

## NOTES

### **Massachusetts Paves the Way: A Comparison Between the Confrontation Right Guaranteed by the United States and Massachusetts Constitutions in Light of *Crawford v. Washington***

*“There are few subjects, perhaps, upon which [the Supreme] Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.”*<sup>1</sup>

#### I. INTRODUCTION

On November 17, 1603, at the conclusion of Sir Walter Raleigh’s now famous trial, a jury found Raleigh guilty of treason.<sup>2</sup> Historical observers have recognized the unfairness of the entire proceeding, but it was the denial of Raleigh’s request to face his lone accuser that arguably brought the trial its notoriety.<sup>3</sup> The prosecution based its case almost entirely upon the assertions of Raleigh’s alleged accomplice, Lord Cobham, who never testified at the trial.<sup>4</sup> Raleigh argued that Cobham lied in order to clear his own name and pleaded with the court to allow him to face his accuser: “[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . .”<sup>5</sup> The court refused his request and held that it would not consider the issue of confrontation in a case of treason against the

---

1. *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

2. See RENNELL RODD, *SIR WALTER RALEIGH* 215, 227 (1904) (detailing events of Raleigh’s trial). The English government alleged that Raleigh had committed treasonous acts by attempting to overthrow the King. See *id.* at 214.

3. *Id.* at 216 (asserting court determined Raleigh’s guilt before trial began). The English government refused to allow Raleigh to have counsel during the trial and limited his defense to the opportunity to respond to the prosecution’s arguments. *Id.* at 216, 218; see also *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (classifying Raleigh’s trial as “most notorious” of great political trials of sixteenth and seventeenth centuries); W. Jeremy Counsellor & Shannon Rickett, *The Confrontation Clause After Crawford v. Washington: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 7 (2005) (noting trial’s fame resulted from court’s refusal to call witnesses during proceeding).

4. See RODD, *supra* note 2, at 227 (indicating ease with which English government could have produced Cobham at trial). Cobham implicated Raleigh in the treasonous plot in his testimony taken before the Privy Council, which the prosecution read to the jury at trial. *Id.* at 218-19.

5. See *Crawford*, 541 U.S. at 44 (quoting *Raleigh’s Case*, 2 How. St. Tr. 1, 15-16 (1603)) (discussing Raleigh’s case and its impact on modern confrontation). Raleigh believed that Cobham would recant if Cobham faced Raleigh directly. See *id.*

King.<sup>6</sup> Ultimately, the jury found Raleigh guilty and sentenced him to death.<sup>7</sup>

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”<sup>8</sup> Through the years, the Supreme Court has noted that the Confrontation Clause serves several different purposes.<sup>9</sup> Undoubtedly, its most important purpose is that which guarantees an accused the right to cross-examine adverse witnesses in a criminal proceeding.<sup>10</sup> The Court affirmed this in *Crawford v. Washington*<sup>11</sup> by holding that testimonial statements admitted under a hearsay exception violate the accused’s confrontation rights unless the declarant is unavailable and the accused had a prior opportunity to cross-examine the declarant.<sup>12</sup>

The Court decided *Crawford* after a series of cases in the previous half century emphasized the public policy benefit of admitting reliable hearsay evidence in criminal proceedings.<sup>13</sup> As a result of these decisions, the Court

---

6. See RODD, *supra* note 2, at 222 (alleging prosecution knew its case rested solely on Cobham’s unsupported statements).

7. See RODD, *supra* note 2, at 227-28 (noting jury returned guilty verdict in less than fifteen minutes).

8. U.S. CONST. amend. VI.

9. See *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (noting clause protects individuals from “unchallengeable” charges); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (describing overall concern for advancing accurate truth-determining process); *California v. Green*, 399 U.S. 149, 158 (1970) (listing different purposes including importance of accused’s right to cross-examine witnesses); *Barber v. Page*, 390 U.S. 719, 725 (1968) (observing importance of jury’s opportunity to observe witness demeanor); *Mattox v. United States*, 156 U.S. 237, 242 (1895) (stating confrontation prevents use of ex parte affidavits instead of live testimony); see also Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 549 (2003) (noting Framers intended Confrontation Clause to protect “certain fundamental liberties”). See generally 4 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 25:1 (7th ed. 2000) (discussing purpose of Confrontation Clause as it pertains to hearsay); 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1395 (Chadbourn rev. ed. 1974) (describing overall purpose and theory of confrontation).

10. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (noting right of cross-examination primary interest of Confrontation Clause); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (discussing cross-examination as essential purpose of confrontation); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) (contending cross-examination principal means to test witness credibility); WIGMORE, *supra* note 9, at § 1369, 150 (declaring opportunity for cross-examination main purpose of confrontation). Wigmore asserts that cross-examination is the “greatest legal engine ever invented for the discovery of the truth.” WIGMORE, *supra* note 9, at § 1367, 32. But see *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (cautioning confrontation guarantees opportunity for effective cross-examination, not cross-examination to extent “defense might wish”).

11. 541 U.S. 36 (2004).

12. *Id.* at 68 (setting forth new requirements for confrontation).

13. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (holding admissibility of hearsay evidence depends upon whether statement bears “particularized guarantees of trustworthiness”). The *Roberts* Court further stated that courts should presume the reliability of out-of-court statements which fall within a firmly rooted hearsay exception, noting that the hearsay rules and the Confrontation Clause protect similar values. *Id.*; see also *White v. Illinois*, 502 U.S. 346, 355 (1992) (rejecting witness unavailability requirement for excited utterances and statements made for medical care purposes); *Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987) (concluding Constitution does not require reliability inquiry for out-of-court statements made by co-conspirator); *United States v. Inadi*, 475 U.S. 387, 400 (1986) (declining to require unavailability of witness for admission of out-of-court statements made by co-conspirator); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (concluding out-of-court statements bearing “indicia of reliability” admissible despite no opportunity for confrontation).

substantially constrained the Constitutional guarantee of confrontation.<sup>14</sup> *Crawford* effectively overruled *Ohio v. Roberts*,<sup>15</sup> which for twenty years provided that the test for determining if a court violated a defendant's confrontation right was whether a statement bears "particularized guarantees of trustworthiness."<sup>16</sup> The Court established that the new rule for determining confrontation violations is whether an out-of-court statement is testimonial.<sup>17</sup> The Court reasoned that its holding more accurately reflects the Framers' original understanding of the Confrontation Clause.<sup>18</sup> Legal scholars, however, have criticized *Crawford* because the Court refused to define a testimonial statement.<sup>19</sup>

This Note will begin with a discussion of the history of the confrontation right from its origins in England, through its development in colonial America, to the role it played in early Supreme Court decisions.<sup>20</sup> This Note will then detail the series of cases throughout the past half century that narrowed the right to confrontation based on the belief that courts should balance the confrontation right with the need for reliable hearsay evidence at trial.<sup>21</sup> This Note will then outline the history of the confrontation right in Massachusetts prior to *Crawford*.<sup>22</sup> It will then discuss how *Crawford* has both changed and added to the right to confrontation in Massachusetts and analyze the decision's effect on Massachusetts case law.<sup>23</sup> This Note will conclude by comparing the confrontation right the United States Constitution guarantees with the right the

---

14. See Counseller & Rickett, *supra* note 3, at 2-3 (discussing various cases construing Confrontation Clause as evidentiary rule rather than procedural rule).

15. 448 U.S. 56 (1980).

16. *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (noting *Roberts* holding both too broad and too narrow). The Court held that the *Roberts* test was too broad because "[i]t applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony." *Id.* The test is too narrow because it allows courts to admit *ex parte* testimony that they find reliable. *Id.*

17. *Id.* at 68 (asserting Sixth Amendment requires both unavailability and prior opportunity for cross-examination).

18. *Id.* at 61 (stating Framers did not intend courts to determine confrontation based only on concepts of reliability); see also David A. Lowy & Katherine Bowles Dudich, *After Crawford: Using the Confrontation Clause in Massachusetts Courts*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 1, 7 (2007) (noting Court attempted to "re-infuse Confrontation Clause with its original intent" in *Crawford*). But see *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring) (asserting new rule "no better rooted in history than our current doctrine").

19. *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring) (asserting majority decision will create uncertainty over future criminal proceedings); see also Won Shin, *Crawford v. Washington: Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 HARV. C.R.-C.L. L. REV. 223, 225 (2005) (criticizing Court's decision not to define testimonial statements). Shin noted that the issue of testimonial statements is a "concept at the very heart of [the Court's] new framework" and asserted that the Court should have narrowly defined the term in the *Crawford* decision. Shin, *supra*, at 225.

20. *Infra* Part II.A (providing historical background of confrontation right prior to ratification of Bill of Rights); *infra* Part II.B.1-2 (examining Supreme Court cases dealing with Confrontation Clause generally).

21. *Infra* Part II.B.3 (detailing Supreme Court cases narrowing right to confrontation).

22. *Infra* Part II.C (examining Massachusetts cases decided prior to *Crawford*).

23. *Infra* Part II.D (discussing specific facts and holding of *Crawford*); *infra* Part II.E (analyzing Massachusetts cases on confrontation decided since *Crawford*).

Massachusetts Constitution guarantees, particularly in light of *Crawford*.<sup>24</sup>

## II. HISTORY

### A. *Confrontation: Its Origins in the United States of America*

Although the right to confront one's accuser originated in Roman times, its inclusion in the Constitution sprung from the English common-law tradition.<sup>25</sup> The common-law right to confrontation emerged in reaction to the civil law practice of judicial magistrates examining witnesses before trial and reading their depositions or affidavits in lieu of live testimony.<sup>26</sup> The English government used these civil law practices during the trial of Sir Walter Raleigh, which some scholars say directly led to the inclusion of the right to confrontation in the United States Constitution.<sup>27</sup> Regardless of the role Raleigh's trial played, however, the Framers made it clear that they would not allow these civil law abuses to continue in their newly formed nation.<sup>28</sup>

Confrontation of one's accuser was particularly important to the American colonists who had experienced firsthand the injustices that resulted from its denial during the series of events leading up to the Revolution, specifically the Crown's attempts to enforce the 1763 Sugar Act and the 1765 Stamp Act.<sup>29</sup> When the colonists resisted the enforcement of these laws, the Crown granted jurisdiction to the admiralty courts.<sup>30</sup> Admiralty courts not only sat without

---

24. *Infra* Part III (comparing Massachusetts and Sixth Amendment confrontation rights).

25. *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (noting common law involves live court testimony "subject to adversarial testing"); *see also* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 78-79 (1995) (discussing belief of Justices Scalia and Thomas that Confrontation Clause originated with English common law).

26. *See White v. Illinois*, 502 U.S. 346, 361 (1992) (Thomas, J., concurring) (stating common-law confrontation right developed in late sixteenth century as response to civil law abuses); *see also Crawford*, 541 U.S. at 43 (discussing England's use of civil law practices). *But see* Jonakait, *supra* note 25, at 81-82 (contending Confrontation Clause emerged as byproduct of unique American adversarial system developed in colonies).

27. *See White*, *supra* note 9, at 541-48 (discussing connection between Confrontation Clause and Raleigh's trial); *see also* Jonakait, *supra* note 25, at 79 (discussing Raleigh trial as example of English civil law practice); *supra* notes 1-7 and accompanying text (detailing Raleigh's trial). *But see* ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* 73 (1992) (suggesting link between Raleigh trial and Confrontation Clause as possible myth).

28. *See* U.S. CONST. amend. VI; Kristen Sluyter, Note, *Sixth Amendment and the Confrontation Clause—Testimonial Trumps Reliable: The United States Supreme Court Reconsiders its Approach to the Confrontation Clause*, 27 U. ARK. LITTLE ROCK L. REV. 323, 329 (2005) (commenting on traditional view Framers included Confrontation Clause because of English civil law abuses).

29. *See* Sluyter, *supra* note 28, at 331-32 (discussing weaknesses in Crown's administration of American colonies).

30. *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 579 (1992) (discussing Stamp Act's enlargement of admiralty court jurisdiction); Sluyter, *supra* note 28, at 331 (observing colonists believed Sugar and Stamp Acts were unconstitutional). The Crown sent violators of the Stamp Act back to England for trial, effectively depriving them of their right to a jury of their peers, the right to call witnesses on their behalf, and the right to

juries, they also examined witnesses in chambers and used their depositions as testimony in proceedings against violators, thereby depriving the accused of the right to confront those witnesses.<sup>31</sup>

As a result of the injustices at the hands of the admiralty courts, the Framers understood the importance of adopting a criminal system that would protect individuals from government abuses.<sup>32</sup> The proposed Constitution of the United States, however, did not include a right to confrontation.<sup>33</sup> As a result of the omission of confrontation and other individual rights, the states delayed ratification of the Constitution, which may have derailed the nascent

---

cross-examine the Crown's witnesses because the Crown presented all of their evidence in the form of depositions. Berger, *supra*, at 579.

31. Berger, *supra* note 30, at 579 (suggesting colonists viewed these procedures as reversion to inquisitorial system).

32. See White, *supra* note 9, at 552 (observing Framers' familiarity with England's attempts to deny confrontation rights prior to Revolution). In setting up the government of their new nation, particularly with regard to individual rights, the Framers also referred to *Blackstone's Commentaries*, an important book by William Blackstone discussing the development of English criminal procedure. Berger, *supra* note 30, at 581-82 (observing book's high demand in colonies led to American edition in 1771-1772). In discussing the importance of the jury's role, Blackstone noted the important role confrontation plays in uncovering the truth. *Id.* at 583-84. While analyzing confrontation, Blackstone wrote:

This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful and careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled . . . . In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness . . . .

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (Univ. of Chicago Press 1979) (1768).

33. See *Crawford v. Washington*, 541 U.S. 36, 48 (2004) (discussing history of confrontation right during American Revolution). The *Crawford* opinion discusses the states' reactions to this omission, which ultimately led to the clause's inclusion in the Bill of Rights. *Id.* at 49-50. Abraham Holmes of the Massachusetts ratifying convention, in asserting his objections to the judiciary power under the proposed Constitution, stated:

The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and to have the advantage of cross-examination, we are not yet told. These are matters of by no means small consequence, yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges . . . .

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110-11 (Jonathan Elliot ed., 2d ed. 1941) (noting Holmes contends omission of Confrontation Clause gave Congress too much power).

constitution without the Framers' promise to adopt a bill of rights.<sup>34</sup> The Framers kept their promise, and in 1791, the states ratified the first ten amendments to the United States, known collectively as the Bill of Rights.<sup>35</sup> The Bill of Rights included, inter alia, the right for an accused to confront adverse witnesses in a criminal proceeding.<sup>36</sup>

*B. The United States Supreme Court's Early Interpretations of the Confrontation Clause*

*1. The Supreme Court's First Major Confrontation Clause Decision: Mattox v. United States*

The Court's first major Confrontation Clause case involved a retrial where two witnesses who testified at the first trial had since died.<sup>37</sup> During the retrial, the judge allowed the prosecution to read the witnesses' testimonies from the previous trial as transcribed by the court reporter.<sup>38</sup> The defendant, Mattox, objected to the admission of this testimony, however, arguing that it denied him his right to confront the witnesses.<sup>39</sup>

The Supreme Court disagreed and upheld the conviction, concluding that because Mattox had previously cross-examined the two witnesses, his Sixth Amendment confrontation right was satisfied.<sup>40</sup> The Court reasoned that although one purpose of the clause is to afford a defendant the right to face his accuser so that a jury may evaluate his demeanor and determine credibility, the clause's "primary object" was to prevent courts from using ex parte affidavits and depositions in lieu of live testimony.<sup>41</sup> The Court stressed the necessity of balancing the rights of the accused with public policy considerations and declared that "the rights of the public shall not be wholly sacrificed in order

---

34. See 16A AM. JUR. 2D *Constitutional Law* § 398 (2007) (asserting states "insisted on" adoption of Bill of Rights which included right to confront witnesses). The fact that several state constitutions already contained a right to confrontation prior to the adoption of the Bill of Rights further illustrates the importance of the Confrontation Clause's inclusion in the Constitution. See White, *supra* note 9, at 550 (noting confrontation rights existed in Massachusetts and six other states before ratification of Sixth Amendment).

35. Gary L. Henry, Note, *Testimonial Statements Inadmissible Under the Confrontation Clause Absent Showing of Unavailability and Prior Opportunity for Cross-Examination*, 72 TENN. L. REV. 671, 673 (2005) (noting states ratified Bill of Rights in 1791); see *supra* note 34 and accompanying text (discussing adoption of Bill of Rights).

36. U.S. CONST. amend. VI (granting procedural rights in criminal prosecutions).

37. *Mattox v. United States*, 156 U.S. 237, 240 (1895) (noting importance of deceased witnesses' testimony for prosecution of case); see also Berger, *supra* note 30, at 589 (noting Court did not address confrontation until 1895 because of federal courts' limited criminal jurisdiction).

38. *Mattox*, 156 U.S. at 240 (observing reporter testified to accuracy of notes from first trial).

39. *Id.* (explaining why defendant challenged conviction).

40. *Id.* at 242 (explaining admittance of testimony from first trial did not cause defendant hardship).

41. *Id.* at 242-43 (distinguishing importance of both objectives). The use of ex parte statements was not at issue in *Mattox* and as a result, excluding the statements would not serve the Confrontation Clause's primary purpose. *Id.* at 243.

that an incidental benefit may be preserved to the accused.”<sup>42</sup>

2. *The Supreme Court Emphasizes the Importance of Cross-Examination: Pointer v. Texas and Barber v. Page*

The Court’s next major Confrontation Clause decision came in 1965, when it considered whether the Constitution requires application of the Sixth Amendment’s confrontation right to the states under the Fourteenth Amendment.<sup>43</sup> In *Pointer v. Texas*,<sup>44</sup> an armed robbery case, the defendant, Pointer, objected to the prosecution’s admittance of a witness’s damaging statement made at a preliminary hearing.<sup>45</sup> The witness had moved away after the hearing and the prosecution sought to introduce the witness’s statements by demonstrating the witness’s unavailability.<sup>46</sup> At the preliminary hearing, however, Pointer did not have an attorney and he did not cross-examine the witness.<sup>47</sup> Pointer therefore claimed that when the court admitted the testimony, it denied him his constitutional right to confront the adverse witness.<sup>48</sup> The Texas Court of Criminal Appeals disagreed and upheld Pointer’s conviction, concluding that the prosecution’s use of the witness’s transcript from the preliminary hearing did not violate Pointer’s Sixth and Fourteenth Amendment rights.<sup>49</sup>

The Supreme Court reversed Pointer’s conviction, holding that the Confrontation Clause applies to the states through the Fourteenth Amendment.<sup>50</sup> Confrontation is a fundamental right and the Fourteenth Amendment requires that states cannot deprive citizens of this right without due process.<sup>51</sup> The Court emphasized the importance of cross-examination and declared that it “is an essential and fundamental requirement for the kind of fair

---

42. *Mattox*, 156 U.S. at 243 (suggesting defendant who had right to cross-examine witness should not benefit from witness’s death). The Court reasoned that it should not allow a defendant to walk free merely because a witness, whose testimony previously convicted the defendant, had since died. *Id.* To do so “would be carrying his constitutional protection to an unwarrantable extent.” *Id.*

43. See *infra* notes 45-53 and accompanying text (discussing *Pointer v. Texas*); see also Sluyter, *supra* note 28, at 334 (noting Supreme Court decided very few Confrontation Clause cases between *Mattox* and *Pointer* decisions).

44. 380 U.S. 400 (1965).

45. *Id.* at 401-02 (noting prosecution conducted examination of witnesses at preliminary hearing).

46. *Id.* (contending witness moved to California with no intention of returning).

47. *Id.* (noting defendant attempted to cross-examine other witnesses at hearing but not this particular witness).

48. *Pointer*, 380 U.S. 400 at 401-02 (noting defendant’s counsel objected repeatedly).

49. *Id.* at 402 (observing Texas court held no denial of Sixth or Fourteenth Amendment rights). The Texas Court of Criminal Appeals concluded that the Sixth Amendment right to Confrontation did not apply to the states. *Id.* at 407.

50. *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (stating Framers’ inclusion of confrontation in Bill of Rights supports confrontation as fundamental right).

51. *Id.* at 405 (noting Court has “expressly declared” denial of confrontation violates accused’s Fourteenth Amendment due process right).

trial which is the country's constitutional goal."<sup>52</sup> The Court reasoned that this fundamental right required equal application, and the states, like the federal government, could not deny criminal defendants this protection.<sup>53</sup>

The Supreme Court next considered the Confrontation Clause in *Barber v. Page*.<sup>54</sup> Barber's accomplice in an armed robbery testified against him at a preliminary hearing.<sup>55</sup> At the hearing, Barber's attorney chose not to cross-examine the accomplice.<sup>56</sup> At Barber's subsequent trial, the judge allowed the prosecution to introduce the accomplice's testimony from the first hearing.<sup>57</sup> Barber appealed the use of the accomplice's testimony, and the case eventually reached the Supreme Court.<sup>58</sup> The Court unanimously reversed on the grounds that the prosecution did not make a good faith effort to produce the witness at trial.<sup>59</sup> Even if Barber had cross-examined the witness at the preliminary hearing, the Court indicated that it would have reached the same result.<sup>60</sup> Cross-examination is an important trial right—only at trial can a jury view a witness's demeanor and assess his or her credibility.<sup>61</sup> Despite limited exceptions to the confrontation requirement, none exist where the prosecution makes no attempt to produce a witness.<sup>62</sup> In such a case, the right of "confrontation may not be dispensed with so lightly" because it denies the jury an opportunity to determine the witness's credibility.<sup>63</sup>

---

52. *Id.* at 405 (stating denial of cross-examination violates due process). By not applying the Confrontation Clause to the states, the court denied Pointer his right to due process under the Fourteenth Amendment. *See id.* at 405. The Court reaffirmed the importance of cross-examination in another case decided the same day as *Pointer*. *See Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (declaring cross-examination "primary interest" of Confrontation Clause).

53. *See Pointer*, 380 U.S. at 404 (discussing history of courts' emphasis on necessity of cross-examination).

54. 390 U.S. 719 (1968); *see also infra* notes 56-63 and accompanying text (discussing *Barber v. Page*).

55. *Barber*, 390 U.S. at 720 (noting accomplice waived right to self-incrimination).

56. *Id.* (noting although another codefendant's attorney cross-examined witness, defendant's attorney did not).

57. *Id.* (accepting prosecution's claim accomplice unavailable due to incarceration in federal prison two hundred miles away).

58. *Id.* at 720-21 (noting Oklahoma Court of Criminal Appeals affirmed lower court).

59. *Barber*, 390 U.S. at 724 (explaining prosecution could have easily attempted to produce witness for trial). The Court dismissed the prosecution's claim that the witness was unavailable because he was in the custody of federal authorities. *Id.* at 723 (discussing increased cooperation between states and federal government in providing witnesses for trial). The Court refused to apply the "witness unavailability" exception to the confrontation right because the prosecution did not make a good faith effort to procure the witness. *Id.* at 724-25 (stating "confrontation may not be dispensed with so lightly").

60. *Barber v. Page*, 390 U.S. 719, 725 (1968) (rejecting prosecution's argument that defendant waived right to cross-examine witness at preliminary hearing).

61. *Id.* at 725 (describing preliminary hearing's limited function to determine probable cause, not to resolve merits).

62. *See id.* at 725-26 (rejecting justification for prosecution's lack of effort to make witness available).

63. *See id.* at 725 (emphasizing witness's absence at trial due only to prosecution's refusal to produce him).

3. *A Shift in Reasoning—the Supreme Court Narrows the Right to Confrontation: California v. Green, Dutton v. Evans, Ohio v. Roberts, and Subsequent Cases*

Beginning in 1970, the Court began to define the Confrontation Clause more narrowly by placing added emphasis on the public policy need for reliable hearsay evidence.<sup>64</sup> The first case that illustrated this shift was *California v. Green*,<sup>65</sup> where the Court upheld the admission of statements made at a preliminary hearing, effectively overruling part of its holding in *Barber*, decided only two years earlier.<sup>66</sup> In *Green*, the Court disregarded its reasoning in *Barber* that emphasized the importance of confrontation as a trial right that allows a jury to determine the credibility of witnesses.<sup>67</sup> The Court held that the admission of a statement made in a preliminary hearing did not violate the defendant's confrontation rights when the circumstances of the hearing were similar to those of a "typical trial."<sup>68</sup>

The Supreme Court again narrowed the Confrontation Clause when, just a few months after *Green*, it held that the admission of co-conspirator hearsay statements made during the commission of a crime did not violate a defendant's confrontation rights.<sup>69</sup> In *Dutton v. Evans*,<sup>70</sup> the Court concluded that a co-conspirator's statement against his own interest bears sufficient "indicia of reliability" and allowed the witness who heard the statement to testify as to

---

64. See *supra* note 13 and accompanying text (detailing judicial narrowing of Confrontation Clause); see also Lowy & Dudich, *supra* note 18, at 30 (noting trial's dual purpose to search for both truth and justice). But see *Davis v. Alaska*, 415 U.S. 308, 320 (1974) (giving Sixth Amendment confrontation right greater weight than public policy of keeping juvenile records confidential).

65. 399 U.S. 149 (1970).

66. Compare *Green*, 399 U.S. 149 at 165 (holding statements made at preliminary hearing admissible despite jury's inability to view witness demeanor), with *Barber v. Page*, 390 U.S. 719, 725 (1968) (describing confrontation as trial right and emphasizing jury's role in determining witness credibility).

67. See *Green*, 399 U.S. at 166 (focusing on declarant's availability at trial rather than jury's role).

68. *Id.* at 165 (listing similarities between defendant's preliminary hearing and actual trial). The Court noted that the witness gave his testimony while under oath, the defendant's counsel was present, the defendant had an opportunity to cross-examine the witness regarding his statement, and a judicial tribunal conducted the hearing. *Id.* (concluding same result would follow if prosecution actually produced witness). Absent from this list, however, is any reference to the jury's role in determining witness credibility. See *id.* In fact, the Court states in an earlier portion of the opinion that it "discount[s] as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement." *Id.* at 160 (suggesting jury determines witness credibility from witness's explanation of inconsistencies between past and present statements). The Court does, however, acknowledge that as a result, the jury loses the opportunity to weigh relevant "demeanor evidence." *Id.* (holding despite relevance of such evidence, defendant's confrontation rights not violated); see also White, *supra* note 9, at 568-69 (criticizing Court's decision in *Green*). Although the jury can determine a witness's credibility based on his explanation of inconsistencies between the past written statement and his present statements, the circumstances surrounding the first statement are the most relevant to the jury but are impossible for the jury to perceive at trial. White, *supra* note 9, at 568-69.

69. See *infra* notes 71-73 and accompanying text (detailing holding in *Dutton v. Evans*).

70. 400 U.S. 74 (1970).

what the co-conspirator said.<sup>71</sup> The Court reasoned that the trial court did not deny the defendant his right to challenge whether the co-conspirator actually made the statement because the court had provided him the opportunity to confront the witness who allegedly heard it.<sup>72</sup> The Court opined that “[f]rom the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.”<sup>73</sup>

Ten years after the Court decided *Green* and *Dutton*, it further narrowed an accused’s confrontation right in *Ohio v. Roberts*,<sup>74</sup> a decision to which the Court would adhere for nearly twenty-four years.<sup>75</sup> In *Roberts*, the Court held that the prosecution does not deny a defendant his confrontation right if it can prove both that the witness is unavailable to testify and that the statements it seeks to admit bear sufficient “indicia of reliability.”<sup>76</sup> Further, a defendant who examines a witness during direct examination in a preliminary hearing has adequate opportunity to confront the witness, even when the prosecution offers the statements against the defendant at the subsequent trial.<sup>77</sup>

In reversing the appellate court’s decision, the *Roberts* Court discussed the need for balancing the state’s interest in effective law enforcement with a person’s constitutional right to confront witnesses.<sup>78</sup> The Court asserted that the Framers never intended the Confrontation Clause to prevent the admissibility of all hearsay evidence, and it noted that case history and public policy supported this conclusion.<sup>79</sup> Instead, when determining confrontation

---

71. See *id.* at 89 (noting courts have widely permitted juries to hear similar statements without confrontation); FED. R. EVID. 804(b)(3) (setting forth hearsay exception for statements made against one’s own interest). In justifying the statement’s reliability, the *Dutton* Court also noted: a third codefendant’s testimony corroborated the declarant’s knowledge of the conspiracy, the unlikelihood that the co-conspirator’s recollection was inaccurate, and the spontaneity of the co-conspirator’s statement. *Dutton*, 400 U.S. at 88-89.

72. *Dutton*, 400 U.S. at 88 (pointing out hearsay rule does not entirely preclude witness from testifying about what he heard). The Court also pointed out that the defendant could have subpoenaed the declarant but did not because it was not in his best interest. *Id.* at 88 & n.19.

73. *Id.* But see *White*, *supra* note 9, at 571-72 (noting problems Court’s holding would bring in future cases). If courts literally integrated the language in *Dutton* that a witness’s testimony as to what he heard is reliable, they could then admit declarants’ statements even though the defendant never had a chance to cross-examine that declarant. *Id.* (asserting *Dutton* holding “creates a hollow confrontation right controlled, and easily abused, by the government”).

74. 448 U.S. 56 (1980).

75. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (effectively nullifying *Roberts*).

76. *Roberts*, 448 U.S. at 66 (setting forth new Confrontation Clause rule).

77. See *id.* at 58, 71, 73 (stating defendant’s examination of witness complied with confrontation purposes “no less so than classic cross-examination”). The Court, however, also noted that the defendant’s attorney never asked the trial court judge to declare the witness hostile during the preliminary hearing, nor did he ask the court for permission to cross-examine the witness. *Id.* at 58.

78. *Id.* at 64 (recognizing law enforcement and constitutional rights as “competing interests”). The Court relied on *Mattox* in its discussion, noting that there are some circumstances under which these competing interests “may warrant dispensing with confrontation at trial.” *Id.*

79. *Id.* at 62-63 (suggesting strict interpretation of Confrontation Clause would exclude hearsay

violations, courts should focus on ascertaining whether the challenged statements are reliable enough to provide jurors with a sufficient basis to determine their accuracy.<sup>80</sup>

The *Roberts* Court supported this broad reading of the Confrontation Clause by noting that legislatures intend hearsay rules to protect the same values as confrontation.<sup>81</sup> Thus, statements falling under a hearsay exception based on reliable circumstances do not violate the Confrontation Clause, and courts should therefore allow the admission of such statements.<sup>82</sup> Courts should not, however, admit statements not falling under a firmly rooted hearsay exception unless they demonstrate “particularized guarantees of trustworthiness.”<sup>83</sup> Applying this rule in *Roberts*, the Court concluded that the challenged statements satisfied the reliability requirements because the defendant effectively cross-examined the witness when he made the statements at preliminary hearing.<sup>84</sup> As a result, the defendant did not suffer a violation of his confrontation rights.<sup>85</sup>

The Court further limited a defendant’s confrontation right when it relaxed the requirement set forth in *Roberts* that the prosecution must prove a witness is unavailable before the judge may determine whether her out-of-court statements are admissible.<sup>86</sup> In *United States v. Inadi*,<sup>87</sup> the Court reasoned that requiring proof of the unavailability of co-conspirators in order to admit their statements placed an unnecessary burden on the prosecution.<sup>88</sup> In balancing the accused’s rights against the prosecution’s needs, the Court concluded that the

---

exceptions); see also Shin, *supra* note 19, at 224 (maintaining Supreme Court interprets Confrontation Clause to allow admission of hearsay evidence).

80. Ohio v. Roberts, 448 U.S. 56, 65-66 (1980) (citing California v. Green, 399 U.S. 149 (1970)).

81. *Id.* at 66 (asserting confrontation and hearsay rules originated from same place).

82. *Id.* (suggesting courts should admit all statements falling under “firmly rooted hearsay exception[s]”).

83. *Id.* at 75 (setting forth holding of case).

84. *Roberts*, 448 U.S. at 73 (comparing *Green*, where Court also allowed admittance of statements made at preliminary hearing).

85. *Id.* at 66 (concluding reliable statements do not violate Confrontation Clause).

86. See *infra* notes 88-89 and accompanying text (detailing *United States v. Inadi*); see also White v. Illinois, 502 U.S. 346, 357 (1992) (reaffirming *Inadi* rule admitting certain out-of-court statements despite confrontation clause even when declarant unavailable). Under the federal rules, a witness is unavailable in the following five situations: the court exempts the declarant on grounds of privilege concerning the subject matter of the declarant’s statement; the declarant refuses to testify against a court order to do so; the declarant testifies that she cannot remember the substance of his statement; the declarant cannot testify because of death or mental or physical illness; or the proponent of a statement is unable to procure the declarant despite reasonable attempts to do so. FED. R. EVID. 804(a); see also WILLIAM G. YOUNG ET AL., 20 MASSACHUSETTS PRACTICE SERIES § 804.1 (2d ed. 2007) (defining witness unavailability under Massachusetts law). Massachusetts has accepted the same grounds for unavailability as the federal government except that Massachusetts courts do not consider a declarant who refuses to testify unavailable. YOUNG ET AL., *supra*, at § 804.1 & n.7.

87. 475 U.S. 387 (1986).

88. See *id.* at 398-99 (noting rule would give defendants another conduit to appellate review). Furthermore, the unavailability requirement places a substantial burden on prison officials and marshals because they have to arrange the transportation of those co-conspirators who are incarcerated. *Id.* at 399 (citing increased risk of escape by convicts during transport).

unavailability rule produced minimal benefit to the process of discovering the truth “over and above what would be produced without such a rule.”<sup>89</sup> Similarly, in *White v. Illinois*,<sup>90</sup> the Court concluded that the truth-seeking process would gain little if the law forced prosecutors to establish the unavailability of declarants whose statements fall under the excited utterance and medical statement hearsay exceptions.<sup>91</sup> The Court also considered the significant probative value of such statements and concluded that they do not violate a defendant’s confrontation rights, even if the declarant is available under established rules of evidence.<sup>92</sup>

### C. Confrontation in Massachusetts Prior to Crawford

#### 1. Pre-Roberts Cases in Massachusetts

Defendants in Massachusetts trials not only enjoy rights guaranteed under the United States Constitution, but also under the Massachusetts Constitution, which provides that “every subject shall have a right . . . to meet the witnesses against him face to face . . . .”<sup>93</sup> The Massachusetts Constitution contains similar, though not identical, language to the Sixth Amendment to the United States Constitution, affording defendants an equal level of protection against hearsay statements.<sup>94</sup> The first significant decision on confrontation in

---

89. *Id.* at 396 (noting likelihood prosecution and defense already subpoenaed declarants notwithstanding confrontation requirements).

90. 502 U.S. 346 (1992).

91. *Id.* at 357 (contending unavailability requirement imposes unnecessary litigation costs); *see also* FED. R. EVID. 803(2) (defining excited utterance exception to hearsay rule); FED. R. EVID. 803(4) (defining hearsay exception for statements made for purposes of medical treatment). Excited utterances and statements made while seeking medical treatment are spontaneous and unrehearsed at the time the witness speaks them and therefore more reliable. *See White*, 502 U.S. at 356. Even the witness could not accurately describe the context and meaning the statements had at the time at which he spoke them. *Id.* at 355-56 (noting factors supporting reliability “cannot be recaptured by later in-court testimony”). As a result, the declarant’s in-court testimony would not add significant evidentiary value, thus making his availability unnecessary. *Id.* at 356.

92. *White v. Illinois*, 502 U.S. 346, 357 (1992) (upholding admissibility of statements based on those admissible in *Inadi*).

93. MASS. CONST. pt. 1, art. XII (setting forth rights in criminal prosecutions and jury trials); MASS. GEN. LAWS ch. 263, § 5 (2000) (reaffirming Massachusetts Constitution guarantees confrontation right); *see* YOUNG ET AL., *supra* note 86, at § 804.1 (defining unavailability under Massachusetts law); David Skeels, *Due Process and the Massachusetts Constitution*, 84 MASS. L. REV. 76, 81 (1999) (discussing which procedural rights Massachusetts constitution guarantees); *see also* FED. R. EVID. 804(a) (listing situations when witnesses unavailable under federal law).

94. *See* Commonwealth v. Siegfriedt, 522 N.E.2d 970, 974-75 (Mass. 1988) (holding previously recorded testimony subject to same constitutional standard in Massachusetts as under Sixth Amendment); *infra* note 113 and accompanying text (discussing Massachusetts Constitution’s stricter standard for face-to-face confrontation). *Compare* U.S. CONST. amend. VI (“accused shall enjoy the right . . . to be confronted with the witnesses against him”), with MASS. CONST. pt. 1, art. XII (“every subject shall have a right . . . to meet the witnesses against him face to face”). In *Siegfriedt*, the SJC compared the facts with those in *Green* and noted that the trial court afforded the defendant “a constitutionally adequate basis for evaluating the witness’s credibility.” *Siegfriedt*, 522 N.E.2d at 974-75 (concluding declarant’s out-of-court statements admissible).

Massachusetts dealt with the admission of statements by a deceased witness who testified at a preliminary hearing prior to trial.<sup>95</sup> In *Commonwealth v. Richards*,<sup>96</sup> the Massachusetts Supreme Judicial Court (SJC) noted that, although it would normally consider such testimony reliable, here it did not because the witnesses who testified at the subsequent trial merely took notes on the testimony from the first trial and therefore did not have a complete record.<sup>97</sup> Because the testimony consisted of insufficient proof as to what the deceased witness actually said, its admission violated the defendant's confrontation rights.<sup>98</sup>

During the first half of the twentieth century, the SJC further defined the bounds of confrontation rights.<sup>99</sup> The court addressed whether an extrajudicial observation of a premise by the fact-finder violated confrontation and whether courts can admit evidence from scientific processes absent confrontation of the scientist who conducted the test.<sup>100</sup> Additionally, the SJC discussed when courts should admit testimony that deceased, insane, or absent witnesses gave at prior hearings.<sup>101</sup>

In the few decades prior to the Supreme Court's decision in *Roberts*, the majority of Massachusetts jurisprudence on confrontation either affirmed or further narrowed the standards set forth in the state's decisions from the first half of the century.<sup>102</sup> In 1969, the SJC affirmed an earlier decision by

---

95. See *infra* notes 97-98 and accompanying text (discussing *Commonwealth v. Richards*).

96. 35 Mass. (18 Pick.) 434 (1836).

97. *Id.* at 439 (stating jury should hear witness's words and not another person's interpretation of them). The court discussed its concerns with offering statements in the form of notes taken by witnesses rather than a precise transcription, particularly when both witnesses admitted that their notes did not reflect the deceased's exact words. *Id.* at 439-40. The court reasoned that people hear things differently, particularly when they are inclined to favor one party over another, and therefore, one person's notes on what someone said might be something entirely different from another person's. *Id.* at 439 (concluding witnesses offered inadequate evidence).

98. *Id.* at 440 (reversing trial court).

99. See *infra* notes 100-101 and accompanying text (discussing early twentieth century Massachusetts decisions).

100. See *Berlandi v. Commonwealth*, 50 N.E.2d 210, 225-26 (Mass. 1943) (holding observation not evidence so no confrontation violation when judge visited premises to view layout); *Commonwealth v. Slavski*, 140 N.E. 465, 469 (Mass. 1923) (holding admission of scientific evidence of amount of alcohol in liquor does not violate confrontation).

101. *Commonwealth v. Gallo*, 175 N.E. 718, 723-24 (Mass. 1931) (holding absent witness's testimony from prior judicial hearing admissible). The *Gallo* court employed the same reasoning from prior decisions that permitted the admission of statements made at prior hearings by witnesses who have since become deceased or insane. *Id.* at 723 (noting *Gallo* issue one of first impression). If the state cannot find a witness, according to one former English Chief Justice, the witness is effectively dead and his testimony from a prior proceeding is admissible out of necessity. *Id.* (citing early seventeenth English common-law case). The court's reasoning is consistent with the purpose of confrontation because the defendant had the opportunity to cross-examine the witness in the prior proceeding. *Id.* at 724 (upholding trial court's admission of testimony); see also *Commonwealth v. Glassman*, 147 N.E. 833, 835 (Mass. 1925) (admitting witness's recollection of "exact words" of deceased witness's former testimony); *Commonwealth v. Caruso*, 146 N.E. 664, 667 (Mass. 1925) (upholding admission of stenographic testimony of deceased witness from prior hearing).

102. See *infra* notes 103-105 and accompanying text (discussing Massachusetts decisions leading up to

upholding the admissibility of two drug analysis certificates signed under oath by a scientist, even though the court did not allow the defendant to confront the scientist in order to challenge the test's accuracy.<sup>103</sup> In 1973, the court affirmed another earlier decision by holding that the trial court did not violate the defendant's confrontation right when it allowed the prosecution to admit witness statements from a previous trial that resulted in a hung jury, even though the witness was missing and therefore unavailable for the second trial.<sup>104</sup> The court took its *Gallo* holding one step further in 1978, when it allowed the prosecution to admit witness testimony from a probable cause hearing where the witness was unavailable at the subsequent trial because he invoked his Fifth Amendment right against self-incrimination.<sup>105</sup>

## 2. Massachusetts Cases—Post-Roberts, Pre-Crawford

Between 1980 and 2004, the time period between the Supreme Court's *Roberts* and *Crawford* decisions, the Massachusetts SJC determined once again that the court did not err by denying the defendant the right to cross-examine a witness who invoked his Fifth Amendment privilege.<sup>106</sup> The SJC also concluded during this time period that confrontation does not require "perfect"

---

Supreme Court's *Roberts* decision). *But see* Commonwealth v. Ferrara, 330 N.E.2d 837, 842-43 (Mass. 1975) (citing Davis v. Alaska, 415 U.S. 308, 320 (1974)) (holding defendant's confrontation right greater than state policy of protecting exposure of juvenile's record). Unlike most of the SJC decisions during this time period, this holding actually broadened a defendant's confrontation right, illustrating that the right to face one's accuser will not always yield to public policy. *See id.* at 843 (citing Davis v. Alaska, 415 U.S. 308, 320 (1974)).

103. Commonwealth v. Harvard, 253 N.E.2d 346, 352 (Mass. 1969) (discussing whether defendant's argument that right to cross-examine analyst exists because results constitute legal conclusions); *see also* Commonwealth v. Slavski, 140 N.E. 465, 469 (Mass. 1923) (concluding admission of scientific evidence of percentage of alcohol in liquor does not violate confrontation). In *Harvard*, the defendant argued that he had a constitutional right to test the analyst's understanding of the law. *Harvard*, 253 N.E.2d at 352 (noting applicable statute assumed analyst obtained adequate knowledge of drug test). The court, however, pointed out that the analyst's certificates, like the conclusions admitted in *Slavski*, were merely "prima facie evidence of the quality and substance." *Id.* (pointing out defendant could have rebutted evidence). Thus, the court allowed the prosecution to admit the certificates. *Id.*

104. Commonwealth v. Clark, 295 N.E.2d 163, 165-66 (Mass. 1973) (noting defendant claimed prosecution did not conduct "diligent" search for witness); *see also* Commonwealth v. Gallo, 175 N.E. 718, 723-24 (Mass. 1931) (concluding absent witness's testimony from prior judicial hearing admissible). In *Clark*, the prosecution made a good faith effort to find the witness prior to the trial. *See Clark*, 295 N.E.2d at 166. Because the witness's testimony was crucial to the case, its complete and accurate recitation to the jury did not violate the defendant's confrontation rights. *Id.* (comparing holding to cases where witness declared insane or deceased at time of second trial).

105. Commonwealth v. Francis, 375 N.E.2d 1221, 1224 (1978) (refusing to "balance" defendant's Sixth Amendment rights against witness's Fifth Amendment rights). The court only needed to conclude whether the defendant properly invoked his Fifth Amendment right against self-incrimination. *Id.* This holding furthered an earlier decision where the SJC held that the prosecution could admit testimony a witness gave during a civil trial when that witness invoked his Fifth Amendment privilege against self-incrimination at a criminal trial. Commonwealth v. Canon, 368 N.E.2d 1181, 1184-85 (1977) (affirming trial court's holding).

106. *See* Commonwealth v. Pennellatore, 467 N.E.2d 820, 825 (Mass. 1984) (concluding trial judge justified in favoring Fifth Amendment right over Sixth Amendment right).

cross-examination.<sup>107</sup> The two issues that Massachusetts courts primarily dealt with during this time period, however, were the unavailability requirement discussed in *Roberts* and the interpretation of the “face to face” language found in article 12 of the Massachusetts Constitution, which provides greater protection for a defendant to confront witnesses face to face than the Sixth Amendment.<sup>108</sup>

In 1982, the Massachusetts SJC applied the Supreme Court’s *Roberts* decision to determine whether a witness who testified at a prior hearing was unavailable at the time of trial.<sup>109</sup> The court noted, just as the Supreme Court had in *Roberts*, that the prosecution bears the burden of establishing whether a witness is unavailable.<sup>110</sup> In this case, the SJC held that the prosecution did not meet its burden because it did not make a good faith effort to find the witness “at the time of trial.”<sup>111</sup> Later, the SJC narrowed the unavailability requirement by holding that a witness who emerges during trial remains unavailable due to the burden the court and parties would suffer if the court required the witness to testify.<sup>112</sup>

The face-to-face requirement in the Massachusetts Constitution provides more protection than the United States Constitution and other states’

---

107. See, e.g., *Commonwealth v. Roberio*, 797 N.E.2d 364, 369 (Mass. 2003) (allowing admission of prior testimony even though defendant’s counsel ineffective in other aspects of defense); *Commonwealth v. Childs*, 596 N.E.2d 351, 357 (Mass. 1992) (holding no need for “perfect” cross-examination as long as purpose of Confrontation Clause fulfilled); *Commonwealth v. Siegfriedt*, 522 N.E.2d 970, 974 (Mass. 1988) (concluding prior testimony admissible even though witness lied about his name); see also *Commonwealth v. Trigones*, 492 N.E.2d 1146, 1150 (Mass. 1986) (holding no confrontation violation when defendant does not “adequately pursue the opportunity to cross-examine”). In *Roberio*, the court rejected the defendant’s claim that his attorney’s cross-examination of the witness, whose testimony the prosecution sought to admit, was unreliable simply because the attorney was ineffective in other aspects of the lawsuit. *Roberio*, 797 N.E.2d at 369.

108. See *infra* notes 109-112 and accompanying text (discussing Massachusetts decisions on unavailability requirement); *infra* notes 115-117 and accompanying text (discussing decisions on interpreting meaning of “face to face” language in Massachusetts Constitution).

109. *Commonwealth v. Bohannon*, 434 N.E.2d 163, 168 (Mass. 1981) (noting rule requires unavailability and sufficient opportunity for defendant to cross-examine witness in prior proceeding).

110. *Id.* at 169 (discussing unavailability requirement as rule of necessity); see also *Ohio v. Roberts*, 448 U.S. 56, 65 (1980). The *Bohannon* court’s stance is in harmony with several Supreme Court decisions such as *Barber and Green*. *Bohannon*, 434 N.E.2d at 168 (noting Framers preferred face-to-face confrontation under Sixth Amendment).

111. *Bohannon*, 434 N.E.2d at 169 (concluding prosecution should not have relied solely on another judge’s determination from eight months earlier); cf. *Siegfriedt*, 522 N.E.2d at 973 (distinguishing *Bohannon*). In *Siegfriedt*, the same judge presided over two trials which were held a week apart. *Siegfriedt*, 522 N.E.2d at 973. The judge concluded that the witness was unavailable at the first trial and then reached the same conclusion at the second trial when the prosecution could not locate the witness. *Id.* (noting judge’s awareness of prosecution’s attempts to find witness for first trial). In this case, the two trials were close together in time, and the prosecution presented evidence at the second trial of additional attempts to reach the witness between trials. *Id.* (concluding prosecution made good faith effort prior to second trial). Unlike the judge in *Bohannon*, here the judge did not “merely adopt his former ruling” on the witness’s unavailability. *Id.* (stating prosecution need not repeat each step from previous week to find witness); see also *Childs*, 596 N.E.2d at 357 (“due diligence does not require exhaustion of every lead, no matter how speculative”).

112. *Roberio*, 797 N.E.2d at 368 (rejecting defendant’s argument that court should not determine unavailability based on convenience).

constitutions by requiring defendants to confront their accusers “face to face”.<sup>113</sup> While article 12 provides greater protection for a defendant to confront witnesses face-to-face than the Sixth Amendment, the two rights offer equal protection in cases involving the admission of out-of-court statements under hearsay exceptions.<sup>114</sup> Throughout the past two decades, the SJC has consistently held that it has “never interpreted art. 12 as permitting introduction of an available witness’s testimony outside a defendant’s presence.”<sup>115</sup> On the other hand, the face-to-face requirement does not encompass an “eye to eye” requirement.<sup>116</sup> Thus, if the defendant is present in the courtroom and can view

---

113. MASS. CONST. pt. 1, art. XII (guaranteeing every subject right “to meet the witnesses against him face to face”); *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 371 (Mass. 1988) (deciding issue solely on article 12 of Massachusetts Constitution, not on Sixth Amendment); *see also* *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (stating Sixth Amendment Confrontation Clause does not guarantee “absolute” right to confront witnesses face-to-face); *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988) (commenting exceptions to face-to-face requirement yield for certain public policy issues); 3 CRIM. PRAC. MANUAL § 83:3 (2007) (noting Confrontation Clause prefers, but does not require, face-to-face confrontation). *See generally* AM. JUR. 2D *Criminal Law* § 1175 (2007) (discussing cases pertaining to use of testimony by video or closed circuit television). “The Massachusetts Declaration of Rights can . . . provide greater safeguards than the Bill of Rights of the United States Constitution.” *Bergstrom*, 524 N.E.2d at 371 (quoting *Commonwealth v. Hodge*, 434 N.E.2d 1246, 1249 (Mass. 1982)). In *Bergstrom*, the court held that the trial court violated the defendant’s confrontation rights under article 12 when it allowed two child witnesses to testify out of the presence of the jury and the defendant. *Id.* at 377. The prosecution contended that it satisfied the defendant’s confrontation right because the court allowed him to see and hear the witness during her testimony, despite the language in article 12 granting a defendant the right to “meet” his accusers “face to face.” *Id.* at 370-71 (noting prosecution’s that assertion additional language in article 12 adds nothing to Sixth Amendment confrontation right). Adopting the prosecution’s argument, however, would make the additional language of article 12 superfluous, rather than giving the words their obvious plain meaning. *Id.* at 371. Similar to the United States Constitution, many state constitutions do not contain the face-to-face language in their confrontation right. *Id.* at 371 n.9 (contending framers of Massachusetts Constitution aware of other states’ constitutional language). This suggests that the framers of the Massachusetts Constitution purposely chose to explicitly guarantee more protection to defendants. *Id.* (noting Massachusetts Constitution first to contain face-to-face language).

114. *See supra* note 113 (comparing Massachusetts confrontation right with Sixth Amendment confrontation right); *see also* *Commonwealth v. Whelton*, 696 N.E.2d 540, 545 (Mass. 1998) (noting Massachusetts Constitution gives confrontation same weight as Sixth Amendment when dealing with hearsay rules); *Bohannon*, 434 NE.2d at 168 (relying on *Roberts* to hold unavailability required in order to admit testimony from prior hearing).

115. *Commonwealth v. Johnson*, 631 N.E.2d 1002, 1007 (Mass. 1994) (holding violation occurred when witnesses testified with backs to defendant to hide faces); *Commonwealth v. Rios*, 588 N.E.2d 6, 8 (Mass. 1992) (concluding confrontation violation when witness testifies at portion of trial where defendant not present); *Bergstrom*, 524 N.E.2d at 373 (declaring witness testimony out of defendant’s observation violation of article 12). In *Rios*, all of the testimony that the witness gave outside of the defendant’s presence directly affected the question of the defendant’s guilt, and as a result, he had a right to confrontation. *Rios*, 588 N.E.2d 6, 8 (relying on *Bergstrom*).

116. *See* *Commonwealth v. Lynch*, 789 N.E.2d 1052, 1061 (Mass. 2003) (holding no violation of confrontation when witness wears sunglasses); *Commonwealth v. Kater*, 567 N.E.2d 885, 893 (Mass. 1991) (holding no confrontation violation when judge refused to order witness to look at defendant); *see also* *Commonwealth v. Tufts*, 542 N.E.2d 586, 615-16 (Mass. 1989) (holding no violation when defendant forced to lean to see witness during out-of-court videotaped testimony); *Commonwealth v. Melchionno*, 558 N.E.2d 18, 20 (Mass. App. Ct. 1990) (concluding no confrontation violation when prosecution tells witness not to look at defendant). A face-to-face encounter “does not presuppose eye contact at all times.” *Melchionno*, 558 N.E.2d at 20 (commenting not unreasonable for prosecution to ask for witness’s direct attention).

the witness's face, and the prosecution satisfies all of the other elements of confrontation, then there is no violation under either the Massachusetts Constitution or the Sixth Amendment.<sup>117</sup>

*D. A Return to the Fundamentals of Confrontation: Crawford v. Washington*

In its 2004 *Crawford v. Washington* decision, the Supreme Court modified its approach to determine whether a state has violated a defendant's right to confrontation.<sup>118</sup> By effectively overruling *Roberts*, the Court rejected the controversial approach that critics claimed blended a constitutional right with the hearsay rule.<sup>119</sup> The Court advanced a new test to determine confrontation violations: if the out-of-court statements are testimonial in nature, the Sixth Amendment requires both a prior opportunity for cross-examination and the witness's unavailability.<sup>120</sup>

A jury in a Washington state court convicted Michael Crawford of assaulting a man who allegedly raped his wife.<sup>121</sup> During the trial, the prosecution submitted into evidence an audio recording from Crawford's wife, who made statements during police questioning that contradicted her husband's self-defense claim.<sup>122</sup> The trial court accepted the prosecution's argument that the wife's testimony bore "particularized guarantees of trustworthiness," which satisfied one prong of the *Roberts* test and therefore did not lead to a confrontation violation.<sup>123</sup> The Washington Court of Appeals reversed

---

117. See *Kater*, 567 N.E.2d at 893 (listing elements of confrontation). The witness testified while under oath, the defense cross-examined her, the jury heard her testimony and could determine her credibility, and she was physically present in the courtroom. *Id.* (upholding trial court's conclusion of no violation).

118. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (effectively invalidating *Roberts*). The Court commented that the *Roberts* test is "unpardonable" because it allows courts to admit "statements that the *Confrontation Clause* plainly meant to exclude." *Id.* at 63; see also Lowy & Dudich, *supra* note 18, at 5-6 (noting in nearly every post-*Roberts*, pre-*Crawford* circumstance, government satisfied confrontation by meeting hearsay exception).

119. Sluyter, *supra* note 28, at 323 (criticizing *Roberts* approach); see also *Crawford*, 541 U.S. at 60 (noting *Roberts* does not serve historical purpose of Confrontation Clause); White, *supra* note 9, at 576 (describing *Roberts* decision as "troubling"); Ariana J. Torchin, Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 94 GEO. L.J. 581, 582 (2006) (claiming *Roberts* "critically diluted" Confrontation Clause); *supra* note 118 and accompanying text (discussing *Crawford* case). But see *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring) (asserting disposition did not require invalidating *Roberts*); Shin, *supra* note 19, at 225 (criticizing *Crawford* for overruling *Roberts*). Shin argues that *Crawford* "relegat[ed] reliability to the scrapheap of Confrontation Clause theory." Shin, *supra* note 19, at 225.

120. *Crawford*, 541 U.S. at 68 (declining to define testimonial statements). Many legal scholars have criticized the Court for refusing to provide a firm guide for defining testimonial statements. See *infra* notes 128-129 and accompanying text (describing problems Court created by neglecting to define testimonial statements).

121. *Crawford*, 541 U.S. at 40-41 (suggesting jury believed prosecution's claim that wife's testimony contradicted defendant's self-defense claim).

122. *Id.* at 40 (noting wife unavailable to testify due to defendant's marital privilege).

123. *Id.* (listing reasons supporting trustworthiness of wife's statements). Crawford's wife made the statements with the intent of corroborating her husband's story rather than with the intent to shift blame; she

Crawford's conviction, but the Washington Supreme Court reinstated it, holding that the statements were trustworthy because the wife's description of the events that occurred was nearly identical to Crawford's.<sup>124</sup>

The Supreme Court reversed the Washington Supreme Court's decision and created a new test to determine confrontation violations based on whether statements are testimonial in nature.<sup>125</sup> The Court, however, did not specifically define "testimonial," stating only that "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."<sup>126</sup> In addition, the Court inferred that testimonial statements include those a witness makes to a police officer when the witness reasonably knew the state would use the statements in future prosecution.<sup>127</sup> The Court offered no further guidance on which statements are testimonial and by declining to specifically define the term, it set forth a difficult task for both for the lower courts, whose responsibility it is to define the term "testimonial," and for criminal trial attorneys, who must employ the new test.<sup>128</sup> As a result, legal scholars have criticized the *Crawford* decision, claiming that it left uncertainty regarding which statements are actually subject to confrontation.<sup>129</sup>

*E. The Supreme Court Offers Some Guidance: Davis v. Washington and Hammon v. Indiana*

In June of 2006, the United States Supreme Court decided two confrontation cases that offered further guidance as to which kinds of statements are

---

was an eyewitness and therefore had personal knowledge of the incident; her statements were made shortly after the incident; and the officer who questioned her was "neutral." *Id.*

124. *Crawford v. Washington*, 541 U.S. 36, 41 (2004) (noting Washington Supreme Court's decision unanimous).

125. *Id.* at 68 (noting text of Sixth Amendment "demands" confrontation for testimonial statements). The Confrontation Clause applies to "'witnesses' against the accused—in other words, those who 'bear testimony.'" *Id.* at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). A witness who makes a formal statement to a police officer therefore "bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.*

126. *Id.* at 68 (setting forth holding of case).

127. *See id.* at 51-52 (listing types of statements courts should scrutinize).

128. *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring) (claiming majority's decision "casts a mantle of uncertainty over future criminal trials"); *see also* Sluyter, *supra* note 28, at 350 (noting difficulty trial attorneys will face).

129. *See* Lowy & Dudich, *supra* note 18, at 12 (asserting urgent need for Supreme Court to resolve issue of defining testimonial statements); Shin, *supra* note 19, at 225 (criticizing Court's decision not to define testimonial); Torchin, *supra* note 119, at 582 (claiming *Crawford* decision sent lower courts "scrambling" to define testimonial). Torchin, however, asserts that while the Court did not specifically define testimonial, the opinion itself actually sets forth a "functional approach" to determining which out-of-court statements require confrontation. Torchin, *supra* note 119, at 582. This approach is based on determining whether the witness was aware that the state would use the statements in a future prosecution, and also what role the government official played in soliciting the statement. *Id.* at 587-89.

testimonial.<sup>130</sup> In the combined judgment of *Davis v. Washington* and *Hammon v. Indiana*,<sup>131</sup> the Court elucidated a two-part rule that will shape the way Massachusetts and other jurisdictions apply *Crawford* in certain situations.<sup>132</sup> Part one holds that statements are non-testimonial if the witness made them in response to police questioning during a continuous emergency situation.<sup>133</sup> Part two affirms that statements are testimonial when made in response to questioning when no ongoing emergency situation exists and where the primary purpose is to investigate a past crime or to prove facts that the state could use in a future prosecution.<sup>134</sup>

#### F. Crawford's Effect in Massachusetts Cases

Although *Crawford* has led to changes in Massachusetts case law, the SJC's first analysis of the new test resulted in its affirming two previous confrontation cases.<sup>135</sup> In *Commonwealth v. Verde*,<sup>136</sup> the SJC considered whether a drug

---

130. See *infra* notes 132-134 (discussing details of consolidated case of *Davis v. Washington* and *Hammon v. Indiana*); see also Lowy & Dudich, *supra* note 18, at 12 (noting *Davis* and *Hammon* provide "some clarity" to post-*Crawford* confusion).

131. 126 S. Ct. 2226 (2006).

132. See *id.* at 2273-74 (announcing new rule for determining testimonial statements).

133. *Id.* at 2276-77 (distinguishing facts from those in *Crawford*); see also Lowy & Dudich, *supra* note 18, at 15 (stating *Davis* consistent with historical purpose of Clause). The *Davis* Court recognized that modern police officers serve the public in different ways than did the old English justices of the peace. See Lowy & Dudich, *supra* note 18, at 15. Unlike their old English counterparts, modern police forces "are not always vehicles for testimonial statements." *Id.* In *Davis*, the witness made the challenged statements in response to questioning from a 911 operator, whom the witness called to report a domestic abuse incident. *Davis*, 126 S. Ct. at 2276-77. On the other hand, the police took and recorded the statements in *Crawford* at the station house during interrogation. *Id.* Unlike the calm statements in *Crawford*, the frantic ones the witness made in *Davis* illustrated that the purpose of the operator's interrogation was to help the witness with an emergency situation. *Id.* The *Davis* witness was therefore not "testifying" at the time, and thus, her statements were not testimonial. *Id.*; see also Ann Hetherwick Pumphrey, *Admissibility of Hearsay Statements to Police: Davis v. Washington and Hammon v. Indiana*, 50 BOSTON B.J. 17, 18 (2006) (discussing Court's recognition declarant does not bear testimony during emergency). But see *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting) (suggesting new rule will motivate officers to gather incriminating evidence before resolving emergency); Jeffrey A. Zick, *Rethinking Confrontation: A Look At Crawford v. Washington*, 43 ARIZ. ATT'Y 28, 32 (2006) (concluding *Davis* rule did not resolve problems *Crawford* left for lower courts in determining testimonial statements); Leading Cases, *Sixth Amendment—Witness Confrontation*, 120 HARV. L. REV. 213, 217 (2006) [hereinafter *Sixth Amendment—Witness Confrontation*] (suggesting *Davis* rule will encourage officers to abuse system in order to elicit non-testimonial evidence). On the other hand, "it is not clear the [*Davis*] Court could have done better" in this situation. *Sixth Amendment—Witness Confrontation, supra*, at 220 (suggesting Court chose middle ground between creating abusive rule and creating overly broad or narrow rule). A narrower rule would allow police officers to "skirt" the Sixth Amendment while a broader rule would exclude types of evidence which the Court has deemed admissible for years. *Id.*

134. *Davis*, 126 S. Ct. at 2279 (describing similarities with facts in *Crawford*); see also Lowy & Dudich, *supra* note 18, at 15 (stating *Davis* consistent with *Crawford* because it recognized interrogation can occur in informal settings). In *Davis*, the statements described something that was presently occurring; the facts in *Hammon* were similar to those in *Crawford* in that the statements described a past event that occurred at a time removed from when the interrogation took place. *Davis*, 126 S. Ct. at 2279 (calling comparison of *Hammon* to *Crawford* "compelling").

135. See *Commonwealth v. Verde*, 827 N.E.2d 701, 703-07 (Mass. 2005) (upholding prior decisions in

analyst's certificate, in light of *Crawford*, violates the defendant's confrontation right without the right to confront the scientist who conducted the test.<sup>137</sup> A drug analyst's certificate is characterized as similar to a business document, which the *Crawford* Court recognized as non-testimonial.<sup>138</sup> As a result, *Crawford* does not apply to drug analysts' certificates, and the SJC therefore upheld its prior holdings in *Slavski* and *Harvard*.<sup>139</sup>

In early 2006, the SJC set forth another straightforward rule regarding a situation where *Crawford* does not apply.<sup>140</sup> In two decisions published on February 9, 2006, the court held that *Crawford* does not apply to probation revocation hearings.<sup>141</sup> Although confrontation is a fundamental right, because a probationer has a limited liberty interest, he is not entitled to all of the protections that the Constitution guarantees to a defendant at a criminal trial.<sup>142</sup> Thus, the denial of confrontation at a probation hearing does not violate a defendant's Fourteenth Amendment due process right, the Sixth Amendment, nor the Massachusetts Constitution.<sup>143</sup>

Massachusetts's most significant application of the *Crawford* test came in 2005.<sup>144</sup> The SJC analyzed facts that, though similar to *Crawford* in some respects, were also distinguishable because the witness made the statements as

---

*Slavski* and *Harvard*). Since *Crawford*, Massachusetts courts have upheld at least one other confrontation case that it decided prior to *Crawford*. See *Commonwealth v. Nwachukwu*, 837 N.E.2d 301, 307 (Mass. App. Ct. 2005) (confirming *Rios* decision holding defendant has right to presence in courtroom during witness's testimony).

136. 827 N.E.2d 701 (Mass. 2005).

137. See *id.* at 704 (noting defendant argued drug analyst certificate testimonial under *Crawford*).

138. *Id.* at 706 (stating drug analyst certificates are not type of evidence Confrontation Clause intended to protect against); *Commonwealth v. Lampron*, 839 N.E.2d 870, 875 (Mass. App. Ct. 2005) (holding statements made in medical records non-testimonial, therefore no confrontation violation); *Commonwealth v. Crapps*, 835 N.E.2d 275, 276 (Mass. App. Ct. 2005) (applying SJC's decision in *Verde*). A record of prior conviction is also similar to a business document; therefore, *Crawford* does not prohibit it. *Crapps*, 835 N.E.2d at 276.

139. *Verde*, 827 N.E.2d at 704 (discussing prior Massachusetts cases dealing with admissibility of drug analyst certificates); see also *supra* note 103 and accompanying text (detailing *Slavski* and *Harvard* cases).

140. See *infra* notes 141-143 and accompanying text (discussing Massachusetts decisions on application of *Crawford* to probation revocation hearings).

141. *Commonwealth v. Nunez*, 841 N.E.2d 1250, 1254 (Mass. 2006) (concluding no violation even with testimonial statements); *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1250 (Mass. 2006) (concluding confrontation denial does not offend due process where judge finds hearsay evidence reasonably reliable).

142. See *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (stating right to confrontation fundamental); *Wilcox*, 841 N.E.2d at 1245-46 (discussing probationer's obligation to comply with court's conditions). "Inherent in a court's power to grant probation is the power to revoke it." *Wilcox*, 841 N.E.2d at 1246. Each of the United States Appeals Courts that have considered whether *Crawford* is applicable to probation revocation hearings and similar proceedings, such as sentencing hearings, has concluded that confrontation does not apply. See *id.* at 1247-48 (citing cases from First, Second, Sixth, Eighth, Ninth, and D.C. Circuits).

143. See *Wilcox* 841 N.E.2d at 1249 (affirming District Court's decision). In discussing the Fourteenth Amendment's due process rights, the SJC in *Wilcox* stated that "a probationer's liberty interest is not absolute." *Id.*; see also *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (holding Confrontation Clause applies to states through Fourteenth Amendment).

144. See *Lowy & Dudich*, *supra* note 18, at 9 (noting SJC began by applying *Crawford* to facts in *Gonsalves*); *Pumphrey*, *supra* note 133, at 19 (noting *Gonsalves* leading case in Massachusetts on confrontation post-*Crawford*).

spontaneous utterances at the scene rather than in a police interrogation room.<sup>145</sup> In addition, *Gonsalves* involved statements the victim had made to her mother.<sup>146</sup>

In applying *Crawford* to *Gonsalves*, the SJC sought to establish its own rule to determine which statements are testimonial and require confrontation.<sup>147</sup> The court prescribed a two-part test.<sup>148</sup> First, the court held that statements made in response to law enforcement questioning are testimonial per se unless the officers make their inquiries during an attempt to secure an emergency situation or to provide medical treatment.<sup>149</sup> The second part of the analysis requires the court to determine whether statements that are non-testimonial per se—those made to people who are not law enforcement officers—are testimonial in fact.<sup>150</sup> The court must inquire “whether a reasonable person in the declarant’s position would anticipate the statement’s being used against the accused in investigating and prosecuting a crime.”<sup>151</sup> If the court answers this in the affirmative, the statements are testimonial and are admissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.<sup>152</sup>

In applying the first part of the test, the *Gonsalves* court held that the statements were testimonial per se because the declarant made them in response to police questioning that merely sought to investigate an event that had already

---

145. See *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-56 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006) (noting distinction has no effect because “investigatory interrogation” here similar to interrogation in *Crawford*). The court pointed out that this case is not about the spontaneous utterance exception under the hearsay rules and its decision is not meant to change anything regarding the rule. See *id.* at 559. Because the Confrontation Clause “trumps” the hearsay rules, witness statements can be simultaneously spontaneous utterances and testimonial. *Id.*

146. *Id.* at 561-62 (explaining statements not testimonial per se because not made in response to police questioning).

147. *Id.* at 551-52 (discussing SJC’s reason for reviewing case).

148. *Id.* at 551-52 (setting forth elements of new rule).

149. *Gonsalves*, 833 N.E.2d at 555-56 (noting inclusion of inquiries during investigations and police actions to determine whether crime occurred).

150. *Id.* (focusing on why declarant made statement).

151. *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-56 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006); see also Lowy & Dudich, *supra* note 18, at 24 (listing factors courts should address when determining whether statement testimonial in fact). Courts should consider such factors as: to whom the declarant made the statement; whether the declarant made the statement in public or in private; the declarant’s emotional state; the witness’s emotional state; the declarant’s motivation in making the statement; whether police were present when declarant made the statement; the content of the statement; and whether someone solicited the statement. Lowy & Dudich, *supra* note 18, at 25.

152. See *Gonsalves*, 833 N.E.2d at 559 (pointing out if statement not testimonial, Massachusetts hearsay rules govern admissibility); *infra* notes 157-159 and accompanying text (discussing SJC’s analysis in *Gonsalves* of whether declarant’s statements testimonial in fact); *accord* *Washington v. Shafer*, 128 P.3d 87, 92 (Wash. 2006) (concluding witness’s statements made to nongovernmental acquaintances not testimonial); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (concluding witness’s statements to casual acquaintance not testimonial because no anticipation of future prosecutorial use); Richard D. Friedman, *Grappling With the Meaning of “Testimonial”*, 71 BROOK. L. REV. 241, 260 (2005) (arguing nongovernmental involvement not dispositive of whether confrontation violation occurred).

occurred.<sup>153</sup> Because the emergency situation had subsided by the time the officers arrived, they did not conduct the questioning to secure a volatile scene.<sup>154</sup> In addition, the record indicated that the victim did not request medical assistance.<sup>155</sup> As a result, the statements were testimonial per se and therefore required confrontation.<sup>156</sup>

The SJC applied the second part of its new analysis to the victim's statements to her mother, which were not testimonial per se because the mother was not a law enforcement officer, nor did she act on the police's behalf.<sup>157</sup> The court determined that the mother's inquiry purported to determine what happened to her daughter, not to "establish a basis for prosecution."<sup>158</sup> As a

---

153. *Gonsalves*, 833 N.E.2d at 561 (describing officer's line of questioning). The officer's questioning at the scene consisted not only of questions about the incident but also questions seeking details of the alleged perpetrator such as his name, height, weight, and race. *Id.*

154. *Id.* (noting officer's awareness that perpetrator left scene before his arrival); see also *Commonwealth v. Rodriguez*, 833 N.E.2d 134, 135 (Mass. 2005) (holding children's statements made at scene testimonial because no emergency existed at time of questioning). The *Rodriguez* court upheld *Gonsalves* by noting that the children answered questions from police seeking details regarding the alleged assault. *Rodriguez*, 833 N.E.2d at 135. As a result, the statements were testimonial per se and required confrontation. *Id.*; cf. *Commonwealth v. Foley*, 833 N.E.2d 130, 133 (Mass. 2005) (holding statements made while police secured volatile scene admissible but not after emergency subsided). In *Foley*, the court distinguished the officer's first questions asking where the suspect was and if the victim needed medical treatment by noting that such questions are part of the officer's "community caretaking function" rather than an attempt to investigate the crime. *Foley*, 833 N.E.2d at 133. On the other hand, once the officer knew the suspect was not present and that the victim did not need medical treatment, any subsequent questions were part of an investigation into the potential crime. *Id.* Thus, the statements were testimonial and therefore subject to confrontation. *Id.*; see also *Lowy & Dudich*, *supra* note 18, at 19 (asserting determination of moment when emergency situation subsides crucial to confrontation analysis).

155. *Gonsalves*, 833 N.E.2d at 561 (describing victim as "mobile, verbal, and responsive" and noting no record of her receiving treatment); see also *Commonwealth v. Williams*, 836 N.E.2d 335, 337 (Mass. App. Ct. 2005) (holding response to investigatory questions rather than police offer for medical care testimonial); cf. *Foley*, 833 N.E.2d at 133 (noting police questions upon arrival at scene regarding victim's need for medical care not testimonial).

156. *Gonsalves*, 833 N.E.2d at 555-56 (holding declarant made statements in response to "investigatory interrogation").

157. *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 561-62 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006) (noting mother did not call police and she questioned declarant before police arrived); see also *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 225 (Mass. 2006) (concluding statements child made to doctor not testimonial even though police at hospital during examination). In *DeOliveira*, despite the officers' presence at the hospital for purposes of investigating sexual abuse charges, the doctor did not act as an agent of law enforcement and he conducted his examination for medical purposes only. *DeOliveira*, 849 N.E.2d at 225. As a result, the statements made to the doctor were not testimonial per se. *Id.*

158. *Gonsalves*, 833 N.E.2d at 562 (asserting reasonable person in mother's position would not ask questions anticipating investigation or prosecution); see also *DeOliveira*, 849 N.E.2d at 226 (concluding six-year-old unaware police would use her statements to doctor in future prosecution). The witness in *DeOliveira* was a sexual abuse victim who made incriminating statements against the defendant to the victim's doctor when he examined her. *DeOliveira*, 849 N.E.2d at 226. Even though the police were present in the room during the examination, the child responded to what she believed were medical questions. *Id.* Thus, the child's statements were not testimonial and were therefore admissible. *Id.* (asserting decision consistent with similar decisions from other jurisdictions since *Crawford*); see also *Commonwealth v. Tang*, 845 N.E.2d 407, 413 (Mass. App. Ct. 2006) (determining statements by five-year-old boy who witnessed fight between father and uncle non-testimonial). "It is almost inconceivable that, moments after such an event, a child in [the boy's]

result, the statements made to the mother were not testimonial in fact and therefore did not violate the defendant's confrontation right.<sup>159</sup>

The SJC's next major confrontation decision came in November 2006, and was its first application of the Supreme Court's holding in *Davis*, decided only five months earlier.<sup>160</sup> In *Commonwealth v. Galicia*,<sup>161</sup> the SJC held that statements made by a victim to a 911 operator were not testimonial because the witness made them in response to questions intended to help the witness in an emergency situation.<sup>162</sup> Once the officers arrived at the scene, the perpetrator was gone and the emergency had subsided, so the statements that the witness made after that point were in response to investigatory questions.<sup>163</sup> Those statements were testimonial and therefore subject to confrontation.<sup>164</sup> The SJC noted in *Galicia* the consistency between the Supreme Court's holding in *Davis* and the SJC's prior holding in *Gonsalves*, both of which examined the purpose of an interrogation to determine whether a statement was testimonial.<sup>165</sup>

---

condition—described as essentially frantic—could have spoken in contemplation of a future legal proceeding.” *Tang*, 845 N.E.2d at 407.

159. *Gonsalves*, 833 N.E.2d at 561 (asserting although confrontation does not apply, evidence rules do); see also *Commonwealth v. Perkins*, No. 05-P-149, 2006 WL 2715543, at \*1 (Mass. App. Ct. Sept. 22, 2006) (holding statements victim made to neighbors not testimonial in fact). In *Perkins*, the court applied the second part of the *Gonsalves* rule and determined that the victim's statements to her neighbors that her boyfriend beat her up were not testimonial in fact because a reasonable person in her position would not have anticipated that the government would use the statements in future prosecution. *Perkins*, 2006 WL 2715543, at \*2-3. The court noted that the victim did not identify her boyfriend to either neighbor and that she seemed to make the statements because she was scared that he may hurt her again. *Id.* at \*3.

160. See *infra* notes 162-165 and accompanying text (discussing *Commonwealth v. Galicia*).

161. 857 N.E.2d 463 (Mass. 2006).

162. *Id.* at 470 & n.15 (noting defendant conceded 911 call constituted non-testimonial hearsay in light of *Davis*). The 911 recording clearly illustrated that the purpose of the questioning was to help the wife prevent her husband from continuing to abuse her. See *id.*

163. *Id.* at 470 (describing interrogation as “formal cast of a police investigation of a crime”). When the police arrived at the victim's house, the emergency had subsided, and despite the fact that the victim was visually shaken up, the court determined the purpose of the police questioning was to investigate a crime that had already occurred. *Id.*; see also *Commonwealth v. Gonzalez*, 863 N.E.2d 958, 964 (Mass. 2007), *cert. denied*, 449 Mass. 1104 (2007) (holding lower court judge erred in admitting witness's statement made to officer investigating crime). In *Gonzalez*, the prosecution relied on *Davis* to argue that the witness's statement was not testimonial. *Gonzalez*, 863 N.E.2d at 965. The court overturned the lower court's finding that the witness made the statement in order to assist the officer in securing an ongoing emergency. *Id.* By the time the officers had arrived on the scene, the defendant had driven away and several minutes passed before the officer questioned the declarant. *Id.* at 961. At that time, the officer's focus was to investigate the crime, despite having provided medical care to the victim when he initially arrived at the scene. *Id.* at 965. As a result, the witness's statements to the officer were testimonial and the defendant ultimately had a right to confrontation. See *id.* at 965. Nonetheless, the court held that the judge's error was not prejudicial to the jury and denied the defendant's motion for a mistrial. *Id.* at 967-68.

164. *Gonzalez*, 863 N.E.2d at 965 (setting forth conclusion).

165. *Galicia*, 857 N.E.2d at 469 n.14 (comparing two cases); see also Pumphrey, *supra* note 133, at 19 (suggesting SJC “seemingly anticipat[ed] the Supreme Court's analysis in *Davis*”).

## III. ANALYSIS

A. *Massachusetts Holds Prosecution to Higher Standard for Satisfying Confrontation*

Although confrontation rights under the Sixth Amendment are similar in many ways to those under the Massachusetts Constitution, Massachusetts jurisprudence slightly favors defendants' rights against the public's need for reliable hearsay evidence.<sup>166</sup> While consistently interpreting the state's confrontation right regarding hearsay statements by using the same standard as the Supreme Court, Massachusetts courts have simultaneously provided defendants the added protection of requiring that defendants be permitted to confront their accusers "face to face."<sup>167</sup> By adhering to this face-to-face requirement, Massachusetts courts have held the prosecution to a higher standard for satisfying confrontation since before the states even ratified the Sixth Amendment.<sup>168</sup> In its 2004 *Crawford* decision, the Supreme Court

---

166. See *supra* note 113 and accompanying text (detailing additional confrontation protections Massachusetts Constitution requires compared to Sixth Amendment).

167. See *supra* note 113 and accompanying text (comparing confrontation rights under United States Constitution with Massachusetts Constitution); *supra* notes 115-117 and accompanying text (discussing cases defining scope of face-to-face requirement applied). Prior to *Crawford*, Massachusetts courts adhered to the Supreme Court's relaxed standard set forth in *Roberts* for determining whether the admission of hearsay statements violates confrontation. *Commonwealth v. Bohannon*, 434 NE.2d 163, 168 (Mass. 1982) (relying on *Roberts* to hold unavailability required in order to admit testimony from prior hearing); see also *Commonwealth v. Whelton*, 696 N.E.2d 540, 545 (Mass. 1998) (noting Massachusetts Constitution gives confrontation same weight as Sixth Amendment when dealing with hearsay rules). At the same time, unlike the Supreme Court, Massachusetts courts could not admit statements where the accused and the defendant could not view each other face-to-face. See *supra* note 115 (discussing cases requiring both defendant's and witness's physical presence in order to satisfy confrontation); see also *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (stating Supreme Court never held Confrontation Clause guarantees "absolute" right to confront witnesses face-to-face). In *Craig*, the Supreme Court upheld the validity of a statutory procedure that permitted a child victim to testify by a one-way closed circuit television out of the presence of the defendant. See *Craig*, 497 U.S. at 859-60 (noting witness does not see defendant at any time during procedure). In doing so, the Court narrowed a defendant's confrontation right by reasoning that the Confrontation Clause does not prohibit a procedure which protects a child witness from the trauma caused by testifying in front of the defendant. See *id.* at 857; cf. *Coy v. Iowa*, 487 U.S. 1012, 1020-21 (1988) (holding use of screen to prevent witnesses from viewing defendant violated Confrontation Clause absent sufficient public policy concerns). The *Coy* Court pointed out that although the defendant could see the witnesses, the witnesses could not see the defendant. *Coy*, 487 U.S. at 1015. The Court commented that "[i]t is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." *Id.* at 1020. Although this holding seems consistent with the Massachusetts constitutional requirement to confront witnesses face-to-face, the *Coy* Court also suggested that the face-to-face requirement is not absolute, commenting that courts can allow exceptions to it when the exceptions are necessary for public policy purposes. *Id.* at 1021; see also *Craig*, 497 U.S. at 844 (relying on *Coy* to make exception to face-to-face requirement); 3 CRIMINAL PRACTICE MANUAL § 83:3 (2007) (stating Confrontation Clause creates preference, not absolute requirement of face-to-face confrontation). See generally AM. JUR. 2D *Criminal Law* § 1175 (2007) (discussing cases pertaining to use of testimony by video or closed circuit television).

168. See *Henry*, *supra* note 35, at 673 (noting states ratified Bill of Rights in 1791); *Skeels*, *supra* note 93, at 81 (noting Massachusetts adopted its constitution, including confrontation right found in article 12, in 1780).

determined that all courts should hold the prosecution to a higher standard for satisfying confrontation by requiring the right to confront witnesses in all instances where the statements are testimonial.<sup>169</sup> The fact that Massachusetts courts have held the prosecution to a high standard for satisfying confrontation for a longer period of time than the Supreme Court, albeit under different reasoning, suggests that it is ahead of the Supreme Court in advancing the scope of confrontation that the Framers envisioned.<sup>170</sup>

*Crawford* has had a significant impact on the confrontation analysis within Massachusetts courts.<sup>171</sup> Now, in order to admit out-of-court statements, the prosecution must provide strict face-to-face confrontation and prove that the statements are non-testimonial.<sup>172</sup> By combining these requirements,

---

Massachusetts thus provided its citizens with broad confrontation rights by holding the prosecution to a high face-to-face standard more than a decade before the Sixth Amendment confrontation right appeared in the United States Constitution. See Skeels, *supra* note 93, at 82. Massachusetts courts continued holding the prosecution to this high standard, even when the Supreme Court consistently narrowed the confrontation right under the Sixth Amendment. See *id.* at 82; *supra* Part II.B.3 (detailing cases narrowing confrontation right under Sixth Amendment); see also *Craig*, 497 U.S. at 844-45 (relaxing face-to-face requirement under Confrontation Clause); *Coy*, 487 U.S. at 1020-21 (noting Sixth Amendment does not require face-to-face confrontation when public policy necessitates exceptions).

169. See *supra* Part II.D (detailing *Crawford* decision and its effect on confrontation jurisprudence). *Crawford* requires the prosecution to take additional steps in order to prove that hearsay statements do not violate the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding prosecution must determine more than whether statements fall under reliable hearsay exception). If the prosecution can not satisfy this high standard, the court will not allow the prosecution to admit the statements. *Id.* (holding prosecution can only admit non-testimonial statements).

170. See *Crawford*, 541 U.S. at 68 (requiring confrontation for all testimonial statements); *supra* note 168 and accompanying text (discussing high standards Massachusetts holds prosecution to in determining whether confrontation required); see also *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 371 (Mass. 1988) (noting Massachusetts Constitution provides more protection than United States Constitution). The high standard that the Massachusetts Constitution has always held the prosecution to is its requirement for face-to-face confrontation. See *supra* note 113 and accompanying text (discussing Massachusetts Constitution's face-to-face requirement). The high standard to which the Supreme Court holds the prosecution, as a result of *Crawford*, requires the prosecution to prove hearsay statements are non-testimonial. *Crawford*, 541 U.S. at 68 (holding states have flexibility with non-testimonial statements but Sixth Amendment "demands" confrontation for testimonial statements). Even though these two standards are different, both of them support the Framers' view that confrontation is a broad fundamental right that every criminal defendant is entitled to. See *id.* at 61 (asserting Framers meant for confrontation to require more than mere reliability). Massachusetts guaranteed face-to-face confrontation two centuries prior to *Crawford's* requirement that testimonial statements require confrontation. See *supra* note 168 and accompanying text (comparing timing of inceptions of Massachusetts Constitution and Sixth Amendment confrontation rights). Thus, in respect to advancing the broad confrontation rights that the Framers envisioned, Massachusetts is ahead of the Supreme Court in the area of confrontation jurisprudence. *Id.*; see also *Bergstrom*, 524 N.E.2d at 371 (discussing Massachusetts's broader confrontation rights).

171. See *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-56 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006) (noting *Crawford* altered test to determine whether admissibility of hearsay statements violates confrontation). The *Gonsalves* opinion dedicates an entire section to discussing *Crawford* and its new requirements for determining confrontation. *Id.* at 553-54. The court noted that *Crawford* controls the admissibility of testimonial statements, though state hearsay rules still govern the admissibility of non-testimonial hearsay statements. *Id.* at 554.

172. *Crawford*, 541 U.S. at 68 (requiring confrontation for testimonial statements); *supra* note 113 and accompanying text (detailing Massachusetts Constitution's face-to-face requirement and comparing it to Sixth

Massachusetts now offers defendants an even broader confrontation right.<sup>173</sup> This broad interpretation of the fundamental right to confront witnesses is consistent with the confrontation right that the Framers envisioned.<sup>174</sup> The purpose of the Confrontation Clause was both to provide criminal defendants with the opportunity to cross-examine witnesses who made adverse statements, and to allow defendants to confront those witnesses in court, face-to-face, in order to test their veracity in front of the jury.<sup>175</sup> Massachusetts courts' insistence that criminal prosecutions adhere to both the Supreme Court's *Crawford* decision and its own higher constitutional standard for face-to-face confrontation accomplishes both of these important goals.<sup>176</sup>

On the other hand, Massachusetts courts have not used *Crawford*'s reasoning to ignore the other side of the confrontation scale—the need for reliable hearsay evidence.<sup>177</sup> Since *Crawford*, Massachusetts courts have carefully considered whether statements are truly testimonial, and they have upheld prior decisions to admit evidence later determined to be non-testimonial hearsay.<sup>178</sup> These cases illustrate that although *Crawford* broadens a defendant's confrontation right in Massachusetts, when courts consider which statements are testimonial, they continue to balance the public policy need for reliable hearsay statements with the defendant's right to confrontation.<sup>179</sup>

---

Amendment).

173. See *supra* Part II.D (discussing higher standard *Crawford* holds prosecution to in satisfying confrontation); *supra* note 113 and accompanying text (comparing confrontation rights under United States Constitution with Massachusetts Constitution).

174. See *Crawford*, 541 U.S. at 61 (noting Framers did not intend hearsay rules to govern Confrontation Clause protection); Lowy & Dudich, *supra* note 18, at 30 (asserting Framers included defendant rights in Constitution to provide fairness and promote liberty); White, *supra* note 9, at 548-49 (asserting Bill of Rights purported to prevent government encroachment upon fundamental liberties); see also *supra* note 33 and accompanying text (discussing adverse reaction to omission of confrontation right in original Constitution).

175. See *supra* note 10 and accompanying text (detailing importance of cross-examination purpose of confrontation right); see also *Barber v. Page*, 390 U.S. 719, 725 (1968) (discussing importance of jury's opportunity to observe witness demeanor); White, *supra* note 9 (noting jury responsible for determining witness veracity).

176. MASS. CONST. pt. 1, art. XII (setting out Massachusetts "face to face" confrontation requirement); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (setting forth requirement that all courts cannot allow prosecution to admit testimonial statements).

177. See *supra* notes 135-138 and accompanying text (discussing cases where Massachusetts courts upheld or reapplied earlier holdings); *supra* notes 141-143 and accompanying text (noting confrontation still not required during probation revocation hearings).

178. See *supra* notes 135-138 (discussing cases where court reaffirmed confrontation does not apply); *supra* notes 141-143 and accompanying text (discussing Massachusetts decisions reaffirming confrontation not required at probation revocation hearings). In *Verde*, the SJC concluded once again that drug analyst certificates are not subject to confrontation, even in light of *Crawford*. *Commonwealth v. Verde*, 827 N.E.2d 701, 703 (Mass. 2005) (holding drug analyst certificate same as business record). The court pointed out that drug analyst certificates do not involve ex parte communications, which, according to *Crawford*, confrontation primarily purports to prevent. *Id.* at 706; see also *Commonwealth v. Lampron*, 839 N.E.2d 870, 875 (Mass. App. Ct. 2005) (concluding statements set forth in medical records not testimonial).

179. See *supra* notes 135-138, 141-143 (detailing situations where defendant not entitled to confrontation). By affirming cases where non-testimonial statements do not apply or where a lesser liberty interest is at stake,

*B. Massachusetts Demonstrates Once Again that It Is a Step Ahead in Confrontation Jurisprudence: Comparing Gonsalves with Davis and Hammon*

Holding the prosecution to a higher standard is not the only way in which Massachusetts has demonstrated that it is ahead of the Supreme Court in interpreting the right to confront witnesses.<sup>180</sup> Recently, the SJC set forth a rule for interpreting confrontation, which the Supreme Court subsequently adopted.<sup>181</sup> The Supreme Court did not explicitly rely on the SJC in adopting the rule, but, by implementing it subsequent to the SJC, just as it adopted a higher standard for the prosecution subsequent to Massachusetts, the Supreme Court demonstrated that Massachusetts continues to stay ahead of it in interpreting the Framers' vision of confrontation.<sup>182</sup>

The rule adopted by the SJC, and subsequently by the Supreme Court, pertained to how courts should determine which statements are testimonial.<sup>183</sup> The Supreme Court's decision not to specifically define "testimonial" in *Crawford* forced Massachusetts courts to take on the complicated task of setting forth a rule that lower courts could follow.<sup>184</sup> The Massachusetts SJC did this in its first major post-*Crawford* decision, where it set forth an important two-part test to determine whether statements are testimonial.<sup>185</sup>

The Supreme Court adopted the same rule in the first part of the *Gonsalves* test almost a year later in its *Davis* and *Hammon* decisions, which provided guidance for lower courts interpreting *Crawford*.<sup>186</sup> The Supreme Court used the same reasoning the SJC used to conclude that statements made in response to police questioning exclusively for purposes of investigating a crime are testimonial, while statements made in response to questions intending to secure

---

Massachusetts courts continue to consider the public policy need for reliable hearsay statements, despite the fact that the Supreme Court broadened the confrontation right in *Crawford*. *See id.*

180. *See infra* notes 185-189 and accompanying text (comparing SJC's *Gonsalves* decision with Supreme Court's *Davis* decision).

181. *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-56 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006) (setting forth new rule for determining confrontation violations after *Crawford*); *infra* note 186 and accompanying text (discussing *Davis* and comparing it with *Gonsalves*); *see also supra* note 165 and accompanying text (discussing SJC's recognition of consistency between *Davis* and *Gonsalves* cases).

182. *See Davis v. Washington*, 126 S. Ct. 2266, 2266-85 (2006) (omitting any reference to Massachusetts *Gonsalves* case); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (prohibiting prosecution from admitting testimonial statements without satisfying confrontation); *see also Pumphrey, supra* note 133, at 19 (suggesting SJC "seemingly anticipat[ed] the Supreme Court's analysis in *Davis*"); *supra* note 168 and accompanying text (discussing high standard Massachusetts courts hold prosecution to in determining whether confrontation required).

183. *Gonsalves*, 833 N.E.2d at 552 (setting forth two-part rule for determining whether statements testimonial); *infra* note 186 and accompanying text (discussing *Davis* and comparing it with *Gonsalves*).

184. *See supra* notes 128-129 and accompanying text (discussing effect and criticism of Supreme Court not defining testimonial in *Crawford* decision).

185. *Gonsalves*, 833 N.E.2d at 552 (setting forth new rule for determining confrontation violations in Massachusetts in light of *Crawford* decision).

186. *See supra* notes 132-134 (discussing *Davis* and *Hammon* cases); *see also Gonsalves*, 833 N.E.2d at 552 (setting forth same rule Supreme Court used in *Davis*).

an emergency situation or provide medical assistance are non-testimonial.<sup>187</sup> Both courts agree that police questioning made in order to secure a volatile scene is not interrogation; rather, it is a function of the government's role as peacekeeper or community caretaker.<sup>188</sup> On the other hand, both courts also asserted that investigatory questioning by police officers is the exact type of testimony against which the confrontation right seeks to protect.<sup>189</sup> Despite not actually relying on *Gonsalves* in its opinion, by following the same reasoning, the Supreme Court demonstrated, once again, that Massachusetts is a step ahead of it in interpreting the right to confrontation.<sup>190</sup>

### C. *The Role of Massachusetts in the Future of Confrontation in the United States*

On more than one occasion, Massachusetts has advanced the level of confrontation consistent with the Framers' intent before any action by the Supreme Court.<sup>191</sup> In fact, the Supreme Court essentially began "catching up" with Massachusetts confrontation jurisprudence beginning with *Crawford* in 2004.<sup>192</sup> This suggests that the Supreme Court will continue along the same path Massachusetts has taken when analyzing the confrontation right in the future.<sup>193</sup> The Supreme Court's use of the same reasoning Massachusetts

---

187. Compare *Davis*, 126 S. Ct. at 2277 (concluding victim seeking help in emergency situation not "witness" unlike one who answers investigatory questions), with *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 556 (Mass. 2005), cert. denied, 126 S. Ct. 2980 (2006) (noting distinction between interrogation for investigatory purposes and questioning to help cease ongoing emergency).

188. See *Davis v. Washington*, 126 S. Ct. 2266, 2279 (2006) (noting officers need to obtain information to determine whether threats or danger exist); *Gonsalves*, 833 N.E.2d at 556 (stating questioning for purpose of dissipating emergency "totally divorced" from investigatory questioning seeking to obtain evidence).

189. See *Davis*, 126 S. Ct. at 2278 (reasoning statements made to police where no danger same as ex parte statements requiring confrontation); *Gonsalves*, 833 N.E.2d at 556 (noting investigatory or fact-finding questioning traditionally considered interrogation requiring confrontation).

190. See *supra* notes 186-187 (discussing Supreme Court's adoption of same rule Massachusetts set forth almost one year earlier); see also *Davis*, 126 S. Ct. at 2266-85 (omitting any reference to Massachusetts *Gonsalves* case).

191. See *supra* Parts III.A-B (detailing two instances where Massachusetts first advanced broad confrontation rights consistent with Framers' intent).

192. See *supra* Parts III.A-B (discussing confrontation rights advanced by Massachusetts and how Supreme Court subsequently adopted similar view). With *Crawford*, the Supreme Court "caught up" to Massachusetts by holding the prosecution to a higher standard for satisfying confrontation, a practice to which Massachusetts had adhered since the states ratified the Sixth Amendment. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding testimonial statements subject to confrontation); *supra* note 168 and accompanying text (discussing high standards Massachusetts holds prosecution to in determining whether confrontation required); see also *Commonwealth v. Bergstrom*, 524 N.E.2d 366, 371 (Mass. 1988) (noting Massachusetts Constitution provides more protection than United States Constitution). The Supreme Court again "caught up" to Massachusetts by setting forth the same rule the SJC had previously set forth regarding how to determine which statements made to police are testimonial. See *supra* note 186 and accompanying text (comparing rule set forth in *Gonsalves* with rule set forth in *Davis*).

193. Compare *supra* text accompanying note 170 (describing first instance where Supreme Court adopts same view of confrontation as Massachusetts), with *supra* notes 186-187 and accompanying text (discussing second example of Supreme Court adopting same understanding of confrontation as Massachusetts). Analyzed

employed in interpreting the right thus far suggests that the Supreme Court will continue to reach conclusions in harmony with Massachusetts jurisprudence, even when it does not directly rely on Massachusetts case law.<sup>194</sup>

For example, the Supreme Court has not yet set forth a rule to determine which statements made to non-governmental officials are testimonial.<sup>195</sup> The SJC, however, did so with the second test it set forth in *Gonsalves*.<sup>196</sup> The SJC concluded that statements made by a witness to someone other than a government official are testimonial in fact if “a reasonable person in the declarant’s position” would expect that the government would use the statements to investigate the crime or to prosecute the perpetrator.<sup>197</sup> Despite its silence on this issue post-*Crawford*, the Supreme Court’s pattern of following the same path as Massachusetts in defining and setting the scope of confrontation indicates that it will likely determine whether statements made to non-governmental employees are testimonial sometime in the near future.<sup>198</sup> When this happens, the Supreme Court, like the SJC before it, will likely conclude that all statements made to nongovernmental officials in anticipation of investigation or prosecution are testimonial and therefore require

---

together, these two examples suggest that the Supreme Court will continue to follow the reasoning that Massachusetts courts use in determining the scope and effect of the confrontation right. *Id.*

194. See *supra* note 187-189 and accompanying text (detailing instance where Supreme Court employed same reasoning as Massachusetts SJC).

195. *Contra* Commonwealth v. Gonsalves, 833 N.E.2d 549, 555-56 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006) (holding statements made to nongovernmental officials testimonial if declarant anticipates its use in future prosecution). Though Massachusetts and other jurisdictions have set forth a clear rule regarding whether statements made to nongovernmental officials are testimonial, the Supreme Court has not yet decided this issue. See *id.*; Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004) (setting forth rule regarding admissibility of statements to nongovernmental officials); Washington v. Shafer, 128 P.3d 87, 92 (Wash. 2006) (discussing admissibility of statements made to nongovernmental officials). But see *Crawford*, 541 U.S. at 51-52 (suggesting casual remarks to nongovernmental acquaintance not testimonial). Although the *Crawford* decision suggests that the Framers did not intend the Confrontation Clause to prohibit the admission of such casual statements, the Court did not include these statements in its short list of those which courts should automatically consider testimonial. *Id.* at 51-52, 68 (listing three types of statements courts should automatically consider testimonial). According to the Court, the term “testimonial” automatically includes statements made at a preliminary hearing, in front of a grand jury, and in response to police interrogations. *Id.* at 68. The Court therefore left unanswered the question of whether statements made to nongovernmental officials are testimonial. *Id.*

196. *Gonsalves*, 833 N.E.2d at 559 (setting forth test to determine whether statements made to nongovernmental officials are testimonial).

197. See *supra* notes 151-152 and accompanying text (discussing Massachusetts rule for determining whether statements made to nongovernmental officials are testimonial); *supra* notes 157-159 (discussing SJC’s analysis in *Gonsalves* of whether declarant’s statement testimonial in fact); see also Friedman, *supra* note 152, at 261 (arguing some statements made to nongovernmental officials testimonial). Friedman asserts that in determining whether statements made to nongovernmental officials are testimonial, “the bottom line question is what the witness anticipated.” Friedman, *supra* note 152, at 261.

198. See *supra* note 195 and accompanying text (discussing Supreme Court’s silence on whether it considers statements made to nongovernmental officials testimonial); see also *supra* text accompanying notes 193-194 (suggesting Supreme Court will continue to use similar reasoning as Massachusetts courts regarding confrontation).

confrontation.<sup>199</sup>

*D. Confrontation: A Case Analysis. How Would the SJC Decide the Outcome of Dutton v. Evans Today?*

In 1970, the Supreme Court allowed the prosecution to admit co-conspirator hearsay statements made during the commission of a crime.<sup>200</sup> The Court held that such statements did not violate a defendant's confrontation right because co-conspirators make such statements against their own penal interest.<sup>201</sup> Given the new *Crawford* requirements, and those that the SJC enunciated in Massachusetts, today the SJC would not allow the admission of the co-conspirator's statement unless the witness was both unavailable and the defendant had a prior opportunity for cross-examination.<sup>202</sup>

In *Dutton*, the defendant's co-conspirator, Williams, allegedly told a fellow prisoner, "If it hadn't been for that dirty son-of-a-bitch [defendant] Alex Evans, we wouldn't be in this now."<sup>203</sup> During the trial, the state did not satisfy the requirements for confrontation: Williams did not testify at the trial and Evans did not have any prior opportunity to cross-examine him.<sup>204</sup> The SJC today would therefore require the prosecution to prove that Williams's statement was non-testimonial in order to admit it at trial.<sup>205</sup>

The SJC would begin today's analysis of *Dutton* by determining whether the challenged statement was testimonial per se under *Gonsalves*.<sup>206</sup> Williams's statement was not testimonial per se because he did not make it in response to police questioning—he made it to a fellow prisoner who was not a government official or agent.<sup>207</sup> Because the statement was not testimonial per se, the court

---

199. See *Gonsalves*, 833 N.E.2d at 559 (concluding statements to nongovernmental officials testimonial if declarant aware government may use statement for prosecution); *supra* text accompanying notes 193-194 (suggesting Supreme Court will continue to use similar reasoning as Massachusetts courts to interpret confrontation).

200. See *supra* note 71-73 and accompanying text (discussing Supreme Court's holding in *Dutton v. Evans*).

201. See *supra* note 71 and accompanying text (detailing Supreme Court's reasoning for allowing prosecution to admit co-conspirator statements absent confrontation).

202. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (announcing new rule broadening defendants' confrontation rights); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-56 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006) (setting forth new two-part test for determining confrontation violations in Massachusetts); *infra* text accompanying notes 204-222 (analyzing whether SJC would require confrontation if it decided facts of *Dutton* today).

203. *Dutton v. Evans*, 400 U.S. 74, 77 (1970).

204. See *id.* at 88 n.19 (noting defendant chose not to subpoena Williams).

205. See *Crawford*, 541 U.S. at 68 (noting if confrontation requirements not met, courts may only admit non-testimonial hearsay statements).

206. See *Gonsalves*, 833 N.E.2d at 552 (noting statements made in response to police questioning testimonial per se with only two exceptions).

207. *Dutton*, 400 U.S. at 77 (pointing out Williams made statement incriminating Evans to fellow prisoner at federal penitentiary); see also *supra* note 149 and accompanying text (discussing SJC's definition of testimonial per se statements).

would advance to the second part of the *Gonsalves* test: determining whether the statement was testimonial in fact.<sup>208</sup> To answer this question, the court would determine whether a person in the declarant's position reasonably knew that the government would use the statement for future investigation or prosecution.<sup>209</sup> If the court answers this question in the affirmative, the statement is testimonial and therefore requires confrontation.<sup>210</sup>

In an analysis today, the question of whether Williams reasonably knew the prosecution would use the statement he made to his fellow prisoner against him is a close one.<sup>211</sup> Although the statement has the characteristics of an excited utterance, which suggests that Williams did not speak it for purposes of future prosecution, the fact that he spoke it spontaneously is not dispositive of whether he may have considered that the government would use it for such purposes.<sup>212</sup> Additionally, the statement falls under another hearsay exception because Williams spoke it against his own penal interest.<sup>213</sup> This, however, is also not dispositive.<sup>214</sup> In fact, a co-conspirator stands to gain from trying to pass blame onto someone who also participated in the crime by diminishing his own role in the conspiracy.<sup>215</sup> It therefore seems likely that a reasonable person

---

208. See *supra* note 150 and accompanying text (noting if statement not testimonial per se, Massachusetts courts must inquire if testimonial in fact); see also *supra* text accompanying note 207 (noting statement at issue in *Dutton* not testimonial per se).

209. See *supra* note 151 and accompanying text (discussing standard for determining which statements testimonial in fact).

210. See *supra* notes 157-159 and accompanying text (analyzing whether declarant's statements to mother in *Gonsalves* testimonial in fact).

211. See *infra* notes 212-215 (analyzing difficulty of question).

212. See *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (pointing out Williams made statement spontaneously); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-56 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006) (noting possibility statements both spontaneous utterance and testimonial); *supra* note 215 and accompanying text (discussing how defendants stand to gain from incriminating their co-conspirators); see also FED. R. EVID. 803(2) (defining excited utterance exception to hearsay rule). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;" Williams's statement was a spontaneous response to a question about how his arraignment went upon returning to jail. *Dutton*, 400 U.S. at 77, 89. The Court concluded that courts widely viewed such spontaneous statements as being sufficiently reliable to satisfy confrontation. *Id.* at 89.

213. *Dutton*, 400 U.S. at 89 (pointing out Williams made statement against his own penal interest). Statements against one's own interest fall under a hearsay exception under the Federal Rules of Evidence. FED. R. EVID. 804(b)(3). To qualify under this exception, a statement against interest is one "which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Id.* Arguably, Williams would not have made the statement that he was in his current predicament because of the defendant if it was not true because he incriminated himself by making the statement. *Id.*; see also *supra* note 203 and accompanying text (stating incriminating statement Williams made in *Dutton*).

214. *Gonsalves*, 833 N.E.2d at 559 (stating hearsay exceptions and Confrontation Clause not "mutually exclusive" under *Crawford*). The SJC asserts that "[w]hether some out-of-court statements are admissible under exceptions to the hearsay rule does not change whether admitting them would violate the confrontation clause as newly articulated by *Crawford*." *Id.*

215. See *United States v. Inadi*, 475 U.S. 387, 395 (1986) (pointing out co-conspirators' positions tend to change from partners to adversaries before trial). The Court notes how each co-conspirator has "information potentially damaging to the other" and that "the declarant himself may be facing indictment or trial" and

in Williams's position would anticipate that the government would use his statement incriminating Evans in a future prosecution against Evans.<sup>216</sup> As a result, Williams's statement was testimonial and therefore subject to confrontation.<sup>217</sup>

Although the question in *Dutton* analyzed today is a close one, the Supreme Court's new treatment shows that confrontation demands more than just reliable hearsay statements and strengthens the conclusion that Williams's statements were testimonial.<sup>218</sup> If the SJC continued to follow *Roberts*, there is no doubt that it would have admitted the statement because it falls within "a firmly rooted hearsay exception."<sup>219</sup> *Crawford*, however, changed the analysis, and the government must now provide an accused more protection than it did under *Roberts*.<sup>220</sup> This added protection would aid the defendant in *Dutton* today when determining whether his co-conspirator anticipated the government's use of the statement for future prosecution.<sup>221</sup> The new demands for confrontation, both in the United States and in Massachusetts, require the conclusion that today, the statements made in *Dutton* are testimonial and thus violate the Confrontation Clause.<sup>222</sup>

---

therefore "wary of coming to the aid of his former partners in crime." *Id.*

216. See *supra* note 215 and accompanying text (discussing co-conspirator aware government may use statements made to nongovernmental acquaintance for future prosecution); FED. R. EVID. 804(b)(3) (setting forth exception to hearsay statements made against one's own interest).

217. See *Gonsalves*, 833 N.E.2d at 558 (holding intent of declarant controlling factor in determining whether statement testimonial); *supra* text accompanying note 216 (asserting person in Williams's position would anticipate government using his statement to prosecute defendant). The *Gonsalves* court held that until it receives further instruction from the Supreme Court, statements made to a nongovernmental acquaintance are testimonial if the declarant made them while anticipating future prosecution. *Gonsalves*, 833 N.E.2d at 558.

218. See *supra* notes 16-17 and accompanying text (discussing Supreme Court's new rule in broadening defendant's confrontation right); see also Part III.A (detailing broad confrontation right offered in Massachusetts).

219. See *Ohio v. Roberts*, 448 U.S. 56, 67 (1980) (holding statements falling within "firmly rooted hearsay exception" reliable and therefore do not violate confrontation); see also *Commonwealth v. Bohannon*, 434 N.E.2d 163, 168 (Mass. 1982) (relying on Supreme Court's holding in *Roberts*). The court would have ended its analysis there because under *Roberts*, courts infer reliability under "firmly rooted hearsay exception[s]" with no further inquiry. See *Roberts*, 448 U.S. at 67.

220. See *supra* notes 16-17 and accompanying text (discussing *Crawford* and how it effectively overruled *Roberts*).

221. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (expanding right of accused to confront adverse witnesses). It makes sense for courts to give defendants the presumption in such a close case because, in light of *Crawford*, courts must bestow broader confrontation rights upon criminal defendants. *Id.* (implying courts should carefully consider facts in light that will favor upholding defendant's confrontation rights).

222. See *id.* at 68 (requiring courts to bestow greater confrontation rights upon criminal defendants); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 555-56 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006) (setting forth new test consistent with *Crawford* for determining confrontation violations in Massachusetts). See generally *supra* Part III.A (discussing Massachusetts's broad confrontation right and how *Crawford* broadened it even further).

#### IV. CONCLUSION

The right to confront adverse witnesses is a fundamental right that courts can not arbitrarily restrict. The Supreme Court recognized this prerogative in *Crawford v. Washington*, a decision that broadened a defendant's right to face his accuser. As a result of *Crawford*, courts can no longer limit a criminal defendant's constitutionally guaranteed right to confront adverse witnesses as they had under *Ohio v. Roberts*. Courts must now hold the prosecution to a higher standard for satisfying confrontation by requiring the prosecution to prove that statements are non-testimonial in order to admit them. The Framers created the confrontation right to offer more protection than mere reliability: they demanded a right that protected criminal defendants from the abusive government tactics, such as those the English had used during Raleigh's trial and the events leading up to the American Revolution.

Massachusetts courts have always been slightly ahead of the Supreme Court in advancing the broad confrontation right that the Framers intended. For example, the Massachusetts Constitution has always guaranteed broader confrontation rights than the United States Constitution because it contains language guaranteeing a defendant the right to confront witnesses face-to-face. This language gives defendants added protection by holding the prosecution to a higher standard that guarantees defendants a right to the witnesses' physical presence during cross-examination. Consequently, Massachusetts had already fostered the overarching belief that the Supreme Court advanced in *Crawford*—that confrontation requires broad protection for criminal defendants.

Another example of how Massachusetts's understanding of confrontation is ahead of the Supreme Court is that, following *Crawford*, the Supreme Court set forth a rule that the SJC had expounded almost a year before. Like the SJC before it, the Supreme Court held that statements a witness makes in response to police questioning serving the primary purpose of dealing with a continuous emergency situation are non-testimonial. On the other hand, those made in response to investigatory or fact-finding questioning are testimonial and subject to confrontation.

Although the Supreme Court has not specifically relied on Massachusetts cases in its expansion of a defendant's confrontation right, it has used the same reasoning as Massachusetts, suggesting that the Supreme Court will continue to interpret confrontation similarly to Massachusetts. In doing so, the Supreme Court will continue to advance the belief it set forth in *Crawford*—the same belief that Massachusetts has advanced since the state's inception: the constitutionally guaranteed right to confrontation demands that courts furnish criminal defendants with a broad right to confront adverse witnesses.

*Elizabeth O. Brown*