

**2011 Update to Evidence: The Objection Method, 3<sup>rd</sup> Edition**

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## Introduction

Here are some developments that warrant mention and treatment in class. We did not believe that there is enough to justify the additional expenditure on a supplement. Feel free to use the materials below and to distribute them to your students.

*Please note that in Spring semester, a new edition of the casebook will be available for your use. It will of course include the Restyled Rules of Evidence, discussed below.*

## General — Restyling of the Federal Rules of Evidence

The Advisory Committee on Evidence Rules has restyled the Federal Rules of Evidence — in the manner of previous restyling projects for the Appellate, Criminal and Civil Rules. The goal of the restyling project was to make the rules more user-friendly, with consistent terminology, unpacking of structure and language, and clarifying or modifying problematic language.

The proposed restyled Rules of Evidence have been approved by the Judicial Conference and the Supreme Court. At this writing, the Rules have been submitted to Congress with the Supreme Court’s recommendation that they become law. Barring any unforeseen developments, the restyled rules will become law on *December 1, 2011*.

*The restyled rules, in side-by-side form, are being sent to you in a separate electronic document.*

## Chapter 4 Section F — Common Applications of the Rule 403 Balancing Test

**Add the following discussion:**

*Sprint/United Mgmt. Co. v. Mendelsohn*, [128 S.Ct. 1140](#) (2007): This case discusses how a trial court should treat so-called “me too” evidence, and how an appellate court should evaluate the trial court’s evidentiary determination. The plaintiff argued that her employer had a company-wide policy discriminating against age, and proffered a number of instances in which other age-protected employees had suffered adverse job determinations. The trial court excluded this evidence on the ground that none of the instances involved the plaintiff’s immediate supervisors. The court of appeals took this as a ruling that “me-too” evidence was never relevant, i.e., as a *per se* rule of exclusion.

The Supreme Court, in an opinion by Justice Thomas, undertook the following analysis:

The parties focus their dispute on whether the Court of Appeals correctly held that the evidence was relevant and not unduly prejudicial under Rules 401 and 403. We conclude, however, that the Court of Appeals should not have engaged in that inquiry. Rather, as explained below, we hold that the Court of Appeals erred in concluding that the District Court applied a per se rule. Given the circumstances of this case and the unclear basis of the District Court's decision, the Court of Appeals should have remanded the case to the District Court for clarification.

\* \* \*

In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings. This Court has acknowledged:

“A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403....” *United States v. Abel*, [469 U.S. 45, 54](#) (1984).

This is particularly true with respect to Rule 403 since it requires an on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that already has been found to be factually relevant. \* \* \* Under this deferential standard, courts of appeals uphold Rule 403 rulings unless the district court has abused its discretion. \* \* \*

When a district court's language is ambiguous, as it was here, it is improper for the court of appeals to presume that the lower court reached an incorrect legal conclusion. A remand directing the district court to clarify its order is generally permissible and would have been the better approach in this case.

\* \* \*

In the Court of Appeals' view, the District Court excluded the evidence as per se irrelevant, and so had no occasion to reach the question whether such evidence, if relevant, should be excluded under Rule 403. The Court of Appeals, upon concluding that such evidence was not per se irrelevant, decided that it was relevant in the circumstances of this case and undertook its own balancing under Rule 403. But questions of relevance and prejudice are for the District Court to determine in the first instance. \* \* \* Rather than assess the relevance of the evidence itself and conduct its own balancing of its probative value and potential prejudicial effect, the Court of Appeals should have allowed the District Court to make these determinations in the first instance, explicitly and on the record. \* \* \* With respect to evidentiary questions in general and Rule 403 in particular, a district court virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it.

We note that, had the District Court applied a per se rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its

discretion. Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad per se rules. See Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U.S.C.App., p. 864 ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case"). But, as we have discussed, there is no basis in the record for concluding that the District Court applied a blanket rule.

\* \* \*

The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Because Rules 401 and 403 do not make such evidence per se admissible or per se inadmissible, and because the inquiry required by those Rules is within the province of the District Court in the first instance, we vacate the judgment of the Court of Appeals and remand the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable Rules.

## Chapter 15, Section C — The Right to Confrontation — Focus on Testimonial Hearsay

Add the following material at the end of the section on page 857:

### MELENDEZ-DIAZ v. MASSACHUSETTS

[129 S.Ct. 2527](#) (2009)

#### JUSTICE SCALIA delivered the opinion of the Court.

The Massachusetts courts in this case admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine. The question presented is whether those affidavits are “testimonial,” rendering the affiants “witnesses” subject to the defendant’s right of confrontation under the Sixth Amendment.

I

\* \* \*

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. At trial, the prosecution placed into evidence the bags seized from [the defendant’s accomplice and from the police cruiser where the defendant had stashed some]. It also submitted three “certificates of analysis” showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags “[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine.” The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law. [Mass. Gen. Laws, ch. 111, §13.](#)

Petitioner objected to the admission of the certificates, asserting that our Confrontation Clause decision in *Crawford v. Washington*, [541 U. S. 36](#) (2004), required the analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as “prima facie evidence of the composition, quality, and the net weight of the narcotic ... analyzed.” [Mass. Gen. Laws, ch. 111, §13.](#)

The jury found Melendez-Diaz guilty. He appealed, contending, among other things, that admission of the certificates violated his Sixth Amendment right to be confronted with the witnesses against him. The Appeals Court of Massachusetts rejected the claim, relying on the Massachusetts Supreme Judicial Court’s decision in *Commonwealth v. Verde*, [444 Mass. 279, 283-285](#), 827 N. E. 2d 701, 705-706 (2005), which held that the authors of certificates of forensic analysis are not subject to confrontation under the Sixth Amendment. \* \* \* We granted certiorari. 552 U. S. \_\_\_\_ (2008).

## II

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” In *Crawford*, after reviewing the Clause’s historical underpinnings, we held that it guarantees a defendant’s right to confront those “who ‘bear testimony’ ” against him. . A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

Our opinion described the class of testimonial statements covered by the Confrontation Clause as follows:

“Various formulations of this core class of testimonial statements exist: 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; 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.”

There is little doubt that the documents at issue in this case fall within the “core class of testimonial statements” thus described. Our description of that category mentions affidavits twice. The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” Black’s Law Dictionary 62 (8th ed. 2004). They are incontrovertibly a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine — the precise testimony the analysts would be expected to provide if called at trial. The “certificates” are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.” *Davis v. Washington*, [547 U. S. 813, 830](#) (2006).

Here, moreover, not only were the affidavits “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” [Crawford, supra, at 52](#), but under Massachusetts law the *sole purpose* of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance, [Mass. Gen. Laws, ch. 111, §13](#). We can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves.

In short, under our decision in *Crawford* the analysts’ affidavits were testimonial statements, and the analysts were “witnesses” for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at

trial.<sup>1</sup>

### III

Respondent and the dissent advance a potpourri of analytic arguments in an effort to avoid this rather straightforward application of our holding in *Crawford*. Before addressing them, however, we must assure the reader of the falsity of the dissent’s opening alarum that we are “sweep[ing] away an accepted rule governing the admission of scientific evidence” that has been “established for at least 90 years” and “extends across at least 35 States and six Federal Courts of Appeals.”

The vast majority of the state-court cases the dissent cites in support of this claim come not from the last 90 years, but from the last 30, and not surprisingly nearly all of them rely on our decision in *Ohio v. Roberts*, [448 U. S. 56](#) (1980), or its since-rejected theory that unconfrosted testimony was admissible as long as it bore indicia of reliability.<sup>2</sup> As for the six Federal Courts of Appeals cases cited by the dissent, five of them postdated and expressly relied on *Roberts*. The sixth predated *Roberts* but relied entirely on the same erroneous theory. See *Kay v. United States*, [255 F. 2d 476, 480-481](#) (CA4 1958) (rejecting confrontation clause challenge “where there is reasonable necessity for [the evidence] and where . . . the evidence has those qualities of reliability and trustworthiness”).

A review of cases that predate the *Roberts* era yields a mixed picture. As the dissent notes, three state supreme court decisions from the early 20th century denied confrontation with

<sup>1</sup> Contrary to the dissent’s suggestion, we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. While the dissent is correct that it is the obligation of the prosecution to establish the chain of custody, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent’s own quotation from *United States v. Lott*, 854 F. 2d 244, 250 (CA7 1988), “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.” It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

<sup>2</sup> The exception is a single pre- *Roberts* case that relied on longstanding Massachusetts precedent. See *Commonwealth v. Harvard*, 356 Mass. 452, 462, 253 N. E. 2d 346, 352 (1969). Others are simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision today. See, e.g., *Baber v. State*, 775 So. 2d 258, 258-259 (Fla. 2000); *State v. Garlick*, 313 Md. 209, 223-225, 545 A. 2d 27, 34-35 (1998).

respect to certificates of analysis regarding a substance’s alcohol content. But other state courts in the same era reached the opposite conclusion. At least this much is entirely clear: In faithfully applying *Crawford* to the facts of this case, we are not overruling 90 years of settled jurisprudence. It is the dissent that seeks to overturn precedent by resurrecting *Roberts* a mere five years after it was rejected in *Crawford*.

We turn now to the various legal arguments raised by respondent and the dissent.

## A

Respondent first argues that the analysts are not subject to confrontation because they are not “accusatory” witnesses, in that they do not directly accuse petitioner of wrongdoing; rather, their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband. This finds no support in the text of the Sixth Amendment or in our case law.

The Sixth Amendment guarantees a defendant the right “to be confronted with the witnesses *against* him.” (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony against petitioner, proving one fact necessary for his conviction — that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses “against him,” the Compulsory Process Clause guarantees a defendant the right to call witnesses “in his favor.” The text of the Amendment contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

It is often, indeed perhaps usually, the case that an adverse witness’s testimony, taken alone, will not suffice to convict. Yet respondent fails to cite a single case in which such testimony was admitted absent a defendant’s opportunity to cross-examine.<sup>3</sup> Unsurprisingly, since such a holding would be contrary to longstanding case law. In *Kirby v. United States*, [174 U. S. 47](#) (1899), the Court considered Kirby’s conviction for receiving stolen property, the

<sup>3</sup> Respondent cites our decision in *Gray v. Maryland*, 523 U. S. 185 (1998). That case did indeed distinguish between evidence that is “incriminating on its face” and evidence that “bec[omes] incriminating ... only when linked with evidence introduced later at trial,” *id.*, at 191 (internal quotation marks omitted). But it did so for the entirely different purpose of determining when a nontestifying codefendant’s confession, redacted to remove all mention of the defendant, could be admitted into evidence with instruction for the jury not to consider the confession as evidence against the nonconfessor. The very premise of the case was that, without the limiting instruction even admission of a redacted confession containing evidence of the latter sort would have violated the defendant’s Sixth Amendment rights.

evidence for which consisted, in part, of the records of conviction of three individuals who were found guilty of stealing the relevant property. Though this evidence proved only that the property was stolen, and not that Kirby received it, the Court nevertheless ruled that admission of the records violated Kirby's rights under the Confrontation Clause.

## B

Respondent and the dissent argue that the analysts should not be subject to confrontation because they are not "conventional" (or "typical" or "ordinary") witnesses of the sort whose ex parte testimony was most notoriously used at the trial of Sir Walter Raleigh. It is true, as the Court recognized in *Crawford*, that ex parte examinations of the sort used at Raleigh's trial have "long been thought a paradigmatic confrontation violation." But the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case. That use provoked such an outcry precisely because it flouted the deeply rooted common-law tradition "of live testimony in court subject to adversarial testing." *Crawford, supra*, at 43.

In any case, the purported distinctions respondent and the dissent identify between this case and Sir Walter Raleigh's "conventional" accusers do not survive scrutiny. The dissent first contends that a "conventional witness recalls events observed in the past, while an analyst's report contains near-contemporaneous observations of the test." It is doubtful that the analyst's reports in this case could be characterized as reporting "near-contemporaneous observations"; the affidavits were completed almost a week after the tests were performed. . But regardless, the dissent misunderstands the role that "near-contemporaneity" has played in our case law. The dissent notes that that factor was given "substantial weight" in *Davis*, but in fact that decision *disproves* the dissent's position. There the Court considered the admissibility of statements made to police officers responding to a report of a domestic disturbance. By the time officers arrived the assault had ended, but the victim's statements — written and oral — were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as a "present sense impression." Though the witness's statements in *Davis* were "near-contemporaneous" to the events she reported, we nevertheless held that they could *not* be admitted absent an opportunity to confront the witness.

A second reason the dissent contends that the analysts are not "conventional witnesses" (and thus not subject to confrontation) is that they "observe[d] neither the crime nor any human action related to it." The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be outside the scope of the Confrontation Clause. For example, is a police officer's investigative report describing the crime scene admissible absent an opportunity to examine the officer? The dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses — a hardly "unconventional" class of witnesses.

A third respect in which the dissent asserts that the analysts are not "conventional" witnesses and thus not subject to confrontation is that their statements were not provided in response to interrogation. \* \* \* Respondent and the dissent cite no authority, and we are aware of none, holding that a person who volunteers his testimony is any less a "witness against the

defendant” than one who is responding to interrogation. In any event, the analysts’ affidavits in this case were presented in response to a police request. See [Mass. Gen. Laws, ch. 111, §§12-13](#). If an affidavit submitted in response to a police officer’s request to “write down what happened” suffices to trigger the Sixth Amendment’s protection (as it apparently does, see *Davis*, [547 U. S., at 819-820](#)), then the analysts’ testimony should be subject to confrontation as well.

## C

Respondent claims that there is a difference, for Confrontation Clause purposes, between testimony recounting historical events, which is “prone to distortion or manipulation,” and the testimony at issue here, which is the “result of neutral, scientific testing.” Relatedly, respondent and the dissent argue that confrontation of forensic analysts would be of little value because “one would not reasonably expect a laboratory professional ... to feel quite differently about the results of his scientific test by having to look at the defendant.”

This 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. What we said in *Crawford* in response to that argument remains true:

“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. ... 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.” [541 U. S., at 61-62](#).

Respondent and the dissent may be right that there are 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. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Nor is it evident that what respondent calls “neutral scientific testing” is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, “[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.” National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” [Id., at S-17](#). A forensic analyst responding to a request from a law enforcement official may feel pressure — or have an incentive — to alter the evidence in a manner favorable to the prosecution.

Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as Amicus Curiae 15-17 (discussing cases of documented “drylabbing” where forensic analysts report results of tests that were never performed); National Academy Report 1-8 to 1-10 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. See *Coy v. Iowa*, [487 U. S. 1012, 1019](#) (1988). And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that “[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.” Metzger, *Cheating the Constitution*, [59 Vand. L. Rev. 475, 491](#) (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, [95 Va. L. Rev. 1, 14](#) (2009). And the National Academy Report concluded:

“The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country.” National Academy Report P-1 <sup>4</sup>

Like expert witnesses generally, an analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.

This case is illustrative. The affidavits submitted by the analysts contained only the bare-bones statement that “[t]he substance was found to contain: Cocaine.” At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed. While we still do not know the precise tests used by the analysts, we are told that the laboratories use “methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs.” At least some of that methodology requires

<sup>4</sup> Contrary to the dissent’s suggestion, we do not rely \* \* \* on the deficiencies of crime-lab analysts shown by this report to resolve the constitutional question presented in this case. The analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation; we would reach the same conclusion if all analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa. We discuss the report only to refute the suggestion that this category of evidence is uniquely reliable and that cross-examination of the analysts would be an empty formalism.

the exercise of judgment and presents a risk of error that might be explored on cross-examination. See 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* §23.03[c], pp. 532-533, ch. 23A, p. 607 (4th ed. 2007) (identifying four “critical errors” that analysts may commit in interpreting the results of the commonly used gas chromatography/mass spectrometry analysis); Shellow, *The Application of Daubert to the Identification of Drugs*, 2 *Shepard’s Expert & Scientific Evidence Quarterly* 593, 600 (1995) (noting that while spectrometers may be equipped with computerized matching systems, “forensic analysts in crime laboratories typically do not utilize this feature of the instrument, but rely exclusively on their subjective judgment”).

The same is true of many of the other types of forensic evidence commonly used in criminal prosecutions. “[T]here is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material.” National Academy Report S-5. See also *id.*, at 5-9, 5-12, 5-17, 5-21 (discussing problems of subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms analysis). Contrary to respondent’s and the dissent’s suggestion, there is little reason to believe that confrontation will be useless in testing analysts’ honesty, proficiency, and methodology — the features that are commonly the focus in the cross-examination of experts.

#### D

Respondent argues that the analysts’ affidavits are admissible without confrontation because they are “akin to the types of official and business records admissible at common law.” But the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman*, [318 U. S. 109](#) (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad’s operations, it was “calculated for use essentially in the court, not in the business.” The analysts’ certificates — like police reports generated by law enforcement officials — do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as “excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel”).

\* \* \*

The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk’s certificate authenticating an official record — or a copy thereof — for use as evidence. But a clerk’s authority in that regard was narrowly circumscribed. He was permitted “to certify to the correctness of a copy of a record kept in his office,” but had “no authority to furnish, as evidence for the trial of a lawsuit, his interpretation

of what the record contains or shows, or to certify to its substance or effect.” *State v. Wilson*, [141 La. 404, 409](#), 75 So. 95, 97 (1917). The dissent suggests that the fact that this exception was narrowly circumscribed makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk’s statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk’s certificate would qualify as an official record under respondent’s definition — it was prepared by a public officer in the regular course of his official duties — and although the clerk was certainly not a “conventional witness” under the dissent’s approach, the clerk was nonetheless subject to confrontation. See *People v. Bromwich*, [200 N. Y. 385, 388-389](#), 93 N. E. 933, 934 (1911).

Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. As we stated in *Crawford*: “Most of the hearsay exceptions covered statements that by their nature were not testimonial — for example, business records or statements in furtherance of a conspiracy.” Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because — having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial — they are not testimonial. Whether or not they qualify as business or official records, the analysts’ statements here — prepared specifically for use at petitioner’s trial — were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

## E

Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power — whether pursuant to state law or the Compulsory Process Clause — is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. Converting the prosecution’s duty under the Confrontation Clause into the defendant’s privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

## F

Finally, respondent asks us to relax the requirements of the Confrontation Clause to accommodate the “necessities of trial and the adversary process.” It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause — like those other constitutional provisions — is binding, and we may not disregard it at our convenience.

We also doubt the accuracy of respondent’s and the dissent’s dire predictions. The dissent, respondent, and its amici highlight the substantial total number of controlled-substance analyses performed by state and federal laboratories in recent years. But only some of those tests are implicated in prosecutions, and only a small fraction of those cases actually proceed to trial. See Brief for Law Professors as Amici Curiae 7-8 (nearly 95% of convictions in state and federal courts are obtained via guilty plea).

Perhaps the best indication that the sky will not fall after today’s decision is that it has not done so already. Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution’s intent to use a forensic analyst’s report. Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst’s appearance at trial. Indeed, in Massachusetts itself, a defendant may subpoena the analyst to appear at trial, and yet there is no indication that obstructionist defendants are abusing the privilege.

The dissent finds this evidence “far less reassuring than promised.” But its doubts rest on two flawed premises. First, the dissent believes that those state statutes “requiring the defendant to give early notice of his intent to confront the analyst,” are “burden-shifting statutes [that] may be invalidated by the Court’s reasoning.” That is not so. In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst’s appearance live at trial. Contrary to the dissent’s perception, these statutes shift no burden whatever. The defendant always has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the time within which he must do so. States are free to adopt procedural rules governing objections. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. See Fed. Rules Crim. Proc. 12.1(a), (e), 16(b)(1)(C); Comment: Alibi Notice Rules: The Preclusion Sanction as Procedural Default, [51 U. Chi. L. Rev. 254, 254-255, 281-285](#) (1984) (discussing and cataloguing State notice-of-alibi rules). There is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial. Today’s decision will not disrupt criminal prosecutions in the many large States whose practice is already in accord with the Confrontation Clause.

Second, the dissent notes that several of the state-court cases that have already adopted this rule did so pursuant to our decision in *Crawford*, and not “independently ... as a matter of state law.” That may be so. But in assessing the likely practical effects of today’s ruling, it is

irrelevant why those courts adopted this rule; it matters only that they did so. It is true that many of these decisions are recent, but if the dissent's dire predictions were accurate, and given the large number of drug prosecutions at the state level, one would have expected immediate and dramatic results. The absence of such evidence is telling.

But it is not surprising. Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion. \* \* \* Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to a defendant from such testimony. Given these strategic considerations, and in light of the experience in those States that already provide the same or similar protections to defendants, there is little reason to believe that our decision today will commence the parade of horrors respondent and the dissent predict.

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This case involves little more than the application of our holding in *Crawford v. Washington*, [541 U. S. 36](#). The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error. We therefore reverse the judgment of the Appeals Court of Massachusetts and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

**JUSTICE THOMAS, concurring.**

I write separately to note that I continue to adhere to my position that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *White v. Illinois*, [502 U. S. 346, 365](#) (1992) (opinion concurring in part and concurring in judgment). I join the Court’s opinion in this case because the documents at issue in this case “are quite plainly affidavits.” As such, they fall within the core class of testimonial statements governed by the Confrontation Clause.

**JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE BREYER, and JUSTICE ALITO join, dissenting.**

The Court sweeps away an accepted rule governing the admission of scientific evidence. Until today, scientific analysis could be introduced into evidence without testimony from the “analyst” who produced it. This rule has been established for at least 90 years. It extends across

at least 35 States and six Federal Courts of Appeals. Yet the Court undoes it based on two recent opinions that say nothing about forensic analysts: *Crawford v. Washington*, [541 U. S. 36](#) (2004), and *Davis v. Washington*, [547 U. S. 813](#) (2006).

It is remarkable that the Court so confidently disregards a century of jurisprudence. We learn now that we have misinterpreted the Confrontation Clause — hardly an arcane or seldom-used provision of the Constitution — for the first 218 years of its existence. The immediate systemic concern is that the Court makes no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses — “witnesses” being the word the Framers used in the Confrontation Clause.

*Crawford* and *Davis* dealt with ordinary witnesses — women who had seen, and in two cases been the victim of, the crime in question. Those cases stand for the proposition that formal statements made by a conventional witness — one who has personal knowledge of some aspect of the defendant’s guilt — may not be admitted without the witness appearing at trial to meet the accused face to face. But *Crawford* and *Davis* do not say — indeed, could not have said, because the facts were not before the Court — that anyone who makes a testimonial statement is a witness for purposes of the Confrontation Clause, even when that person has, in fact, witnessed nothing to give them personal knowledge of the defendant’s guilt.

Because *Crawford* and *Davis* concerned typical witnesses, the Court should have done the sensible thing and limited its holding to witnesses as so defined. \* \* \* The Court’s reliance on the word “testimonial” is of little help, of course, for that word does not appear in the text of the Clause.

The Court dictates to the States, as a matter of constitutional law, an as-yet-undefined set of rules governing what kinds of evidence may be admitted without in-court testimony. Indeed, under today’s opinion the States bear an even more onerous burden than they did before *Crawford*. Then, the States at least had the guidance of the hearsay rule and could rest assured that “where the evidence f[ell] within a firmly rooted hearsay exception,” the Confrontation Clause did not bar its admission. *Ohio v. Roberts*, [448 U. S. 56, 66](#) (1980) (overruled by *Crawford*). Now, without guidance from any established body of law, the States can only guess what future rules this Court will distill from the sparse constitutional text.

The Court’s opinion suggests this will be a body of formalistic and wooden rules, divorced from precedent, common sense, and the underlying purpose of the Clause. Its ruling has vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence. For these reasons, as more fully explained below, the Court’s opinion elicits my respectful dissent.

I

A

1

The Court says that, before the results of a scientific test may be introduced into evidence, the defendant has the right to confront the “analyst.” One must assume that this term, though it appears nowhere in the Confrontation Clause, nevertheless has some constitutional substance that now must be elaborated in future cases. There is no accepted definition of analyst, and there is no established precedent to define that term.

Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine’s printout — often, a graph showing the frequencies of radiation absorbed by the sample or the masses of the sample’s molecular fragments. See 2 P. Giannelli & E. Imwinkelried, *Scientific Evidence* §23.03 (4th ed. 2007) (describing common methods of identifying drugs, including infrared spectrophotometry, nuclear magnetic resonance, gas chromatography, and mass spectrometry). A second person interprets the graph the machine prints out—perhaps by comparing that printout with published, standardized graphs of known drugs. Meanwhile, a third person — perhaps an independent contractor — has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth person — perhaps the laboratory’s director — certifies that his subordinates followed established procedures.

It is not at all evident which of these four persons is the analyst to be confronted under the rule the Court announces today. If all are witnesses who must appear for in-court confrontation, then the Court has, for all practical purposes, forbidden the use of scientific tests in criminal trials. As discussed further below, requiring even one of these individuals to testify threatens to disrupt if not end many prosecutions where guilt is clear but a newly found formalism now holds sway.

It is possible to read the Court’s opinion, however, to say that all four must testify. Each one has contributed to the test’s result and has, at least in some respects, made a representation about the test. Person One represents that a pure sample, properly drawn, entered the machine and produced a particular printout. Person Two represents that the printout corresponds to a known drug. Person Three represents that the machine was properly calibrated at the time. Person Four represents that all the others performed their jobs in accord with established procedures.

And each of the four has power to introduce error. A laboratory technician might adulterate the sample. The independent contractor might botch the machine’s calibration. And so forth. The reasons for these errors may range from animus against the particular suspect or all criminal suspects to unintentional oversight; from gross negligence to good-faith mistake. It is no surprise that a plausible case can be made for deeming each person in the testing process an analyst under the Court’s opinion.

Consider the independent contractor who has calibrated the testing machine. At least in a routine case, where the machine’s result appears unmistakable, that result’s accuracy depends entirely on the machine’s calibration. The calibration, in turn, can be proved only by the contractor’s certification that he or she did the job properly. That certification appears to be a testimonial statement under the Court’s definition: It is a formal, out-of-court statement, offered

for the truth of the matter asserted, and made for the purpose of later prosecution. It is not clear, under the Court's ruling, why the independent contractor is not also an analyst.

Consider the person who interprets the machine's printout. His or her interpretation may call for the exercise of professional judgment in close cases. If we assume no person deliberately introduces error, this interpretive step is the one most likely to permit human error to affect the test's result. This exercise of judgment might make this participant an analyst. The Court implies as much.

And we must yet consider the laboratory director who certifies the ultimate results. The director is arguably the most effective person to confront for revealing any ambiguity in findings, variations in procedures, or problems in the office, as he or she is most familiar with the standard procedures, the office's variations, and problems in prior cases or with particular analysts. The prosecution may seek to introduce his or her certification into evidence. The Court implies that only those statements that are actually entered into evidence require confrontation. This could mean that the director is also an analyst, even if his or her certification relies upon or restates work performed by subordinates.

The Court offers no principles or historical precedent to determine which of these persons is the analyst. All contribute to the test result. And each is equally remote from the scene, has no personal stake in the outcome, does not even know the accused, and is concerned only with the performance of his or her role in conducting the test.

It could be argued that the only analyst who must testify is the person who signed the certificate. Under this view, a laboratory could have one employee sign certificates and appear in court, which would spare all the other analysts this burden. But the Court has already rejected this arrangement. The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second:

“[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman [here, the laboratory employee who signs the certificate] recite the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test], instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it.” [547 U. S., at 826](#).

Under this logic, the Court's holding cannot be cabined to the person who signs the certificates. If the signatory is restating the testimonial statements of the true analysts — whoever they might be — then those analysts, too, must testify in person.

Today's decision demonstrates that even in the narrow category of scientific tests that identify a drug, the Court cannot define with any clarity who the analyst is. Outside this narrow category, the range of other scientific tests that may be affected by the Court's new confrontation right is staggering. See, e.g., Comment, Toward a Definition of “Testimonial”: How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement, [96 Cal. L. Rev. 1093, 1094, 1115](#) (2008) (noting that every court post-*Crawford* has held that autopsy reports are not

testimonial, and warning that a contrary rule would “effectively functio[n] as a statute of limitations for murder”).

## 2

It is difficult to confine at this point the damage the Court’s holding will do in other contexts. Consider just two — establishing the chain of custody and authenticating a copy of a document.

It is the obligation of the prosecution to establish the chain of custody for evidence sent to testing laboratories — that is, to establish “the identity and integrity of physical evidence by tracing its continuous whereabouts.” 23 C. J. S., Criminal Law §1142, p. 66 (2008). Meeting this obligation requires representations — that one officer retrieved the evidence from the crime scene, that a second officer checked it into an evidence locker, that a third officer verified the locker’s seal was intact, and so forth. The iron logic of which the Court is so enamored would seem to require in-court testimony from each human link in the chain of custody. That, of course, has never been the law. See, e.g., *United States v. Lott*, [854 F. 2d 244, 250](#) (CA7 1988) (“[G]aps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility”); 29A Am. Jur. 2d, Evidence §962, p. 269 (2009) (“The fact that one of the persons in control of a fungible substance does not testify at trial does not, without more, make the substance or testimony relating to it inadmissible”); C. J. S., *supra*, §1142, at 67 (“It is generally not necessary that every witness who handled the evidence testify”).

It is no answer for the Court to say that “[i]t is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence.” The case itself determines which links in the chain are crucial — not the prosecution. In any number of cases, the crucial link in the chain will not be available to testify and so the evidence will be excluded for lack of a proper foundation.

Consider another context in which the Court’s holding may cause disruption: The long-accepted practice of authenticating copies of documents by means of a certificate from the document’s custodian stating that the copy is accurate. See, e.g., Fed. Rule Evid. 902(4) (in order to be self-authenticating, a copy of a public record must be “certified as correct by the custodian”); Rule 902(11) (business record must be “accompanied by a written declaration of its custodian”). Under one possible reading of the Court’s opinion, recordkeepers will be required to testify. So far, courts have not read *Crawford* and *Davis* to impose this largely meaningless requirement. See, e.g., *United States v. Adefehinti*, [510 F. 3d 319, 327-328](#) (CADC 2008) (certificates authenticating bank records may be admitted without confrontation); *United States v. Ellis*, [460 F. 3d 920, 927](#) (CA7 2006) (certificate authenticating hospital records). But the breadth of the Court’s ruling today, and its undefined scope, may well be such that these courts now must be deemed to have erred. The risk of that consequence ought to tell us that something is very wrong with the Court’s analysis.

Because the Court is driven by nothing more than a wooden application of the *Crawford*

and *Davis* definition of “testimonial,” divorced from any guidance from history, precedent, or common sense, there is no way to predict the future applications of today’s holding. Surely part of the justification for the Court’s formalism must lie in its predictability. There is nothing predictable here, however, other than the uncertainty and disruption that now must ensue.

## B

With no precedent to guide us, let us assume that the Court’s analyst is the person who interprets the machine’s printout. This result makes no sense. The Confrontation Clause is not designed, and does not serve, to detect errors in scientific tests. That should instead be done by conducting a new test. Or, if a new test is impossible, the defendant may call his own expert to explain to the jury the test’s flaws and the dangers of relying on it. And if, in an extraordinary case, the particular analyst’s testimony is necessary to the defense, then, of course, the defendant may subpoena the analyst. The Court frets that the defendant may be unable to do so “when the [analyst] is unavailable or simply refuses to appear.” But laboratory analysts are not difficult to locate or to compel. As discussed below, analysts already devote considerable time to appearing in court when subpoenaed to do so. Neither the Court, petitioner, nor amici offer any reason to believe that defendants have trouble subpoenaing analysts in cases where the analysts’ in-court testimony is necessary.

The facts of this case illustrate the formalistic and pointless nature of the Court’s reading of the Clause. Petitioner knew, well in advance of trial, that the Commonwealth would introduce the tests against him. The bags of cocaine were in court, available for him to test, and entered into evidence. Yet petitioner made no effort, before or during trial, to mount a defense against the analysts’ results. Petitioner could have challenged the tests’ reliability by seeking discovery concerning the testing methods used or the qualifications of the laboratory analysts. He did not do so. Petitioner could have sought to conduct his own test. Again, he did not seek a test; indeed, he did not argue that the drug was not cocaine. Rather than dispute the authenticity of the samples tested or the accuracy of the tests performed, petitioner argued to the jury that the prosecution had not shown that he had possessed or dealt in the drugs.

Despite not having prepared a defense to the analysts’ results, petitioner’s counsel made what can only be described as a pro forma objection to admitting the results without in-court testimony, presumably from one particular analyst. Today the Court, by deciding that this objection should have been sustained, transforms the Confrontation Clause from a sensible procedural protection into a distortion of the criminal justice system.

It is difficult to perceive how the Court’s holding will advance the purposes of the Confrontation Clause. One purpose of confrontation is to impress upon witnesses the gravity of their conduct. See *Coy v. Iowa*, [487 U. S. 1012, 1019-1020](#) (1988). A witness, when brought to face the person his or her words condemn, might refine, reformulate, reconsider, or even recant earlier statements. A further purpose is to alleviate the danger of one-sided interrogations by adversarial government officials who might distort a witness’s testimony. The Clause guards against this danger by bringing the interrogation into the more neutral and public forum of the courtroom.

But neither purpose is served by the rule the Court announces today. It is not plausible that a laboratory analyst will retract his or her prior conclusion upon catching sight of the defendant the result condemns. After all, the analyst is far removed from the particular defendant and, indeed, claims no personal knowledge of the defendant's guilt. And an analyst performs hundreds if not thousands of tests each year and will not remember a particular test or the link it had to the defendant.

This is not to say that analysts are infallible. They are not. It may well be that if the State does not introduce the machine printout or the raw results of a laboratory analysis; if it does not call an expert to interpret a test, particularly if that test is complex or little known; if it does not establish the chain of custody and the reliability of the laboratory; then the State will have failed to meet its burden of proof. That result follows because the State must prove its case beyond a reasonable doubt, without relying on presumptions, unreliable hearsay, and the like. The State must permit the defendant to challenge the analyst's result. See *Holmes v. South Carolina*, [547 U. S. 319, 331](#) (2006) (affirming the defendant's right to "have a meaningful opportunity to present a complete defense"). The rules of evidence, including those governing reliability under hearsay principles and the latitude to be given expert witnesses; the rules against irrebuttable presumptions; and the overriding principle that the prosecution must make its case beyond a reasonable doubt—all these are part of the protections for the accused. The States, however, have some latitude in determining how these rules should be defined.

The Confrontation Clause addresses who must testify. It simply does not follow, however, that this clause, in lieu of the other rules set forth above, controls who the prosecution must call on every issue. Suppose, for instance, that the defense challenges the procedures for a secure chain of custody for evidence sent to a lab and then returned to the police. The defense has the right to call its own witnesses to show that the chain of custody is not secure. But that does not mean it can demand that, in the prosecution's case in chief, each person who is in the chain of custody — and who had an undoubted opportunity to taint or tamper with the evidence — must be called by the prosecution under the Confrontation Clause. And the same is true with lab technicians.

The Confrontation Clause is simply not needed for these matters. Where, as here, the defendant does not even dispute the accuracy of the analyst's work, confrontation adds nothing.

## C

For the sake of these negligible benefits, the Court threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician, now invested by the Court's new constitutional designation as the analyst, simply does not or cannot appear.

Consider first the costs today's decision imposes on criminal trials. Our own Court enjoys weeks, often months, of notice before cases are argued. We receive briefs well in advance. The argument itself is ordered. A busy trial court, by contrast, must consider not only attorneys' schedules but also those of witnesses and juries. Trial courts have huge caseloads to be processed within strict time limits. Some cases may unexpectedly plead out at the last minute; others, just

as unexpectedly, may not. Some juries stay out longer than predicted; others must be reconstituted. An analyst cannot hope to be the trial court's top priority in scheduling. The analyst must instead face the prospect of waiting for days in a hallway outside the courtroom before being called to offer testimony that will consist of little more than a rote recital of the written report.

As matters stood before today's opinion, analysts already spent considerable time appearing as witnesses in those few cases where the defendant, unlike petitioner in this case, contested the analyst's result and subpoenaed the analyst. By requiring analysts also to appear in the far greater number of cases where defendants do not dispute the analyst's result, the Court imposes enormous costs on the administration of justice.

Setting aside, for a moment, all the other crimes for which scientific evidence is required, consider the costs the Court's ruling will impose on state drug prosecutions alone. In 2004, the most recent year for which data are available, drug possession and trafficking resulted in 362,850 felony convictions in state courts across the country. See Dept. of Justice, Bureau of Justice Statistics, M. Durose & P. Langan, *Felony Sentences in State Courts 2004*, p. 2 (July 2007). Roughly 95% of those convictions were products of plea bargains, which means that state courts saw more than 18,000 drug trials in a single year.

The analysts responsible for testing the drugs at issue in those cases now bear a crushing burden. For example, the district attorney in Philadelphia prosecuted 25,000 drug crimes in 2007. Brief for National Dist. Attorneys Association et al. as Amici Curiae 12-13. Assuming that number remains the same, and assuming that 95% of the cases end in a plea bargain, each of the city's 18 drug analysts, will be required to testify in more than 69 trials next year. Cleveland's district attorney prosecuted 14,000 drug crimes in 2007. Assuming that number holds, and that 95% of the cases end in a plea bargain, each of the city's 6 drug analysts (two of whom work only part time) must testify in 117 drug cases next year.

The Federal Government may face even graver difficulties than the States because its operations are so widespread. For example, the FBI laboratory at Quantico, Virginia, supports federal, state, and local investigations across the country. Its 500 employees conduct over one million scientific tests each year. Dept. of Justice, FBI Laboratory 2007, Message from the FBI Laboratory Director, <http://www.fbi.gov/hq/lab/lab2007/labannual07.pdf> (as visited June 22, 2009, and available in Clerk of Court's case file). The Court's decision means that before any of those million tests reaches a jury, at least one of the laboratory's analysts must board a plane, find his or her way to an unfamiliar courthouse, and sit there waiting to read aloud notes made months ago.

The Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to the truth-finding process. The analyst will not always make it to the courthouse in time. He or she may be ill; may be out of the country; may be unable to travel because of inclement weather; or may at that very moment be waiting outside some other courtroom for another defendant to exercise the right the Court invents today. If for any reason the analyst cannot make it to the courthouse in time, then, the

Court holds, the jury cannot learn of the analyst’s findings (unless, by some unlikely turn of events, the defendant previously cross-examined the analyst). The result, in many cases, will be that the prosecution cannot meet its burden of proof, and the guilty defendant goes free on a technicality that, because it results in an acquittal, cannot be reviewed on appeal.

The Court’s holding is a windfall to defendants, one that is unjustified by any demonstrated deficiency in trials, any well-understood historical requirement, or any established constitutional precedent.

## II

All of the problems with today’s decision — the imprecise definition of “analyst,” the lack of any perceptible benefit, the heavy societal costs — would be of no moment if the Constitution did, in fact, require the Court to rule as it does today. But the Constitution does not.

The Court’s fundamental mistake is to read the Confrontation Clause as referring to a kind of out-of-court statement — namely, a testimonial statement — that must be excluded from evidence. The Clause does not refer to kinds of statements. Nor does the Clause contain the word “testimonial.” The text, instead, refers to kinds of persons, namely, to “witnesses against” the defendant. Laboratory analysts are not “witnesses against” the defendant as those words would have been understood at the framing. There is simply no authority for this proposition.

Instead, the Clause refers to a conventional “witness” — meaning one who witnesses (that is, perceives) an event that gives him or her personal knowledge of some aspect of the defendant’s guilt.

## A

\* \* \*

The infamous treason trial of Sir Walter Raleigh provides excellent examples of the kinds of witnesses to whom the Confrontation Clause refers. Raleigh’s accusers claimed to have heard Raleigh speak treason, so they were witnesses in the conventional sense. We should limit the Confrontation Clause to witnesses like those in Raleigh’s trial.

The Court today expands the Clause to include laboratory analysts, but analysts differ from ordinary witnesses in at least three significant ways. First, a conventional witness recalls events observed in the past, while an analyst’s report contains near-contemporaneous observations of the test. An observation recorded at the time it is made is unlike the usual act of testifying. A typical witness must recall a previous event that he or she perceived just once, and thus may have misperceived or misremembered. But an analyst making a contemporaneous observation need not rely on memory; he or she instead reports the observations at the time they are made. We gave this consideration substantial weight in *Davis*. There, the “primary purpose” of the victim’s 911 call was “to enable police assistance to meet an ongoing emergency,” rather

than “to establish or prove past events potentially relevant to later criminal prosecution.” The Court cites no authority for its holding that an observation recorded at the time it is made is an act of “witness[ing]” for purposes of the Confrontation Clause.

Second, an analyst observes neither the crime nor any human action related to it. Often, the analyst does not know the defendant’s identity, much less have personal knowledge of an aspect of the defendant’s guilt. The analyst’s distance from the crime and the defendant, in both space and time, suggests the analyst is not a witness against the defendant in the conventional sense.

Third, a conventional witness responds to questions under interrogation. But laboratory tests are conducted according to scientific protocols; they are not dependent upon or controlled by interrogation of any sort. Put differently, out-of-court statements should only require confrontation if they are produced by, or with the involvement of, adversarial government officials responsible for investigating and prosecuting crime. There is no indication that the analysts here — who work for the State Laboratory Institute, a division of the Massachusetts Department of Public Health — were adversarial to petitioner. Nor is there any evidence that adversarial officials played a role in formulating the analysts’ certificates.

\* \* \*

## B

No historical evidence supports the Court’s conclusion that the Confrontation Clause was understood to extend beyond conventional witnesses to include analysts who conduct scientific tests far removed from the crime and the defendant. Indeed, what little evidence there is contradicts this interpretation.

Though the Framers had no forensic scientists, they did use another kind of unconventional witness — the copyist. A copyist’s work may be as essential to a criminal prosecution as the forensic analyst’s. To convict a man of bigamy, for example, the State often requires his marriage records. But if the original records cannot be taken from the archive, the prosecution must rely on copies of those records, made for the purpose of introducing the copies into evidence at trial. In that case, the copyist’s honesty and diligence are just as important as the analyst’s here. If the copyist falsifies a copy, or even misspells a name or transposes a date, those flaws could lead the jury to convict. Because so much depends on his or her honesty and diligence, the copyist often prepares an affidavit certifying that the copy is true and accurate.

Such a certificate is beyond question a testimonial statement under the Court’s definition: It is a formal out-of-court statement offered for the truth of two matters (the copyist’s honesty and the copy’s accuracy), and it is prepared for a criminal prosecution.

During the Framers’ era copyists’ affidavits were accepted without hesitation by American courts. See, e.g., *United States v. Percheman*, 7 Pet. 51, 85 (1833) (opinion for the

Court by Marshall, C. J.); see also Advisory Committee’s Note on Fed. Rule Evid. 902(4), 28 U. S. C. App., p. 390 (“The common law ... recognized the procedure of authenticating copies of public records by certificate”); 5 J. Wigmore, Evidence §§1677, 1678 (J. Chadbourn rev. 1974). And courts admitted copyists’ affidavits in criminal as well as civil trials. This demonstrates that the framing generation, in contrast to the Court today, did not consider the Confrontation Clause to require in-court confrontation of unconventional authors of testimonial statements.

The Court attempts to explain away this historical exception to its rule by noting that a copyist’s authority is “narrowly circumscribed.” But the Court does not explain why that matters, nor, if it does matter, why laboratory analysts’ authority should not also be deemed “narrowly circumscribed” so that they, too, may be excused from testifying. And drawing these fine distinctions cannot be squared with the Court’s avowed allegiance to formalism. Determining whether a witness’ authority is “narrowly circumscribed” has nothing to do with *Crawford’s* testimonial framework. It instead appears much closer to the pre- *Crawford* rule of *Ohio v. Roberts*, under which a statement could be admitted without testimony if it “bears adequate indicia of reliability.”

\* \* \*

By insisting that every author of a testimonial statement appear for confrontation, on pain of excluding the statement from evidence, the Court does violence to the Framers’ sensible, and limited, conception of the right to confront “witnesses against” the defendant.

### C

In addition to lacking support in historical practice or in this Court’s precedent, the Court’s decision is also contrary to authority extending over at least 90 years, 35 States, and six Federal Courts of Appeals. [Justice Kennedy discusses prior case law in the states and lower courts.]

\* \* \*

State legislatures, and not the Members of this Court, have the authority to shape the rules of evidence. The Court therefore errs when it relies in such great measure on the recent report of the National Academy of Sciences. That report is not directed to this Court, but rather to the elected representatives in Congress and the state legislatures, who, unlike Members of this Court, have the power and competence to determine whether scientific tests are unreliable and, if so, whether testimony is the proper solution to the problem.

\* \* \*

### III

In an attempt to show that the “sky will not fall after today’s decision,” ante, at 20, the

Court makes three arguments, none of which withstands scrutiny.

## A

In an unconvincing effort to play down the threat that today's new rule will disrupt or even end criminal prosecutions, the Court professes a hope that defense counsel will decline to raise what will soon be known as the *Melendez-Diaz* objection. The Court bases this expectation on its understanding that defense attorneys surrender constitutional rights because the attorneys do not "want to antagonize the judge or jury by wasting their time."

The Court's reasoning is troubling on at least two levels. First, the Court's speculation rests on the apparent belief that our Nation's trial judges and jurors are unwilling to accept zealous advocacy and that, once antagonized by it, will punish such advocates with adverse rulings. The Court offers no support for this stunning slur on the integrity of the Nation's courts. It is commonplace for the defense to request, at the conclusion of the prosecution's opening case, a directed verdict of acquittal. If the prosecution has failed to prove an element of the crime — even an element that is technical and rather obvious, such as movement of a car in interstate commerce — then the case must be dismissed. Until today one would not have thought that judges should be angered at the defense for making such motions, nor that counsel has some sort of obligation to avoid being troublesome when the prosecution has not done all the law requires to prove its case.

Second, even if the Court were right to expect trial judges to feel antagonized by *Melendez-Diaz* objections and to then vent their anger by punishing the lawyer in some way, there is no authority to support the Court's suggestion that a lawyer may shirk his or her professional duties just to avoid judicial displeasure. There is good reason why the Court cites no authority for this suggestion — it is contrary to what some of us, at least, have long understood to be defense counsel's duty to be a zealous advocate for every client. \* \* \*

The instant case demonstrates how zealous defense counsel will defend their clients. To convict, the prosecution must prove the substance is cocaine. Under the Court's new rule, apparently only an analyst's testimony suffices to prove that fact. (Of course there will also be a large universe of other crimes, ranging from homicide to robbery, where scientific evidence is necessary to prove an element.) In cases where scientific evidence is necessary to prove an element of the crime, the Court's rule requires the prosecution to call the person identified as the analyst; this requirement has become a new prosecutorial duty linked with proving the State's case beyond a reasonable doubt. Unless the Court is ashamed of its new rule, it is inexplicable that the Court seeks to limit its damage by hoping that defense counsel will be derelict in their duty to insist that the prosecution prove its case. That is simply not the way the adversarial system works.

In any event, the Court's hope is sure to prove unfounded. The Court surmises that "[i]t is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." This optimistic prediction misunderstands how criminal trials work. If the defense does not plan to challenge the test result, highlighting that result through testimony does not harm the defense as the Court supposes. If the

analyst cannot reach the courtroom in time to testify, however, a *Melendez-Diaz* objection grants the defense a great windfall: The analyst's work cannot come into evidence. Given the prospect of such a windfall (which may, in and of itself, secure an acquittal) few zealous advocates will pledge, prior to trial, not to raise a *Melendez-Diaz* objection. Defense counsel will accept the risk that the jury may hear the analyst's live testimony, in exchange for the chance that the analyst fails to appear and the government's case collapses. And if, as here, the defense is not that the substance was harmless, but instead that the accused did not possess it, the testimony of the technician is a formalism that does not detract from the defense case.

In further support of its unlikely hope, the Court relies on the Brief for Law Professors as Amici Curiae 7-8, which reports that nearly 95% of convictions are obtained via guilty plea and thus do not require in-court testimony from laboratory analysts. What the Court does not consider is how its holding will alter these statistics. The defense bar today gains the formidable power to require the government to transport the analyst to the courtroom at the time of trial. Zealous counsel will insist upon concessions: a plea bargain, or a more lenient sentence in exchange for relinquishing this remarkable power.

## B

As further reassurance that the "sky will not fall after today's decision," the Court notes that many States have enacted burden-shifting statutes that require the defendant to assert his Confrontation Clause right prior to trial or else "forfeit" it "by silence." The Court implies that by shifting the burden to the defendant to take affirmative steps to produce the analyst, these statutes reduce the burden on the prosecution.

The Court holds that these burden-shifting statutes are valid because, in the Court's view, they "shift no burden whatever." While this conclusion is welcome, the premise appears flawed. Even what the Court calls the "simplest form" of burden-shifting statutes do impose requirements on the defendant, who must make a formal demand, with proper service, well before trial. Some statutes impose more requirements, for instance by requiring defense counsel to subpoena the analyst, to show good cause for demanding the analyst's presence, or even to affirm under oath an intent to cross-examine the analyst. In a future case, the Court may find that some of these more onerous burden-shifting statutes violate the Confrontation Clause because they "impos[e] a burden ... on the defendant to bring ... adverse witnesses into court."

The burden-shifting statutes thus provide little reassurance that this case will not impose a meaningless formalism across the board.

## C

In a further effort to support its assessment that today's decision will not cause disruption, the Court cites 10 decisions from States that, the Court asserts, "have already adopted the constitutional rule we announce today." The Court assures us that "there is no evidence that the criminal justice system has ground to a halt in the[se] States."

On inspection, the citations prove far less reassuring than promised. Seven were decided

by courts that considered themselves bound by *Crawford*. These cases thus offer no support for the Court’s assertion that the state jurists independently “adopted” the Court’s interpretation as a matter of state law. Quite the contrary, the debate in those seven courts was over just how far this Court intended *Crawford* to sweep. The Court should correct these courts’ overbroad reading of *Crawford*, not endorse it. Were the Court to do so, these seven jurisdictions might well change their position.

Moreover, because these seven courts only “adopted” the Court’s position in the wake of *Crawford*, their decisions are all quite recent. These States have not yet been subject to the widespread, adverse results of the formalism the Court mandates today.

\* \* \*

Laboratory analysts who conduct routine scientific tests are not the kind of conventional witnesses to whom the Confrontation Clause refers. The judgment of the Appeals Court of Massachusetts should be affirmed.

***Editors’s Note on Bullcoming v. New Mexico:***

In *Bullcoming v. New Mexico*, [131 S.Ct. 2705](#) (2011), the Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with and had no personal knowledge of the testing procedure. Judge Ginsburg, writing for the Court, declared as follows:

The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused’s right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Justice Sotomayor concurred in the judgment and emphasized that the Court’s holding was limited.

Although this case is materially indistinguishable from the facts we considered in *Melendez-Diaz*, I highlight some of the factual circumstances that this case does not present.

First, this is not a case in which the State suggested an alternate purpose, much less an alternate primary purpose, for the BAC report. For example, the State has not claimed that the report was necessary to provide Bullcoming with medical treatment. See

*Giles v. California*, [554 U.S. 353, 376](#) (2008) (“[S]tatements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules”).

Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. Razatos conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Curtis Caylor's conduct of the testing. \* \* \* It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report.

Third, this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. See Fed. Rule Evid. 703 (explaining that facts or data of a type upon which experts in the field would reasonably rely in forming an opinion need not be admissible in order for the expert's opinion based on the facts and data to be admitted). \* \* \* [T]he State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration. \* \* \* Here the State offered the BAC report, including Caylor's testimonial statements, into evidence. We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.

Finally, this is not a case in which the State introduced only machine-generated results, such as a printout from a gas chromatograph. The State here introduced Caylor's statements, which included his transcription of a blood alcohol concentration, apparently copied from a gas chromatograph printout, along with other statements about the procedures used in handling the blood sample. Thus, we do not decide whether, as the New Mexico Supreme Court suggests, [226 P.3d, at 10](#), a State could introduce (assuming an adequate chain of custody foundation) raw data generated by a machine in conjunction with the testimony of an expert witness.

Justice Kennedy, joined by the Chief Justice and Justices Breyer and Alito, dissented in *Bullcoming* for essentially the same reasons that they dissented in *Melendez-Diaz*.

**MICHIGAN v. BRYANT**

[131 S.Ct. 1143](#) (2011)

JUSTICE SOTOMAYOR delivered the opinion of the Court

At respondent Richard Bryant's trial, the court admitted statements that the victim, Anthony Covington, made to police officers who discovered him mortally wounded in a gas station parking lot. A jury convicted Bryant of, inter alia, second-degree murder. On appeal, the Supreme Court of Michigan held that the Sixth Amendment's Confrontation Clause, as explained in our decisions in *Crawford v. Washington*, [541 U.S. 36](#) (2004), and *Davis v. Washington*, [547 U.S. 813](#) (2006), rendered Covington's statements inadmissible testimonial hearsay, and the court reversed Bryant's conviction. We granted the State's petition for a writ of certiorari to consider whether the Confrontation Clause barred the admission at trial of Covington's statements to the police. We hold that the circumstances of the interaction between Covington and the police objectively indicate that the "primary purpose of the interrogation" was "to enable police assistance to meet an ongoing emergency." *Davis*, [547 U.S., at 822](#). Therefore, Covington's identification and description of the shooter and the location of the shooting were not testimonial statements, and their admission at Bryant's trial did not violate the Confrontation Clause. We vacate the judgment of the Supreme Court of Michigan and remand.

I

Around 3:25 a.m. on April 29, 2001, Detroit, Michigan police officers responded to a radio dispatch indicating that a man had been shot. At the scene, they found the victim, Anthony Covington, lying on the ground next to his car in a gas station parking lot. Covington had a gunshot wound to his abdomen, appeared to be in great pain, and spoke with difficulty.

The police asked him "what had happened, who had shot him, and where the shooting had occurred." Covington stated that "Rick" shot him at around 3 a.m. He also indicated that he had a conversation with Bryant, whom he recognized based on his voice, through the back door of Bryant's house. Covington explained that when he turned to leave, he was shot through the door and then drove to the gas station, where police found him.

Covington's conversation with the police ended within 5 to 10 minutes when emergency medical services arrived. Covington was transported to a hospital and died within hours. The police left the gas station after speaking with Covington, called for backup, and traveled to Bryant's house. They did not find Bryant there but did find blood and a bullet on the back porch and an apparent bullet hole in the back door. Police also found Covington's wallet and identification outside the house.

At trial, which occurred prior to our decisions in *Crawford*, and *Davis*, the police officers who spoke with Covington at the gas station testified about what Covington had told them. The jury returned a guilty verdict on charges of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony.

\* \* \*

Before the Supreme Court of Michigan, Bryant argued that Covington's statements to the police were testimonial under *Crawford* and *Davis* and were therefore inadmissible. The State, on the other hand, argued that the statements were admissible as "excited utterances" under the Michigan Rules of Evidence. There was no dispute that Covington was unavailable at trial and Bryant had no prior opportunity to cross-examine him. The court therefore assessed whether Covington's statements to the police identifying and describing the shooter and the time and location of the shooting were testimonial hearsay for purposes of the Confrontation Clause. The court concluded that the circumstances "clearly indicate that the 'primary purpose' of the questioning was to establish the facts of an event that had already occurred; the 'primary purpose' was not to enable police assistance to meet an ongoing emergency." The court explained that, in its view, Covington was describing past events and as such, his "primary purpose in making these statements to the police ... was ... to tell the police who had committed the crime against him, where the crime had been committed, and where the police could find the criminal." Noting that the officers' actions did not suggest that they perceived an ongoing emergency at the gas station, the court held that there was in fact no ongoing emergency. The court distinguished the facts of this case from those in *Davis*, where we held a declarant's statements in a 911 call to be nontestimonial. It instead analogized this case to *Hammon v. Indiana*, which we decided jointly with *Davis* and in which we found testimonial a declarant's statements to police just after an assault. Based on this analysis, the Supreme Court of Michigan held that the admission of Covington's statements constituted prejudicial plain error warranting reversal and ordered a new trial. . The court did not address whether, absent a Confrontation Clause bar, the statements' admission would have been otherwise consistent with Michigan's

hearsay rules or due process.<sup>5</sup>

The majority's opinion provoked two dissents, both of which would have held Covington's statements admissible because they were made in circumstances indicating that their "primary purpose" was to assist police in addressing an ongoing emergency. Justice Corrigan's dissent explained that the time and space between "the onset of an emergency and statements about that emergency clearly must be considered in context." Justice Corrigan concluded that the objective circumstances of Covington's interaction with police rendered this case more similar to the nontestimonial statements in *Davis* than to the testimonial statements in *Crawford*.

\* \* \*

## II

[The Court discussed *Ohio v. Roberts*; its overruling, and the analysis in *Crawford*; and the Court's new-found focus on "testimonial" hearsay. It then proceeds to discuss the decision in the consolidated cases of *Davis* and *Hammond*.]

<sup>5</sup> The Supreme Court of Michigan held that the question whether the victim's statements would have been admissible as "dying declarations" was not properly before it because at the preliminary examination, the prosecution, after first invoking both the dying declaration and excited utterance hearsay exceptions, established the factual foundation only for admission of the statements as excited utterances. The trial court ruled that the statements were admissible as excited utterances and did not address their admissibility as dying declarations. This occurred prior to our 2004 decision in *Crawford v. Washington*, where we first suggested that dying declarations, even if testimonial, might be admissible as a historical exception to the Confrontation Clause. We noted in *Crawford* that we "need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations." Because of the State's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here.

In 2006, the Court in *Davis v. Washington* and *Hammon v. Indiana*, [547 U.S. 813](#), took a further step to “determine more precisely which police interrogations produce testimony” and therefore implicate a Confrontation Clause bar. We explained that when *Crawford* said that “ ‘interrogations by law enforcement officers fall squarely within [the] class’ of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.”

We thus made clear in *Davis* that not all those questioned by the police are witnesses and not all “interrogations by law enforcement officers,” are subject to the Confrontation Clause.

*Davis* and *Hammon* were both domestic violence cases. In *Davis*, Michelle McCottry made the statements at issue to a 911 operator during a domestic disturbance with Adrian Davis, her former boyfriend. McCottry told the operator, “ He's here jumpin' on me again, ” and, “ He's usin' his fists. ” The operator then asked McCottry for Davis' first and last names and middle initial, and at that point in the conversation McCottry reported that Davis had fled in a car. McCottry did not appear at Davis' trial, and the State introduced the recording of her conversation with the 911 operator.

In *Hammon*, decided along with *Davis*, police responded to a domestic disturbance call at the home of Amy and Hershel Hammon, where they found Amy alone on the front porch. She appeared “somewhat frightened, ” but told them “nothing was the matter. ” She gave the police permission to enter the house, where they saw a gas heating unit with the glass front shattered on the floor. One officer remained in the kitchen with Hershel, while another officer talked to Amy in the living room about what had happened. Hershel tried several times to participate in Amy's conversation with the police and became angry when the police required him to stay separated from Amy. The police asked Amy to fill out and sign a battery affidavit. She wrote: “Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter.” Amy did not appear at Hershel's trial, so the police officers who spoke with her testified as to her statements and authenticated the affidavit. The trial court admitted the affidavit as a present sense impression and admitted the oral statements as excited utterances under state hearsay rules. The Indiana Supreme Court affirmed Hammon's conviction, holding that Amy's oral statements were not testimonial and that the admission of the affidavit, although erroneous because the affidavit was testimonial, was harmless.

To address the facts of both cases, we expanded upon the meaning of “testimonial” that we first employed in *Crawford* and discussed the concept of an ongoing emergency. We explained:

“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.”

Examining the *Davis* and *Hammon* statements in light of those definitions, we held that the statements at issue in *Davis* were nontestimonial and the statements in *Hammon* were testimonial. We distinguished the statements in *Davis* from the testimonial statements in *Crawford* on several grounds, including that the victim in *Davis* was “speaking about events as they were actually happening, rather than describing past events,” that there was an ongoing emergency, that the “elicited statements were necessary to be able to resolve the present emergency,” and that the statements were not formal. In *Hammon*, on the other hand, we held that, “[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct.” There was “no emergency in progress.” The officer questioning Amy “was not seeking to determine ... ‘what is happening,’ but rather ‘what happened.’ ” It was “formal enough” that the police interrogated Amy in a room separate from her husband where, “some time after the events described were over,” she “deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed.” Because her statements “were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation,” we held that they were testimonial.

*Davis* did not “attemp[t] to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial.” 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. *Crawford*, [541 U.S., at 51](#). 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. Even where such an interrogation is conducted with all good faith, introduction of the resulting statements at trial can be unfair to the accused if they are untested by cross-examination. Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the

accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial. When, as in *Davis*, the primary purpose of an interrogation is to respond to an “ongoing emergency,” its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.

Deciding this case also requires further explanation of the “ongoing emergency” circumstance addressed in *Davis*. Because *Davis* and *Hammon* arose in the domestic violence context, that was the situation “we had immediately in mind (for that was the case before us).” We now face a new context: a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim. Thus, 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.”

### III

To determine whether the “primary purpose” of an interrogation is “to enable police assistance to meet an ongoing emergency,” which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.

#### A

The Michigan Supreme Court correctly understood that this inquiry is objective. *Davis* uses the word “objective” or “objectively” no fewer than eight times in describing the relevant inquiry. (“The question before us in *Davis*, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements”). “Objectively” also appears in the definitions of both testimonial and nontestimonial statements that *Davis* established.

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.” The circumstances in which an encounter occurs— e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

## B

As our recent Confrontation Clause cases have explained, the existence of an “ongoing emergency” at the time of an encounter between an individual and the police is among the most important circumstances informing the “primary purpose” of an interrogation. The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than “prov[ing] past events potentially relevant to later criminal prosecution.” *Davis*, [547 U.S., at 822](#). Rather, it focuses them on “end[ing] a threatening situation.” *Id.*, [at 832](#). Implicit in *Davis* is the idea that because 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.

This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” Fed. Rule Evid. 803(2) [pre-restyled rule], are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood. An ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency.<sup>6</sup>

<sup>6</sup> Many other exceptions to the hearsay rules similarly rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions. See, e.g., Fed. Rule Evid. 801(d)(2)(E) (statement by a co-conspirator during and in furtherance of the conspiracy); 803(4) (Statements for Purposes of

Following our precedents, the court below correctly began its analysis with the circumstances in which Covington interacted with the police. But in doing so, the court construed *Davis* to have decided more than it did and thus employed an unduly narrow understanding of “ongoing emergency” that *Davis* does not require.

\* \* \*

[B]y assuming that *Davis* defined the outer bounds of “ongoing emergency,” the Michigan Supreme Court failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry. *Davis* and *Hammon* involved domestic violence, a known and identified perpetrator, and, in *Hammon*, a neutralized threat. Because *Davis* and *Hammon* were domestic violence cases, we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat to them.

Domestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims than cases involving threats to public safety. An 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. See Brief for United States as Amicus Curiae 19–20 (“An emergency posed by an unknown shooter who remains at large does not automatically abate just because the police can provide security to his first victim”).

Medical Diagnosis or Treatment); 803(6) (Records of Regularly Conducted Activity); 803(8) (Public Records and Reports); 803(9) (Records of Vital Statistics); 803(11) (Records of Religious Organizations); 803(12) (Marriage, Baptismal, and Similar Certificates); 803(13) (Family Records); 804(b)(3) (Statement Against Interest); see also *Melendez–Diaz v. Massachusetts*, 129 S.Ct., at 2539–2540 (“Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial”); *Giles v. California*, 554 U.S., at 376, 128 S.Ct. 2678 (noting in the context of domestic violence that “[s]tatements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules”); *Crawford*, 541 U.S., at 56, 124 S.Ct. 1354 (“Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy”).

The Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed. The court relied on *Davis* and *Hammon*, in which the assailants used their fists, as controlling the scope of the emergency here, which involved the use of a gun. The problem with that reasoning is clear when considered in light of the assault on Amy Hammon. Hershel Hammon was armed only with his fists when he attacked his wife, so removing Amy to a separate room was sufficient to end the emergency. If Hershel had been reported to be armed with a gun, however, separation by a single household wall might not have been sufficient to end the emergency.

The Michigan Supreme Court's failure to focus on the context-dependent nature of our *Davis* decision also led it to conclude that the medical condition of a declarant is irrelevant. But *Davis* and *Hammon* did not present medical emergencies, despite some injuries to the victims. Thus, we have not previously considered, much less ruled out, the relevance of a victim's severe injuries to the primary purpose inquiry.

\* \* \* The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

\* \* \* [N]one of this suggests that an emergency is ongoing in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose. As we recognized in *Davis*, “a conversation which begins as an interrogation to determine the need for emergency assistance” can “evolve into testimonial statements.” This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public. Trial courts can determine in the first instance when any transition from nontestimonial to testimonial occurs, and exclude “the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.”

Finally, our discussion of the Michigan Supreme Court's misunderstanding of what *Davis* meant by “ongoing emergency” should not be taken to imply that the existence vel non of an

ongoing emergency is dispositive of the testimonial inquiry. As *Davis* made clear, 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. Another factor the Michigan Supreme Court did not sufficiently account for is the importance of informality in an encounter between a victim and police. Formality is not the sole touchstone of our primary purpose inquiry because, although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent. The court below, however, too readily dismissed the informality of the circumstances in this case in a single brief footnote and in fact seems to have suggested that the encounter in this case was formal. As we explain further below, the questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion. All of those facts make this case distinguishable from the formal station-house interrogation in *Crawford*.

## C

In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.. The Michigan Supreme Court did, at least briefly, conduct this inquiry.

As the Michigan Supreme Court correctly recognized, *Davis* requires a combined inquiry that accounts for both the declarant and the interrogator. 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.

The combined approach also ameliorates problems that could arise from looking solely to one participant. Predominant among these is the problem of mixed motives on the part of both interrogators and declarants. Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession.

Victims are also likely to have mixed motives when they make statements to the police.

During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated. Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive. The victim's injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution. Taking into account a victim's injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim's physical state.

\* \* \*

#### IV

As we suggested in *Davis*, when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the “primary purpose of the interrogation” by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation.<sup>7</sup> As the context of this case brings into sharp relief, the existence and duration of

<sup>7</sup> Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements at trial. State and federal rules of evidence prohibit the introduction of hearsay, subject to exceptions. Consistent with those rules, the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence. See *Dutton v. Evans*, 400 U.S. 74, 96–97 (1970) (HARLAN, J., concurring in result) (“[T]he Fifth and Fourteenth Amendments' commands that federal and state trials, respectively, must be conducted in accordance with due process of law” is the “standard” by which to “test federal and state rules of evidence”).

an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

Applying this analysis to the facts of this case \* \* \* [w]e first examine the circumstances in which the interrogation occurred. The parties disagree over whether there was an emergency when the police arrived at the gas station. Bryant argues, and the Michigan Supreme Court accepted, that there was no ongoing emergency because “there ... was no criminal conduct occurring. No shots were being fired, no one was seen in possession of a firearm, nor were any witnesses seen cowering in fear or running from the scene.” \* \* \*

In contrast, Michigan and the Solicitor General explain that when the police responded to the call that a man had been shot and found Covington bleeding on the gas station parking lot, “they did not know who Covington was, whether the shooting had occurred at the gas station or at a different location, who the assailant was, or whether the assailant posed a continuing threat to Covington or others.”

\* \* \*

As explained above, the scope of an emergency in terms of its threat to individuals other than the initial assailant and victim will often depend on the type of dispute involved. Nothing Covington said to the police indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended. The record reveals little about the motive for the shooting. The police officers who spoke with Covington at the gas station testified that Covington did not tell them what words Covington and Rick had exchanged prior to the shooting. What Covington did tell the officers was that he fled Bryant's back porch, indicating that he perceived an ongoing threat. The police did not know, and Covington did not tell them, whether the threat was limited to him. The potential scope of the dispute and therefore the emergency in this case thus stretches more broadly than those at issue in *Davis* and *Hammon* and encompasses a threat potentially to the police and the public.

\* \* \* The physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat in this case; Covington was shot through the back door

of Bryant's house. Bryant's argument that there was no ongoing emergency because “[n]o shots were being fired,” surely construes ongoing emergency too narrowly. An emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the victim. If an out-of-sight sniper pauses between shots, no one would say that the emergency ceases during the pause. That is an extreme example and not the situation here, but it serves to highlight the implausibility, at least as to certain weapons, of construing the emergency to last only precisely as long as the violent act itself, as some have construed our opinion in *Davis*.

At no point during the questioning did either Covington or the police know the location of the shooter. In fact, Bryant was not at home by the time the police searched his house at approximately 5:30 a.m. At some point between 3 a.m. and 5:30 a.m., Bryant left his house. At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington.

This is not to suggest that the emergency continued until Bryant was arrested in California a year after the shooting. We need not decide precisely when the emergency ended because Covington's encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers' arrival and well before they secured the scene of the shooting—the shooter's last known location.

We reiterate, moreover, that the existence vel non of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency.. We turn now to that inquiry, as informed by the circumstances of the ongoing emergency just described. The circumstances of the encounter provide important context for understanding Covington's statements to the police. When the police arrived at Covington's side, their first question to him was “What happened?” Covington's response was either “Rick shot me” or “I was shot,” followed very quickly by an identification of “Rick” as the shooter. In response to further questions, Covington explained that the shooting occurred through the back door of Bryant's house and provided a physical description of the shooter. When he made the statements, Covington was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen. His answers to the police officers' questions were punctuated with questions about when emergency medical services would arrive. He was obviously in considerable pain and had difficulty breathing and talking. From this description of his condition and report of his statements, we cannot say that a person in Covington's situation would have had a “primary purpose” “to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, [547 U.S., at 822](#).

For their part, the police responded to a call that a man had been shot. As discussed above, they did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred. The questions they asked—“what had happened, who had shot him, and where the shooting occurred,”—were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public, including to allow them to ascertain whether they would be encountering a violent felon. In other words, they solicited the information necessary to enable them “to meet an ongoing emergency.” *Davis*, [547 U.S. at 822](#).

Nothing in Covington's responses indicated to the police that, contrary to their expectation upon responding to a call reporting a shooting, there was no emergency or that a prior emergency had ended. Covington did indicate that he had been shot at another location about 25 minutes earlier, but he did not know the location of the shooter at the time the police arrived and, as far as we can tell from the record, he gave no indication that the shooter, having shot at him twice, would be satisfied that Covington was only wounded. In fact, Covington did not indicate any possible motive for the shooting, and thereby gave no reason to think that the shooter would not shoot again if he arrived on the scene. As we noted in *Davis*, “initial inquiries” may “often ... produce nontestimonial statements.” The initial inquiries in this case resulted in the type of nontestimonial statements we contemplated in *Davis*.

Finally, we consider the informality of the situation and the interrogation. This situation is more similar, though not identical, to the informal, harried 911 call in *Davis* than to the structured, station-house interview in *Crawford*. As the officers' trial testimony reflects, the situation was fluid and somewhat confused: the officers arrived at different times; apparently each, upon arrival, asked Covington “what happened?”; and \* \* \* they did not conduct a structured interrogation. The informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements.

Because the circumstances of the encounter as well as the statements and actions of Covington and the police objectively indicate that the “primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency,” *Davis*, [547 U.S., at 822](#), Covington's identification and description of the shooter and the location of the shooting were not testimonial hearsay. The Confrontation Clause did not bar their admission at Bryant's trial.

\* \* \*

For the foregoing reasons, we hold that Covington's statements were not testimonial and that their admission at Bryant's trial did not violate the Confrontation Clause. We leave for the Michigan courts to decide on remand whether the statements' admission was otherwise permitted by state hearsay rules. The judgment of the Supreme Court of Michigan is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the admission of Covington's out-of-court statements did not violate the Confrontation Clause, but I reach this conclusion because Covington's questioning by police lacked sufficient formality and solemnity for his statements to be considered “testimonial.” See *Crawford v. Washington*, [541 U.S. 36, 68](#) (2004).

In determining whether Covington's statements to police implicate the Confrontation Clause, the Court evaluates the “‘primary purpose’” of the interrogation. The majority's analysis which relies on, *inter alia*, what the police knew when they arrived at the scene, the specific questions they asked, the particular information Covington conveyed, the weapon involved, and Covington's medical condition illustrates the uncertainty that this test creates for law enforcement and the lower courts. I have criticized the primary-purpose test as “an exercise in fiction” that is “disconnected from history” and “yields no predictable results.” *Davis v. Washington*, [547 U.S. 813, 839](#) (2006) (opinion concurring in judgment in part and dissenting in part).

Rather than attempting to reconstruct the “primary purpose” of the participants, I would consider the extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed. See, e.g., *id.*, at 835–836 (describing “practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary”). As the majority notes, Covington interacted with the police under highly informal circumstances, while he bled from a fatal gunshot wound. The police questioning was not “a formalized dialogue,” did not result in “formalized testimonial materials” such as a deposition or affidavit, and bore no

“indicia of solemnity.” [Davis, supra, at 840 \(opinion of Thomas, J.\)](#). Nor is there any indication that the statements were offered at trial “in order to evade confrontation.” [Davis, supra, at 840](#). This interrogation bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate. Covington thus did not “bea[r] testimony” against Bryant, and the introduction of his statements at trial did not implicate the Confrontation Clause. I concur in the judgment.

JUSTICE SCALIA, dissenting.

Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford v. Washington*, [541 U.S. 36](#), 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), I dissent.

I

A

\* \* \*

B

Looking to the declarant's purpose (as we should), this is an absurdly easy case. \* \* \* From Covington's perspective, his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant. \* \* \* Even if Bryant had pursued him (unlikely), and after seeing that Covington had ended up at the gas station was unable to confront him there before the police arrived (doubly unlikely), it was entirely beyond imagination that Bryant would again open fire while Covington was surrounded by five armed police officers. And Covington knew the shooting was the work of a drug dealer, not a spree killer who might randomly threaten others.

\* \* \*

Covington's pressing medical needs do not suggest that he was responding to an emergency, but to the contrary reinforce the testimonial character of his statements. He understood the police were focused on investigating a past crime, not his medical needs. \* \* \* Neither Covington's statements nor the colloquy between him and the officers would have been out of place at a trial; it would have been a routine direct examination. Like a witness, Covington recounted in detail how a past criminal event began and progressed, and like a prosecutor, the police elicited that account through structured questioning. \* \* \* Ex parte examinations raise the same constitutional concerns whether they take place in a gas-station parking lot or in a police interrogation room.

C

Worse still for the repute of today's opinion, this is an absurdly easy case even if one (erroneously) takes the interrogating officers' purpose into account. The five officers interrogated Covington primarily to investigate past criminal events. None—absolutely none—of their actions indicated that they perceived an imminent threat. \* \* \*

D

\* \* \*

The Court's distorted view creates an expansive exception to the Confrontation Clause for violent crimes. Because Bryant posed a continuing threat to public safety in the Court's imagination, the emergency persisted for confrontation purposes at least until the police learned his “motive for and location after the shooting.” It may have persisted in this case until the police “secured the scene of the shooting” two-and-a-half hours later. This is a dangerous

definition of emergency. Many individuals who testify against a defendant at trial first offer their accounts to police in the hours after a violent act. If the police can plausibly claim that a “potential threat to ... the public” persisted through those first few hours, \* \* \* a defendant will have no constitutionally protected right to exclude the uncross-examined testimony of such witnesses. His conviction could rest (as perhaps it did here) solely on the officers' recollection at trial of the witnesses' accusations.

\* \* \*

## II

### A

But today's decision is not only a gross distortion of the facts. It is a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned.

\* \* \*

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*, [448 U.S. 56](#) (1980) 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. The arguments in Raleigh's infamous 17th-century treason trial contained full debate about the reliability of Lord Cobham's ex parte accusations, see Raleigh's Case, 2 How. St. Tr. 1, 14, 17, 19–20, 22–23, 29 (1603); that case remains the canonical example of a Confrontation Clause violation, not because Raleigh should have won the debate but because he should have been allowed cross-examination.

The Court attempts to fit its resurrected interest in reliability into the *Crawford* framework, but the result is incoherent. Reliability, the Court tells us, is a good indicator of whether “a statement is ... an out-of-court substitute for trial testimony.” That is patently false.

Reliability tells us nothing about whether a statement is testimonial. Testimonial and nontestimonial statements alike come in varying degrees of reliability. An eyewitness's statements to the police after a fender-bender, for example, are both reliable and testimonial. Statements to the police from one driver attempting to blame the other would be similarly testimonial but rarely reliable.

The Court suggests otherwise because it “misunderstands the relationship” between qualification for one of the standard hearsay exceptions and exemption from the confrontation requirement. That relationship is not a causal one. Hearsay law exempts business records, for example, because businesses have a financial incentive to keep reliable records. See Fed. Rule Evid. 803(6). The Sixth Amendment also generally admits business records into evidence, but not because the records are reliable or because hearsay law says so. It admits them because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not weaker substitutes for live testimony. Moreover, the scope of the exemption from confrontation and that of the hearsay exceptions also are not always coextensive. The reliability logic of the business-record exception would extend to records maintained by neutral parties providing litigation-support services, such as evidence testing. The Confrontation Clause is not so forgiving. Business records prepared specifically for use at a criminal trial are testimonial and require confrontation.

Is it possible that the Court does not recognize the contradiction between its focus on reliable statements and *Crawford*'s focus on testimonial ones? Does it not realize that the two cannot coexist? Or does it intend, by following today's illogical roadmap, to resurrect *Roberts* by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*? After all, honestly overruling *Crawford* would destroy the illusion of judicial minimalism and restraint. And it would force the Court to explain how the Justices' preference comports with the meaning of the Confrontation Clause that the People adopted—or to confess that only the Justices' preference really matters.

## B

The Court recedes from *Crawford* in a second significant way. It requires judges to conduct “open-ended balancing tests” and “amorphous, if not entirely subjective,” inquiries into the totality of the circumstances bearing upon reliability. Where the prosecution cries “emergency,” the admissibility of a statement now turns on “a highly context-dependent inquiry,” into the type of weapon the defendant wielded; the type of crime the defendant committed, the medical condition of the declarant; if the declarant is injured, whether paramedics have arrived on the scene; whether the encounter takes place in an “exposed public area,”; whether the encounter appears disorganized.; whether the declarant is capable of forming a purpose; whether the police have secured the scene of the crime; the formality of the statement;

and finally, whether the statement strikes us as reliable. This is no better than the nine-factor balancing test we rejected in *Crawford*, [541 U.S., at 63](#). I do not look forward to resolving conflicts in the future over whether knives and poison are more like guns or fists for Confrontation Clause purposes, or whether rape and armed robbery are more like murder or domestic violence.

It can be said, of course, that under *Crawford* analysis of whether a statement is testimonial requires consideration of all the circumstances, and so is also something of a multifactor balancing test. But the “reliability” test does not replace that analysis; it supplements it. As I understand the Court's opinion, even when it is determined that no emergency exists (or perhaps before that determination is made) the statement would be found admissible as far as the Confrontation Clause is concerned if it is not testimonial.

\* \* \*

JUSTICE GINSBURG, dissenting.

I agree with Justice SCALIA that Covington's statements were testimonial and that “[t]he declarant's intent is what counts.” Even if the interrogators' intent were what counts, I further agree, Covington's statements would still be testimonial. It is most likely that “the officers viewed their encounter with Covington [as] an investigation into a past crime with no ongoing or immediate consequences.” \* \* \*

I would add, however, this observation. In *Crawford v. Washington*, [541 U.S. 36, 56, n. 6](#) (2004), this Court noted that, in the law we inherited from England, there was a well-established exception to the confrontation requirement: The cloak protecting the accused against admission of out-of-court testimonial statements was removed for dying declarations. This historic exception \* \* \* applied to statements made by a person about to die and aware that death was imminent. Were the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions. \* \* \*

***Editor's Note:***

**Standard for Forfeiture of the Right to Confrontation:** *Giles v. California*, [128 S.Ct. 2678](#) (2008): In *Giles v. California*, the Court in an opinion by Justice Scalia held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial*. Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim's hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murder the victim with the intent to keep her from testifying.

Justice Scalia found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there were necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Much of Justice Scalia's opinion, as well as the dissent by Justice Breyer, is a back-and-forth about the meaning of 400 year-old case law. [Students interested in such matters are invited to read the whole case.] What follows are a few excerpts from Justice Scalia's opinion:

In sum, our interpretation of the common-law forfeiture rule is supported by (1) the most natural reading of the language used at common law; (2) the absence of common-law cases admitting prior statements on a forfeiture theory when the defendant had not engaged in conduct designed to prevent a witness from testifying; (3) the common law's uniform exclusion of unconfrosted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in the innumerable cases in which the defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony; (4) a subsequent history in which the dissent's broad forfeiture theory has not been applied. The first two and the last are highly persuasive; the third is in our view conclusive.

\* \* \*

The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them--in other words, it is grounded in the ability of courts to protect the integrity of their proceedings. The boundaries of the doctrine seem to us intelligently fixed so as to avoid a principle repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty (after less than a full trial, mind you, and of course before the jury has pronounced guilt) should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong.

\* \* \*

The dissent closes by pointing out that a forfeiture rule which ignores *Crawford* would be particularly helpful to women in abusive relationships--or at least particularly helpful in punishing their abusers. Not as helpful as the dissent suggests, since only testimonial statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing. In any event, we are puzzled by the dissent's decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means--from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution--rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. \* \* \*

The state courts in this case did not consider the intent of the defendant because they found that irrelevant to application of the forfeiture doctrine. This view of the law was error, but the court is free to consider evidence of the defendant's intent on remand.

Justice Thomas wrote a short concurring opinion indicating his belief that the victim's statements to police officers were not testimonial in the first place. They were made to responding police officers and therefore were not the type of formal statements that constituted "testimony" under the common law. Justice Alito wrote a short concurring opinion agreeing with Justice Thomas.

Justice Souter also wrote a short concurring opinion, joined by Justice Ginsburg, in which he emphasized a point made by the majority in the excerpt above -- forfeiture could be found in a domestic violence case by implicit threats and acts of aggression. Justice Souter stated that

the element of intention would normally be satisfied by the intent inferred on the part of

the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.

Justice Breyer, joined by Justices Stevens and Kennedy, dissented. Obviously Justice Breyer had a different take on the history than the majority. On policy questions, Justice Breyer had this to say:

The rule of forfeiture is implicated primarily where domestic abuse is at issue. In such a case, a murder victim may have previously given a testimonial statement, say, to the police, about an abuser's attacks; and introduction of that statement may be at issue in a later trial for the abuser's subsequent murder of the victim. This is not an uncommon occurrence. Each year, domestic violence results in more than 1,500 deaths and more than 2 million injuries; it accounts for a substantial portion of all homicides; it typically involves a history of repeated violence; and it is difficult to prove in court because the victim is generally reluctant or unable to testify. See \* \* \* Lininger, *Prosecuting Batterers after Crawford*, [91 Va. L. Rev. 747, 751, 768-769](#) (2005).

Regardless of a defendant's purpose, threats, further violence, and ultimately murder, can stop victims from testifying. \* \* \* A constitutional evidentiary requirement that insists upon a showing of purpose (rather than simply intent or probabilistic knowledge) may permit the domestic partner who made the threats, caused the violence, or even murdered the victim to avoid conviction for earlier crimes by taking advantage of later ones. In *Davis*, we recognized that "domestic violence" cases are "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." [547 U.S., at 832-833](#). We noted the concern that "[w]hen this occurs, the Confrontation Clause gives the criminal a windfall." [Id., at 833](#). And we replied to that concern by stating that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." [Ibid.](#) To the extent that it insists upon an additional showing of purpose, the Court breaks the promise implicit in those words and, in doing so, grants the defendant not fair treatment, but a windfall. I can find no history, no underlying purpose, no administrative consideration, and no constitutional principle that requires this result.

Insofar as JUSTICE SOUTER's rule in effect presumes "purpose" based on no more than evidence of a history of domestic violence, I agree with it. In all other respects, however, I must respectfully dissent.

## **Chapter 18 Privileges — Attorney-Client Privilege**

### **Page 1075. Update on Rule 502**

Proposed Rule 502, providing protection against waiver of privilege and work-product, was signed into law by the President in September 2008. Its text is identical to the Proposed Rule 502 that is set forth at page 1075 of the Casebook. The Committee Note, set forth in the casebook, was designated by Congress to be the legislative history of the law that was enacted.

D.J.C.

New York, N.Y., June 1, 2010

S.A.S.

Washington, D.C., June 1, 2010