Study K-201 August 31, 2004

Memorandum 2004-45

Conforming the Evidence Code to the Federal Rules of Evidence: Hearsay Issues

The Commission has been working through the analysis of the federal and California hearsay rules prepared by its consultant, Prof. Miguel Méndez of Stanford Law School. This memorandum introduces and analyzes the following exceptions to the hearsay rule:

(1) Former testimony.
(2) Use in a dependency proceeding of testimony given at a preliminary examination by a minor child who was the alleged victim.
(3) Use in a criminal case of a statement that was admitted as a prior inconsistent statement at the preliminary hearing or at a previous trial in the same case.
(4) Statement by an unavailable declarant whose unavailability was caused by a party opposing admission of the statement.
(5) Statement by a dead declarant that is relevant to a gang-related prosecution.
(6) Dying declaration.

The Commission is in the process of developing a tentative recommendation on hearsay issues.

The analysis prepared by Prof. Méndez (hereafter, "Méndez Hearsay Analysis") was attached to Memorandum 2002-41 and is available on the Commission's website at <www.clrc.ca.gov>. The analysis has also been published. See Méndez, *California Evidence Code — Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351 (2003).

FORMER TESTIMONY

Suppose a store clerk is injured when the store catches on fire. The owner of the store is subsequently prosecuted for arson and the clerk testifies against him. Later, an insurance company sues the owner for submitting a fraudulent insurance claim in

connection with the fire. By then, the store clerk has moved out of the country and is unavailable to testify. May the store clerk's testimony in the arson trial be introduced as substantive evidence in the civil case?

Under both the Evidence Code and the Federal Rules of Evidence, introduction of former testimony does not violate the hearsay rule if the witness is unavailable and certain other requirements are met. This exception to the hearsay rule is in part justified as a matter of necessity due to the unavailability of the witness. The exception is also justified on the ground that former testimony satisfies some of the ideal conditions for presenting evidence: The prior statement was given under oath and subject to cross-examination. Of the ideal conditions for presenting evidence, the only one missing is the presence of the trier of fact and the opponent at the earlier hearing — i.e., the opportunity to observe the witness' demeanor. See Fed. R. Evid. 804(b)(1) advisory committee's note. This is true of all hearsay exceptions, so "it may be argued that former testimony is the strongest hearsay ...." *Id*. "However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination." *Id*. Hence, the limitation that former testimony is admissible as substantive evidence only when the witness is unavailable.

As with many of the hearsay exceptions, the California version is more detailed than the corresponding federal provision. We describe the California version first, then the federal one, and then analyze key differences between the provisions.

California Law

As enacted on recommendation of the Law Revision Commission in 1965, the Evidence Code included three hearsay-related provisions on the use of former testimony (Evid. Code §§ 1290-1292). The Legislature later added a provision on use in a dependency proceeding of testimony given at a preliminary examination by a minor child who was the alleged victim (Evid. Code § 1293) and a provision on use in a criminal case of a statement that was admitted as a prior inconsistent statement at the preliminary hearing or at a previous trial in the same case (Evid. Code § 1294). We discuss these context-specific provisions later in this memorandum; the focus here is on the general provisions governing use of former testimony.

Evidence Code Section 1290 defines the term "former testimony" to include testimony given under oath in certain types of actions and proceedings:

> 1290. As used in this article, "former testimony" means testimony given under oath in:
>
> (a) Another action or in a former hearing or trial of the same action;
>
> (b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States;
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> (c) A deposition taken in compliance with law in another action; or
>
> (d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.

Evidence Code Section 1291 governs the use of former testimony that is offered against a party who previously proffered the evidence, or the successor in interest of such a party. The provision also governs the use of former testimony that is offered against a party who had the right, opportunity, and similar motive to cross-examine the declarant in the prior case:

> 1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
>
> (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
>
> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.
>
> (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:
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> (1) Objections to the form of the question which were not made at the time the former testimony was given.
>
> (2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

In determining whether a party had a similar motive to cross-examine the declarant in the prior case, a court should examine practical considerations and not merely the similarity of the party's position in the two cases. For example,

> testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery

> purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive.

Section 1291 Comment.

Evidence Code Section 1292 creates a hearsay exception for former testimony that is offered in a civil case against a party who was not a party to the prior case:

> 1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:
> (1) The declarant is unavailable as a witness;
> (2) The former testimony is offered in a civil action; and
> (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.
> (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections based on competency or privilege which did not exist at the time the former testimony was given.

This exception applies only if a party to the prior case had "the right and opportunity to *cross-examine* the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing." (Emphasis added.) This party to the prior case must have been adverse to the witness, not on the same side as the witness. *Rufo v. Simpson*, 86 Cal. App. 4th at 604-07; 103 Cal. Rptr. 2d 492 (2001).

Federal Law

The Federal Rules of Evidence contain the following provision on the use of former testimony:

> 804. ... (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> (1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another

> proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
>
> ....

Significant distinctions between this provision and the corresponding California provisions are discussed and analyzed below.

Testimony in an Administrative Adjudication or Arbitration Proceeding

Section 1290 defines "former testimony" to include testimony given in an administrative adjudication or arbitration proceeding. In contrast, Rule 804(b)(1) does not specifically address testimony given in an administrative adjudication or arbitration proceeding.

In his 1976 analysis for the Commission, Professor Jack Friedenthal observed that there "seems little reason not to include all former testimony, formally given, regardless of the nature of the proceedings, provided other safeguards are met." Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 62-63 (hereafter, "Friedenthal Analysis"). He recommended that California keep its approach of including testimony given in an administrative adjudication or arbitration proceeding. The staff agrees that **there is no need to change Section 1290 in this regard.**

Deposition Testimony in the Same Action

As defined in Section 1290, "former testimony" does not include deposition testimony in the same action. The Comment to Section 1290 explains that the Code of Civil Procedure and Penal Code control the admissibility of such evidence:

> [D]epositions taken in *another* action are considered former testimony under Section 1290, and their admissibility is determined by Sections 1291 and 1292. The use of a deposition taken in the same action, however, is not covered by this article. Code of Civil Procedure Sections 2016-2036 deal comprehensively with the conditions and circumstances under which a deposition taken in a civil action may be used at the trial of the action in which the deposition was taken, and Penal Code Sections 1345 and 1362 prescribe the conditions for admitting the deposition of a witness that has been taken in the same criminal action. These sections will continue to govern the use of depositions in the action in which they are taken.

(Emphasis in original.)

Prof. Méndez points out that the distinction "is important because the waiver provisions of the Code of Civil Procedure are broader than those found in the Evidence Code." Méndez Hearsay Analysis at 26. In particular, "[i]n the absence of stipulations, the Code of Civil Procedure requires parties opposing the deposition at trial to show that they objected to the question or answer on the same grounds whenever the defect might have been cured if promptly presented at the deposition." *Id*. at 26-27, *citing* Code Civ. Proc. § 2025(m).

The federal hearsay exception for former testimony does not differentiate between a deposition taken in the same action in which it is offered and a deposition taken in another action. Prof. Méndez explains that two uncertainties stem from this approach.

First, the grounds for determining unavailability under Federal Rule of Evidence 804 are not identical to the grounds for determining unavailability under the Federal Rules of Civil Procedure. "Satisfaction of a ground listed only in the Federal Rules of Civil Procedure raises questions whether such a ground satisfies the unavailability requirements of the Federal Rule of Evidence." Méndez Hearsay Analysis at 27.

Second, under Federal Rule of Civil Procedure 32 (as in California), a party is precluded from raising for the first time at trial an objection that could have been cured if it had been promptly presented at the deposition. As Prof. Méndez explains in detail, it is unclear whether that requirement applies when a party seeks to introduce deposition testimony that was taken in another action, or "whether its use should be governed exclusively by the federal former testimony exception to the hearsay rule." Méndez Hearsay Analysis at 27 & n.209.

The Evidence Code "avoids these uncertainties by exempting from the definition of former testimony those depositions offered in the action in which they are taken." *Id*. at 27. Prof. Méndez therefore concludes that the "Code approach is sound and should be retained." *Id*. The staff agrees that **the definition of "former testimony" in Section 1290 should not be changed; it should continue to exclude deposition testimony taken in the same action.**

Former Testimony Offered Against a Party or the Successor in Interest of a Party Who Previously Proffered the Evidence

Sometimes a litigant seeks to introduce former testimony as substantive evidence against a party who previously proffered the testimony. The Federal Rules of Evidence set a stiffer standard for admission of such testimony than the

Evidence Code. We first discuss the possibility of adopting the federal approach, then consider the potential impact of the Truth-in-Evidence provision on such a reform.

Similar Interest and Motive to Examine the Declarant

Section 1291(a)(1) creates a hearsay exception for former testimony that is offered against a party who previously proffered the evidence, or the successor in interest of such a party. As Prof. Friedenthal pointed out in his analysis, in these circumstances the Evidence Code requires "[n]o other safeguard." Friedenthal Analysis at 63; *see also People v. Salas*, 58 Cal. App. 3d 460, 466, 468, 129 Cal. Rptr. 871 (1976).

In contrast, Section 1292(a)(2) creates a hearsay exception for former testimony that is offered against a party who had the right and opportunity to cross-examine the declarant in the prior case. This exception applies only if the declarant's interest and motive in the prior case was similar to that in which the former testimony is offered.

The corresponding federal rule does not differentiate between former testimony that is offered against a party who previously proffered the evidence and former testimony that is offered against a party who had the right and opportunity to cross-examine the declarant in the prior case. In either situation, the proponent must show that the party against whom the former testimony is offered (or, in a civil case, a predecessor in interest) had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For example, in *United States v. Salerno*, 505 U.S. 317 (1992), the defendant proffered exculpatory grand jury testimony of witnesses who invoked the Fifth Amendment at trial. The Court held that the grand jury testimony was inadmissible absent a showing that the prosecution's motive at the grand jury proceeding was similar to its motive at trial. *Id*. at 321.

According to Prof. Friedenthal, the federal rule "is preferable." Friedenthal Analysis at 63. He explains that a "person who offers testimony in a prior case may have had entirely different motives than when faced with that evidence at a later time." *Id*. In his opinion, "use of such evidence against a successor in interest who was not present when the testimony was taken seems particularly inappropriate without such a safeguard." *Id*. He therefore recommends that Section 1291(a)(1) be amended to apply only when the person against whom the

former testimony is offered, or that person's predecessor in interest, had a similar motive and interest in the prior case as in the present case. *Id*.

The staff finds this policy argument persuasive. If the Commission agrees, **the approach be implemented by amending Section 1291 along the following lines:**

> 1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and either of the following conditions is satisfied:
>
> (1) The former testimony is offered against a person or the successor in interest of a person who offered it in evidence in ~~his~~ the person's own behalf on the former occasion, ~~or against the successor in interest of such person; or~~ with an interest and motive similar to that which the person or the successor in interest has at the hearing.
>
> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which ~~he~~ the party has at the hearing.
>
> (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:
>
> (1) Objections to the form of the question which were not made at the time the former testimony was given.
>
> (2) Objections based on competency or privilege which did not exist at the time the former testimony was given.
>
> **Comment.** Subdivision (a)(1) of Section 1291 is amended to require that when former testimony is offered against a person (or the successor in interest of a person) who previously proffered the evidence, the former testimony is admissible only if the person had a similar interest and motive to examine the declarant on the former occasion as in the present case. This conforms to the federal approach on showing similarity of motive and interest when former testimony is offered against a party who previously proffered the evidence. See Fed. R. Evid. 804(b)(1); United States v. Salerno, 505 U.S. 317, 321 (1992).
>
> Section 1291 is further amended to use gender-neutral language and make other nonsubstantive, stylistic revisions.

Prof. Méndez concurs in this approach. He agrees that "it would be a good idea, over objection, to force the offering party to convince the judge that in offering the evidence at the first hearing, the opponent had a similar motive and

interest to the ones he would have at the current hearing were the hearsay declarant available." Memorandum from Miguel A. Méndez to Barbara Gaal (Aug. 13, 2004), p. 1 (hereafter, "Memorandum from Méndez to Gaal").

Impact of the Truth-in-Evidence Provision

As always in this study, it is important to consider whether the proposed reform would be affected by the Truth-in-Evidence provision of the California Constitution, which provides:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

Cal. Const. art. I, § 28(d). The thrust of the Truth-in-Evidence provision is on ensuring, with specified limitations, that relevant evidence is presented to the factfinder in a criminal case.

The above amendment of Section 1291(a)(1) clearly would narrow the admissibility of former testimony offered against the prosecution in a criminal case. It might also be viewed as narrowing the admissibility of former testimony offered against the defendant in a criminal case. That is less clear, however, because one could argue that the Confrontation Clause (U.S. Const. amend. VI; Cal. Const. art. I, § 15) compels the restriction that the defendant had a similar interest and motive to examine the declarant on the former occasion as in the present case.

Because the proposed amendment would narrow the admissibility of former testimony offered against the prosecution in a criminal case, it might trigger the supermajority vote requirement of the Truth-in-Evidence provision. It would be ironic, however, for this aspect of the Victims' Bill of Rights to impede a reform favoring the prosecution. The reform may also be exempt from the supermajority vote requirement, because the Truth-in-Evidence provision expressly states that it does not "affect any existing statutory rule of evidence relating to ... hearsay." We have previously discussed the meaning of that language to some extent. See Memorandum 2003-7, pp. 2-4; Memorandum 2003-26, pp. 34-36 (available at

www.clrc.ca.gov); Memorandum 2004-18, p. 24 (available at www.clrc.ca.gov). **Further research on this point is needed.** If time permits, we will do some work on it before the Commission meeting.

Testimony of a Defendant In Support of a Suppression Motion or at a Probation Revocation Hearing

In California, there are two long-recognized but uncodified exceptions to the introduction of former testimony against a person who previously proffered the evidence. First, "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Simmons v. United States*, 390 U.S. 377, 394 (1968). Otherwise, the defendant would be forced either to forego presenting key evidence in support of the Fourth Amendment claim (e.g., evidence establishing that the defendant had standing to assert the claim), or to waive the Fifth Amendment privilege against self-incrimination. In that circumstance, the United States Supreme Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id*.

Second, a defendant's testimony at a probation revocation hearing may not be introduced as substantive evidence against the defendant at a subsequent criminal trial based on the same event:

> [U]pon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination at the criminal proceeding are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing.

People v. Coleman, 13 Cal. 3d 867, 889, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975). This restriction prevents the probationer from being "forced to choose between the privilege against self-incrimination and the opportunity to be heard at the revocation hearing." *People v. Connell*, 152 Cal. App. 3d 548, 554, 199 Cal. Rptr. 542 (1984). It is not based on constitutional grounds but is a judicial rule of

evidence, established "to insure that the administration of justice in California operates as fairly as is feasible ...." *Coleman*, 13 Cal. 3d at 888, 889. The California Supreme Court has repeatedly said that this rule continues to apply despite the enactment of the Truth-in-Evidence provision of the Victims' Bill of Rights. *Lucido v. Superior Court*, 51 Cal. 3d 335, 351, 795 P.2d 1223, 272 Cal. Rptr. 767 (1990); *People v. Weaver*, 39 Cal. 3d 654, 659-60, 703 P.2d 1139, 217 Cal. Rptr. 245 (1985).

Perhaps it would be helpful to codify these exceptions. Prof. Méndez has mixed feelings about that possibility:

> First, one would expect prosecutors, criminal defense attorneys, and judges who preside over criminal trials to be aware of these rules. Second, amending statutes to reflect emerging judicial limitations raises the problem of where to draw the line. Clearly, it would be unwise to revamp statutes to reflect all judicial limitations. On the other hand, there is value in helping avoid error by amending statutes to reflect important judicial limitations.

Memorandum from Méndez to Gaal, p. 1. He suggests that if Section 1291 is amended to codify *Simmons* and *Coleman*, the Comment should explain that evidence otherwise barred as admissions under *Simmons* and *Coleman* is still admissible to impeach the defendant if the defendant takes the stand at trial and testifies inconsistently with the defendant's earlier statements. *Id*.

The staff is not sure that codifying *Simmons* and *Coleman* is good idea, but believes that **an amendment along the following lines is at least worth floating for comment:**

> 1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
>
> (1) The former testimony is offered against a person who offered it in evidence in ~~his~~ the person's own behalf on the former occasion or against the successor in interest of ~~such~~ the person; or
>
> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which ~~he~~ the party has at the hearing.
>
> (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:
>
> (1) Objections to the form of the question which were not made at the time the former testimony was given.

(2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

(c) Paragraph (1) of subdivision (a) does not apply to either of the following:

(1) Testimony of a criminal defendant in support of a motion to suppress evidence, if offered against the same defendant at trial.

(2) Testimony of a probationer at a probation revocation hearing, if offered at a subsequent criminal trial against the probationer based on the same event.

Comment. Subdivision (c)(1) is added to Section 1291 to codify *Simmons v. United States*, 390 U.S. 377, 394 (1968). Subdivision (c)(2) is added to codify *People v. Coleman*, 13 Cal. 3d 867, 889, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975), which was reconfirmed in *Lucido v. Superior Court*, 51 Cal. 3d 335, 351, 795 P.2d 1223, 272 Cal. Rptr. 767 (1990), and *People v. Weaver*, 39 Cal. 3d 654, 659-60, 703 P.2d 1139, 217 Cal. Rptr. 245 (1985). Evidence that is inadmissible as substantive evidence under subdivision (c) may nonetheless be admissible for purposes of impeachment if a criminal defendant testifies at trial and contradicts the defendant's previous testimony. See *Coleman*, 13 Cal. 3d at 889, 891, 892-94; see also Sections 770 (extrinsic evidence of prior inconsistent statement), 780(h) (trier of fact may consider prior inconsistent statement in determining credibility of witness), 785 (any party may attack credibility of witness).

Section 1291 is further amended to use gender-neutral language and make another nonsubstantive, stylistic revision.

This amendment would not promote uniformity with the corresponding federal rule, but might serve to alert some attorneys and judges to the limitations of *Simmons* and *Coleman*.

If the Commission tentatively favors both this reform and the reform proposed on pages 8-9, it would be a simple matter to combine the two reforms into a single amendment of Section 1291. Because the reform would merely codify well-established case law, it would not narrow the admissibility of relevant evidence in a criminal case and thus would not trigger the Truth-in-Evidence provision.

Former Testimony Offered Against a Party Who Was Not a Party to the Prior Case But Whose Interests Were Protected Through Another Party's Opportunity for Cross-Examination in the Prior Case

Section 1292 pertains to former testimony that is offered against a party who was not a party to the prior case. It creates a hearsay exception that applies only if (1) the declarant is unavailable, (2) the former testimony is offered in a civil

case, and (3) "the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing."

Section 1292 is justified on the ground that "[a]lthough the party against whom the former testimony is offered did not himself have an opportunity to cross-examine the witness on the former occasion, it can be generally assumed that most prior cross-examination is adequate if the same stakes are involved." Section 1292 Comment. If, however, "the same stakes are not involved, the difference in interest or motivation would justify exclusion." *Id*.

The corresponding federal rule is more restrictive than Section 1292. Under the federal rule, if former testimony is offered as substantive evidence against a party who did not participate in the prior case, the testimony is admissible only if a *predecessor in interest* of that party participated in the prior case, and the three requirements imposed in California are also satisfied. Rule 804(b)(1).

Prof. Méndez comments that "[t]he meaning of the term 'predecessor in interest' is uncertain." Méndez Hearsay Analysis at 26. He recommends sticking with the California approach on this point. *Id*.

Prof. Friedenthal argued more emphatically for the same conclusion in his 1976 analysis:

> As the leading writers on the subject have noted, see McCormick, Evidence § 261 (2d ed. 1972), the federal-type limitations on former testimony are absurd in light of far more liberal rules permitting exceptions for other types of hearsay with far fewer safeguards. The crucial factor should not be whether a person was "in privity" with a party to a former proceeding, but whether the person against whom the testimony is now sought to be used is protected by the fact that at the time the testimony was given there was adequate opportunity and proper motive and interest for full examination of the declarant.
>
> Since § 1292 contains the proper safeguards, it would be improper to alter § 1292 to exclude testimony even against persons who were neither parties nor successors to parties to the initial proceedings.

Friedenthal Analysis at 63-64. The staff finds these comments persuasive and **would not switch to the predecessor in interest approach used in the federal rule.**

Application to a Criminal Case

In reviewing the hearsay exceptions for former testimony, it is important to consider the limitations of the Confrontation Clause. We first discuss those limitations, concluding that Section 1291(a)(1) should be amended to apply to a successor in interest only in a civil case, not in a criminal case. We then consider the potential impact of the Truth-in-Evidence provision on such a reform.

Limitations of the Confrontation Clause

Section 1291, the California hearsay exception for former testimony offered against a person who was a party to the prior case, applies in both civil and criminal cases. Likewise, the corresponding federal exception — Rule 804(b)(1) — can be invoked in either a civil or a criminal case when former testimony is offered against a person who was a party to the prior case.

Invoking one of these exceptions against a criminal defendant in that circumstance does not violate the defendant's constitutional right to confront the prosecution's witnesses, even if the former testimony constitutes a "testimonial statement" under the new test established in *Crawford v. Washington*, __ U.S. __, 124 S.Ct. 1354 (2004) (copy attached). *Crawford* simply holds that if the prosecution offers a testimonial statement as substantive evidence in a criminal case and the declarant does not testify at trial, the statement is admissible only if the declarant was "unavailable to testify, and the defendant had ... a prior opportunity for cross-examination." *Id*. at 1365, attached slip op. at 17-18. Those requirements — unavailability of the declarant and a prior opportunity for cross-examination — must also be satisfied when former testimony is admitted pursuant to Section 1291 or Rule 804(b)(1) against a person who was a party to the prior case. "In the absence of exceptional circumstances, these statutory limitations alone should satisfy *Crawford*'s requirements." M. Méndez, Evidence: The California Code and the Federal Rules — A Problem Approach § 11.07, at 363 (3d ed. 2004) (hereafter, "Méndez Casebook").

It would be a different situation if former testimony was admitted against a criminal defendant who was not a party to the prior case, because then there would not have been a prior opportunity for cross-examination as mandated by *Crawford* with respect to a testimonial statement. But Section 1292, the California hearsay exception for former testimony offered against a person who was not a party to the prior case, applies only in a civil case. Likewise, such testimony is admissible pursuant to the corresponding federal exception — Rule 804(b)(1) —

only if it is offered in a civil case. The only potentially problematic language is the portion of Section 1291 recognizing a hearsay exception when former testimony is offered against the successor in interest of a party who proffered the testimony in the prior case. That provision is not limited to a civil case.

According to Prof. Friedenthal's 1976 analysis, that aspect of Section 1291 is inconsistent with the limitation of Section 1292 to civil cases:

> For this purpose, no logical distinction can be made between persons who were not present at the time the testimony was taken. Being a "successor-in-interest" provides no special security from unfairness. The matter is particularly grievous in California because, as already noted, § 1291(a)(1) does not have the usually required safeguards of adequate examination.

Friedenthal Analysis at 64. Prof. Friedenthal recommended that Sections 1291(a)(1) and 1292(a)(2) be harmonized. *Id*.

He regarded it as a hard question whether former testimony should or should not be admissible in a criminal case against a person who was not a party to the prior case. *Id*. In light of the recent *Crawford* decision, however, the proper course seems clear: If Sections 1291(a)(1) and 1292(a)(2) are to be harmonized as Prof. Friedenthal suggested, that should be done by revising Section 1291(a)(1) such that it applies to a successor in interest only in a civil case. Such a revision would

> preserv[e] the right of a person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty is at stake — as it is in a criminal action — the defendant should not be compelled to rely on the fact that another person has had an opportunity to cross-examine the witness.

Section 1292 Comment.

If the Commission decides to pursue this approach, it could be implemented by **amending Section 1291 along the following lines:**

> 1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
>
> (1) The former testimony is offered against a person who offered it in evidence in ~~his~~ the person's own behalf on the former occasion or, in a civil case, against the successor in interest of ~~such person~~ the person who offered it in evidence on the former occasion; or
>
> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the

declarant with an interest and motive similar to that which ~~he~~ the party has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:

(1) Objections to the form of the question which were not made at the time the former testimony was given.

(2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

Comment. Subdivision (a)(1) of Section 1291 is amended to restrict its application when former testimony is offered against the successor in interest of a party who previously proffered the testimony. Under the provision as amended, in such circumstances the provision creates a hearsay exception only if the former testimony is offered in a civil case, not in a criminal case. This conforms to the treatment of a successor in interest in the corresponding federal hearsay exception, which does not encompass former testimony offered in a criminal case as substantive evidence against a successor in interest or any other person who was not a party to the prior case. See Fed. R. Evid. 804(b)(1). For further guidance on the admissibility of former testimony offered in a civil case as substantive evidence against a person who was not a party to the prior case, see Section 1292.

Section 1291 is further amended to use gender-neutral language.

If the Commission tentatively favors both this reform and either or both of the other reforms of Section 1291 suggested in this memorandum (see pp. 8-9, 11-12), the staff will draft an amendment combining those reforms and present it to the Commission for review.

Impact of the Truth-in-Evidence Provision

If the Commission is inclined to go forward with the preceding amendment pertaining to a successor in interest, it should consider the implications of the Truth-in-Evidence provision. In undertaking that analysis, it is necessary to discuss two different situations.

First, suppose former testimony is offered against a criminal defendant as successor in interest of a party to the prior case. For example, the prosecution in a robbery case might offer former testimony of the defendant's father establishing ownership of a weapon that the defendant later inherited. If Section 1291(a)(1) is amended as proposed, it would not apply in that circumstance. But that result would not narrow the admissibility of relevant evidence, because *Crawford*

already appears to preclude admission of such evidence for the truth of the matter asserted.

Second, suppose former testimony is offered against the prosecution as successor in interest of a party to the prior case. The proposed amendment would make Section 1291(a)(1) inapplicable in that circumstance, thus narrowing the admissibility of relevant evidence in a criminal case. For example, consider the following hypothetical:

- Goldstein owns a large parcel of land with an old, vacant warehouse on it.
- Goldstein sues his neighbor Jones for trespassing on the property and spray-painting anti-Semitic slogans inside the warehouse. At trial, Goldstein testifies that he saw Jones do the spray-painting. The case is settled before the trial is completed.
- Goldstein dies without heirs and his property escheats to the State.
- Soon afterwards, someone spray-paints anti-Semitic slogans on the local synagogue and several other buildings in the vicinity of the warehouse. In investigating the incident, the sheriff also finds the anti-Semitic slogans inside the warehouse.
- The sheriff arrests Rodriguez, who has a reputation as the local troublemaker. The State prosecutes Rodriguez for vandalizing the warehouse as well as the synagogue and other defaced buildings.
- At trial, Rodriguez offers Goldstein's former testimony to show that Jones vandalized the warehouse, not Rodriguez, and suggest that Jones may have been responsible for the other acts of vandalism as well.

Under existing Section 1291(a)(1), Goldstein's former testimony would be admissible as substantive evidence. Under the proposed amendment making the successor in interest provision inapplicable in a criminal case, Goldstein's former testimony would not be admissible.

Because it would restrict the admissibility of relevant evidence in a criminal case, the proposed amendment raises the same Truth-in-Evidence issue discussed on page 10: What is the meaning of the sentence in the Truth-in-Evidence provision stating that the provision does not affect any "existing statutory rule of evidence relating to ... hearsay"? The reoccurrence of this issue underscores the need for further research on it.

Prof. Méndez questions whether it is a good idea to make former testimony inadmissible against the prosecution as successor in interest to a party who previously proffered the testimony:

> Goldstein cannot testify at the criminal trial because he is dead. The next best evidence is the testimony he gave at the earlier proceeding. Why should Rodriguez be precluded from offering this evidence? Because life or liberty are at stake in a criminal trial, there is a justification for allowing the use of the evidence where the successor in interest is the state.

Email from M. Méndez to B. Gaal (Aug. 26, 2004). Prof. Méndez raises an important issue.

In deciding how to resolve it, the Commission needs to **weigh the policy interest identified by Prof. Méndez** — the interest in allowing a criminal defendant to present key evidence relevant to the determination of guilt or innocence — **against several countervailing considerations.** These include:

(1) The danger of a miscarriage of justice because the State's interests were not adequately protected in the earlier trial in which it had no opportunity to participate. This danger would be mitigated to some extent if Section 1291(a)(1) was amended to require similarity of motive and interest to examine the declarant. See "Former Testimony Offered Against a Party or the Successor in Interest of a Party Who Previously Proffered the Evidence" *supra*.

(2) The interest in uniformity with the Federal Rules of Evidence, which do not allow any former testimony to be used in a criminal case against a party who did not participate in the prior case.

(3) The potential political difficulties inherent in proposing a reform that disadvantages the prosecution in a criminal case without imposing a comparable burden on the defense. Such an effort was unsuccessful in this area when the Evidence Code was first drafted by the Commission in the 1960's. In its tentative recommendation, the Commission proposed that the provision that became Section 1292 apply not just when former testimony was offered in a civil case, but also when former testimony was offered "against the people in a criminal action or proceeding." Tentative Recommendation Relating to *The Uniform Rules of Evidence: Article VIII. Hearsay Evidence*, 4 Cal. L. Revision Comm'n Reports 301, 315 (1962) (proposed Rule 63(3.1)). As enacted, the provision applies only when former testimony meeting the statutory requirements is offered in a civil case. This revision appears to have been made in response to objections raised by the Los Angeles County District Attorney to the one-sided nature of the proposed provision as applied in a criminal case. See Memorandum 64-13, p. 13.

If the Commission agrees with Prof. Méndez that (1) former testimony should remain admissible against the prosecution as successor in interest to a party who

previously proffered the testimony, but (2) the statutes should be revised to reflect that the Confrontation Clause precludes use of former testimony against a criminal defendant as successor in interest to a party who previously proffered the testimony, the staff will draft an appropriate amendment and present it to the Commission for review.

Objections

Rule 804(b)(1) is silent regarding what objections may be raised to a question or answer in former testimony that is admitted pursuant to that provision. In contrast, Sections 1291 and 1292 contain express guidance regarding permissible objections.

As a general rule, the admissibility of former testimony under Section 1291 or 1292 "is subject to the same limitations and objections as though the declarant were testifying at the hearing." Evid. Code §§ 1291(b), 1292(b). However, former testimony offered under Section 1291 or 1292 is not subject to objections "based on competency or privilege which did not exist at the time the former testimony was given." Evid. Code §§ 1291(b)(1), 1292(b). The provisions thus make clear that "objections based on the competence of the declarant or on privilege are to be determined by reference to the time the former testimony was given." Section 1291 Comment. **This guidance regarding objections based on competence or privilege is useful and should be retained.**

Section 1291 further provides that former testimony admitted pursuant to that provision is not subject to "[o]bjections to the form of the question which were not made at the time the former testimony was given." As Prof. Méndez explains, "[t]he justification is that the proponent should not lose the answer on account of the defect in the question, since the opponent had an opportunity to object on that ground at the former hearing." Méndez Hearsay Analysis at 26. "Moreover, had the opponent objected at the former hearing, the proponent might have easily cured the defect by rephrasing the question." *Id*. Further, if former testimony is offered under Section 1291(a)(1) instead of 1291(a)(2), "the party against whom the former testimony is now offered phrased the question himself," and thus should not be permitted to raise a technical objection to its form. Section 1291 Comment.

Section 1292 does not contain a similar limitation. That is appropriate as a general rule, because when former testimony is offered against a person who was

not party to the prior case, that person has not had a prior opportunity for input on the form of the question.

Perhaps, however, a successor in interest should be bound by a predecessor's failure to object to the form of a question. That could be achieved by **amending Section 1292 along the following lines:**

> 1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:
>
> (1) The declarant is unavailable as a witness;
>
> (2) The former testimony is offered in a civil action; and
>
> (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.
>
> (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to ~~objections~~ either of the following:
>
> (1) Objections to the form of the question which were not made at the time the former testimony was given, if the former testimony is offered against a successor in interest of a party to the action or proceeding in which the testimony was given.
>
> (2) Objections based on competency or privilege which did not exist at the time the former testimony was given.
>
> **Comment.** Section 1292 is amended to preclude a successor in interest from objecting to the form of a question on a basis that was not previously raised. When former testimony is offered against a successor in interest of a party to the prior case, it is appropriate for the successor in interest to be bound by the predecessor's failure to object on a technical basis.

This amendment would not promote uniformity with the corresponding federal rule, but it might further the search for truth by allowing use of relevant evidence unobtainable by other means, which previously would have been excluded due to a technical imperfection in the form of the question that could have been but was not pointed out by a predecessor in interest of the party against whom the evidence is offered. Because the reform would expand the admissibility of evidence, it would not trigger any concerns relating to the Truth-in-Evidence provision.

Prof. Méndez questions the wisdom of such a reform. Instead of amending Section 1292 to preclude a successor in interest from objecting to the form of a question that a predecessor failed to object to on cross-examination, he suggests amending Section 1291 to allow a successor in interest to object to the form of a question that a predecessor asked on direct examination:

> Under section 1291(a)(1), when former testimony is offered against the party who elicited the testimony at the earlier hearing, then under section (b)(1) that party may not object to the form of the question....
>
> [T]he same limitation is imposed on the successor in interest of the party who elicited the former testimony. Why that should be so is not spelled out in the Comment. The successor was not a party to the former proceeding and, hence, did not have an opportunity to avoid the defect in the question....
>
> There is probably an explanation for treating the successor in the same way as the predecessor, but it is not readily apparent to me. Indeed, in the absence of a compelling reason, I would be tempted to give the successor under Section 1291(a)91) the right to object to the form of the question.

Email from M. Méndez to B. Gaal (Aug. 26, 2004).

Prof. Méndez is correct that **Sections 1291 and 1292 should be consistent with regard to whether a successor in interest is bound by a predecessor's failure to object.** We suspect that the rationale for binding a successor to the predecessor's conduct, as in Section 1291, is twofold: (1) as a successor in interest, a party steps into the shoes of the predecessor and thus inherits both the benefits and the burdens of the predecessor's position, including a failure to object, and (2) if a successor was not bound by a predecessor's failure to object, a party might manipulate that rule to its advantage (e.g., a party might try to escape the consequences of a failure to object by transferring a cause of action to another person). We have not thoroughly researched this matter and would appreciate hearing further insights on it.

Organization of Sections 1291 and 1292

Prof. Méndez suggests reorganizing Sections 1291 and 1292. He writes:

> According to its title, section 1292 is concerned with the rights of a party who was not a party to the former proceeding. That, of course, would include the successor in interest contemplated by section 1291. But the legislature chose to place the successor in section 1291 despite the title of section 1292. If this was an error, it

> could be remedied by striking "or against the successor in interest of such person" in section 1291(a)(1) and amending section 1292(3) by adding "or the former testimony is offered against the successor in interest of the person who offered it in evidence on his or her behalf on the former occasion."

Email from M. Méndez to B. Gaal (Aug. 26, 2004).

The title of a section (technically known as the "leadline") is not enacted by the Legislature and is not officially part of the code. It is drafted by each publisher and varies from publication to publication, so it is not determinative of the proper content of a section.

However, Prof. Méndez may be correct that it would be more logical to reorganize Sections 1291 and 1292 such that all material relating to the use of former testimony against a person who was not a party to the prior proceeding was placed in Section 1292. We would **not decide that drafting issue now.** Rather, it seems better for the Commission to resolve the various policy issues about the use of former testimony, and then leave it to the staff to assess whether to reorganize Sections 1291 and 1292. If reorganization appears in order, the staff will present an appropriate draft for the Commission to review at a later meeting.

USE IN A DEPENDENCY PROCEEDING OF TESTIMONY GIVEN AT A PRELIMINARY EXAMINATION BY A MINOR CHILD WHO WAS THE ALLEGED VICTIM

Suppose a young child is molested by her father with her mother's knowledge and acquiescence. The State brings criminal charges against the father, and the child reluctantly and fearfully testifies against him at the preliminary hearing. Later, the Department of Child Services brings a proceeding to declare the victim a dependent child of the court pursuant to Welfare and Institutions Code Section 300. At the dependency hearing, must the child testify again, or can the child's testimony at the preliminary hearing be introduced instead?

If the child is available to testify, neither Section 1291 nor Section 1292 would apply. In 1989, however, the Legislature enacted Evidence Code Section 1293, a hearsay exception specifically for testimony given at a preliminary examination by a minor child who was the alleged victim of the criminal act. This exception applies only in a dependency proceeding. It can be invoked without having to show that the child who previously testified is unavailable to testify again.

But there are some safeguards. In particular, the exception applies only when "[t]he issues are such that a defendant in the preliminary examination in which

the former testimony was given had the right and opportunity to cross-examine the minor child with an interest and motive similar to that which the parent or guardian against whom the testimony is offered has at the proceeding to declare the minor a dependent child of the court." Evid. Code § 1293(a)(2). Further, the admissibility of the preliminary hearing testimony can be challenged on the ground that "new substantially different issues are present in the proceeding to declare the minor a dependent child than were present in the preliminary examination." Evid. Code § 1293(c). The admissibility of the preliminary hearing testimony is also "subject to the same limitations and objections as though the minor child were testifying at the proceeding to declare him or her a dependent child of the court." Evid. Code § 1293(b).

"The purpose of the exception is to spare the minor the necessity to testify twice to substantially similar matters, once at the preliminary hearing and a second time at the dependency hearing." Méndez Hearsay Analysis at 28. As district attorney Nancy O'Malley reportedly put it, requiring a child to testify against a parent who molested the child is like expecting the child to put aside being a kid and all of a sudden become the bravest adult. Opatmy, *A Disarming Decision*, S.F. Daily J., April 13, 2004, at 6. Section 1293 helps lessen that burden.

The Federal Rules of Evidence do not contain a similar exception, although such evidence might be admitted pursuant to the catchall exception of Rule 807. Prof. Méndez recommends that California retain Section 1293. Méndez Hearsay Analysis at 28.

The staff is likewise inclined to **leave Section 1293 alone.** The constitutionality of the provision is uncertain after *Crawford*, but the issue is likely to be contentious and probably should first be addressed by the courts. *See generally Crawford*, 124 S.Ct. at 1365, 1374, attached slip op. at 17-18, 33 (under Confrontation Clause, preliminary hearing testimony is admissible at trial only if declarant is unavailable to testify and defendant had prior opportunity for cross-examination); *Maryland v. Craig*, 497 U.S. 836 (1990) (in some circumstances, right of confrontation may be outweighed by interest in protecting child victim of sex crime from further trauma); *In re Elizabeth T.*, 9 Cal. App. 4th 636, 640, 12 Cal. Rptr. 2d 10 (1992) (right of confrontation extends by statute to juvenile dependency hearing); *In re Kerry O.*, 210 Cal. App. 3d 326, 334, 258 Cal. Rptr. 448 (1989) (dependency proceeding does not require all formalities of criminal trial).

USE IN A CRIMINAL CASE OF A STATEMENT THAT WAS ADMITTED AS A PRIOR INCONSISTENT STATEMENT AT THE PRELIMINARY HEARING OR AT A PREVIOUS TRIAL IN THE SAME CASE

Evidence Code Section 1294 was enacted in 1996 to overturn the result in *People v. Williams*, 16 Cal. 3d 663, 547 P.2d 1000, 128 Cal. Rptr. 888 (1976). The section deals with a narrow but not uncommon fact situation.

In *Williams*, a robbery suspect (Morris) gave a statement to a police detective (Smith) implicating the defendant (Williams) in the robbery. At the preliminary hearing, Morris testified but did not implicate defendant Williams in the robbery. Detective Smith then testified to Morris' prior inconsistent statement, which was admitted pursuant to Evidence Code Sections 770 and 1235.

At trial, Morris was unavailable to testify. His preliminary hearing testimony was admitted as former testimony under Section 1291. Detective Smith again testified to Morris' prior statement implicating defendant Williams in the robbery. The trial court admitted that testimony as a prior inconsistent statement pursuant to Sections 770 and 1235.

On appeal, however, the California Supreme Court held that "Smith's testimony regarding Morris' prior inconsistent statements was not admissible under section 1235 of the Evidence Code." *Williams*, 16 Cal. 3d at 667. The Court explained that the Law Revision Commission's Comments to Sections 1202 and 1235 "indicate that section 1235 applies at trial only to prior inconsistent statements of a *trial* witness." *Id*. at 668 (emphasis added). "Morris not having testified at trial — the hearing at which the admissibility of his prior inconsistent statements arose — those statements were not inconsistent with his testimony 'at the hearing.'" *Id*. at 669.

The situation that arose in *Williams* apparently is not rare. Rather, according to the Los Angeles District Attorney, it "comes up frequently in gang-related cases." Assem. Floor Analysis of AB 2483 (May 15, 1996), p. 3. Often,

> the reluctant witness who recants at the preliminary hearing is at the heart of the people's case. At trial, these witnesses hide, flee the jurisdiction, and are sometimes deceased. Thus, the people need to rely on the former testimony given at the preliminary hearing, as well as upon the prior inconsistent statements of the witness which were introduced at the previous proceedings.

Id.

Section 1294 was "designed to overcome the admissibility problems associated with out-of-court statements which are inconsistent with an unavailable witness's former testimony ...." *People v. Martinez*, 113 Cal. App. 4th 400, 409, 7 Cal. Rptr. 3d 49 (2003). The section provides:

> 1294. (a) The following evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter pursuant to Section 1235 is not made inadmissible by the hearsay rule if the witness is unavailable and former testimony of the witness is admitted pursuant to Section 1291:
>
> (1) A videotaped statement introduced at a preliminary hearing or prior proceeding concerning the same criminal matter.
>
> (2) A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter.
>
> (b) The party against whom the prior inconsistent statements are offered, at his or her option, may examine or cross-examine any person who testified at the preliminary hearing or prior proceeding as to the prior inconsistent statements of the witness.

The provision would, for example, "permit an officer to relate an informant's statement to the jury when the informant is unavailable to testify, and the informant denied making the statement at the preliminary hearing, provided that the defendant had an opportunity to cross-examine the informant at the preliminary hearing." Assem. Judic. Comm. Analysis of AB 2483 (May 8, 1996), p. 1. According to the author of the measure, a provision like this is especially important in gang-related cases, because "substantial pressure is applied to witnesses to disappear by the time of trial." Sen. Crim. Proc. Comm. Analysis of AB 2483 (July 9, 1996), p. 4.

The Federal Rules of Evidence do not contain a comparable provision. "Indeed, under the Rules a prior inconsistent statement needs to be made under oath in some kind of proceeding in order to be received for the truth." Méndez Hearsay Analysis at 29. The Commission previously considered and rejected the possibility of amending Section 1235 to make a prior inconsistent statement admissible as substantive evidence only if it was given under oath. See Memorandum 2003-7, pp. 12-19 (available at www.clrc.ca.gov); Minutes (March 2003), p. 12 (available at www.clrc.ca.gov).

Prof. Méndez says that Section 1294 "should be retained." Méndez Hearsay Analysis at 29. Because the provision was recently adopted by the Legislature in

response to a perceived problem, the staff is inclined to agree with that recommendation.

In the legislative process, however, the American Civil Liberties Union and California Attorneys for Criminal Justice opposed the enactment of Section 1294, contending that it would violate a defendant's constitutional right of confrontation. See, e.g., Assem. Floor Analysis of AB 2483 (May 15, 1996), p. 3. The opposition pointed out that

> the burden of proof is only probable cause at the preliminary hearing and thus the court, the defense attorney and the district attorney all have different motivation. The defense may not have the opportunity to fully cross-examine the witness testifying to the inconsistent statement or may not have all the character impeachment evidence etc. available at the preliminary hearing.

Sen. Crim. Proc. Comm. Analysis of AB 2483 (July 9, 1996), p. 7.

Several decades ago, the United States Supreme Court considered the admissibility of preliminary hearing testimony at trial in a California prosecution. It concluded that although a preliminary hearing is "ordinarily a less searching exploration into the merits of a case than a trial," the opportunity for cross-examination at a preliminary hearing generally satisfies the Confrontation Clause if the witness is unavailable at trial. *California v. Green*, 399 U.S. 149, 165-66 (1970).

Further, if a prior inconsistent statement is offered at a preliminary hearing, it cannot be admitted under Section 1235 without satisfying Section 770, which requires that the witness be given an opportunity to explain or deny the statement. Thus, in the *Williams* situation addressed by Section 1294, the prior inconsistent statement of a witness could not be used at a preliminary hearing unless the defense had an opportunity to examine the witness regarding the statement. It therefore appears likely that Section 1294 would withstand a Confrontation Clause challenge.

The new *Crawford* decision would not seem to affect that conclusion. Under *Crawford*, a testimonial statement is admissible as substantive evidence in a criminal case only if the declarant is unavailable and the defendant had a prior opportunity for cross-examination. 124 S.Ct. at 1365, attached slip op. at 17-18. As explained above, those requirements appear to be satisfied in the *Williams* situation addressed by Section 1294.

Thus, we would **not propose any change in Section 1294 at this time.** We would **continue to monitor developments in Confrontation Clause jurisprudence**, however, and would alert the Commission if new case law suggests that the provision is constitutionally vulnerable.

STATEMENT BY AN UNAVAILABLE DECLARANT WHOSE UNAVAILABILITY WAS CAUSED BY A PARTY OPPOSING ADMISSION OF THE STATEMENT

Suppose a person observes a neighbor molest a child. The person informs the Department of Child Services, triggering an investigation. The neighbor, a two-strike felon, is charged with child molestation but released on bail pending trial. Just before the trial, the witness mysteriously disappears. The police suspect that the neighbor murdered the witness. They cannot find the body but they do find a knife and blood-stained clothing belonging to the witness in the neighbor's car. May the witness' statement to the Department of Child Services be introduced as substantive evidence at the child molestation trial?

Both the Evidence Code and the Federal Rules of Evidence "recognize the need for a hearsay exception for damaging statements made by declarants who are prevented by a party from testifying." Méndez Hearsay Analysis at 29. The scope of those exceptions is quite different.

California Approach

Evidence Code Section 1350 is a detailed provision incorporating many safeguards, which was enacted in 1985. The Law Revision Commission was not involved in drafting the legislation, which was enacted to deal with the "murdered witness problem" — i.e., "serious charges are dismissed, lost or reduced every year because of the unavailability of prosecution witnesses who have been murdered or kidnapped by the persons against whom they would testify." *Dalton v. Superior Court*, 19 Cal. App. 4th 1506, 1511, 24 Cal. Rptr. 2d 248 (1993), *quoting* Assem. Floor Analysis of AB 2059 (1985-86).

Section 1350 provides:

> 1350. (a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:
>
> (1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of

preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.

(2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.

(3) The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.

(4) The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.

(5) The statement is relevant to the issues to be tried.

(6) The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged.

The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

(b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial.

(c) If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

(d) As used in this section, "serious felony" means any of the felonies listed in subdivision (c) of Section 1192.7 of the Penal Code or any violation of Section 11351, 11352, 11378, or 11379 of the Health and Safety Code.

(e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those

> hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.

Importantly, the provision applies only in a criminal proceeding charging a serious felony, and only when there is "clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution" of that party. There must also be clear and convincing evidence that the declarant's unavailability resulted from homicide or kidnapping. Further, a statement is admissible under this exception only if it was tape recorded by a law enforcement official, or it was prepared by and notarized in the presence of a law enforcement official. Other substantive protections also apply, as well as procedural protections regarding the manner of introducing the statement.

Federal Approach

The corresponding federal provision, just enacted in 1997, is broader in scope but far less detailed. Federal Rule of Evidence 804(b)(6) provides:

> 804. ... (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ....
>
> (6) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

The Uniform Rules of Evidence contain the same provision. See Unif. R. Evid. 804(b)(5).

The advisory committee's note to Rule 804(b)(6) explains that the provision was added "to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness." The provision thus "recognizes the need for a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'" Fed. R. Evid. 804(b)(6) advisory committee's note, *quoting United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

Prof. Méndez succinctly contrasts this provision with the corresponding California provision:

> The numerous California limitations evince an abundance of caution when abolishing the right of criminal defendants to object to hearsay even when they have been charged with bringing about the hearsay declarant's unavailability as a witness. In contrast, the federal exception can be applied against any party, including the prosecution, in both civil and criminal cases. Moreover, under the Rules the wrongdoing behind the declarant's unavailability does not have to amount to a criminal act.

Méndez Hearsay Analysis at 31 (footnotes omitted). A further distinction is that the California provision requires the wrongdoing to be shown by clear and convincing evidence, while the federal provision only requires a showing by a preponderance of the evidence. *Compare* Evid. Code § 1350(a)(1) *with* Fed. R. Evid. 804(b)(6) advisory committee's note.

Analysis and Recommendation

Profs. Eileen Scallen (Hastings College of the Law) and Glen Weissenberger (University of Cincinnati) regard the California provision as "far more sensible than the vague and wide-ranging federal provision." E. Scallen & G. Weissenberger, California Evidence: Courtroom Manual 1209 (1st ed. 2000). In support of that conclusion, they point to the "limitations and procedural safeguards that are lacking in the federal version." *Id*. at 1208.

The staff agrees with that assessment in the context of offering hearsay evidence against the accused in a criminal case. The premise of both Section 1350 and Rule 804(b)(6) is that the accused has forfeited the constitutional right of confrontation by wrongfully causing the declarant to be unavailable to testify against the accused. The United States Supreme Court has repeatedly recognized that the right of confrontation can be forfeited by misconduct. *See, e.g.*, *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Diaz v. United States*, 223 U.S. 442, 452 (1912); *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878). There is no reason to think that the Court's new Confrontation Clause decision in *Crawford* would affect that line of authority. Nonetheless, we would be reluctant to relax the careful safeguards incorporated into Section 1350, which obviously were designed to restrict the provision to a situation in which there is solid evidence of the accused's misconduct. We would **leave Section 1350 as is.**

The Commission should consider, however, whether it would make sense to **supplement Section 1350 with a provision similar to Rule 804(b)(6) that could**

be invoked in a civil case. For example, a provision along the following lines could be added to the Evidence Code:

> **Evid. Code § 1351 (added). Unavailability of declarant due to wrongdoing by party in civil case**
>
> SEC. ____. Section 1351 is added to the Evidence Code, to read:
>
> 1351. Evidence of a statement is not made inadmissible by the hearsay rule if both of the following conditions are satisfied:
>
> (a) The declarant is unavailable as a witness.
>
> (b) The statement is offered against a party in a civil action when that party has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.
>
> **Comment.** Section 1351 is added to the Evidence Code to help ensure that a party does not benefit from wrongfully causing the unavailability of an adverse witness. It is drawn from Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5). For a provision governing unavailability of a declarant due to wrongdoing by the defendant in a criminal proceeding charging a serious felony, see Section 1350.
>
> See also Section 120 ("civil action" defined).

We are not confident that the drafting of this proposed new provision is ideal, but it is drawn from the federal statute. Further safeguards or limitations may be appropriate. It would be a reasonable starting point, however, and we believe that the general concept of adding a provision applicable to a party in a civil case is at least worth exploring.

The Commission may also want to look into the possibility of adding a similar provision applicable to the prosecution in a criminal case. Such an effort might be controversial and would require particularly careful drafting .

We have not researched federal case law to see how Rule 804(b)(6) has functioned in practice since it was enacted in 1997. We could pursue this if the Commission thinks it would be worthwhile.

STATEMENT BY A DEAD DECLARANT THAT IS RELEVANT TO A GANG-RELATED PROSECUTION

Suppose a witness observes a member of a street gang (Gang A) shoot and kill a member of a rival gang (Gang B). The witness gives a sworn statement to the police, and murder charges are filed against the Gang A member identified by the witness. Just before the murder trial, the witness dies an unnatural death. The police suspect Gang A was responsible for the witness' death, but they cannot find any evidence to support their

suspicion. May the witness' sworn statement to the police be introduced against the Gang A member accused of murdering the Gang B victim?

In that situation, the prosecution could not invoke Section 1351, because it does not have "clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by" the Gang A defendant. Likewise, the prosecution could not invoke Section 1291, because the Gang A defendant had no opportunity to cross-examine the witness regarding the witness' statement to the police.

But the prosecution might be able to meet the requirements of Section 1231, an anti-gang provision that was enacted in 1997 at the urging of then-Governor Pete Wilson. Section 1231 creates a hearsay exception for verbatim evidence of a sworn statement that is relevant to a prosecution under the California Street Terrorism Enforcement and Prevention Act (Penal Code §§ 186.20-186.33), if the statement was made on personal knowledge, under circumstances indicating that it is trustworthy and believable, by a declarant who died an unnatural death.

The section provides:

> 1231. Evidence of a prior statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is deceased and the proponent of introducing the statement establishes each of the following:
>
> (a) The statement relates to acts or events relevant to a criminal prosecution under provisions of the California Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1 of the Penal Code).
>
> (b) A verbatim transcript, copy, or record of the statement exists. A record may include a statement preserved by means of an audio or video recording or equivalent technology.
>
> (c) The statement relates to acts or events within the personal knowledge of the declarant.
>
> (d) The statement was made under oath or affirmation in an affidavit; or was made at a deposition, preliminary hearing, grand jury hearing, or other proceeding in compliance with law, and was made under penalty of perjury.
>
> (e) The declarant died from other than natural causes.
>
> (f) The statement was made under circumstances that would indicate its trustworthiness and render the declarant's statement particularly worthy of belief. For purposes of this subdivision, circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

> (1) Whether the statement was made in contemplation of a pending or anticipated criminal or civil matter, in which the declarant had an interest, other than as a witness.
>
> (2) Whether the declarant had a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.
>
> (4) Whether the statement was a statement against the declarant's interest.

A number of procedural protections apply. See Evid. Code §§ 1231.1-1231.4.

The purpose of Section 1231 is "to discourage gang members from eliminating potential witnesses in prosecutions for gang crimes." Méndez Hearsay Analysis at 31. It is, in effect, "an insurance policy to victims and witnesses to gang crimes by providing that, should they be killed to prevent their testimony at trial, their earlier sworn statement would be admissible during trial." Sen. Pub. Safety Comm. Analysis of SB 941 (May 13, 1997), pp. 3-4. The legislation was prompted by evidence of increasing gang-related crime in California, such as a news article reporting that over 1,000 gang members walk the streets of Los Angeles and reportedly are to blame for 40% of the murders in Los Angeles County. Stepno, *Gang-Related Hearsay Exception*, 29 McGeorge L. Rev. 605 (1998).

The Federal Rules of Evidence do not contain a similar exception. In his background study, Prof. Méndez advised that Section 1231 "is designed to meet a special need in gang prosecutions and should be retained." Méndez Hearsay Analysis at 31.

That advice predated the *Crawford* decision, in which the United States Supreme Court rewrote Confrontation Clause jurisprudence. Even before Section 1231 was enacted, serious concerns were raised regarding whether it would comply with the Confrontation Clause. Those concerns were articulated not just by groups such as the American Civil Liberties Union and California Attorneys for Criminal Justice, but also by the appellate division of the Los Angeles County District Attorney's Office. See Assem. Pub. Safety Comm. Analysis of SB 941 (July 8, 1997), pp. 4, 10. Several of the bill analyses pointed out that convictions would be overturned if the measure was enacted and subsequently found unconstitutional. Those analyses also cautioned that it might be inordinately difficult to retry gang defendants. *Id*. at 4; Assem. Pub. Safety Comm. Analysis of

SB 941 (July 15, 1997), p. 10; Assem. Jud. Comm. Analysis of SB 941 (July 16, 1997), pp. 4-5.

Crawford holds that if the prosecution offers a testimonial statement as substantive evidence in a criminal case and the declarant does not testify at trial, the statement is admissible only if the declarant was "unavailable to testify, and the defendant had ... a prior opportunity for cross-examination." 124 S.Ct. at 1365, attached slip op. at 17-18. The Court did not define the term "testimonial statement." From the examples it gave and history it related, however, a sworn statement proffered pursuant to Section 1231 seems likely to qualify, because the statement probably was prepared in expectation that it would be used for purposes of a criminal prosecution. *See id*. at 1359-65, 1367 n.7, 1371-72, 1374, attached slip op. at 6-17, 21 n.7, 28-30, 33. Further, although the statutory language is not as clear as it could be, it appears that Section 1231 is only meant to apply in a prosecution pursuant to the California Street Terrorism Enforcement and Prevention Act. While it is conceivable that a defendant might on a rare occasion invoke the provision to introduce testimony inculpating another person, the provision was largely intended to aid the prosecution. Thus, in the vast majority of cases to which Section 1231 would apply, the prosecution would be offering a testimonial statement as substantive evidence in a criminal case. Assuming that *Crawford* is interpreted in a straightforward manner, admission of such testimony would violate the Confrontation Clause unless the defendant had a prior opportunity for cross-examination.

If the defendant had a prior opportunity for cross-examination, however, the statement would be admissible under Section 1291, so there would be no need for Section 1231. Further, under Evidence Code Section 1204, a statement "that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California." Consequently, *Crawford* might have rendered Section 1231 essentially pointless. To the extent that the provision creates a hearsay exception for evidence that is not covered by Section 1291, that exception may be overridden by Section 1204. If so, admission of the evidence would violate both the Confrontation Clause and Section 1204.

Thus, it might be appropriate to propose the repeal of Sections 1231-1231.4. Alternatively, the Commission could leave Sections 1231-1231.4 alone until there

is either a published appellate court decision discussing the impact of *Crawford* on those provisions, or further guidance from the United States Supreme Court on the Confrontation Clause, or both.

Prof. Méndez is inclined towards the wait-and-see approach. He thinks California courts might respond to *Crawford* by limiting use of Section 1231 to cases in which the prosecution can show that the defendant wrongfully caused the declarant's unavailability. Memorandum from Méndez to Gaal, p. 2. If so construed, the provision might be deemed constitutional under the doctrine that a defendant's right of confrontation can be forfeited by misconduct. See "Statement By an Unavailable Declarant Whose Unavailability was Caused By a Party Opposing Admission of the Statement," *supra*. Prof. Méndez therefore suggests that instead of proposing to repeal Section 1231 now, "it might be preferable for the Commission to await the U.S. Supreme Court's treatment of forfeiture." Memorandum from Méndez to Gaal, p. 2.

That approach probably makes sense. True, Section 1231 might do little more than duplicate Section 1350 (unavailability of declarant due to wrongdoing by defendant charged with serious felony) if it is narrowly construed as Prof. Méndez predicts. It might be tempting to clean up the Code by eliminating what may be viewed as useless and misleading material. It is probably more prudent, however, for the Commission to **await further judicial guidance on the Confrontation Clause before taking any action on Section 1231.**

DYING DECLARATION

Suppose a woman is fatally injured in a hit and run car crash. Just before she dies, she asks a paramedic to tell her husband and children that she loves them. She also gives the paramedic the license number of the other car. May that information be introduced as substantive evidence in a criminal prosecution for manslaughter? In a wrongful death lawsuit?

Under certain circumstances in both California and the federal courts, an out of court statement made by a dying person is admissible as substantive evidence at trial. Evidence Code Section 1242 states the California rule:

> 1242. Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.

The comparable federal provision is Rule 804(b)(2) of the Federal Rules of Evidence, which provides:

> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ….
>
> (2) **Statement under belief of impending death.** In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
>
> ....

The theory underlying these provisions is that a person is unlikely to lie if the person believes death is near, because of religious beliefs, because of a lack of worldly motives, or because of the powerful psychological forces bearing on a person in the process of dying. *People v. Smith*, 214 Cal. App. 3d 904, 910, 263 Cal. Rptr. 155 (1989); *see also* Weissenberger, *Federal Rules of Evidence 804: Admissible Hearsay From an Unavailable Declarant*, 55 U. Cin. L. Rev. 1079, 1106-07 (1987). As Professor Wigmore put it, the guarantees of trustworthiness are:

> (1) The declarant, being at the point of death "must lose all deceit" — in Shakespeare's phrase. There is no longer any temporal self-serving purpose to be furthered. (2) If a belief exists in a punishment soon to be inflicted by a Higher Power upon human ill-doing, the fear of this punishment will outweigh any possible motive for deception, and will even counterbalance the inclination to gratify a possible spirit of revenge. (3) Even without such a belief, there is a natural and instinctive awe at the approach of an unknown future — a physical revulsion common to all men, irresistible, and independent of theological belief.

People v. Smith, 214 Cal. App. 3d 904, 910, 263 Cal. Rptr. 155 (1989) (quotation marks omitted), *quoting* 5 Wigmore, Evidence § 1443 (Chadbourn rev. ed. 1974).

The dying declaration exception to the hearsay rule also "rests in part upon the necessity principle." Weissenberger, *supra*, at 1108. "In the usual case the words of the declarant are offered to prove that the accused was the declarant's murderer and in this situation, necessity assumes special importance in justifying the exception." *Id*.

Types of Cases in Which the Dying Declaration Exception Applies

An important distinction between the California and federal provisions on a dying declaration relates to the types of cases to which they apply. We first

discuss this distinction without considering the impact of *Crawford*; we then explore whether *Crawford* changes that analysis.

Pre-Crawford *Analysis*

In drafting Section 1242 in the early 1960's, this Commission deliberately broadened the existing exception to apply to all types of cases, not just criminal homicide actions. As the Comment explains,

> **Comment.** Section 1242 is a broadened form of the well-established exception to the hearsay rule for dying declarations relating to the cause and circumstances of the declarant's death. The existing law — Code of Civil Procedure Section 1870(4) as interpreted by the courts — makes such declarations admissible only in criminal homicide actions. People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892); Thrasher v. Board of Medical Examiners, 44 Cal. App. 26, 185 Pac. 1006 (1919). For the purpose of the admissibility of dying declarations, *there is no rational basis for differentiating between civil and criminal actions or among various types of criminal actions.* Hence, Section 1242 makes the exception applicable in all actions.

(Emphasis added.)

As proposed by the United States Supreme Court, the federal exception for a dying declaration would also have applied to all civil and criminal cases. Congress revised it, however, to apply only to civil cases and homicide prosecutions, not to other criminal cases. The House report explains:

> The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

H.R. Rep. No. 93-650 (1973).

As Prof. Méndez points out, this reasoning is curious. If dying declarations are not very reliable, "one would expect the declarations to be excluded precisely in those cases — homicides — where the stakes are highest and call for using only the most reliable evidence against the accused." Méndez Hearsay Analysis at 32. In the analysis he prepared for the Commission before *Crawford* was decided, Prof. Méndez recommended that California retain its rule. *Id.*

Prof. Jack Friedenthal reached the same conclusion when he compared the Evidence Code with the Federal Rules of Evidence shortly after the latter were adopted. He explained that once a hearing exception for dying declarations is made, "there is little reason to restrict its scope solely to homicide cases." Friedenthal Analysis at 56. The Uniform Rules of Evidence are consistent with that reasoning: Unlike its federal counterpart, the dying declaration exception under those rules applies to all civil and criminal cases. Unif. R. Evid. 804(a)(1)(B).

In light of these authorities, **California should stick with its current approach of applying the dying declaration exception to all civil and criminal cases.** That is not only sound policy but also conforms to the Commission's practice of adhering to its previous recommendations unless a clear need for change appears. Commission Handbook § 3.5, p. 10 (Jan. 2002). It is important to consider, however, whether any revision of Section 1242 is necessary to account for *Crawford* when a dying declaration is offered as inculpatory rather than exculpatory evidence in a criminal case.

Impact of Crawford *on the Hearsay Exception for a Dying Declaration*

Crawford established a general rule that a testimonial statement by a declarant who does not testify at trial is admissible as substantive evidence against a criminal defendant only if the declarant was unavailable to testify and the defendant had a prior opportunity for cross-examination. 124 S.Ct. at 1365, attached slip op. at 17-18. The United States Supreme Court deliberately left open the question of whether that rule applies to a dying declaration:

> Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical ground, it is *sui generis*.

Id. at 1367 n.6, attached slip op. at 20 n.6 (citations omitted).

The law is thus in a state of uncertainty. It is possible that the Court will decide that a dying declaration is exempt from the requirements of *Crawford*, even if it is testimonial. If so, then it is unclear whether Confrontation Clause scrutiny (1) would apply to a dying declaration at all, (2) would be governed by the test established in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), which was used before *Crawford*, or (3) would be governed by a new, as-yet-unarticulated test. In the first two situations, it is clear that no change in Section 1242 would be

necessary; it is beyond dispute that the hearsay exception for a dying declaration constitutes a "firmly rooted exception" under the *Roberts* test. *See, e.g.*, *Mattox v. United States*, 146 U.S. 140, 151 (1892). If instead a new, as-yet-unarticulated test applies in determining whether admission of a dying declaration violates the Confrontation Clause, then it is premature to assess whether Section 1242 needs to be revised to account for that test.

It is also possible that the Court will decide that the *Crawford* test applies to a testimonial dying declaration but not to a nontestimonial dying declaration. In that event, it would be crucial for courts to distinguish between a testimonial and a nontestimonial dying declaration. So far, however, the Court has given limited guidance on how to draw that distinction. At a minimum, testimonial hearsay includes a response to police interrogation and prior testimony at a preliminary hearing, before a grand jury, or at a former trial. *Crawford*, 124 S.Ct. at 1374, attached slip op. at 33. "These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id*. The Court gave a number of examples of such abuses, including in particular the ex parte examination that served as a basis for convicting Sir Walter Raleigh of treason. *Id*. at 1359-65, attached slip op. at 6-17. The Court also referred to a number of possible standards for determining whether hearsay is testimonial — E.g., Is the statement contained in formalized testimonial materials? Would an objective witness reasonably have believed that the statement would be available for later use at trial? Was a government officer involved in the production of the statement with an eye toward trial? *Id.* at 1364, 1367 n.7, attached slip op. at 15-16, 21 n.7. But the Court said it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 1374, attached slip op. at 33.

It is thus uncertain, for instance, to what extent it matters whether a dying declaration was made to a law enforcement officer as opposed to a paramedic or a bystander at an accident scene. What if the law enforcement officer was in plain clothes, such that a reasonable person would not have realized that a law enforcement officer was present? What if the dying person was unable to see, such that a reasonable person in that situation would have had no cause to believe that a law enforcement officer was hearing what the person said? What if the dying person was frantic and unreasonably mistook a bellman for a law enforcement officer, or vice versa? What if the dying person gave a statement to a

bystander, but asked the bystander to convey the information to the police or the FBI?

Regardless of how these uncertainties are resolved, Section 1242 is not constitutionally defective on its face. There is no Confrontation Clause issue when the provision is applied in a civil case or when it is applied to evidence offered by the defendant in a criminal case. Even when a dying declaration is offered against a defendant in a criminal case, Section 1242 does not make the evidence admissible. It precludes a hearsay objection, but it does not purport to preclude other objections, such as one based on the Confrontation Clause. Further, the provision is subject to the limitations of Section 1204, under which a statement that "is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made ... under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California."

What could be unconstitutional is how Section 1242 has been, or might in the future be, construed in a particular case or class of cases (e.g., if a court has invoked Section 1242 as grounds for admitting a dying declaration that should have been excluded under the Confrontation Clause). At this point, there is too much uncertainty to even begin contemplating whether and how to revise Section 1242 to help ensure that it is only construed and applied consistently with the Confrontation Clause. We would **not make any adjustments in Section 1242 to account for *Crawford* at this time.** If future developments suggest a need for such adjustments, however, we would bring this issue back to the Commission for further consideration.

Necessity of Death

Under federal law, the dying declaration exception applies to any statement "made by a declarant *while believing that the declarant's death was imminent*, concerning the cause or circumstances of *what the declarant believed to be impending death*." Fed. R. Evid. 804(b)(2) (emphasis added). The focus is on whether the declarant *believed* death was about to occur, not on whether death *actually did* occur. The declarant must be unavailable for the statement to be admissible, but "[u]navailability is not limited to death." Fed. R. Evid. 804(b)(2) advisory committee's note. Thus, federal law makes clear that the dying declaration exception can be invoked even if the declarant unexpectedly survives.

The California provision is more ambiguous on this point. It provides that evidence of a statement "made by a *dying* person respecting the cause and circumstances of his *death* is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death." (Emphasis added.) Prof. Méndez construes the provision to apply regardless of whether death occurs; he believes that a dying declaration would be admissible under it "even if the declarant unexpectedly survives and is available to testify." Méndez Casebook at 281. But Prof. Friedenthal interprets the provision to apply "only if death occurs." Friedenthal, *supra*, at 56; *see also* B. Jefferson, *supra*, *Hearsay Exceptions: General Principles* § 2.34, at 60. That is consistent with case law predating the Evidence Code. *See, e.g.*, *People v. Cord*, 157 Cal. 562, 569-70, 108 P. 511 (1910); *People v. Ybarra*, 68 Cal. App. 259, 264, 228 P. 868 (1924). It also serves to explain why the provision does not require that the declarant be unavailable, as the federal provision does. A dead declarant is necessarily unavailable.

The proper interpretation of the California provision is thus debatable. Importantly, however, the main rationale for the dying declaration exception — that a person is unlikely to lie if the person believes death is near — is unrelated to whether the person ultimately survives. Friedenthal, *supra*, at 56. Consequently, **the ambiguity should be eliminated by amending the California provision to make clear that it applies regardless of the declarant's fate:**

> 1242. Evidence of a statement made by a ~~dying~~ person respecting the cause and circumstances of ~~his death~~ the person's impending death is not made inadmissible by the hearsay rule if the statement was made upon ~~his~~ personal knowledge and under a sense of immediately impending death, regardless of whether death actually occurred.
>
> **Comment.** Section 1242 is amended to make clear that the focus is on whether the declarant sincerely believed death was near, not on whether the declarant actually died. *Cf*. Fed. R. Evid. 804(b)(2) advisory committee's note ("Unavailability is not limited to death.").

Necessity of Unavailability

If Section 1242 is amended to make clear that it applies regardless of whether death actually ensues, a subsidiary issue is whether to limit the provision to situations in which the declarant is unavailable. Most of the time, this will not be an issue because the declarant will be dead. In rare circumstances, however, the

declarant will unexpectedly survive, raising the question of whether the declarant must be unavailable for the out of court statement to be admissible.

The federal rule requires a showing of unavailability for admission of a dying declaration. Fed. R. Evid. 804(b)(2). This appears to stem from concerns regarding the reliability of such evidence and consequent desire to limit the use of such evidence to situations in which there is an exceptional need for it. Fed. R. Evid. 804(b)(2) advisory committee's note. As a New York court wrote,

> Dying declarations are dangerous, because made with no fear of prosecution for perjury and without the test of cross-examination, which is the best method known to bring out the full and exact truth. The fear of punishment after death is not now regarded as so strong a safeguard against falsehood as it was when the rule admitting such declarations was first laid down. Such evidence is the mere statement of what was said by a person not under oath, usually made when the body is in pain, the mind agitated and the memory shaken by the certainty of impending death. A clear, full and exact statement of the facts cannot be expected under such circumstances, especially if the declaration is made in response to suggestive questions, or those calling for the answer of "Yes" or "No." Experience shows that dying declarations are not always true.

People v. Falletto, 202 N.Y. 494, 499, 96 N.E. 355 (1911).

In his analysis for the Commission, however, Prof. Friedenthal argued that it is not necessary to require a showing of unavailability. Friedenthal Analysis at 56. He explained that "[i]f the declarant is available, then he can be called and subjected to full examination on the matter and it is of far less consequence whether or not the statement is admitted." *Id*. Prof. Friedenthal also pointed out that "[t]he court may always keep out such a statement on the ground that its value is outweighed by possible prejudicial aspects." *Id*.

The staff does not have a strong opinion on whether it is better policy to require a showing of unavailability or to omit such a requirement. Prof. Méndez likewise has no clear preference. See First Supplement to Memorandum 2002-56 (available at www.clrc.ca.gov); Memorandum from Méndez to Gaal, p. 2. The requirement would matter only in the rare circumstance that a person survives after coming close to death. Unless the Commission has a clear policy preference, **it should promote uniformity by tracking the federal approach, under which a dying declaration is admissible only if the declarant is unavailable.** Thus, the

proposed amendment shown on page 42 should be modified as shown in boldface below:

> 1242. Evidence of a statement made by a ~~dying~~ person respecting the cause and circumstances of ~~his death~~ the person's impending death is not made inadmissible by the hearsay rule if the **person is unavailable and the** statement was made upon ~~his~~ personal knowledge and under a sense of immediately impending death, regardless of whether death actually occurred.
>
> **Comment.** Section 1242 is amended to make clear that the focus is on whether the declarant sincerely believed death was near, not on whether the declarant actually died. *Cf*. Fed. R. Evid. 804(b)(2) advisory committee's note ("Unavailability is not limited to death."). **If the declarant survived, however, the dying declaration may be introduced under this exception to the hearsay rule only if the declarant is unavailable. This conforms to the federal approach on whether it is necessary to show that the declarant is unavailable. See Fed. R. Evid. 804(b)(2).**

Necessity of an Attempt to Depose the Witness

If the Commission opts to require a showing of unavailability for admission of a dying declaration, then it will also have to resolve another issue: Whether, in establishing unavailability, it is sufficient to show that the proponent was unable to procure the declarant's attendance at trial, or whether it is also necessary to show that the proponent unsuccessfully attempted to depose the declarant.

As originally proposed by the United States Supreme Court, the federal provision did not require an attempted deposition to establish unavailability in the context of a dying declaration, statement against interest, or statement of personal or family history. Fed. R. Evid. 804(a)(5) advisory committee's note. The House added the requirement (see H.R. Rep. No. 93-650 (1973)), but the Senate deleted it, stating:

> Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. …
>
> ….
>
> Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the

> amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

S. Rep. No. 93-1277 (1974). Without explaining its reasoning, the Conference Committee reinserted the attempted deposition requirement. Fed. R. Evid. 804(a)(5); H.R. Conf. Rep. No. 93-1597 (1974).

Prof. Méndez agrees with the Senate's criticism that requiring an attempted deposition is a "needless, impractical and highly restrictive complication." See First Supplement to Memorandum 2002-56, Exhibit p. 1. He points out that depositions are costly and time-consuming, rarely authorized in a criminal case in California, and not always admissible at trial. *Id*. at 1, 2. The expense, time, and effort of arranging a deposition might be warranted when a dying declaration is the key evidence in a case, but not when it is one of several pieces of evidence that collectively bear on the proper result. Despite the potential benefits of uniformity, **it does not seem advisable to require an attempted deposition.**

Impact of the Truth-in-Evidence Provision

If Section 1242 is amended as recommended on page 43, a dying declaration would be admissible regardless of whether the declarant actually died, but only if the declarant is unavailable. Whether that reform would raise any Truth-in-Evidence issues hinges on how one interprets the current scope of Section 1242.

One possibility is the view espoused by Prof. Friedenthal and Justice Jefferson — i.e., Section 1242 applies only if death occurs. If the provision is construed that way, the proposed amendment would expand the admissibility of relevant evidence. It would extend the provision to a statement made by a person who believed death was near but who did not die. Because the proposed amendment would expand the admissibility of relevant evidence, albeit with the restriction that the declarant be unavailable, it would not trigger any Truth-in-Evidence concerns.

A second possibility is the view taken by Prof. Méndez — i.e., Section 1242 already applies to a statement by a person who believed death was near but who did not actually die. If the provision is construed that way, the proposed amendment would narrow the admissibility of relevant evidence by adding the requirement that the declarant be unavailable. In the context of a criminal case, that would raise Truth-in-Evidence considerations. Specifically, the reform

would again present the question of how to interpret the sentence in the Truth-in-Evidence provision stating that the provision does not affect any "existing statutory rule of evidence relating to ... hearsay." This possibility further reinforces the need for research on that point.

Respectfully submitted,

Barbara Gaal
Staff Counsel

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CRAWFORD *v.* WASHINGTON

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 02–9410. Argued November 10, 2003—Decided March 8, 2004

Petitioner was tried for assault and attempted murder. The State sought to introduce a recorded statement that petitioner's wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense. Sylvia did not testify at trial because of Washington's marital privilege. Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be "confronted with the witnesses against him." Under *Ohio* v. *Roberts,* 448 U. S. 56, that right does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability,'" a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Id.*, at 66. The trial court admitted the statement on the latter ground. The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, *i.e.,* interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.

Held: The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. Pp. 5–33.

(a) The Confrontation Clause's text does not alone resolve this case, so this Court turns to the Clause's historical background. That history supports two principles. First, the principal evil at which the Clause was directed was the civil-law mode of criminal procedure, particularly the use of *ex parte* examinations as evidence against the accused. The Clause's primary object is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class. Second, the Framers would not have allowed admission of tes-

Syllabus

timonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination. English authorities and early state cases indicate that this was the common law at the time of the founding. And the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the common-law right of confrontation, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States,* 156 U. S. 237, 243. Pp. 5–21.

(b) This Court's decisions have generally remained faithful to the Confrontation Clause's original meaning. See, *e.g., Mattox, supra.* Pp. 21–23.

(c) However, the same cannot be said of the rationales of this Court's more recent decisions. See *Roberts, supra,* at 66. The *Roberts* test departs from historical principles because it admits statements consisting of *ex parte* testimony upon a mere reliability finding. Pp. 24–25.

(d) The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one. Pp. 25–27.

(e) *Roberts'* framework is unpredictable. Whether a statement is deemed reliable depends on which factors a judge considers and how much weight he accords each of them. However, the unpardonable vice of the *Roberts* test is its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Pp. 27–30.

(f) The instant case is a self-contained demonstration of *Roberts'* unpredictable and inconsistent application. It also reveals *Roberts'* failure to interpret the Constitution in a way that secures its intended constraint on judicial discretion. The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority to replace it with one of its own devising. Pp. 30–32.

147 Wash. 2d 424, 54 P. 3d 656, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 02–9410

MICHAEL D. CRAWFORD, PETITIONER *v.* WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[March 8, 2004]

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

I

On August 5, 1999, Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife *Miranda* warnings, detectives interrogated each of them twice. Petitioner eventually confessed that he and Sylvia had gone in search of Lee because he was upset over an earlier incident in which Lee had tried to rape her. The two had found Lee at his apartment, and a fight ensued in which

Lee was stabbed in the torso and petitioner's hand was cut.

Petitioner gave the following account of the fight:

> "Q. Okay. Did you ever see anything in [Lee's] hands?
> "A. I think so, but I'm not positive.
> "Q. Okay, when you think so, what do you mean by that?
> "A. I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later." App. 155 (punctuation added).

Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account of the fight itself was arguably different—particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him:

> "Q. Did Kenny do anything to fight back from this assault?
> "A. (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.
> "Q. After he was stabbed?
> "A. He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).
> "Q. Okay, you, you gotta speak up.
> "A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right

> pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).
> "Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?
> "A. Yeah, after, after the fact, yes.
> "Q. Did you see anything in his hands at that point?
> "A. (pausing) um um (no)." *Id.*, at 137 (punctuation added).

The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. See Wash. Rev. Code §5.60.060(1) (1994). In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, see *State* v. *Burden*, 120 Wash. 2d 371, 377, 841 P. 2d 758, 761 (1992), so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003).

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be "confronted with the witnesses against him." Amdt. 6. According to our description of that right in *Ohio* v. *Roberts,* 448 U. S. 56 (1980), it does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.'" *Id.*, at 66. To meet that test, evidence must either fall within a "firmly rooted hearsay exception" or bear

"particularized guarantees of trustworthiness." *Ibid.* The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or "justified reprisal"; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a "neutral" law enforcement officer. App. 76–77. The prosecution played the tape for the jury and relied on it in closing, arguing that it was "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). The jury convicted petitioner of assault.

The Washington Court of Appeals reversed. It applied a nine-factor test to determine whether Sylvia's statement bore particularized guarantees of trustworthiness, and noted several reasons why it did not: The statement contradicted one she had previously given; it was made in response to specific questions; and at one point she admitted she had shut her eyes during the stabbing. The court considered and rejected the State's argument that Sylvia's statement was reliable because it coincided with petitioner's to such a degree that the two "interlocked." The court determined that, although the two statements agreed about the events leading up to the stabbing, they differed on the issue crucial to petitioner's self-defense claim: "[Petitioner's] version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia's version has Lee grabbing for something only after he has been stabbed." App. 32.

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness: "'[W]hen a codefendant's confession is virtually identical [to, *i.e.*, interlocks with,] that of a defendant, it may be deemed reliable.'" 147 Wash. 2d 424, 437, 54 P. 3d 656, 663 (2002)

(quoting *State* v. *Rice*, 120 Wash. 2d 549, 570, 844 P. 2d 416, 427 (1993)). The court explained:

> "Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap. . . .
>
> "[B]oth of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.
>
> "[N]either Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." 147 Wash. 2d, at 438–439, 54 P. 3d, at 664 (internal quotation marks omitted).[1]

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause. 539 U. S. 914 (2003).

II

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall

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[1] The court rejected the State's argument that guarantees of trustworthiness were unnecessary since petitioner waived his confrontation rights by invoking the marital privilege. It reasoned that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." 147 Wash. 2d, at 432, 54 P. 3d, at 660. The State has not challenged this holding here. The State also has not challenged the Court of Appeals' conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless. We express no opinion on these matters.

enjoy the right . . . to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer* v. *Texas,* 380 U. S. 400, 406 (1965). As noted above, *Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability—*i.e.*, falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U. S., at 66. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

A

The Constitution's text does not alone resolve this case. One could plausibly read "witnesses against" a defendant to mean those who actually testify at trial, cf. *Woodsides* v. *State*, 3 Miss. 655, 664–665 (1837), those whose statements are offered at trial, see 3 J. Wigmore, Evidence §1397, p. 104 (2d ed. 1923) (hereinafter Wigmore), or something in-between, see *infra*, at 15–16. We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one's accusers is a concept that dates back to Roman times. See *Coy* v. *Iowa,* 487 U. S. 1012, 1015 (1988); Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994). The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. See 3 W. Blackstone, Commentaries on the Laws of England 373–374 (1768).

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.* the witnesses against him, brought before him face to face." 1 J. Stephen, History of the Criminal Law of England 326 (1883). In some cases, these demands were refused. See 9 W. Holdsworth, History of English Law 216–217, 228 (3d ed. 1944); *e.g.*, *Raleigh's Case*, 2 How. St. Tr. 1, 15–16, 24 (1603); *Throckmorton's Case*, 1 How. St. Tr. 869, 875–876 (1554); cf. *Lilburn's Case*, 3 How. St. Tr. 1315, 1318–1322, 1329 (Star Chamber 1637).

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 *id.*, c. 10 (1555). These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. See J. Langbein, Prosecuting Crime in the Renaissance 21–34 (1974). Whatever the original purpose, however, they came to be used as evidence in some cases, see 2 M. Hale, Pleas of the Crown 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, *supra*, at 528–530.

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's

mercy; to excuse me cannot avail him; by accusing me he may hope for favour." 1 D. Jardine, Criminal Trials 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[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 . . . ." 2 How. St. Tr., at 15–16. The judges refused, *id.*, at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," *id.,* at 15, the jury convicted, and Raleigh was sentenced to death.

One of Raleigh's trial judges later lamented that "'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" 1 Jardine, *supra*, at 520. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. *E.g.*, 13 Car. 2, c. 1, §5 (1661); see 1 Hale, *supra*, at 306. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See *Lord Morley's Case*, 6 How. St. Tr. 769, 770–771 (H. L. 1666); 2 Hale, *supra*, at 284; 1 Stephen, *supra*, at 358. Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated. See 2 W. Hawkins, Pleas of the Crown c. 46, §3, pp. 603–604 (T. Leach 6th ed. 1787); 1 Hale, *supra*, at 585, n. *(k);* 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791); cf. *Tong's Case*, Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (treason). But see *King* v. *Westbeer*, 1 Leach 12, 168 Eng. Rep. 108, 109 (1739).

One recurring question was whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him. In 1696, the Court of King's Bench an-

swered this question in the affirmative, in the widely reported misdemeanor libel case of *King* v. *Paine*, 5 Mod. 163, 87 Eng. Rep. 584. The court ruled that, even though a witness was dead, his examination was not admissible where "the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of a cross-examination." *Id.*, at 165, 87 Eng. Rep., at 585. The question was also debated at length during the infamous proceedings against Sir John Fenwick on a bill of attainder. Fenwick's counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine. See *Fenwick's Case*, 13 How. St. Tr. 537, 591–592 (H. C. 1696) (Powys) ("[T]hat which they would offer is something that Mr. Goodman hath sworn when he was examined . . . ; sir J. F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered as evidence . . ."); *id.*, at 592 (Shower) ("[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him . . . . [O]ur constitution is, that the person shall see his accuser"). The examination was nonetheless admitted on a closely divided vote after several of those present opined that the common-law rules of procedure did not apply to parliamentary attainder proceedings—one speaker even admitting that the evidence would normally be inadmissible. See *id.*, at 603–604 (Williamson); *id.*, at 604–605 (Chancellor of the Exchequer); *id.*, at 607; 3 Wigmore §1364, at 22–23, n. 54. Fenwick was condemned, but the proceedings "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination." *Id.*, §1364, at 22; cf. *Carmell* v. *Texas,* 529 U. S. 513, 526–530 (2000).

Paine had settled the rule requiring a prior opportunity

for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in felony cases. The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 *id.*, c. 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See *Westbeer*, *supra*, at 12, 168 Eng. Rep., at 109; compare *Fenwick's Case*, 13 How. St. Tr., at 596 (Sloane), with *id.*, at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See *King* v. *Eriswell*, 3 T. R. 707, 710, 100 Eng. Rep. 815, 817 (K. B. 1790) (Grose, J.) (dicta); *id.*, at 722–723, 100 Eng. Rep., at 823–824 (Kenyon, C. J.) (same); compare 1 Gilbert, Evidence, at 215 (admissible only "by Force 'of the Statute'"), with *id.*, at 65. Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases. See *King* v. *Dingler*, 2 Leach 561, 562–563, 168 Eng. Rep. 383, 383–384 (1791); *King* v. *Woodcock*, 1 Leach 500, 502–504, 168 Eng. Rep. 352, 353 (1789); cf. *King* v. *Radbourne*, 1 Leach 457, 459–461, 168 Eng. Rep. 330, 331–332 (1787); 3 Wigmore §1364, at 23. Early 19th-century treatises confirm that requirement. See 1 T. Starkie, Evidence 95 (1826); 2 *id.*, at 484–492; T. Peake, Evidence 63–64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, see 11 & 12 Vict., c. 42, §17, the change merely "introduced in terms" what was already afforded the defendant "by the equitable construction of the law." *Queen* v. *Beeston*, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C. J.).[2]

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[2]There is some question whether the requirement of a prior opportu-

B

Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having "privately issued several commissions to examine witnesses against particular men *ex parte*," complaining that "the person accused is not admitted to be confronted with, or defend himself against his defamers." A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed. 1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law procedures and thus routinely took testimony by deposition or private judicial examination. See 5 Geo. 3, c. 12, §57 (1765); Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 396–397 (1959). Colonial representatives protested that the Act subverted their rights "by extending the jurisdiction of the courts of admiralty beyond its ancient limits." Resolutions of the Stamp Act Congress §8th (Oct. 19, 1765), reprinted in Sources of Our Liberties 270, 271 (R. Perry & J. Cooper eds. 1959). John Adams, defending a merchant in a high-profile admiralty case, ar-

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nity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes. See 3 Wigmore §1364, at 23 (requirement "never came to be conceded at all in England"); T. Peake, Evidence 64, n. *(m)* (3d ed. 1808) (not finding the point "expressly decided in any reported case"); *State* v. *Houser*, 26 Mo. 431, 436 (1858) ("there may be a few cases . . . but the authority of such cases is questioned, even in [England], by their ablest writers on common law"); *State* v. *Campbell*, 1 S. C. 124, 130 (1844) (point "has not . . . been plainly adjudged, even in the English cases"). Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements. See *Houser*, *supra*, at 436; *Campbell*, *supra*, at 130; T. Cooley, Constitutional Limitations *318.

gued: "Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." Draft of Argument in *Sewall* v. *Hancock* (1768–1769), in 2 Legal Papers of John Adams 194, 207 (K. Wroth & H. Zobel eds. 1965).

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights §8 (1776); Pennsylvania Declaration of Rights §IX (1776); Delaware Declaration of Rights §14 (1776); Maryland Declaration of Rights §XIX (1776); North Carolina Declaration of Rights §VII (1776); Vermont Declaration of Rights Ch. I, §X (1777); Massachusetts Declaration of Rights §XII (1780); New Hampshire Bill of Rights §XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to civil-law practices: "The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition*." 2 Debates on the Federal Constitution 110–111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of "written evidence" while objecting to the omission of a vicinage right: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom

leads to the proper discovery of truth." R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra*, at 469, 473. The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Early state decisions shed light upon the original understanding of the common-law right. *State* v. *Webb*, 2 N. C. 103 (1794) *(per curiam),* decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.,* at 104.

Similarly, in *State* v. *Campbell*, 1 S. C. 124 (1844), South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: "[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte*, and, therefore, utterly incompetent." *Id.*, at 125. The court said that one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." *Ibid.*

Many other decisions are to the same effect. Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases *even if* the accused had a previous opportunity to cross-examine. See *Finn* v. *Commonwealth*, 26 Va. 701, 708 (1827); *State* v. *Atkins*, 1 Tenn. 229 (1807) *(per curiam).* Most courts rejected that view, but only after reaffirming that admissibility de-

pended on a prior opportunity for cross-examination. See *United States* v. *Macomb*, 26 F. Cas. 1132, 1133 (No. 15,702) (CC Ill. 1851); *State* v. *Houser*, 26 Mo. 431, 435–436 (1858); *Kendrick* v. *State*, 29 Tenn. 479, 485–488 (1850); *Bostick* v. *State*, 22 Tenn. 344, 345–346 (1842); *Commonwealth* v. *Richards*, 35 Mass. 434, 437 (1837); *State* v. *Hill*, 2 Hill 607, 608–610 (S. C. 1835); *Johnston* v. *State*, 10 Tenn. 58, 59 (1821). Nineteenth-century treatises confirm the rule. See 1 J. Bishop, Criminal Procedure §1093, p. 689 (2d ed. 1872); T. Cooley, Constitutional Limitations *318.

III

This history supports two inferences about the meaning of the Sixth Amendment.

A

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore §1397, at 101; accord, *Dutton* v. *Evans,* 400 U. S. 74, 94 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most

flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White* v. *Illinois,* 502 U. S. 346, 365 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and

concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, *e.g.*, *Campbell*, 1 S. C., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, Pleas of the Crown, at 52. Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. See *supra*, at 8.[3]

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[3]These sources—especially Raleigh's trial—refute THE CHIEF JUSTICE's assertion, *post*, at 3 (opinion concurring in judgment), that the right of confrontation was not particularly concerned with unsworn testimonial statements. But even if, as he claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK. (The claim that unsworn testimony was self-regulating because jurors would disbelieve it, cf. *post*, at 2, n. 1, is belied by the very existence of a

That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, Criminal Law of England, at 221; Langbein, Prosecuting Crime in the Renaissance, at 34–45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra*, at 194–200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.[4]

B

The historical record also supports a second proposition:

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general bar on unsworn testimony.) Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation—what THE CHIEF JUSTICE calls use of a "proxy," *post*, at 3—but that is hardly a reason not to make the estimation as accurate as possible. Even if, as THE CHIEF JUSTICE mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.

[4]We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island* v. *Innis,* 446 U. S. 291, 300–301 (1980). Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States,* 156 U. S. 237, 243 (1895); cf. *Houser*, 26 Mo., at 433–435. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.[5]

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[5] THE CHIEF JUSTICE claims that English law's treatment of testimonial statements was inconsistent at the time of the framing, *post*, at 4–5, but the examples he cites relate to examinations under the Marian statutes. As we have explained, to the extent Marian examinations were admissible, it was only because the statutes *derogated* from the common law. See *supra*, at 10. Moreover, by 1791 even the statutory-derogation view had been rejected with respect to justice-of-the-peace examinations—explicitly in *King* v. *Woodcock*, 1 Leach 500, 502–504, 168 Eng. Rep. 352, 353 (1789), and *King* v. *Dingler*, 2 Leach 561, 562–563, 168 Eng. Rep. 383, 383–384 (1791), and by implication in *King* v. *Radbourne*, 1 Leach 457, 459–461, 168 Eng. Rep. 330, 331–332 (1787).

None of THE CHIEF JUSTICE's citations proves otherwise. *King* v. *Westbeer*, 1 Leach 12, 168 Eng. Rep. 108 (1739), was decided a half-century earlier and cannot be taken as an accurate statement of the law in 1791 given the directly contrary holdings of *Woodcock* and *Dingler*. Hale's treatise is older still, and far more ambiguous on this point, see 1 M. Hale, Pleas of the Crown 585–586 (1736); some who

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espoused the requirement of a prior opportunity for cross-examination thought it entirely consistent with Hale's views. See *Fenwick's Case*, 13 How. St. Tr. 537, 602 (H. C. 1696) (Musgrave). The only timely authority THE CHIEF JUSTICE cites is *King* v. *Eriswell*, 3 T. R. 707, 100 Eng. Rep. 815 (K. B. 1790), but even that decision provides no substantial support. *Eriswell* was not a criminal case at all, but a Crown suit against the inhabitants of a town to charge them with care of an insane pauper. *Id.*, at 707–708, 100 Eng. Rep., at 815–816. It is relevant only because the judges discuss the Marian statutes in dicta. One of them, Buller, J., defended admission of the pauper's statement of residence on the basis of authorities that purportedly held *ex parte* Marian examinations admissible. *Id.*, at 713–714, 100 Eng. Rep., at 819. As evidence writers were quick to point out, however, his authorities said no such thing. See Peake, Evidence, at 64, n. *(m)* ("Mr. J. Buller is reported to have said that it was so settled in 1 Lev. 180, and Kel. 55; certainly nothing of the kind appears in those books"); 2 T. Starkie, Evidence 487–488, n. *(c)* (1826) ("Buller, J. . . . refers to *Radbourne*'s case . . . ; but in that case the deposition was taken in the hearing of the prisoner, and of course the question did not arise" (citation omitted)). Two other judges, Grose, J., and Kenyon, C. J., responded to Buller's argument by distinguishing Marian examinations as a statutory exception to the common-law rule, but the context and tenor of their remarks suggest they merely *assumed* the accuracy of Buller's premise without independent consideration, at least with respect to examinations by justices of the peace. See 3 T. R., at 710, 100 Eng. Rep., at 817 (Grose, J.); *id.*, at 722–723, 100 Eng. Rep., at 823–824 (Kenyon, C. J.). In fact, the case reporter specifically notes in a footnote that their assumption was erroneous. See *id.*, at 710, n. *(c),* 100 Eng. Rep., at 817, n. *(c).* Notably, Buller's position on pauper examinations was resoundingly rejected only a decade later in *King* v. *Ferry Frystone*, 2 East 54, 55, 102 Eng. Rep. 289 (K. B. 1801) ("The point . . . has been since considered to be so clear against the admissibility of the evidence . . . that it was abandoned by the counsel . . . without argument"), further suggesting that his views on evidence were not mainstream at the time of the framing.

In short, none of THE CHIEF JUSTICE's sources shows that the law in 1791 was unsettled *even as to examinations by justices of the peace under the Marian statutes*. More importantly, however, even if the statutory rule in 1791 were in doubt, the numerous early state-court decisions make abundantly clear that the Sixth Amendment incorporated the *common-law* right of confrontation and not any exceptions the Marian statutes supposedly carved out from it. See *supra*, at 13–14; see also *supra*, at 11, n. 2 (coroner statements). The common-law rule

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. This is not to deny, as THE CHIEF JUSTICE notes, that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence. *Post*, at 5. Several had become well established by 1791. See 3 Wigmore §1397, at 101; Brief for United States as *Amicus Curiae* 13, n. 5. But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case.[6] Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. Cf. *Lilly* v. *Virginia,* 527 U. S. 116, 134 (1999) (plurality opinion) ("[A]ccomplices' confessions that inculpate a criminal defendant are not

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had been settled since *Paine* in 1696. See *King* v. *Paine*, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K. B.).

[6]The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, *e.g.*, *Mattox* v. *United States,* 156 U. S. 237, 243–244 (1895); *King* v. *Reason*, 16 How. St. Tr. 1, 24–38 (K. B. 1722); 1 D. Jardine, Criminal Trials 435 (1832); Cooley, Constitutional Limitations, at *318; 1 G. Gilbert, Evidence 211 (C. Lofft ed. 1791); see also F. Heller, The Sixth Amendment 105 (1951) (asserting that this was the *only* recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock*, *supra*, at 501–504, 168 Eng. Rep., at 353–354; *Reason*, *supra*, at 24–38; Peake, Evidence, at 64; cf. *Radbourne*, *supra*, at 460–462, 168 Eng. Rep., at 332–333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

within a firmly rooted exception to the hearsay rule").[7]

IV

Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. *Mattox* v. *United States,* 156 U. S. 237 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . ." *Id.*, at 244.

Our later cases conform to *Mattox*'s holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi* v. *Stubbs,* 408 U. S. 204, 213–216 (1972); *California* v. *Green,* 399 U. S. 149, 165–168 (1970); *Pointer* v. *Texas,* 380 U. S., at 406–408; cf. *Kirby* v. *United States,* 174 U. S. 47, 55–61 (1899). Even where the defendant had such an opportunity, we excluded the testimony where the government had not established unavailability of the witness. See *Barber* v. *Page,* 390 U. S. 719, 722–725 (1968); cf. *Motes* v. *United States,* 178 U. S. 458, 470–471 (1900). We similarly excluded accomplice confessions

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[7]We cannot agree with THE CHIEF JUSTICE that the fact "[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions." *Post*, at 6. Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

where the defendant had no opportunity to cross-examine. See *Roberts* v. *Russell,* 392 U. S. 293, 294–295 (1968) *(per curiam); Bruton* v. *United States,* 391 U. S. 123, 126–128 (1968); *Douglas* v. *Alabama,* 380 U. S. 415, 418–420 (1965). In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. See *Dutton* v. *Evans,* 400 U. S., at 87–89 (plurality opinion).

Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio* v. *Roberts,* 448 U. S., at 67–70, admitted testimony from a preliminary hearing at which the defendant had examined the witness. *Lilly* v. *Virginia, supra*, excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily* v. *United States,* 483 U. S. 171, 181–184 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement.[8]

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[8] One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White* v. *Illinois,* 502 U. S. 346 (1992), which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations. *Id.*, at 349–351. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson* v. *Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K. B. 1694). In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. See 502 U. S., at 348–349. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We "[took] as a given . . . that the testimony properly falls within the relevant hearsay exceptions." *Id.*, at 351, n. 4.

Lee v. *Illinois,* 476 U. S. 530 (1986), on which the State relies, is not to the contrary. There, we *rejected* the State's attempt to admit an accomplice confession. The State had argued that the confession was admissible because it "interlocked" with the defendant's. We dealt with the argument by rejecting its premise, holding that "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." *Id.*, at 545. Respondent argues that "[t]he logical inference of this statement is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted." Brief for Respondent 6. But this is merely a possible inference, not an inevitable one, and we do not draw it here. If *Lee* had meant authoritatively to announce an exception—previously unknown to this Court's jurisprudence—for interlocking confessions, it would not have done so in such an oblique manner. Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's *own* confession against him in a joint trial. See *Parker* v. *Randolph,* 442 U. S. 62, 69–76 (1979) (plurality opinion), abrogated by *Cruz* v. *New York,* 481 U. S. 186 (1987).

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.[9]

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[9]THE CHIEF JUSTICE complains that our prior decisions have "never drawn a distinction" like the one we now draw, citing in particular *Mattox* v. *United States,* 156 U. S. 237 (1895), *Kirby* v. *United States,* 174 U. S. 47 (1899), and *United States* v. *Burr*, 25 F. Cas. 187 (No. 14,694) (CC Va. 1807) (Marshall, C. J.). *Post*, at 4–6. But nothing in these cases contradicts our holding in any way. *Mattox* and *Kirby*

V

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U. S., at 66. This test departs from the historical principles identified above in two respects. First, it is too

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allowed or excluded evidence depending on whether the defendant had had an opportunity for cross-examination. *Mattox*, *supra*, at 242–244; *Kirby*, *supra*, at 55–61. That the two cases did not extrapolate a more general class of evidence to which that criterion applied does not prevent us from doing so now. As to *Burr*, we disagree with THE CHIEF JUSTICE's reading of the case. Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy. The "principle so truly important" on which "inroad[s]" had been introduced was the "rule of evidence which rejects mere hearsay testimony." See 25 F. Cas., at 193. Nothing in the opinion concedes exceptions to the Confrontation Clause's exclusion of testimonial statements as we use the term. THE CHIEF JUSTICE fails to identify a single case (aside from one minor, arguable exception, see *supra*, at 22, n. 8), where we have admitted testimonial statements based on indicia of reliability other than a prior opportunity for cross-examination. If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached.

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California* v. *Green*, 399 U. S. 149, 162 (1970). It is therefore irrelevant that the reliability of some out-of-court statements "'cannot be replicated, even if the declarant testifies to the same matters in court.'" *Post*, at 6 (quoting *United States* v. *Inadi,* 475 U. S. 387, 395 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee* v. *Street,* 471 U. S. 409, 414 (1985).)

broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. See, *e.g.*, *Lilly*, 527 U. S., at 140–143 (BREYER, J., concurring); *White*, 502 U. S., at 366 (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); A. Amar, The Constitution and Criminal Procedure 125–131 (1997); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1011 (1998). They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law—thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine—thus eliminating the excessive narrowness referred to above.

In *White*, we considered the first proposal and rejected it. 502 U. S., at 352–353. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition. This case does, however, squarely implicate the second proposal.

A

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's

protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See *Reynolds* v. *United States,* 98 U. S. 145, 158–159 (1879).

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's

statements were self-inculpatory, 2 How. St. Tr., at 19, that they were not made in the heat of passion, *id.*, at 14, and that they were not "extracted from [him] upon any hopes or promise of Pardon," *id.*, at 29. It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

B

The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. See, *e.g.*, *People* v. *Farrell*, 34 P. 3d 401, 406–407 (Colo. 2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," *id.*, at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting," *United States* v. *Photogrammetric Data Servs., Inc.*, 259 F. 3d 229, 245

(2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), see *Nowlin* v. *Commonwealth*, 40 Va. App. 327, 335–338, 579 S. E. 2d 367, 371–372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect, see *State* v. *Bintz*, 2002 WI App. 204, ¶13, 257 Wis. 2d 177, 187, 650 N. W. 2d 913, 918. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, *Farrell*, *supra*, at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens* v. *People*, 29 P. 3d 305, 316 (2001).

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality's speculation in *Lilly*, 527 U. S., at 137, that it was "highly unlikely" that accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them. See *Photogrammetric Data Servs., supra*, at 245–246; *Farrell*, *supra*, at 406–408; *Stevens*, *supra*, at 314–318; *Taylor* v. *Commonwealth*, 63 S. W. 3d 151, 166–168 (Ky. 2001); *State* v. *Hawkins*, No. 2001–P–0060, 2002 WL 31895118, ¶¶34–37, *6 (Ohio App., Dec. 31, 2002); *Bintz*, *supra*, ¶¶7–14, 257 Wis. 2d, at 183–188, 650 N. W. 2d, at 916–918; *People* v. *Lawrence*, 55 P. 3d 155, 160–161 (Colo. App. 2001); *State* v. *Jones*, 171 Ore. App. 375, 387–391, 15 P. 3d 616, 623–625 (2000); *State* v. *Marshall*, 136 Ohio App. 3d 742, 747–748, 737 N. E. 2d 1005, 1009 (2000); *People* v. *Schutte*, 240 Mich. App. 713, 718–721, 613 N. W. 2d 370, 376–377 (2000); *People* v. *Thomas*, 313 Ill. App. 3d 998, 1005–1007, 730 N. E. 2d 618, 625–626 (2000); cf. *Nowlin*, *supra*, at 335–338, 579 S. E. 2d, at 371–

372 (witness confessed to a related crime); *People* v. *Campbell*, 309 Ill. App. 3d 423, 431–432, 721 N. E. 2d 1225, 1230 (1999) (same). One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases—more than one-third of the time. Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia*, 53 Syracuse L. Rev. 87, 105 (2003). Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States* v. *Aguilar*, 295 F. 3d 1018, 1021–1023 (CA9 2002) (plea allocution showing existence of a conspiracy); *United States* v. *Centracchio*, 265 F. 3d 518, 527–530 (CA7 2001) (same); *United States* v. *Dolah*, 245 F. 3d 98, 104–105 (CA2 2001) (same); *United States* v. *Petrillo*, 237 F. 3d 119, 122–123 (CA2 2000) (same); *United States* v. *Moskowitz*, 215 F. 3d 265, 268–269 (CA2 2000) (same); *United States* v. *Gallego*, 191 F. 3d 156, 166–168 (CA2 1999) (same); *United States* v. *Papajohn*, 212 F. 3d 1112, 1118–1120 (CA8 2000) (grand jury testimony); *United States* v. *Thomas*, 30 Fed. Appx. 277, 279 (CA4 2002) (same); *Bintz*, *supra*, ¶¶15–22, 257 Wis. 2d, at 188–191, 650 N. W. 2d, at 918–920 (prior trial testimony); *State* v. *McNeill*, 140 N. C. App. 450, 457–460, 537 S. E. 2d 518, 523–524 (2000) (same).

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial. As noted earlier, one court relied on the fact that the witness's statement was made to police while in custody on pending charges—the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin*, *supra*, at 335–338, 579 S. E. 2d, at 371–372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. *E.g.*, *Gallego*, *supra*, at 168 (plea allocution); *Papajohn*, *supra*,

at 1120 (grand jury testimony). That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

C

Roberts' failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released "depend[ed] on how the investigation continues." App. 81. In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts'* unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that she had "shut [her] eyes and . . . didn't really watch" part of the fight, and that she was "in shock." App. 134. The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law en-

forcement, and, thus, the [questioner] is . . . neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." *Id.*, at 77. The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination could reveal that.

The State Supreme Court gave dispositive weight to the interlocking nature of the two statements—that they were both ambiguous as to when and whether Lee had a weapon. The court's claim that the two statements were *equally* ambiguous is hard to accept. Petitioner's statement is ambiguous only in the sense that he had lingering doubts about his recollection: "A. I coulda swore I seen him goin' for somethin' before, right before everything happened. . . . [B]ut I'm not positive." *Id.*, at 155. Sylvia's statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked: "Q. Did Kenny do anything to fight back from this assault?" *Id.*, at 137. Moreover, Sylvia specifically said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that.

The prosecutor obviously did not share the court's view that Sylvia's statement was ambiguous—he called it "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). We have no way of knowing whether the jury agreed with the prosecutor or the court. Far from obviating the need for cross-examination, the "interlocking" ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.

We readily concede that we could resolve this case by simply reweighing the "reliability factors" under *Roberts*

and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. Moreover, to reverse the Washington Supreme Court's decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. Cf. U. S. Const., Amdt. 6 (criminal jury trial); Amdt. 7 (civil jury trial); *Ring* v. *Arizona,* 536 U. S. 584, 611–612 (2002) (SCALIA, J., concurring). By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts'* providing any meaningful protection in those circumstances.

* * *

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States

flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial."[10] Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[10] We acknowledge THE CHIEF JUSTICE's objection, *post*, at 7–8, that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo. See *supra*, at 27–30, and cases cited. The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.

SUPREME COURT OF THE UNITED STATES

No. 02–9410

MICHAEL D. CRAWFORD, PETITIONER *v.* WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[March 8, 2004]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

I dissent from the Court's decision to overrule *Ohio* v. *Roberts,* 448 U. S. 56 (1980). I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine. Under the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based.[1]

[1] Modern scholars have concluded that at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions, and thus hearsay was still often heard by the jury. See Gallanis, The Rise of Modern Evidence Law, 84 Iowa L. Rev. 499, 534–535 (1999); Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual

See, *e.g.*, *King* v. *Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202 (K. B. 1779); see also J. Langbein, Origins of Adversary Criminal Trial 235–242 (2003); G. Gilbert, Evidence 152 (3d ed 1769).[2] Testimonial statements such as accusatory statements to police officers likely would have been disapproved of in the 18th century, not necessarily because they resembled *ex parte* affidavits or depositions as the Court reasons, but more likely than not because they were not made under oath.[3] See *King* v. *Woodcock*, 1

Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 738–746. In many cases, hearsay alone was generally not considered sufficient to support a conviction; rather, it was used to corroborate sworn witness testimony. See 5 J. Wigmore, Evidence, §1364, pp. 17, 19–20, 19, n. 33 (J. Chadbourn rev. 1974) (hereinafter Wigmore) (noting in the 1600's and early 1700's testimonial and nontestimonial hearsay was permissible to corroborate direct testimony); see also J. Langbein, Origins of Adversary Criminal Trial 238–239 (2003). Even when unsworn hearsay was proffered as substantive evidence, however, because of the predominance of the oath in society, juries were largely skeptical of it. See Landsman, Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 Cornell L. Rev. 497, 506 (1990) (describing late 17th-century sentiments); Langbein, Criminal Trial before the Lawyers, 45 U. Chi. L. Rev. 263, 291–293 (1978). In the 18th century, unsworn hearsay was simply held to be of much lesser value than were sworn affidavits or depositions.

[2] Gilbert's noted in 1769:

"Hearsay is no Evidence . . . though a Person Testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the same Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath . . . ."

[3] Confessions not taken under oath were admissible against a confessor because "'the most obvious Principles of Justice, Policy, and Humanity'" prohibited an accused from attesting to his statements. 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791). Still, these unsworn confessions were considered evidence only against the confessor as the Court

Leach 500, 503, 168 Eng. Rep. 352, 353 (1789) (noting that a statement taken by a justice of the peace may not be admitted into evidence unless taken under oath). Without an oath, one usually did not get to the second step of whether confrontation was required.

Thus, while I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements. See 1 N. Webster, An American Dictionary of the English Language (1828) (defining "Testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Such affirmation in judicial proceedings, may be verbal or written, but must be under oath*" (emphasis added)). As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.[4]

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points out, see *ante*, at 16, and in cases of treason, were insufficient to support even the conviction of the confessor, 2 W. Hawkins, Pleas of the Crown, C. 46, §4, p. 604, n. 3 (T. Leach 6th ed. 1787).

[4]The fact that the prosecution introduced an unsworn examination in 1603 at Sir Walter Raleigh's trial, as the Court notes, see *ante*, at 16, says little about the Court's distinction between testimonial and nontestimonial statements. Our precedent indicates that unsworn testimonial statements, as do some nontestimonial statements, raise confrontation concerns once admitted into evidence, see, *e.g.*, *Lilly* v. *Virginia,* 527 U. S. 116 (1999); *Lee* v. *Illinois,* 476 U. S. 530 (1986), and I do not contend otherwise. My point is not that the Confrontation Clause does not reach these statements, but rather that it is far from clear that courts in the late 18th century would have treated unsworn statements, even testimonial ones, the same as sworn statements.

I therefore see no reason why the distinction the Court draws is preferable to our precedent. Starting with Chief Justice Marshall's interpretation as a Circuit Justice in 1807, 16 years after the ratification of the Sixth Amendment, *United States* v. *Burr*, 25 F. Cas. 187, 193 (No. 14,694) (CC Va. 1807), continuing with our cases in the late 19th century, *Mattox* v. *United States,* 156 U. S. 237, 243–244 (1895); *Kirby* v. *United States,* 174 U. S. 47, 54–57 (1899), and through today, *e.g.*, *White* v. *Illinois,* 502 U. S. 346, 352–353 (1992), we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware. I see little value in trading our precedent for an imprecise approximation at this late date.

I am also not convinced that the Confrontation Clause categorically requires the exclusion of testimonial statements. Although many States had their own Confrontation Clauses, they were of recent vintage and were not interpreted with any regularity before 1791. State cases that recently followed the ratification of the Sixth Amendment were not uniform; the Court itself cites state cases from the early 19th century that took a more stringent view of the right to confrontation than does the Court, prohibiting former testimony even if the witness was subjected to cross-examination. See *ante*, at 13 (citing *Finn* v. *Commonwealth*, 26 Va. 701, 708 (1827); *State* v. *Atkins*, 1 Tenn. 229 (1807) *(per curiam)*).

Nor was the English law at the time of the framing entirely consistent in its treatment of testimonial evidence. Generally *ex parte* affidavits and depositions were excluded as the Court notes, but even that proposition was not universal. See *King* v. *Eriswell*, 3 T. R. 707, 100 Eng. Rep. 815 (K. B. 1790) (affirming by an equally divided court the admission of an *ex parte* examination because the declarant was unavailable to testify); *King* v. *Westbeer*, 1 Leach 12, 13, 168 Eng. Rep. 108, 109 (1739) (noting the

admission of an *ex parte* affidavit); see also 1 M. Hale, Pleas of the Crown 585–586 (1736) (noting that statements of "accusers and witnesses" which were taken under oath could be admitted into evidence if the declarant was "dead or not able to travel"). Wigmore notes that sworn examinations of witnesses before justices of the peace in certain cases would not have been excluded until the end of the 1700's, 5 Wigmore §1364, at 26–27, and sworn statements of witnesses before coroners became excluded only by statute in the 1800's, see *ibid.; id.,* §1374, at 59. With respect to unsworn testimonial statements, there is no indication that once the hearsay rule was developed courts ever excluded these statements if they otherwise fell within a firmly rooted exception. See, *e.g.*, *Eriswell*, *supra*, at 715–719 (Buller, J.), 720 (Ashhurst, J.), 100 Eng. Rep., at 819–822 (concluding that an *ex parte* examination was admissible as an exception to the hearsay rule because it was a declaration by a party of his state and condition). Dying declarations are one example. See, *e.g.*, *Woodcock, supra*, at 502–504, 168 Eng. Rep., at 353–354; *King* v. *Reason*, 16 How. St. Tr. 1, 22–23 (K. B. 1722).

Between 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed. See n. 1, *supra.* There were always exceptions to the general rule of exclusion, and it is not clear to me that the Framers categorically wanted to eliminate further ones. It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence. It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled.

To find exceptions to exclusion under the Clause is not to denigrate it as the Court suggests. Chief Justice Marshall stated of the Confrontation Clause: "I know of no

principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important." *Burr*, 25 F. Cas., at 193. Yet, he recognized that such a right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which he considered as an "inroad" on the right to confrontation, had been introduced. See *ibid.*

Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply "cannot be replicated, even if the declarant testifies to the same matters in court." *United States* v. *Inadi,* 475 U. S. 387, 395 (1986). Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission "actually furthers the 'Confrontation Clause's very mission' which is to 'advance the accuracy of the truth-determining process in criminal trials.'" *Id.*, at 396 (quoting *Tennessee* v. *Street,* 471 U. S. 409, 415 (1985) (some internal quotation marks omitted)). Similar reasons justify the introduction of spontaneous declarations, see *White*, 502 U. S., at 356, statements made in the course of procuring medical services, see *ibid.*, dying declarations, see *Kirby, supra*, at 61, and countless other hearsay exceptions. That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. See *Kentucky* v. *Stincer,* 482 U. S. 730, 737 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially

a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial"); see also *Maryland* v. *Craig,* 497 U. S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact"). "[I]n a given instance [cross-examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." 5 Wigmore §1420, at 251. In such a case, as we noted over 100 years ago, "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox,* 156 U. S., at 243; see also *Salinger* v. *United States,* 272 U. S. 542, 548 (1926). By creating an immutable category of excluded evidence, the Court adds little to a trial's truth-finding function and ignores this longstanding guidance.

In choosing the path it does, the Court of course overrules *Ohio* v. *Roberts,* 448 U. S. 56 (1980), a case decided nearly a quarter of a century ago. *Stare decisis* is not an inexorable command in the area of constitutional law, see *Payne* v. *Tennessee,* 501 U. S. 808, 828 (1991), but by and large, it "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *id.*, at 827. And in making this appraisal, doubt that the new rule is indeed the "right" one should surely be weighed in the balance. Though there are no vested interests involved, unresolved questions for the future of everyday criminal trials throughout the country surely counsel the same sort of caution. The Court grandly declares that "[w]e leave for another day

any effort to spell out a comprehensive definition of 'testimonial,'" *ante*, at 33. But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists, see *ibid.,* is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

To its credit, the Court's analysis of "testimony" excludes at least some hearsay exceptions, such as business records and official records. See *ante*, at 20. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process. Likewise to the Court's credit is its implicit recognition that the mistaken application of its new rule by courts which guess wrong as to the scope of the rule is subject to harmless-error analysis. See *ante,* at 5, n. 1.

But these are palliatives to what I believe is a mistaken change of course. It is a change of course not in the least necessary to reverse the judgment of the Supreme Court of Washington in this case. The result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases. In *Idaho* v. *Wright*, 497 U. S. 805, 820–824 (1990), we held that an out-of-court statement was not admissible simply because the truthfulness of that statement was corroborated by other evidence at trial. As the Court notes, *ante*, at 31, the Supreme Court of Washington gave decisive weight to the "interlocking nature of the two statements." No reweighing of the "reliability factors," which is hypothesized by the Court, *ante*, at 31, is required to reverse the judgment here. A citation to *Idaho* v. *Wright*, *supra*, would suffice. For the reasons stated, I believe that this would be a far preferable course for the Court to take here.