Confronting Changes in Confrontation Clause Jurisprudence

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It is a little-known fact that statues of turtles rest at the bottom of several lampposts in the Supreme Court building. Architect Cass Gilbert's design of the building reportedly featured the turtle prominently because it symbolized the slow, deliberate pace of justice to be rendered by the court. For the most part, the analogy has held true.

One area that seems more hare than tortoise, however, has been the court's interpretation of the Sixth Amendment's Confrontation Clause. This constitutional protection ensures that, "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The clause appears clear on its face, but years of jurisprudence muddied the meaning of the term "confrontation." In 2004, the Supreme Court attempted to restore clarity to the term by holding, in essence, that confrontation requires actual confrontation in court.

In the subsequent seven years, the court applied its newly announced rule in a diverse range of factual scenarios. For much of that time, the court's most impassioned defenders of the broad reading of "confrontation" (Justice Antonin Scalia and others) racked up victory after victory in which they reiterated the newly ascendant view of "confrontation." The court's most recent Confrontation Clause opinion, however, represents a step backwards. The impact of that decision may be illuminated by the court's handling of another Confrontation Clause case argued last month, *Bullcoming v. New Mexico* . [Disclosure: On behalf of a group of law professors, Cozen O'Connor filed an amicus curiae brief in this case in support of the petitioner, Donald Bullcoming.]

Before 2004 — Indicia of Reliability

The court's interpretation of the Confrontation Clause prior to 2004 was more pragmatic than principled. The court untangled itself from the words of the Sixth Amendment through abstraction — e.g., inasmuch as promoting reliable courtroom testimony was the overall goal of the Confrontation Clause, courts were encouraged to admit out-of-court statements that bore adequate "indicia of reliability." In cases like *Ohio v. Roberts* (1980), the Supreme Court prescribed multi-factor tests to guide that "reliability" inquiry. Whether these abstract inquiries advanced the truth-seeking function of trials is debatable, but they certainly were not the method of ensuring reliability that the framers demanded in the Sixth Amendment.

Scalia attacked this approach from his first days on the court. For example, in *Maryland v. Craig* (1990), he vigorously dissented from the court's holding that allowed a victim in a child-abuse case to testify at trial via closed-circuit television from outside the courtroom. The policy reasons for such an approach were easy to understand and highly sympathetic in that case. According to Scalia, however, they were not consistent with the Sixth Amendment's mandate of confrontation inside the courtroom.

As new personnel joined the court in the 1990s, Scalia's view slowly appeared to gain support. In particular, a 1999 decision, *Lilly v. Virginia* , seemed to reflect the justices' weakening resolve to preserve the indicia-of-reliability test. *Lilly* unleashed an explosion of separate opinions setting forth differing interpretations of the Confrontation Clause that taxed even veteran court-watchers' skills of discerning whether any portion of Justice John Paul Stevens' opinion commanded a majority.

2004 – Crawford v. Washington

In 2004, the unease reflected in *Lilly* finally coalesced into a majority opinion dramatically reformulating the Court's Confrontation Clause jurisprudence. Aptly, it was Scalia who authored the opinion in *Crawford v. Washington* .

According to Scalia's opinion, Michael Crawford stabbed a man who allegedly attempted to rape his wife, and he claimed that he acted in self-defense. That night, however, the police interrogated his wife about the events in question, and her statements cast doubt on his defense. At trial, she claimed spousal privilege and refused to testify. Prosecutors persuaded the trial judge to admit the audio recording of her out-of-court statements because they bore sufficient "indicia of reliability."

The Supreme Court rejected the use of even these highly reliable out-of-court statements because they lacked actual confrontation in court. The majority opinion detailed the common-law history of the right of confrontation envisioned by the framers — including the infamous trial-by-affidavit of Sir Walter Raleigh — and explained that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." The court endorsed the use of some out-of-court statements, namely, those that were not made in contemplation of use at a criminal trial. But statements made in response to police interrogations — such as those at issue in *Crawford* — were plainly testimonial, and thus inadmissible because the defendant was unable to cross-examine the declarant.

Post-2004 — The Meaning of 'Testimonial'

The years following *Crawford* found the court interpreting the meaning of the term "testimonial" to aid lower courts in applying the new rule. For example, the court used two similar domestic-violence cases to highlight nuances in the rule. In one case, where a woman called 911 to report that her ex-boyfriend was beating her and was fleeing her house, the court held that the recording of this call was not testimonial because it concerned on-going events for which the victim sought immediate assistance. By contrast, where a woman was interviewed by police after her husband fled the premises, the court held that the affidavit she provided to police following the incident was testimonial because her only purpose at that point was to provide evidence to prosecute the prior crime. Importantly, these cases demonstrated that the court's focus was always (and only) on the intent of the declarant.

That is why the court's recent decision in *Michigan v. Bryant* is so shocking. In part, the significance is highlighted by the source and tone of the main dissenting opinion: Scalia. It took Scalia nearly 20 years to bring his colleagues around to his view of the Confrontation Clause, and one can sense from his dissenting opinion that he worries that *Bryant* is the beginning of the court's return to pragmatic, multi-factored tests of reliability.

The facts of *Bryant* concerned the use of a wounded man's statements to police. According to the court, police encountered a man bleeding from a gunshot wound. He told police that he had been shot by defendant Bryant, and the police continued to interview him about details of the offense until he died from the wound. The court held that the victim's

statements were not testimonial because the primary purpose of the statements was to enable the police to respond to an ongoing emergency (armed man on the loose).

In reaching that result, the court appeared to depart radically from the principles of *Crawford.* The majority opinion, authored by Justice Sonia Sotomayor, held that the Confrontation Clause inquiry was governed by an analysis of the "primary purpose" of the disputed police questioning. According to the majority, that required an objective analysis of the surrounding circumstances and the statements/actions of all parties to the interrogation, police and declarant alike. Through this analysis, the majority concluded that the primary purpose of the police interrogation of the dying witness in this case was to address an on-going emergency and not to establish evidence of past events for use in an eventual prosecution.

Scalia's tone in dissent was furious and unsparing. He lamented that the majority's decision left *Crawford* and its progeny "in a shambles," and directly questioned the majority's integrity — calling the decision's recitation of the facts "so transparently false that professing to believe it demeans this institution," characterizing the court here as the "obfuscator of last resort," and noting that the evaluation of these facts should have been "absurdly easy." He also tugged on a string that unraveled the majority's view of the police officer's "primary purpose." He noted that, at no time during the entire interrogation — which lasted a substantial period of time and allowed multiple officers to ask all manner of who, what, when questions about the shooting — did anyone ask the one question that would evince a concern with an on-going emergency: Where is the shooter?

The majority's legal reasoning was equally unforgiveable to Scalia. He noted with disgust that the majority's endorsement of a multi-factored, open-ended balancing test of reliability was nothing but a return to the approach expressly rejected by *Crawford* . To Scalia, the majority's embrace of such a balancing test traded the clarity of *Crawford* 's approach for an approach that encouraged each trial judge to "mix-and-match perspectives to reach its desired outcome." He emphasized that the only important factor in the Sixth Amendment analysis was the declarant's intent in making a statement — if a statement was made with an understanding that it may be used to invoke the machinery of prosecution, then it was "testimonial." Because the dying witness must have plainly understood that the substantial questioning about the circumstances of his shooting could be used in that way, Scalia dissented.

An Uncertain Future

The Supreme Court did not wait long to entertain another Confrontation Clause case that might refine or elaborate on the reasoning of *Bryant* . Just two days after issuing *Bryant* , the court heard oral argument in *Bullcoming v. New Mexico* . At issue in that case is whether the Confrontation Clause permits admission of a forensic scientist's report at trial if the defense is only allowed to confront a different forensic scientist at trial (i.e., an expert witness but not the author of the report). The prosecution in *Bullcoming* offered into evidence a report detailing the defendant's blood-alcohol level, but it would not make available the expert who performed the test (who turns out to have been placed on unpaid leave for reasons not in the record, according to court documents); instead, it introduced the report through a different scientist in the same office who conducted similar tests.

To quote Scalia, this case should be "absurdly easy." The prosecution's argument rests on a disingenuous interpretation of the word "confrontation." The state argues that, because the defendant was allowed to confront someone about the report, the Sixth Amendment was satisfied — even though the entire truth-seeking purpose of cross-examination would be thwarted if the defendant were prevented from probing the declarant for indications of fraud or inadvertent mistake. The proffered expert would simply — and truthfully — answer "I don't know" to any inquiry about the conditions under which the test of the defendant's blood was performed.

The case may not be so easy, though, if *Bryant* represents the beginning of a larger retrenchment of the court's Confrontation Clause jurisprudence. *Bullcoming* could be an opportunity for the Sotomayor-led majority to (re)apply a multi-factored "reliability" test on all questions involving the Confrontation Clause. For instance, in *Bullcoming* , the *Bryant* -majority could hold that the surrogate expert's testimony about the circumstances of blood-alcohol testing rendered the out-of-court expert's report sufficiently reliable to be admitted at trial. That might seem like a stretch, but, then again, so did the *Bryant* decision's abandonment of *Crawford* after less than seven years. •

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