

CONFRONTATION AS A POLICY ISSUE FOR STATE LEGISLATURES

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For over two decades, the Supreme Court's interpretation of the Confrontation Clause set the limits for prosecutors' use of hearsay. In a series of decisions from 2004 to 2007, however, the Supreme Court abdicated this role with respect to a large category of hearsay deemed "nontestimonial." State legislatures should now fill the void. State law should protect confrontation rights in certain situations to which the Supreme Court no longer applies the Confrontation Clause.

A hypothetical example shows what's at stake. Imagine that the government prosecutes a defendant for an alleged assault. The accuser does not testify at the trial. Instead of calling the accuser as a witness, the government calls a police officer who would repeat an out-of-court statement that the accuser made to the officer. Should the judge allow this evidence, or should the judge bar it because the defendant cannot confront the accuser in court?

Confrontation is valuable from a policy standpoint. When a witness appears in court, defense counsel can cross-examine the witness. John Henry Wigmore hailed cross-examination as the "the greatest legal engine ever invented for the discovery of truth," because a deceptive witness finds it difficult to tell a consistent story when subjected to rigorous questioning.¹ The jury can observe the demeanor of a witness testifying in court. The witness, whose demeanor informs the jury as to the reliability of the evidence, must testify under oath subject to the penalty of perjury; by contrast, out-of-court statements to police are not subject to such strict rules.² Finally, the appearance of the accuser in court has important psychological implications for both the defendant (who is more amenable to rehabilitation after facing those he has harmed) and the accuser (who experiences catharsis and vindication).³ All of these considerations justify consistent enforcement of the confrontation requirement, so that every criminal trial benefits from the salutary effects of an in-court appearance by the accuser.

In 1980, the Supreme Court issued a landmark ruling in the case *Ohio v. Roberts*.⁴ That ruling interpreted the Confrontation Clause to impose two requirements on prosecutors who introduce hearsay. First, the government must show that the evidence bears sufficient indicia of reliability. Second, the government must show that the person

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¹ *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §1367 (3d ed. 1940)).

² CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 109 (5th ed. 2005) (explaining that jurors' observation of demeanor helps to ensure the reliability of evidence).

³ See generally, Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1874-84 (2002).

⁴ 448 U.S. 56 (1980).

who made the hearsay statement is unavailable to come to court, or is actually available for cross-examination.⁵ In sum, the *Roberts* ruling insisted that prosecutors must facilitate confrontation unless they can show the reliability of and necessity for hearsay in lieu of live testimony.

Between 1980 and 2004, the Supreme Court excused compliance with both of the *Roberts* requirements when the prosecution invoked a “firmly rooted” hearsay exception – that is, a time-honored exception to the general rule against the admission of hearsay.⁶ The lenient treatment of such hearsay reflected an assumption that evidence fitting within well established rules was necessarily reliable, and therefore cross-examination was less important. Hearsay that did not fall within firmly rooted exceptions was still subject to both parts of the *Roberts* test between 1980 and 2004.⁷

In 2004, the Supreme Court changed the confrontation requirements for prosecutors. The Court ruled in *Crawford v. Washington* that actual confrontation is necessary whenever the prosecution offers “testimonial” hearsay.⁸ The Court did not define the term “testimonial” precisely in *Crawford*, but stressed that the Framers of the Confrontation Clause were most concerned with formal out-of-court statements by accusers to law enforcement personnel.⁹ The idea is that such statements are akin to testimony. The Court indicated in dicta that “nontestimonial” hearsay – that is, informal statements or statements to an audience other than governmental officials – might not be subject to the Confrontation Clause.¹⁰ Thus while *Crawford* fortified the confrontation requirements for testimonial hearsay, *Crawford* left some doubt as to the confrontation requirements for nontestimonial hearsay.

In the wake of *Crawford*, many lower courts still applied the *Roberts* test to nontestimonial hearsay,¹¹ but a follow-up ruling by the Supreme Court in 2006 greatly weakened *Roberts*. In *Davis v. Washington*,¹² the Court established a bright-line test for distinguishing testimonial from nontestimonial statements. If a police officer takes a statement from a witness while the officer is responding to an ongoing emergency, the statement is nontestimonial. If the officer takes a statement after the emergency has ended and the officer is investigating what happened, the statement is testimonial.¹³ The *Davis* ruling indicated more emphatically than the *Crawford* ruling that nontestimonial hearsay lies beyond the scope of the Confrontation Clause.¹⁴ *Davis* seemed to suggest that nontestimonial hearsay does not even need the minimal scrutiny of *Roberts*.

By the end of 2007, the Supreme Court¹⁵ had tacitly endorsed numerous federal¹⁶ and state¹⁷ court decisions which recognized that *Roberts* had perished. In

⁵ *Id.* at 66.

⁶ Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 756-60 (2005).

⁷ *Id.*

⁸ 541 U.S. 36, 68 (2004).

⁹ *Id.* at 51-54, 68.

¹⁰ *Id.* at 68.

¹¹ Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409, 2446 (2005).

¹² 547 U.S. 813 (2006).

¹³ *Id.* at 821-22.

¹⁴ *Id.* at 821.

¹⁵ *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007).

effect, defendants lost any constitutional protection against prosecutorial use of nontestimonial hearsay. Now, if a prosecutor can show that a hearsay statement is nontestimonial, the defendant generally cannot invoke the Confrontation Clause to insist upon cross-examining the absent accuser. If, on the other hand, the statement is testimonial, the defendant has stronger confrontation rights than in the *Roberts* era. The defendant's ability to cross-examine his accuser turns on the vagaries of the term "testimonial," not on a comprehensive policy judgment about the value of confrontation in prosecutions.¹⁸

The result is a schizophrenic, almost arbitrary, enforcement of confrontation rights.¹⁹ Consider a few examples. If a police officer takes statements from an apparent victim of violence, the defendant's presence in the room might prolong the "emergency" so that the out-of-court statements by the accuser are nontestimonial and cross-examination is not required at trial. On the other hand, if the officer has moved the defendant down the hall and the "emergency" is clearly over, the statements by the accuser are testimonial. In other words, the key determinant of confrontation rights is whether the officer chooses to move the defendant down the hall before questioning the apparent victim.

Even a subtle detail on one end of a 911 call could extinguish confrontation rights under the Supreme Court's current jurisprudence. Imagine that a caller calls 911 to report a violent attack in the caller's residence. Once the 911 operator elicits the fact that the assailant is no longer in the residence, the remainder of the recorded conversation will be deemed "testimonial" under *Davis*, and the defendant will have a right to insist upon confrontation. The portion of the conversation that precedes the question about the defendant's flight, however, is arguably nontestimonial because it involves a response to an ongoing emergency. In such a situation, the defendant's confrontation rights could depend entirely on the order in which 911 operators ask questions.

The Supreme Court's recent confrontation jurisprudence necessitates a response from state legislatures. Even if *Crawford* and its progeny have correctly ascertained the intent of the Framers concerning the ambit of the Confrontation Clause, there is little policy justification for limiting confrontation rights to situations in which hearsay is testimonial.²⁰ As noted earlier, confrontation has general value in criminal trials. State

¹⁶ E.g., *United States v. Williams*, 506 F.3d 151, 156 (2d Cir. 2007); *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006).

¹⁷ E.g., *State v. Lewis*, 235 S.W.3d 136, 142-43 (Tenn. 2007); *State v. Ladner*, 373 S.C. 103, 113-15 (2007); *People v. Otis*, slip op., 2007 WL 18814 (Cal. App. Jan. 4, 2007).

¹⁸ Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford's Birth Did Not Require That Roberts Had to Die*, 15 J.L. & POL'Y 685, 772-73 (2007) (lamenting demise of *Roberts* after *Davis* and *Bockting*, and suggesting that *Roberts* test could have been valuable in screening nontestimonial hearsay).

¹⁹ Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL'Y 759, 384 (2007) (arguing that in the place of *Roberts*, "*Crawford* and *Davis* have substituted an approach that is almost arbitrary in its result, with the potential of harming both the prosecution and the defense").

²⁰ Laird C. Kirkpatrick, *Nontestimonial Hearsay After Crawford, Davis and Bockting*, 19 REGENT U. L. REV. 367, 383-84 (2007) (discussing need for some confrontation accusers who utter nontestimonial hearsay, "even if it could be shown that nontestimonial hearsay was beyond the contemplation of the Framers").

legislatures should resurrect the *Roberts* test because a uniform approach to confrontation is preferable to the all-or-nothing rule that results from the Supreme Court's originalist interpretation of the Confrontation Clause. States could legislate confrontation rights by passing laws that establish the two *Roberts* requirements as predicates for the admission of any hearsay against the accused, unless the accused has forfeited confrontation rights by wrongfully procuring the absence of the accuser from trial.

Is it appropriate for states to codify a federal constitutional interpretation? States have done it before. For example, novel hearsay exceptions adopted by state legislatures in the pre-*Crawford* era incorporated some of the *Roberts* analysis concerning indicia of reliability, because these exceptions were not "firmly rooted."²¹ Some state supreme courts have insisted upon affirming *Roberts* as a correct interpretation of state, rather than federal, confrontation requirements, even after the U.S. Supreme Court overruled *Roberts*.²² Interestingly, the Court itself expressly invited states to regulate nontestimonial hearsay in the wake of *Crawford*.²³ Thus it is entirely appropriate for state legislatures to fill the interstices in confrontation law left by the Supreme Court's new interpretation of the Sixth Amendment.

Would the states' codification of *Roberts* hamstring prosecutors? The reliability prong of *Roberts* should pose no significant hindrance for prosecutors, because most hearsay cannot fit within the existing statutory exceptions in the evidence codes unless the hearsay bears minimal indicia of reliability. The availability prong of *Roberts* should not prove too burdensome either, because prosecutors can satisfy this test merely by showing that that they tried to bring the declarant to court and could not do so. It is noteworthy that several states have been using a *Roberts*-like test even for "firmly rooted" hearsay during the period from 1980 to 2007, and prosecutors in these states have not reported unusual difficulty in obtaining convictions.

Confrontation is important not simply because the Confrontation Clause appears in the Constitution. Confrontation is good policy. State legislatures should make sure that confrontation is enforced uniformly, instead of dispensing with confrontation rights due to the happenstance that an accuser makes a "nontestimonial" hearsay statement. The importance of confrontation demands a rule, not roulette.

²¹ OR. EVID. CODE § 803(26) (2003).
²² *E.g.*, *State v. Fields*, 168 P.3d 955, 969-70 (Haw. 2007).
²³ *Crawford*, 541 U.S. at 68.