noted that “[t]his argument is little more than an invitation to return to our overruled decision in Roberts, which held that evidence with ‘particularized guarantees of trustworthiness’ was admissible notwithstanding the Confrontation Clause.”119 Thus, “the comparative reliability of an analyst’s testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar.”120 Therefore, in reaffirming that the Confrontation Clause “is a procedural rather than a substantive guarantee,” the Court concluded that there may be “other ways-and in some cases better ways-to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation.”121 Thus, there is no substitute for cross-

118 Melendez-Diaz, 129 S. Ct. at 2536. See also Jesse J. Norris, Who Can Testify About Lab Results After Melendez-Diaz? The Challenge of Surrogate Testimony to the Confrontation Clause, AM. J. CRIM. L. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1774182 (“The Court also noted that analysts who lied may change their story at trial, and that erroneous or corrupt forensic analysis is common enough to contribute to many false convictions.”). Even the inevitable costs that the states will now face in having to produce laboratory analysts for each criminal trial is not enough to deter a defendant’s guaranteed procedural right to confront those who produce evidence for the sole purpose of convicting him or her. See Steven N. Yirmish, Melendez-Diaz and the Application of Crawford in the Lab, THE CHAMPION, Aug. 2009, at 28, 28 (explaining that states will likely face higher costs in the prosecution of crimes after Melendez-Diaz); Ivana Deyrup, Causing the Sky to Fall: The Legal & Practical Implications of Melendez-Diaz, HARV. L. & POL’Y REV. ONLINE (Apr. 19, 2010), http://hlpronline.com/2010/04/deyrup_melendez-diaz/ (“[T]he costs of complying with Melendez-Diaz are significant and growing.”). Furthermore, the practical difficulties in producing the actual analyst who conducted the report and in having that analyst recall a specific test performed some time ago is not even enough to overcome the defendant’s guaranteed procedural right to confront all witnesses against him or her. See Bullcoming v. New Mexico, No. 09-10876, slip op. at 12 n.7 (June 23, 2011) (noting that although analysts “likely would not recall a particular test, given the number of tests each analyst conducts and the standard procedure followed in testing,” defense counsel would still be able to question the analyst’s “proficiency, the care he took in performing his work, and his veracity”); id at 16 (rejecting the argument that having the original analyst produced “would impose an undue burden on the prosecution”).


120 Bullcoming v. New Mexico, No. 09-10876, slip op. at 11 (June 23, 2011).

121 Melendez-Diaz, 129 S.Ct. at 2536. See also Laura Bowzer, Melendez-Diaz v. Massachusetts: Upholding the Goals and Guarantees of the Confrontation Clause, 88 DENV. U. L. REV. 271, 281 (2010) (“Confrontation is meant to expose both fraudulently and honestly produced erroneous evidence. Finally, the right to confrontation does not
examination, even for such reliable kinds of evidence as forensic lab reports. The fact that cross-examination of such reliable evidence may lack effectiveness and prove little is not the touchstone inquiry; it is not ineffective cross-examination that the Confrontation Clause bans, it is the absence of face to face confrontation.

D. Does Michigan v. Bryant Really Change Anything?

The last great Confrontation Clause case post-Crawford came in early 2011 in Michigan v. Bryant. Contrary to what some believe, and most importantly, what Justice Scalia believes, Crawford’s purpose and framework remain unaltered by Michigan v. Bryant. In Bryant, the police found a man lying in a gas station parking lot, with a gunshot wound to his stomach. The officers asked him who shot him, and he informed the police that the defendant

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vanish because other state or federal procedures, such as the ability to subpoena analysts, are aimed at ensuring reliability.” (footnotes omitted).


123 See Nicholas Klaiber, Confronting Reality: Surrogate Forensic Science Witnesses under the Confrontation Clause, 97 VA. L. REV. 199, 223 (2011) (“[C]ross-examination of analysts provides little overall benefit because forensic science is regarded as extremely reliable and criminal defendants would therefore rarely engage in meaningful cross-examination of forensic analysts.”).


126 See Michigan v. Bryant, 131 S.Ct. 1143, 1174 (2011) (Scalia, J., dissenting) (“The Court announces that in future cases it will look to ‘standard rules of hearsay, designed to identify some statements as reliable,’ when deciding whether a statement is testimonial. Ohio v. Roberts . . . said something remarkably similar: An out-of-court statement is admissible if it ‘falls within a firmly rooted hearsay exception’ or otherwise ‘bears adequate “indicia of reliability.’” We tried that approach to the Confrontation Clause for nearly 25 years before Crawford rejected it as an unworkable standard unmoored from the text and the historical roots of the Confrontation Clause,” (citations omitted) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980))).

127 Bryant, 11 S. Ct. at 1150.
shot him in the back while he was leaving the defendant’s home. The man died shortly thereafter, and thus the issue became whether the victim’s statements to the police were testimonial.

The Court held the statements were not testimonial. The Court, for the first time, explained what exactly an ‘emergency’ is within the context of the Davis primary purpose test. First, the Court explained that the existence of an emergency is not dispositive, but it is “among the most important circumstances informing the ‘primary purpose’ of an interrogation.” In determining whether an emergency does exist though, it will necessarily be “a highly context-dependent inquiry.”

Contrasting with Davis and Hammon, where the emergencies were limited to the victim and the perpetrator, certain situations, such as those involving a fleeing shooter, will expand the scope of the emergency. Thus, to determine whether an emergency exists a trial court must objectively examine multiple factors including: (1) the type of crime at issue; (2) the type of weapon employed; (3) the injuries to the victim; (4) the formality of the interrogation; (5) “the statements and actions of both the declarant and interrogators.”

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128 Id.
129 Id. at 1152. The statement was not admissible as a ‘dying declaration,’ as the prosecution only sought its admission as an excited utterance at trial. Id. at 1151 n.1.
130 Id. at 1156.
131 Id. at 1157. “[B]ecause the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.” Id.
132 Id. at 1158.
133 Id. at 1164.
134 Compare Davis v. Washington, 547 U.S. 813, 829 (2006) (holding that a statement made in the context of a domestic violence dispute after the police arrive and secure the scene testimonial), with Bryant, 11 S. Ct. at 1166 (holding statement made by shooting victim to police after police have secured the scene non-testimonial because the shooter is on the loose).
135 Bryant, 11 S. Ct. at 1158 (“[T]he duration and scope of an emergency may depend in part on the type of weapon employed.”). Compare Davis, 547 U.S. at 830–32 (holding testimonial statements where perpetrator used fists to attack victim), with Bryant, 11 S. Ct. at 1166 (holding non-testimonial where crime involved gun).
136 Bryant, 11 S. Ct. at 1159 (“[W]e have not previously considered, much less ruled out, the relevance of a victim’s severe injuries to the primary purpose inquiry.”).
137 Id. at 1160 (“Another factor the Michigan Supreme Court did not sufficiently account for is the importance of informality in an encounter between a victim and police.”).
138 Id.
but (6) in the end it is the primary purpose of the declarant’s statements which matter the most.\textsuperscript{139}
Applying these factors, the Court determined that there was an ongoing emergency at the time the victim made his statements—the perpetrator had used a gun, the police did not know where or who the perpetrator was, the interrogation was informal, and the victim was mortally wounded.\textsuperscript{140} Thus, the “‘primary purpose of the interrogation’ was ‘to enable police assistance to meet the ongoing emergency.’”\textsuperscript{141}

In so holding, the Court did nothing to change \textit{Crawford} as a bedrock principle of confrontational jurisprudence. \textit{Bryant} will simply go down as another case in the \textit{Crawford} progeny; and will in no way weaken its base:

(1) First, \textit{Bryant} reaffirmed \textit{Crawford}’s central holding: \textit{Crawford} “limited the Confrontation Clause’s reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment ‘demands what the common law required: unavailability and a prior opportunity for cross-examination.’”\textsuperscript{142} If anything, this statement expands the scope of \textit{Crawford} in that \textit{Bryant} now explicitly recognizes that the Confrontation Clause \textit{only} applies to testimonial statements. If latched onto by lower courts, this statement will surely end the reign of \textit{Bruton}, as \textit{Crawford} will exclude testimonial statements, and there will be no functional need for \textit{Bruton}.\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{139} \textit{Id.} at 1162. The majority and the dissent agree on this proposition. \textit{Compare Bryant}, 11 S. Ct. at 1162 (“At trial, the declarant’s statements, not the interrogator’s questions, will be introduced to ‘establish the truth of the matter asserted,’ and must therefore pass the Sixth Amendment test.” (quoting \textit{Crawford v. Washington}, 541 U.S. 36, 60 (2004)), \textit{with Bryant} 11 S. Ct. at 1168 (Scalia, J., dissenting) (“[B]ecause the Court picks a perspective so will I: The declarant’s intent is what counts.”).

\item \textsuperscript{140} \textit{Bryant}, 11 S. Ct. at 1165–66.

\item \textsuperscript{141} \textit{Id.} at 1167 (quoting \textit{Davis v. Washington}, 547 U.S. 813, 822 (2006)).

\item \textsuperscript{142} \textit{Id.} at 1153. “Thus, the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.” \textit{Id.} at 1155.

\item \textsuperscript{143} \textit{See United States v. Williams}, No. 1:09cr414, 2010 WL 3909480, at *3 (E.D. Va. Sept. 23, 2010) (“If, under the Government’s position, the statement was found to be non-testimonial, then it would not violate the Confrontation Clause to admit it. If the statement was found to be \textit{testimonial}, however, then its admission would \textit{automatically} violate the Confrontation Clause. \textit{Bruton} has no place in this equation.” (citations omitted)).
\end{itemize}
(2) Second, Bryant reaffirmed the Clause’s grounding in the treason trial of Raleigh. The Bryant Court noted that the “basic purpose of the Confrontation Clause was to ‘targe[t]’ the sort of ‘abuses’ exemplified at the notorious treason trial of Sir Walter Raleigh.” This is important to note as the right deprived of Raleigh at his trial was a procedural one, not a substantive one. And thus, such a reassurance will serve to further solidify Crawford as a bedrock principle of Confrontation Clause jurisprudence.

(3) Third, Roberts and Bruton have not been revived, despite dicta seemingly to the contrary: “In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” In order for any hearsay statement to be admissible, there must first be a hearsay exception for it. If not, then the FRE will just bar it. The Confrontation Clause does not guarantee the admissibility of certain statements, it guarantees the exclusion of certain statements, absent cross-examination. If the clause were just

144 Bryant, 11 S. Ct. at 1155.
145 See Samuel M. Duncan, “Qualified” Notice-and-Demand Statutes Unconstitutionally Eliminate a Criminal Defendant’s Sixth Amendment Right to “True” Confrontation-Live Testimony from Witnesses, 34 HAMLINE L. REV. 51, 59–60 (2011) (“In the most prominent example of the injustice of civil law procedure, Sir Walter Raleigh pleaded for the opportunity to confront his accuser.” (emphasis added)); Penny J. White, Rescuing the Confrontation Clause, 54 S.C. L. REV. 537, 543 (2003) (“Even though English procedure at the time did not require the production of witnesses or their examination in court, Sir Walter Raleigh demanded the right to meet his accusers, a right recognized 1000 years earlier in secular and ecclesiastical law.” (emphasis added)).
146 See Jeffrey L. Fisher, Originalism as an Anchor for the Sixth Amendment, 34 HARV. J.L. & PUB. POL’Y 53, 59 (2011) (“[I]f history has any force at all in constitutional interpretation, it is hard to deny that what happened in Raleigh’s trial was the precise equivalent of what the Roberts framework allowed to happen every day in cases like Michael Crawford’s.”); David H. Kwasniewski, Confrontation Clause Violations as Structural Defects, 96 CORNELL L. REV. 397, 425 (2011) (describing the Crawford Court’s extensive reliance on the Raleigh trial); Daphne A. Oberg, Working Within and Around Utah’s Section 76-5-411 After Crawford v. Washington: Assessing the Admissibility of Out-of-Court Statements of Child Victims of Sexual Abuse, 2005 UTAH L. REV. 1101, 1122 (2005) (“In Crawford, the Court cited the abuses in the Sir Walter Raleigh case as being exactly the type of abuse against which the Confrontation Clause is meant to protect.”); Judge Daniel B. Shanes, Confronting Testimonial Hearsay: Understanding the New Confrontation Clause, 40 LOY. U. CHI. L.J. 879, 881 (2009) (“Both Crawford and Davis discussed Sir Walter Raleigh’s trial extensively.”).
147 Bryant, 11 S. Ct. at 1155.
148 See FED. R. EVID. 802 (“Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.”).
concerned with reliability, then why do we need the FREs?  
This conclusion was recently affirmed in Justice Sotomayor’s (the author of Bryant) concurrence in Bullcoming v. New Mexico. In Bullcoming, Sotomayor explained that “Bryant deemed reliability, as reflected in the hearsay rules, to be ‘relevant,’ not ‘essential.’ The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation.” Thus, “the admissibility of a [non-testimonial] statement is the concern of state and federal rules of evidence, not the Confrontation Clause.”

(4) Fourth, and most importantly, Bryant is simply about further defining what an ‘emergency’ is within the Davis primary purpose test:

We confront for the first time circumstances in which the “ongoing emergency” discussed in Davis extends beyond an initial victim to a potential threat to the responding police and the public at large. This new context requires us to provide additional clarification with regard to what Davis meant by “the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”

149 See Andrew Darcy, State v. Buda: The New Jersey Supreme Court, The Confrontation Clause, and “Testimonial” Competence, 40 SETON HALL L. REV. 1169, 1210 n.244 (2010) (“And as Crawford makes clear, the Confrontation Clause is not meant to guarantee the substantive reliability of hearsay statements; that is the purpose of the rules of evidence.”).
150 Bullcoming v. New Mexico, No. 09-10876, slip op. (June 23, 2011).
151 Id. at 2 n.1.
152 Bryant, 11 S. Ct. at 1155. The Bryant majority explicitly defined their definition of testimonial in Crawford terminology. It refrained from focusing on the ‘reliability’ of the statements at issue, but only on whether they were meant to cause another’s arrest. Id. at 1160–61 (“In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers. To give an extreme example, if the police say to a victim, ‘Tell us who did this to you so that we can arrest and prosecute them,’ the victim’s response that ‘Rick did it,’ appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.” (emphasis added)).
153 Id. The Court defined the relevance of an emergency as focusing “the participants on something other than ‘prov[ing] past events potentially relevant to later criminal prosecution.’” Id. at 1157. Furthermore, the Court noted that “whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the ‘primary purpose’ of an interrogation.” Id. at 1160. This statement should be seen as expanding the realm of statements that may be testimonial, not contracting it. The existence of an emergency does not necessarily render a statement non-testimonial. A declarant may have a pre-existing motive, for example, and may use the emergency as an opportunity to act on that motive. This further shows Bryant’s respect for the core purpose of the Confrontation Clause.
This is important because the Confrontation Clause’s true purpose has nothing to do with regulating police response to an emergency.\(^{154}\) There was no emergency occurring at the time of Raleigh’s trial,\(^ {155}\) and there was no mention of an emergency in \textit{Crawford}.\(^ {156}\) Thus, it is unlikely that \textit{Bryant} could have fundamentally altered \textit{Crawford}.\(^ {157}\) Furthermore, the multi-factor approach the \textit{Bryant} Court provided for determining when there is an emergency is not akin to a

\(^ {154}\) \textit{See} Davis v. Alaska, 415 U.S. 308, 315–16 (1974) (“[T]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.”); Valerie J. Silverman, \textit{Testing the Testimonial Doctrine: The Impact of Melendez-Diaz v. Massachusetts on State-Level Criminal Prosecutions and Procedure}, 91 B.U. L. Rev. 789, 793 (2011) (“[T]he main evil the Confrontation Clause is intended to protect against is the use of affidavits in lieu of live testimony.”); Frank E. Vandervort, \textit{A Search for the Truth or Trial by Ordeal: When Prosecutors Cross-Examine Adolescents How Should Courts Respond?}, 16 Widener L. Rev. 335, 343 (2010) (“[I]n both federal and state prosecutions, the defendant must be given the opportunity to confront witnesses against him and to put questions to those witnesses which test the accuracy and truthfulness of statements, test the witness’s bias, prejudice, along with other interest in the outcome of the matter.”).

\(^ {155}\) It is oft overlooked that Cobham’s confession took place under circumstances which would make the issue of an emergency not at all relevant under the Confrontation Clause. Cobham’s confession, which was the critical evidence against Raleigh at trial, was obtained while Cobham was locked away in the Tower. \textit{See “Signed, Sealed, Delivered. . . Unconstitutional: The Effect of Melendez-Diaz on the Use of Notarized Crime Laboratory Reports in Arkansas}, 63 Ark. L. Rev. 757, 761 (2010) (“During [Raleigh’s] trial, the most ‘damning evidence’ was a statement made by Raleigh’s alleged co-conspirator during interrogations in the Tower of London. The co-conspirator, Lord Cobham, accused Raleigh of fundraising for the insurrection. Lord Cobham did not testify at Raleigh’s trial, causing Raleigh to demand to stand ‘face to face’ with his ‘accuser.’ Although Raleigh noted that some accusers may be unavailable at trial, he stated that his situation was unjust because Cobham was, in fact, ‘alive, and in the house.’”). Not only was Cobham locked away in the Tower, his alleged co-conspirators, including Raleigh, were locked away as well at the time of one of Cobham’s confessions. \textit{See Raleigh Trevelyan, Sir Walter Raleigh} 360–65 (2002); Charles Kittredge True, \textit{The Life and Times of Sir Walter Raleigh: Pioneer of Anglo-American Colonization} 151–52 (1877); Honorable William N. Gemmill, \textit{The Trial of Sir Walter Raleigh, Case & Comment}, (Aug. 1916), at 175, 175–77. It is doubtful that a true emergency could exist when all the alleged criminals are locked away, and there is no immediate danger. Thus, the existence or lack thereof of an emergency was not an issue in the development of the Confrontation Clause; it was that an available witness (Cobham) was prevented from testifying at trial, despite his accusations against Raleigh. \textit{See “Signed, Sealed, Delivered. . . Unconstitutional: The Effect of Melendez-Diaz on the Use of Notarized Crime Laboratory Reports in Arkansas}, 63 Ark. L. Rev. 757, 761 (2010). \textit{See also} Samuel M. Duncan, “Qualified” Notice-and-Demand Statutes Unconstitutionally Eliminate a Criminal Defendant’s Sixth Amendment Right to “True” Confrontation-Live Testimony From Witnesses, 34 Hamline L. Rev. 51, 56 n.27 (2011) (“True confrontation, i.e., the defendant’s right to be confronted by his accuser and alleged accomplice, was in fact the specific right Sir Walter Raleigh famously demanded at his trial.”); Valerie J. Silverman, \textit{Testing the Testimonial Doctrine: The Impact of Melendez-Diaz v. Massachusetts on State-Level Criminal Prosecutions and Procedure}, 91 B.U. L. Rev. 789, 792–93 (2011) (“This right of confrontation has historical origins in Roman times and in the 1603 case of Sir Walter Raleigh. In his trial for treason, Raleigh was convicted on the basis of the out-of-court confessions of Lord Cobham, who Raleigh did not have the chance to cross-examine at trial. The injustice in Raleigh’s trial is still frequently referenced as underlying the purpose of the Confrontation Clause right to cross-examine witnesses against the accused.”).\(^ {156}\) \textit{See generally} Crawford v. Washington, 541 U.S. 36 (2004). This also adds to the argument that the true purpose of the Confrontation Clause is not to \textit{only} apply to testimonial statements, but rather to \textit{only} apply to protect procedural rights.

\(^ {157}\) \textit{See} Bullcoming v. New Mexico, No. 09-10876, slip op. at 8 (June 23, 2011) (citing \textit{Bryant} for the proposition that \textit{Crawford} held the Confrontation Clause excludes testimonial statements absent unavailability of the declarant and a prior opportunity for cross-examination by the defendant).
reliability assessment, but rather is well fitted to a “highly context-dependent inquiry” into the existence of an emergency. 158

(5) Ultimately, the holding of Bryant is entirely consistent with the Crawford holding. 159

The simple fact in Bryant was that the police had a shooting victim, and a known shooter in the

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158 Bryant, 11 S. Ct. at 1158. The Bryant Court held that “[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.” Id. It should be noted that Davis and Hammon also involved a multi-factor test to determine whether the statements at issue were made during a police interrogation:

The [Davis/Hammon] Court considered the following factors in making [the] distinction between Davis and Hammon (and also between Davis and Crawford, for the majority refers back to the facts in their previous confrontation decision): (i) whether the victim-declarant was speaking about events “as they were actually happening”; (ii) whether the victim-declarant was “facing an ongoing emergency”; (iii) whether the statements of the victim-declarant “were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past”; and (iv) the level of formality of the interviews.”

Eleanor Simon, Confrontation and Domestic Violence Post-Davis: Is There and Should There Be A Doctrinal Exception?, 17 Mich. J. Gender & L. 175, 181 (2011) (quoting Davis v. Washington, 547 U.S. 813, 827 (2006)). For further discussion regarding the multiple factors involved in Davis and Hammon, see Justin Chou, Melendez-Diaz v. Massachusetts: Raising the Confrontation Requirements for Forensic Evidence in California, 14 Berkeley J. Crim. L. 439, 445 (2009) (“First, the statements made in Davis referenced events ‘as they were actually happening, rather than describing past events.’” The statements given to the police in Hammon described events that took place hours earlier. Second, any ‘reasonable listener’ would have recognized that the alleged victim in Davis was facing an ‘ongoing emergency.’ The call was ‘plainly a call for help against bona fide physical threat.’ Third, the ‘nature of what was asked and answered in Davis, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency.’” The Court included the questions the operator asked after the defendant had fled in this category because their answers were helpful to the responding police to know whether they were dealing with a potentially dangerous felon. Finally, the Court contrasted the formality of the two statements: in Davis, the statements were made frantically over a 911 call, while in Hammon, the police asked the witness to recount the events and sign an affidavit. Thus, the Court found that these four factors made it clear that the objective primary purpose of the statements was to meet an ongoing emergency in Davis,” (quoting Davis v. Washington, 547 U.S. 813, 827 (2006)); Deirdre Ewing, Prosecuting Batteries in the Wake of Davis and Hammon, 35 Am. J. Crim. L. 91, 101 (2007) (“Four factors contributed to the Court’s decision that the victim’s statements to the 911 operator in Davis were made to describe an ongoing emergency requiring police intervention: 1) the victim was describing events as they were happening; 2) her call was clearly a request for help against a ‘bona fide physical threat;’ 3) the nature of the questions asked were clearly designed to determine what was needed to resolve the emergency; and 4) the statements lacked a certain degree of formality because they were made ‘in an environment that was not tranquil, or even . . . safe.’” (quoting Davis v. Washington, 547 U.S. 813, 827 (2006)); Scott G. Sewar, The Right of Confrontation, Ongoing Emergencies, and the Violent-Perpetrator-at-Large Problem, 61 Stan. L. Rev. 751, 775 (2008) (noting that factors to examine within the Davis primary purpose test include: “(1) the timing of the statements relative to the emergency and ‘whether statements are in the past or present tense’; (2) ‘the proximity of the perpetrator to the declarant’; and (3) ‘the formality of the interrogation’ (though the Supreme Court ‘does not appear to employ a narrow definition of ‘formal.’” (quoting State v. Ohlson, 168 P.3d 1273, 1282–83 & nn.1–2 (2007)).

159 Bryant also reaffirms the objective analysis of Crawford: “An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the ‘primary purpose of the interrogation.’” Bryant, 131 S. Ct. at 1156. See also State v. Ayer, 917 A.2d 214, 224 (2007)
area. Obviously, local law enforcement agencies treat such situations as emergencies, and local agencies, such as public schools, often go into lockdown.\textsuperscript{160} The fact that statistically multiple shooting victims occur only rarely is completely irrelevant to the inquiry\textsuperscript{161}; the fact that they occur at all means any situation involving a known shooter on the loose is a potential emergency.\textsuperscript{162} This is objectively reasonable and is completely in line with the \textit{Crawford} framework. Thus, \textit{Bryant} should be seen as an explanation of \textit{Crawford}, not an alteration.\textsuperscript{163}

\section*{V. \textit{Appellate Court Decisions: For \& Against Bruton}}

Since \textit{Crawford} was decided in 2004, numerous appellate court decisions have dealt with the applicability of \textit{Bruton} to non-testimonial statements. Two lines of decisions have emerged: one which holds \textit{Bruton} is limited by \textit{Crawford}, while another holds \textit{Bruton} to be a valid doctrine of Confrontation Clause jurisprudence.

\textsuperscript{160} See e.g., Sean Ellis, \textit{Lockdown: Local Schools Act Due to Shooting Remark on Facebook}, IDAHO ST. J., (Mar. 8, 2011), http://www.journalnet.com/news/local/article_a5b25f6-48d7-11e0-851e-001cc4e03286.html (“A Sunday Facebook posting that claimed there would be a shooting at a Pocatello school Monday afternoon turned out to be a hoax, but a lot of people in the community suffered some tense moments before police determined it wasn’t a serious threat. In a scene that was likely repeated throughout Pocatello and Chubbuck Monday, Tonya Moore’s heart sank when she received a call from School District 25 officials notifying her that local schools had been locked down.”); Sarah Womer, \textit{Schools Go Into Precautionary Lockdown}, YUMA SUN (June 2, 2011), http://www.yumasun.com/news/school-70419-lockdown-high.html (reporting on school lockdowns in response to local shootings). \textit{See also} Michigan v. Bryant, 131 S. Ct. 1143, 1158 (2011) (“Domestic violence cases like \textit{Davis} and \textit{Hammon} often have a narrower zone of potential victims than cases involving threats to public safety.”).

\textsuperscript{161} See DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES, TABLE 36 (2008) \textit{available at} http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus08.pdf (noting that of violent crimes, multiple victims only occur in 4.1\% of the cases).

\textsuperscript{162} Admittedly, the ultimate difficulty in such an analysis is not necessarily determining when the emergency ends, but determining where the emergency ends. For example, if a know shooter is on the loose in a city, would we treat statements made by individuals in surrounding cities, regarding the same shooter, as testimonial? This though is an issue outside the scope of this paper.

\textsuperscript{163} For recent case law on the issue, see Ibarra v. McDonald, No. C 10–01145 JW (PR), 2011 WL 1585559, at *6 (N.D. Cal. Apr. 26, 2011) (“\textit{Michigan v. Bryant} makes clear that what matters for determining whether a statement is ‘testimonial,’ and thus subject to \textit{Crawford}, is whether, viewed objectively, the ‘primary purpose’ of procuring the statement was to create ‘an out-of-court substitute for trial testimony.’”); McKinney v. Jarriel, No. CV409-091, 2010 WL 4313394, at *7 n.3 (S.D. Ga. Oct. 8, 2010) (explaining that \textit{Bryant} held that statements by “wounded victims concerning the perpetrator are non-testimonial if they objectively indicate that the purpose of the interrogation is to enable police assistance to meet an ongoing emergency, and, thus, not afforded heightened protection under \textit{Crawford}”).
A. *Holding Bruton is Limited by Crawford*

One line of cases holds that the Confrontation Clause only applies to testimonial statements, and thus, *Bruton* has no application to a non-testimonial statement. The practical implication of these courts’ decisions is that where there is a testimonial statement at issue, *Crawford* will exclude it (not *Bruton*), if the defendant does not have an opportunity to cross-examine the declarant. Where there is a non-testimonial statement at issue, neither *Crawford* nor *Bruton* will bar the statement’s admissibility.

In *United States v. Johnson*, a prison inmate’s secret tape recorded conversation with the defendant was admitted against the defendant at trial, who was eventually convicted. The defendant argued that such admission violated his Confrontation Clause rights under *Bruton*. The court held otherwise. In concluding so, the court held that *Davis* and *Bockting* “eliminate[d] any need to analyze the admissibility of the tape-recording under the rule established in *Bruton*.“ The court noted that since *Bruton* is based on the Confrontation Clause, then it also only applies to testimonial statements, and any non-testimonial statement (as here) is not subject to it.

In *United States v. Figueroa-Cartagena*, a non-testifying co-defendant’s statements to his mother, which implicated another defendant were introduced at trial against both. Despite the defendant’s invocation of *Bruton*, the court held that the doctrine did not apply because “[t]he

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165 Id. at 323–24.
166 Id. at 324.
167 Id. at 325.
168 Id. at 326. *See also* United States v. Vargas, 570 F.3d 1004, 1009 (8th Cir. 2009) (holding that where statements are nontestimonial, *Bruton* is not applicable); United States v. Pugh, 273 Fed. Appx. 449, 455 (6th Cir. 2008) (“Because the statement at issue is not testimonial in nature, the Confrontation Clause is not implicated, and an analysis under *Bruton* is unnecessary.”); United States v. Pike, 292 Fed. Appx. 108, 112 (2d Cir. 2008) (“[B]ecause the statement was not testimonial, its admission does not violate either *Crawford* v. Washington or *Bruton* v. United States.” (citations omitted)).
170 Id. at 84.
Bruton . . . framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place.”171 In the absence of such a guaranteed right, no constitutional violation can be had.172 Even though the court held the statements non-testimonial, which likely would have been barred under Bruton, the court admitted the statements because Bruton must be viewed “through the lens of Crawford and Davis.”173

In United States v. Castro-Davis,174 a conversation between one defendant and his mother was introduced, which also inculpated the other co-defendant.175 However, since the statement was to his mother and not some government official, the court held the statements to be non-testimonial.176 Furthermore, the court held no Bruton violation occurred as Crawford controls the Confrontation Clause analysis, not Bruton.177 Thus, no Confrontation Clause issue was present.178

United States v. Dale179 involved a typical Bruton situation. The prosecution introduced a recorded conversation between a co-defendant and another individual which implicated the other co-defendant.180 However, neither person on the tape testified, and the co-defendant

171 Id. at 85.
172 Id.
173 See also United States v. Williams, No. 1:09cr414, 2010 WL 3909480, at *3 (E.D. Va. Sept. 23, 2010) (“To say that it is ‘necessary to view Bruton through the lens of Crawford and [Davis v. Washington],’ is really to say there is no longer a[n] Bruton rule.” (citations omitted)); United States v. Smalls, 605 F.3d 765, 780 (10th Cir. 2010) (“Notably, however, the Bruton rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements.”). Smalls also noted that the Confrontation Clause is no longer concerned with a reliability analysis. Smalls, 605 F.3d at 776.
175 Id. at 59–60.
176 Id. at 65–66.
177 Id.
179 United States v. Dale, 614 F.3d 942 (8th Cir. 2010).
180 Id. at 952.
argued that its admission violated his Confrontation Clause rights.\textsuperscript{181} The court held however that the out of court statements were non-testimonial and thus, no \textit{Bruton} violation occurred.\textsuperscript{182} According to the court, “[i]t is now clear that the Confrontation Clause does not apply to non-testimonial statements by an out-of-court declarant.”\textsuperscript{183}

These cases make clear that numerous circuit courts of appeal are recognizing that \textit{Bruton} is no longer an applicable doctrine. Few courts expand on the underlying rationale, but all recognize the overlying truth: In light of \textit{Crawford}, \textit{Bruton} simply need not apply.

\textbf{B. Holding Crawford Did Not Affect Bruton}

Despite the above arguments, some courts of appeal continue to apply \textit{Bruton} and hold that \textit{Crawford} did not limit the Confrontation Clause’s applicability to testimonial statements.

In \textit{United States v. Ramos-Cardenas},\textsuperscript{184} a non-testifying co-defendant’s statements were admitted at trial against the speaker. The court held that although the statements were non-testimonial, since they were entered against their speaker, it is \textit{Bruton} that governs the analysis, not \textit{Crawford}.\textsuperscript{185}

Furthermore, in \textit{United States v. Williams},\textsuperscript{186} three men were charged with conspiracy to sell drugs and the government intended to offer statements made by each one that inculpated another defendant.\textsuperscript{187} However, the FRE barred the statements’ admissibility against the other defendants.\textsuperscript{188} The court rejected the government’s argument that \textit{Bruton} is limited to testimonial statements and held that \textit{Crawford} “did [not] limit the Confrontation Clause to

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\item \textsuperscript{181} \textit{Id.} at 953.
\item \textsuperscript{182} \textit{Id.} at 956.
\item \textsuperscript{183} \textit{Id.} at 955. \textit{See also} United States v. Pugh, 273 Fed. Appx. 449, 455 (6th Cir.2008) (“[T]he statement at issue . . . is nontestimonial in nature, and therefore, does not implicate the Confrontation Clause as analyzed under \textit{Bruton} or otherwise.”)
\item \textsuperscript{184} United States v. Ramos-Cardenas, 524 F.3d 600 (5th Cir. 2008).
\item \textsuperscript{185} \textit{Id.} at 609–10.
\item \textsuperscript{186} United States v. Williams, No. 1:09cr414, 2010 WL 3909480 (E.D. Va. Sept. 23, 2010).
\item \textsuperscript{187} \textit{Id.} at *1 n.1.
\item \textsuperscript{188} \textit{Id.} at *1.
\end{itemize}
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testimonial statements.”¹⁸⁹ The court reasoned that it is “highly unlikely that Crawford (a case that expanded the Confrontation Clause’s application) would have eviscerated Bruton (a Confrontation Clause case that Crawford cited) so casually.”¹⁹⁰ Thus, the court held that Bruton can apply to the statements at issue here and bar them, even if they are non-testimonial.¹⁹¹

Therefore, it still does remain true that to some courts Bruton is applicable as a valid doctrine of Confrontation Clause jurisprudence.¹⁹²

VI. Since Crawford Holds that the Confrontation Clause is a Procedural Guarantee of Confrontation, Bruton’s Substantive Guarantee Impermissibly Expands the Scope of the Confrontation Clause

To return to this paper’s main argument, Bruton is inconsistent with Crawford because Bruton, as with Roberts, is based on a premise that the Confrontation Clause is a substantive right, ensuring the defendant that out of court statements must be factually reliable before being admitted, absent cross-examination.¹⁹³ Bruton relied on the drafters of the FRE to determine an out of court statement’s admissibility. If the drafters determined that a certain type of out of court statement was reliable then it would be excepted from the hearsay rule and admissible against a criminal defendant.¹⁹⁴ Then Roberts affirmed that this ‘reliability’ analysis is not just

¹⁸⁹ Id. at *2.
¹⁹⁰ Id. at *4. This observation was directly contravened in a footnote in the appellate court decision of United States v. Jordan. In Jordan, a case holding that statements made to a friend were non-testimonial, the court explained that in Whorton v. Bockting the United States Supreme Court unanimously held that Crawford limited the Confrontation Clause’s reach to testimonial statements. See United States v. Jordan, 509 F.3d 191, 201 n.5 (2007). As such, the Confrontation Clause permits the admission of non-testimonial statements “even if they lack indicia of reliability.” Id. (quoting Whorton v. Bockting, 549 U.S. 406, 420 (2007)).
¹⁹¹ Williams, 2010 WL 3909480 at *4–*5. Williams was appealed, and although the parties did not raise a Bruton issue on appeal, the appellate court did note that “Crawford did not overrule Bruton and its progeny.” United States v. Williams, 429 F.3d 767, 773 n.2 (2005).
¹⁹² See United States v. Rodriguez-Duran, 507 F.3d 776, 779–79 (2007) (applying both Crawford and Bruton); United States v. Lung Fong Chen, 393 F.3d 139, 150 (2004) (holding Crawford did not affect Bruton); United States v. Rashid, 383 F.3d 769, 775 (2004) (“Crawford did not overrule Bruton and in fact cited Bruton as an example of a case which was consistent with the original understanding of the Confrontation Clause.”).
¹⁹³ But see Crawford v. Washington, 541 U.S. 36, 62 (2004) (“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”).
¹⁹⁴ See Santiago v. O’Brien, 628 F.3d 30, 34 (2010) (“A central concern of evidence law, and the rule against hearsay in particular, is with the reliability of evidence—especially out-of-court statements by one not available for
an ‘implication’ of the Confrontation Clause, but is its substantive guarantee. Therefore, for almost twenty-five years, the Confrontation Clause did not guarantee actual confrontation, but ensured the substantive reliability of certain out of court statements—whose reliability could only be determined by the drafters of the FRE, not necessarily the defendant. This granted the drafters of the FRE the power to control confrontational rights, and to determine that if a statement (or a hearsay exception) were reliable enough, then the judge could dispense with any implicated procedural right the Clause granted the defendant.

*Crawford* reversed this reasoning—the Confrontation Clause was not meant to allow the defendant’s right to confront a witness to be so easily removed by the discretion of a judge or the
cross-examination. The pattern created by hearsay law and its exceptions is to exclude such statements save in categories deemed reliable.”). See also Angela Conti & Brian Gitnik, Federal Rule of Evidence 803(2): Problems With the Excited Utterance Exception to the Rule on Hearsay, 14 ST. JOHN’S J. LEGAL COMMENT 227, 230 (1999) (“Despite the general rule that hearsay is not admissible, the drafters of the Federal Rules, as well as many courts, have adopted exceptions to this rule. Exceptions to the hearsay rule seemingly stem from the belief that a certain amount of hearsay can be proven reliable. In formulating exceptions to the hearsay rule, the drafters of the Federal Rules of Evidence focused centrally on trustworthiness.”). To be sure, even Scalia has noted that the Confrontation Clause contains certain implications. See Maryland v. Craig, 497 U.S. 836, 865 (1990) (“We have nonetheless found implicit in the Confrontation Clause a presumption that a judge in a bench trial has no difficulty in disregarding inadmissible evidence in reaching his verdict, we thus agree with our sister circuits who have determined that *Bruton* is inapplicable to bench trials”); James B. Haddad & Richard G. Agin, A Potential Revolution in Bruton Doctrine: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of a Co-Defendant’s Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use, 81 J. CRIM. L. & CRIMINOLOGY 235, 236 n.6 (1990) (“Bruton is not applicable to bench trials.”); Colin Miller, Avoiding a Confrontation? How Courts Have Erred in Finding that Nontestimonial Hearsay is Beyond the Scope of the Bruton Doctrine 35 (Mar. 15, 2011) (unpublished manuscript), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1787563 (“Every federal appellate court that addressed the issue before *Crawford* concluded the [Bruton] doctrine was inapplicable in cases heard by judges rather than juries.”). See also Jennifer Christianson, The Future Implications of Lilly v. Virginia, 55 U. MIAMI L. REV. 891, 902 (2001) (noting that under Roberts, judges determined the reliability of hearsay evidence); Benjamin E. Rosenberg, The Future of Codefendant Confessions, 30 SETON HALL L. REV. 516, 544 (2000) (same).

See Hon. Jack Nevin, Conviction, Confrontation, and Crawford: Gang Expert Testimony as Testimonial Hearsay, 34 SEATTLE U. L. REV. 857, 864 (2011) (“[I]n *Ohio v. Roberts*, the Supreme Court held that the introduction of an unavailable witness’s hearsay statement did not violate the Confrontation Clause of the Sixth Amendment so long as the trial judge found that the hearsay was reliable and trustworthy.”). See also United States v. Robbins, 197 F.3d 829, 840 (1999) (holding that where a statement would be “admissible against [the defendant] under the Rules of Evidence, the narrow rule of *Bruton* is not implicated”).
rules of evidence. This was one of the chief concerns with Sir Walter Raleigh’s trial, which is the foundation of the Confrontation Clause. Despite Raleigh’s accuser’s availability, Raleigh was not afforded the right to cross-examine him because it was determined that the accusation was reliable and “it need[ed] not the Subscription of the [accuser].” Thus, such “true confrontation” is exactly what Raleigh demanded at his trial, and explicitly what Crawford now guarantees. This distrust of government that is the foundation of the Confrontation Clause extends to judges and the drafters of the FRE as well. That Bruton would allow such a procedural right to be dispensed with—if the FRE would not ban the statement—is the type of reasoning that led to the downfall of Roberts. Furthermore, Justice Scalia, the author of Crawford, has noted that “[t]he purpose of enshrining this protection in the Constitution was to

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198 See Crawford v. Washington, 541 U.S. 36, 61 (2004) (“Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”). This of course only applies to ‘testimonial’ statements. See id. at 60 (noting that the Roberts rationale is in conflict with the true reasoning of the Confrontation Clause).


200 Carrie Jenkins, State Trials of Mary, Queen of Scots, Sir Walter Raleigh, & Captain William Kidd 89 (1899).

201 See Samuel M. Duncan, “Qualified” Notice-and-Demand Statutes Unconstitutionally Eliminate a Criminal Defendant’s Sixth Amendment Right to “True” Confrontation-Live Testimony from Witnesses, 34 Hamline L. Rev. 51, 56 n.27 (2011) (“True confrontation, i.e., the defendant’s right to be confronted by his accuser and alleged accomplice, was in fact the specific right Sir Walter Raleigh famously demanded at his trial.”). See also Stephanos Bilbas, Two Cheers, Not Three, For Sixth Amendment Originalism, 34 Harv. J.L. & Pub. Pol’y 45, 50 (2011) (“Cases equivalent to the Sir Walter Raleigh trial, where the government tries to railroad a defendant—especially a political defendant—and to circumvent proof in open court, are prime examples of cases against which the Confrontation Clause was historically designed to protect.”).

202 See Crawford v. Washington, 541 U.S. 36, 68–69 (2004) (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

203 See Rebecca Sims Talbott, What Remains of the “Forfeited” Right to Confrontation? Restoring Sixth Amendment Values to the Forfeiture-by-Wrongdoing Rule in Light of Crawford v. Washington and Giles v. California, 85 N.Y.U. L. Rev. 1291, 1304–05 (2010) (“Emphasizing that the Confrontation Clause was born of governmental distrust, and that such distrust extended to judges as well as police and prosecutors, the Court warned that granting judges discretion to waive confrontation rights would threaten this hard-won safeguard against governmental abuse and would strike the founders as an alarming irony.”).

204 This certainly lends truth to the argument that the Confrontation Clause only protects against testimonial statements, but as stated above, this paper’s argument is that the Clause only guarantees procedural protection to a defendant concerning testimonial statements. See Michigan v. Bryant, 131 S. Ct. 1143, 1153 (2011) (noting that in Crawford “we . . . limited the Confrontation Clause’s reach to testimonial statements . . . .”).
assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his or her accusers in court . . . .”

Thus, this absolute procedural right guaranteed by Crawford cannot be modified by a rule of evidence or any determination (other than by cross-examination) that evidence is reliable, and by implication neither Roberts nor Bruton can have an effect on Crawford. Bruton was essentially an application of the rules of evidence in that it held inadmissible unreliable hearsay simply for being unreliable hearsay, and Roberts was merely an extension

205 Maryland v. Craig, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting). Thus:

Drawing further attention to the undesirable subjectivity of the reliability standard, [Crawford] emphasized that the question of “whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them,” suggesting that the Roberts decision created a system that encouraged judicial activism and therein inevitably discouraged uniformity of application, resulting in a framework that is “so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”


207 See Crawford v. Washington, 541 U.S. 36, 61 (2004) (“[T]he Confrontation Clause commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

208 “In 1975, the drafters of the Federal Rules of Evidence [even] debated placing a provision which would codify the Supreme Court’s then current interpretation of the Confrontation Clause espoused in Bruton v. United States.” Michael Duffy, Nontestimonial Declarations Against Penal Interest: Eschewing the Corroboration Requirement for Inculpatory Statements After Crawford, 41 J. MARSHALL L. REV. 969, 979–80 (2008). Numerous courts and jurisdictions recognize that Bruton was based on a reliability premise. See United States v. Fleming, 594 F.2d 598, 602 (1979) (“The rationale of Bruton was that the introduction of a potentially unreliable confession of one defendant which implicates another defendant without being subject to cross-examination deprives the latter defendant of his right to confrontation guaranteed by the Sixth Amendment.”); Woodcock v. Amaral, 511 F.2d 985, 995 (1975) (“[I]n the context of Bruton . . . the statements of the codefendant were not only ‘powerfully incriminating’ but also inherently unreliable.” (quoting Bruton v. United States, 391 U.S. 123, 135–36 (1968)); People v. Anderson, 742 P.2d 1306, 1313 (Cal. 1987) (“Broadly stated, the rule of Bruton v. United States—which is rooted in the confrontation clause and accordingly governs state as well as federal prosecutions . . . declares that a nontestifying codefendant’s extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant’s right of confrontation and cross-examination, even if a limiting instruction is given.” (citations omitted)); State v. Vaughn, No. 49311, 1985 WL 6898, at *1 (Ct. App. Ohio, June 27, 1985) (“The rationale of Bruton was that the introduction of a potentially unreliable confession of one defendant which implicates another defendant without being subject to cross-examination deprives the latter defendant of his right to confrontation guaranteed by the Sixth Amendment.” (quoting United States v. Fleming, 594 F.2d 598, 602 (1979))

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of **Bruton**, in that it required reliability of hearsay statements before they could be admitted.\(^{209}\)

The Supreme Court even recognized this in **Dutton v. Evans**\(^{210}\) and in **Lee v. Illinois**\(^{211}\) where the Court explained that every jurisdiction can enact different rules of evidence, which “admit some codefendant confessions as evidence against a defendant, under an exception to the hearsay rule, and still not be deemed guilty of a Confrontation Clause violation, even where the defendant has no opportunity to cross-examine the confessing codefendant.”\(^{212}\)

This is fundamentally inconsistent with **Crawford**’s framework. State rules of evidence nor federal rules of evidence determine the constitutional admissibility of out of court statements by non-testifying individuals—the Constitution does. For now, as noted in **Bryant**, when faced with a testimonial statement the only way to dispense with the confrontation requirement is “‘unavailability [of the declarant] and a prior opportunity for cross-examination.’”\(^{213}\) The fact that a statement would be admissible under the **FRE** cannot be relevant, and hence, neither can **Bruton**.\(^{214}\) The only way to make it past **Crawford** is to **constitutionally** dispense with the confrontation requirement, not **statutorily**.\(^{215}\)

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\(^{209}\) Recall that under **Roberts** non-interlocking confessions of a non-testifying defendant, which implicated a codefendant, were presumptively unreliable. See supra, note 51.


\(^{213}\) This is not inconsistent with **Bryant**. **Bryant** stated that “[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” **Bryant**, 131 S. Ct. at 1155. As noted above, **Bryant** was merely referring to the fact that any out of court statement must be admissible under the **FRE** before the Confrontation Clause comes into play. If the **FRE** bars the statement, the Confrontation Clause is not relevant, as the Confrontation Clause only excludes statements, it does not force their admittance. The argument this paper makes here is that in determining whether a statement is **constitutionally** barred under the Confrontation Clause, the **FRE** cannot be a factor to consider.

\(^{214}\) For arguments to the contrary, see Miguel A. Mendez, Crawford v. Washington: A Critique, 57 STAN. L. REV. 569, 582–83 (2004) (“From a practical perspective, Crawford, is consistent with Bruton. Confessions resulting from police interrogations qualify as ‘testimonial statements.’” Accordingly, admitting a codefendant’s confession to the
police implicating the accused in the crime charged would violate \textit{Crawford} as well as \textit{Bruton}, unless the codefendant takes the stand and is subject to cross-examination by the accused.”); Josephine Ross, Crawford’s \textit{Short-Lived Revolution: How Davis v. Washington Reins in Crawford’s Reach}, 83 N.D. L. REV. 387, 435 n.227 (2007) (“\textit{Crawford} also cites \textit{Bruton} with approval.”); Colin Miller, Avoiding a Confrontation? How Courts Have Erred in Finding that Nontestimonial Hearsay is Beyond the Scope of the \textit{Bruton} Doctrine 49 (Mar. 15, 2011) (unpublished manuscript), \textit{available at}: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1787563 (“The third reason why \textit{Crawford} can be read as having no effect on \textit{Bruton} doctrine cases is the \textit{Crawford} opinion itself, which establishes that the Court did not intend for its testimonial/nontestimonial dichotomy to have any effect on the \textit{Bruton} doctrine.”).