6th Amendment’s Confrontation Clause Evolution

The 6th Amendment guarantees the defendant’s fundamental right to confront the witnesses against him or her in all criminal prosecutions. This right is applicable through the 14th Amendment Due Process Clause. The defendant’s opportunity to cross-examine witnesses is a cornerstone of all criminal defenses and the primary purpose of the right of confrontation. Therefore, out-of-court statements must not deny criminal defendants this right. The 6th Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The rights protections of the 6th Amendment are applicable to the States through the 14th Amendment, and the Rhode Island Constitution has a comparable provision in Article I, Section 10, which states:

Rights of accused persons in criminal proceedings. — In all criminal prosecutions, accused persons shall enjoy the right... to be confronted with the witnesses against them, to have compulsory process for obtaining them in their favor, to have the assistance of counsel in their defense, and shall be at liberty to speak for themselves, nor shall they be deprived of life, liberty, or property, unless by the judgment of their peers or the law of the land.

In certain criminal cases, a balance must be developed between the criminal defendant’s right of confrontation and the use of hearsay evidence by the introduction of out-of-court statements. Although all hearsay evidence is not automatically excluded by the confrontation clause, the 6th Amendment right usually trumps the use of hearsay evidence.

In several cases, the U.S. Supreme Court has analyzed the relationship between the confrontation clause and the use of hearsay evidence. In Ohio v. Roberts, the Court held “[i]n sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicis of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”

However, the “reliability” standard established in Ohio v. Roberts, was overturned by the Court in Crawford v. Washington where the Court held that the confrontation clause permits the admission of “testimonial statements of witnesses absent from trial... only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine.”

During the trial for attempted murder and assault, the defendant’s wife’s statements made during police interrogation were recorded and introduced at trial after a finding that the statements were trustworthy and reliable. The defendant’s conviction was overturned by the U.S. Supreme Court which held that the admission of the statements were in violation of the defendant’s right to confrontation and to cross-examine witnesses against him. The statements were testimonial, and their reliability could only be ascertained through confrontation. The Court concluded that the language of the confrontation clause applies to witnesses who made statements to police officers during interrogation and that those statements are testimonial. If such statements are testimonial, they are only admissible when a defendant has had a prior opportunity to cross-examine the unavailable witness regarding his/her statements. “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.” In Crawford, the Court declined to fully define what statements are testimonial. Instead “[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law
required: unavailability and a prior opportunity for cross-examination. We
leave for another day any effort to spell out a comprehensive definition of “testi-
monial.” Whatever else the term covers, it applies at a minimum to prior testimony
at a preliminary hearing, before a grand jury, or at a former trial; and to police
interrogations.”

In the cases of Davis v. Washington, Hammon v. Indiana, and Michigan v. Bryant, the U.S. Supreme Court had an opportuni-
ty to interpret the definition of “testimonial” left open in its holding in Crawford. In Davis and Hammon, a
tandem decision, the Court attempted to determine when statements made to law
enforcement personnel during a 911 call or at a crime scene are “testimonial” and thus subject to the requirements of the
confrontation clause. In Davis, the defendant’s conviction was upheld because
the Court held that “[s]tatements are non-testimonial when made in the course of
criminal prosecution 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 interro-
gation is to establish or prove past events potentially relevant to later criminal
prosecution.” Therefore, the 911 calls from the defendant’s girlfriend/victim
were properly admitted into evidence at trial to identify the defendant as the perpetrator despite the absence of the
girlfriend/victim at trial. In contrast, the affidavit prepared by the wife/victim after the police responded to a reported
domestic disturbance in Hammon’s case was improperly admitted into evidence
because the affidavit was testimonial and not part of an ongoing emergency.

In Michigan v. Bryant, the police responded to a gas station after reports
of a gunshot. The victim made statements to the police officers about the person
who shot him. The victim died and the defendant was charged and convicted of
second degree murder. The U.S. Supreme Court reinstated the defendant’s convic-
tion because the statements to police were non-testimonial because they were
made as part of an ongoing emergency. The Court attempted to clarify what it
meant by “the primary purpose of the interrogation is to enable police assistance
to meet an ongoing emergency.”¹⁵ The Court reasoned, “[t]he existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because any emergency focuses the participants on something other than ‘prov[ing] past events potentially relevant to later criminal prosecution’; rather, it focuses them on ‘end[ing] a threatening situation.’”¹⁶

More recently, in Melendez-Diaz v. Massachusetts¹⁷ and Bullcoming v. New Mexico,¹⁸ the U.S. Supreme Court overturned petitioners’ convictions in a drug case and drunk driving case, respectively. In Melendez-Diaz, the prosecution, during a state court drug trial, “introduced certificates of state laboratory analysts stating that material seized by police and connected to petitioner was cocaine of a certain quantity. As required by Massachusetts law, the certificates were sworn to before a notary public and were submitted as prima facie evidence of what they asserted. Petitioner objected, asserting that Crawford...required the analyst to testify in person. The trial court disagreed, the certificates were admitted and petitioner was convicted. The Massachusetts Appeals Court affirmed, rejecting petitioner’s claim that the certificates’ admission violated the Sixth Amendment.”¹⁹ However, the U.S. Supreme Court held the following:

“admission of certificates violated petitioner’s Sixth Amendment right to confront the witnesses against him. Under Crawford, a witness’s testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. The certificates here are affidavits, which fall within the ‘core class of testimonial statements’ covered by the Confrontation Clause. They asserted that the substance found in petitioner’s possession was, as the prosecution claimed, cocaine of a certain weight – the precise testimony the analysts would be expected to provide if called at trial. Not only were the certificates made, as Crawford required for testimonial statements, ‘under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ but under the relevant Massachusetts law their sole purpose was to provide

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prima facie evidence of the substance's composition, quality, and net weight. Petitioner was entitled to "be confronted with" the person giving this testimony at trial.20

In Bullock v. Oregon, the U.S. Supreme Court overturned the petitioner's conviction for driving while intoxicated based on a forensic laboratory report certifying that his blood alcohol readings were above the legal limit. The blood sample had been tested at the state laboratory by a forensic analyst who completed, signed, and certified the report. However, the prosecution never called the analyst to testify or stated why the analyst was unavailable. Instead, the prosecution had another analyst, who validated the report, testify at trial. The analyst at trial testified about the testing device used to analyze the defendant's blood and the laboratory testing procedures. However, the testifying analyst had not participated in or observed the testing of the blood sample in question. The Court held 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."21

Most recently, in Williams v. Illinois,22 the U.S. Supreme Court, in a follow-up to its holdings in Melendez-Díaz and Bullcoming, ruled that the confrontation clause does not preclude an expert witness from testifying about the results of testing performed by a non-testifying analyst where the actual report itself is never introduced. In Williams, the defendant was convicted of aggravated criminal assault. During the trial, a forensic specialist from the state crime laboratory testified that the defendant's DNA matched a sample of semen found on the victim. An out-of-state laboratory actually tested the sample and produced the DNA profile that the specialist used to make the match. The lab report from the out-of-state laboratory was never admitted into evidence. In a split decision, the Court held "this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted."23 As a result, because the statements were not hearsay, the confrontation
The Court further held “[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.”

The U.S. Supreme Court's holdings in Melendez-Diaz and Bulcoming demonstrates that the Court is adamant in protecting the criminal defendant's 6th Amendment right of confrontation even when it involves laboratory reports in drunk driving and drug cases. However, the recent Williams decision is also a clear indicator that the scope of the confrontation clause is continuing to evolve.

ENDNOTES
2. U.S. CONST, amend. VI.
3. R.I. CONST, art. 1, § 10.
5. Id. at 66.
7. Id. at 59.
8. Id. at 61.
9. Id. at 68.
13. Davis at 822.
14. Hammon at 832.
15. Davis at 822.
19. Melendez-Diaz at 2529.
20. Id. (Citations omitted). After Melendez-Diaz, there was the case of Briscoe v. Virginia, 130 S.Ct. 1316 (2010), wherein the Court vacated the judgment for “further proceedings not inconsistent with the opinion in Melendez-Diaz v. Massachusetts.” Briscoe at 1.
23. Williams at 2228.
24. Id.
25. The authors express their appreciation for the assistance of Kathleen Child and Jodi Van Sprang in the preparation of this article.