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Brad Clary

University of Minnesota Law School, clary002@umn.edu

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Essay

Crawford v. Washington: What Would Justice Thomas Do?

Bradley G. Clary[†]

INTRODUCTION

In 2004, the United States Supreme Court decided *Crawford v. Washington*.¹ In that case, the Court decided that “testimonial” hearsay cannot be admitted at a defendant’s criminal trial over a Confrontation Clause objection unless the declarant is now unavailable to the prosecution and the defendant had a prior opportunity to cross-examine the declarant about the statement.² The Court overturned its own 1980 decision in *Ohio v. Roberts*, which had ruled that an unavailable witness’s statement against a criminal defendant could be admitted at trial over a Confrontation Clause objection if the statement “bore sufficient indicia of reliability,” defined as meaning that the statement “must either fall within a ‘firmly rooted hearsay exception,’ or bear ‘particularized guarantees of trustworthiness.’”³

The Court in *Crawford* chastised the *Roberts* framework as “so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”⁴ The Court concluded that “[r]eliability is an amorphous, if not entirely subjective, concept.”⁵

But there is a problem: The Court also said that, “We leave for another day any effort to spell out a comprehensive defini-

[†] J Clinical Professor, University of Minnesota Law School. I thank Russell Anderson, Stephen Cribari, Craig Roen, and Stephen Simon for helpful comments on an earlier draft of this essay. Copyright © 2012 by Bradley G. Clary.

1. 541 U.S. 36 (2006).
2. *Id.* at 68.
3. 448 U.S. 56, 66 (1980), *overruled by Crawford*, 541 U.S. at 42.
4. 541 U.S. at 63.
5. *Id.*

tion of testimonial.”⁶ Then in footnote 10, the Court, “acknowledge[d] the Chief Justice’s objection . . . 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. . . . The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.”⁷

Is the Court’s new “testimonial” test actually more predictable, even over the longer term, if it remains to be defined case-by-case? The Court in *Crawford* and its post-*Crawford* jurisprudence has labored to define what testimonial means without adopting a bright-line test. This essay will briefly examine the consequences of that choice to reject a bright-line definition, and will suggest that, if the Court wanted predictability, then it should have gone with Justice Thomas’s view that, “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”⁸ The direction the Court has gone in recent cases in trying to define “testimonial” itself creates unpredictability.⁹

I. HOW HAS THE COURT TRIED TO DEFINE THE TERM “TESTIMONIAL”?

In *Crawford*, the relevant out-of-court declaration was the defendant’s wife’s statement to police officers that she did not see anything in the hands of the victim at the time her husband stabbed the victim with a knife.¹⁰ The defendant at trial was claiming self-defense.¹¹ The wife did not testify live at trial because of the defendant’s invocation of spousal privilege.¹² To refute the self-defense claim, the state offered into evidence the wife’s declaration in the form of tape-recorded statements to the police.¹³ The Court concluded that, “[the wife’s] recorded statement, knowingly given in response to structured police

6. *Id.* at 68.

7. *Id.* at 68 n.10.

8. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., concurring).

9. There are, of course, other important aspects of *Crawford*. The narrow focus of this particular short essay is not meant to suggest that the predictability issue is the only or overriding question presented by the decision.

10. 541 U.S. at 39–40.

11. *Id.* at 40.

12. *Id.*

13. *Id.*

questioning, qualifies under any conceivable definition [of the term testimony].”¹⁴ The Court barred the statement’s use and remanded for further proceedings.¹⁵

The next two cases to come before the Court were *Davis v. Washington*¹⁶ and *Hammon v. Indiana*,¹⁷ which the Court considered together. The issue in *Davis* was the use of a 911 call in a criminal trial.¹⁸ The defendant was on trial for felony violation of a domestic no-contact order.¹⁹ When the defendant’s girlfriend failed to testify live, the state put into evidence the recording of the 911 call in which the girlfriend reported an assault and named the defendant as the perpetrator in response to questions from the 911 operator.²⁰ The defendant objected to the use of the recording as a violation of his Confrontation Clause rights.²¹ The Court rejected the Confrontation Clause objection stating that, “the circumstances of [the girlfriend’s] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. [The girlfriend] simply was not acting as a witness; she was not testifying.”²²

In *Hammon*, by contrast, the relevant declaration consisted of a battery affidavit that the wife of the defendant had handwritten in response to police officer questioning during investigation of an apparent domestic disturbance.²³ The wife did not appear at trial.²⁴ So the questioning officer testified as to the wife’s conversation and authenticated the affidavit.²⁵ The Court ruled that, because the wife’s statement was post-incident “to establish events that have occurred previously,”²⁶ the state-

14. *Id.* at 53 n.4.

15. *Id.* at 69.

16. 547 U.S. 813 (2006).

17. *Id.* (indicating that *Hammon v. Indiana* was consolidated with *Davis v. Washington* for purposes of appeal).

18. *Id.* at 817–19.

19. *Id.* at 819.

20. *Id.* at 817–18.

21. *Id.* at 819.

22. *Id.* at 828.

23. *Id.* at 819–20.

24. *Id.* at 820.

25. *Id.*

26. *Id.* at 832.

ment was an “obvious substitute for live testimony,”²⁷ and remanded the case for further proceedings.²⁸

The meaning of these three cases was then tested in *Michigan v. Bryant*, which came before the Court in 2011.²⁹ The issue in *Bryant* was the admissibility of statements by a gunshot victim before he died naming the defendant as the shooter in response to police questioning at the scene of the crime.³⁰ One potential legal analysis was that the questioning related to a completed past event, and thus resembled the excluded testimony in *Hammon*.³¹ The other potential analysis was that the questioning related to an ongoing emergency, as the shooter potentially still represented a danger to the community, and thus resembled the admitted testimony in *Davis*.³² The Court adopted the second view, and hearkened back to language in *Davis*:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.³³

So how should *primary* purpose be ascertained? The Court identified a two-part inquiry. First, there should be an examination of the objective circumstances of the encounter giving rise to the out-of-court declaration.³⁴ Second, there should be an examination of “the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.”³⁵ The Court then discussed some of the factors that would be relevant to the inquiries in an on-going emergency scenario:

- Does the case involve a narrow zone of potential victims or a larger zone that might cause concern about an ongo-

27. *Id.* at 830.

28. *Id.* at 834.

29. 131 S. Ct. 1143 (2011).

30. *Id.* at 1150.

31. *Id.* at 1151.

32. *Id.*

33. *Id.* at 1154.

34. *Id.* at 1156.

35. *Id.*

ing threat to public safety at the time of the out-of-court declaration?³⁶

- Does the case involve use of a weapon, and, if so, what kind of weapon (that might again cause concern about an ongoing threat to public safety at the time of the declaration)?³⁷
- What is the medical condition of the declarant at the time of the relevant statement, and what does that suggest about the declarant's ability to form a purpose in making the statement?³⁸
- Who is the interrogator who prompted the out-of-court declaration, and what were the "content and tenor of his questions"?³⁹

The Court apparently considered those factors more objective than the nine "reliability" factors that the Washington Supreme Court had employed under the *Roberts* test in *Crawford* before the Supreme Court granted certiorari and adopted the "testimonial" test:

(1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.⁴⁰

But is it really accurate to say that the "reliability" factors are inherently less predictable than the factors the Court discussed in *Bryant*? Whether more than one person heard the relevant out-of-court declaration can certainly be ascertained objectively. So can whether the declaration contained express assertions of past fact. Indeed, courts in assessing the reliability factors historically ought to have been engaged effectively in the same two-part inquiry that the Court now wants done in deciding whether a statement is "testimonial," i.e. they ought to have been examining the objective circumstances of the en-

36. *Id.* at 1158.

37. *Id.*

38. *Id.* at 1159.

39. *Id.* at 1162.

40. *State v. Crawford*, 54 P.3d 656, 661 n.3 (Wash. 2002) (en banc).

counter and they ought to have been looking at the purposes of the speakers in light of those circumstances. The Court seems concerned that in engaging in the analysis for purposes of “reliability,” trial courts in the past could reach, and were reaching, too many inconsistent conclusions.⁴¹ But if the substitute approach is to engage in the analysis to ascertain a declaration’s primary purpose in the eyes of the interrogator and the now unavailable declarant, aren’t trial courts potentially subject to the same possible inconsistencies?

After all, the Court itself in *Bryant* recognized that both interrogators and victims often have “mixed motives.”⁴² “Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession. . . . Victims are also likely to have mixed motives when they make statements to the police.”⁴³ Exactly! And additionally, as the Court noted in *Hammon*, “This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, ‘evolve into testimonial statements,’ . . . once that purpose has been achieved.”⁴⁴

Consider the following simple example: A 911 operator fields a call late one night. The operator says hello, and the caller on the other end of the line says, “Help! He’s breaking in.” The operator asks, “Where are you?” The caller says, “1201 Main Street, Apartment 1.” The operator asks, “What is happening?” The caller says, “A man is prying open my window.” The operator says, “Help is on the way. Stay on the line.” A siren can be heard in the background. The caller says, “He is running away.” The operator asks, “Can you describe the man?” The caller says, “Yes, I am pretty sure it was my ex-boyfriend, Bob, who is mad at me, but I am not sure. It was dark. But he was wearing a white T-shirt with the words ‘Save the Environment’ on it, blue jeans, and a yellow baseball cap. I hope you catch him and put him away for a long time. He tried this once before and I think he is a dangerous guy.” The operator asks, “What did he do the other time?” The caller says, “He punched his fist through my window.” The caller later leaves town, and is unavailable when Bob is prosecuted for attempted

41. Crawford v. Washington, 541 U.S. 36, 63–64 (2006).

42. 131 S. Ct. at 1161.

43. *Id.*

44. Davis v. Washington, 547 U.S. 813, 828 (2006).

break-in. Does the tape of the 911 call get admitted into evidence over a Confrontation Clause objection?

The conversation at the outset objectively looks like an emergency call for help, and resembles the 911 call from *Davis*.⁴⁵ Neither the caller nor the 911 operator appears to be building a prosecutorial file. But is that objectively clear for the entire dialogue? Once the caller says the suspect is running away, is the caller pursuing the emergency, or trying to get Bob arrested, or both? Is the 911 operator in asking about the other incident trying to see if the suspect is a threat to the public at large, or instead starting to build a prosecution? Will all or most trial courts inexorably come to the same conclusion on a Confrontation Clause objection if the definition of testimonial is an inquiry into purpose on a case-by-case, declaration-by-declaration basis?

II. WWJTD—WHAT WOULD JUSTICE THOMAS DO?

Justice Thomas's view is that a declaration cannot constitute "testimony" unless it is given with a degree of formal solemnity.⁴⁶

This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." [Citing his own opinion in *White v. Illinois*] Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements . . .⁴⁷

This view caused him to join the majority opinion in *Crawford*, presumably because he agreed with the majority that "[the wife's] recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition [of the term testimony]."⁴⁸ His view caused him to join the Court's judgment but not its logic in *Davis*, simply because the out-of-court declaration in the form of the 911 call could not be testimonial.⁴⁹ His view caused him to dissent from the Court's judgment in *Hammon*, because, although in his

45. 547 U.S. at 817–18.

46. *Id.* at 836 (Thomas, J., concurring in part and dissenting in part).

47. *Id.* at 836–37.

48. 541 U.S. at 69.

49. 547 U.S. at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).

view the wife's affidavit itself was excludable as "testimony," the informal questions and answers that preceded the affidavit were not.⁵⁰ His view caused him to concur in the Court's judgment but not in its logic in *Bryant*, simply because the informal questions and answers at the crime scene were not sufficiently formal to constitute "testimony."⁵¹

Interestingly, Justice Thomas's view ultimately caused him to dissent only once in these cases.⁵² And Justice Thomas's test is easier for both trial and appellate courts to apply. If a trial court in the first instance must become embroiled in analyzing whether the primary purpose of an out-of-court declaration is "testimonial" or not, the inquiry will necessarily be time-consuming and painstaking, and the trial judge will know that, if the defense loses, there is a built-in appeal issue. The appellate court will then have to re-analyze the issue to see if the trial court got it right. If only formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions count, then the Confrontation Clause issue is much simpler to handle.

III. WHAT ABOUT THE LAB REPORT CASES?

How then do the tests play out when applied to a different evidentiary scenario, i.e. the proposed admission of lab reports into evidence as against Confrontation Clause objections? If one or both tests are workable, they should make sense in multiple categories of "testimony."

The issue of admissibility of lab reports surfaced post-Crawford in *Melendez-Diaz v. Massachusetts*.⁵³ In *Melendez-Diaz*, police officers seized plastic bags containing material that looked like cocaine.⁵⁴ The state at trial offered certificates from the relevant state crime lab attesting that the substance in the bags was in fact cocaine.⁵⁵ Analysts from the lab swore to the certificates in front of a notary public, but were not present to testify live at trial.⁵⁶ The defendant objected to the certificates

50. *Id.*

51. *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring in the judgment).

52. *Davis*, 547 U.S. at 840–42 (Thomas, J., concurring in *Davis*, but dissenting in *Hammon*).

53. 557 U.S. 305, 129 S. Ct. 2527 (2009).

54. *Id.* at 2530.

55. *Id.* at 2531.

56. *Id.*

on the ground that they constituted “testimony” barred by the Confrontation Clause unless the analysts testified subject to cross-examination.⁵⁷ A majority of the Court agreed, ruling that, “the ‘certificates’ are functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’”⁵⁸ In fact, said the Court, “under Massachusetts law the sole purpose of the affidavits was to provide ‘prima facie evidence of the composition, quality, and the net weight’ of the analyzed substance.”⁵⁹ Justice Thomas joined the majority opinion.⁶⁰

More recently, lab reports surfaced again at the Court in *Bullcoming v. New Mexico*.⁶¹ There, a state crime lab had performed a blood-alcohol analysis on the defendant in support of a prosecution for driving while intoxicated (DWI).⁶² The relevant analyst from the lab completed and certified the analysis, reporting that the alcohol content in the defendant’s blood exceeded the legal threshold.⁶³ But at trial the prosecution put a different analyst on the stand to testify to the procedures which had been employed as a matter of standard practice.⁶⁴ The defendant objected on Confrontation Clause grounds, and the Court eventually upheld the objection.⁶⁵ Even though the relevant certificate in *Bullcoming* was unsworn, it nonetheless was sufficiently “formalized” in a “report” to qualify as “testimony.”⁶⁶ Justice Thomas joined the pertinent part of the opinion, except as to footnote 6 thereof which recited that to be testimonial, “a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events”⁶⁷

Ultimately, therefore, application of the two tests in the lab report cases did not produce different results, and Justice Thomas’s test is easier to administer.

57. *Id.*

58. *Id.* at 2532 (citing *Davis v. Washington*, 547 U.S. 813 (2006)).

59. *Id.*

60. *Id.* at 2543 (Thomas, J., concurring).

61. 131 S. Ct. 2705 (2011).

62. *Id.* at 2710.

63. *Id.* at 2709.

64. *Id.*

65. *Id.* at 2710.

66. *Id.* at 2717.

67. *Id.* at 2709 n.*.

IV. WHAT ABOUT THE FORFEITURE CASES?

What happens when the two tests are applied to yet another different evidentiary scenario, i.e. the potential forfeiture of a defendant's Confrontation Clause objections? If one or both tests are workable, then again they should make sense in multiple categories of "testimony."

In *Giles v. California*,⁶⁸ the Supreme Court faced the issue of whether a criminal defendant forfeits his constitutional right of confrontation by procuring the absence of a now unavailable witness.⁶⁹ The defendant in *Giles* had killed his former girlfriend.⁷⁰ His claim was self-defense.⁷¹ To rebut that claim, the prosecution offered into evidence statements that the girlfriend had made to police officers during a separate domestic violence investigation three weeks before the killing.⁷² The lower courts accepted the statements on the ground that defendant's murder of the girlfriend prevented her from testifying at trial to the prior statements, and thus the defendant had forfeited his Sixth Amendment Confrontation right.⁷³ The Supreme Court reversed, concluding that California's broad reading of forfeiture doctrine did not exist at the time of the Sixth Amendment's enactment, and that forfeiture would apply, if at all, only upon a showing that the defendant killed his girlfriend with the *intent to prevent her from testifying*.⁷⁴ Because the lower courts had not examined that intent, the Supreme Court remanded for further proceedings.⁷⁵

Justice Thomas joined in the majority opinion, but wrote separately to explain his logic.⁷⁶ In Justice Thomas's view, the former girlfriend's statements during the domestic violence investigation were simply not testimonial.⁷⁷ They instead were made informally, and resembled the statements in *Hammon* that caused Justice Thomas to dissent in that case.⁷⁸ Thus, there was no Sixth Amendment Confrontation Clause issue

68. 554 U.S. 353 (2008).

69. *Id.* at 355.

70. *Id.* at 356.

71. *Id.*

72. *Id.* at 356–57.

73. *Id.* at 357.

74. *Id.* at 377.

75. *Id.*

76. *Id.*

77. *Id.* at 377–78 (Thomas, J., concurring).

78. *Id.*

present in *Giles* at all. That said, however, the prosecution in *Giles* had never disputed that the former girlfriend's statements were testimonial in nature.⁷⁹ Once that concession existed, whether the defendant had forfeited his Sixth Amendment right was a live issue. And Justice Thomas concluded that the majority correctly decided that particular question.⁸⁰

Ultimately, then, the two tests did not produce irreconcilable results in *Giles*. And Justice Thomas's is easier to administer.

V. BUT IT REALLY IS NOT THAT SIMPLE, IS IT?

No, it is not quite that simple.

One legitimate concern is that a focus on formality to achieve predictability potentially would encourage abusive practices, i.e. it would encourage police and prosecutors to adopt "informal" interrogation precisely to avoid application of the test. This is an appropriate worry. Justice Thomas himself apparently has considered that possibility for he has written that, "Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of ex parte statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process."⁸¹

Is that a helpful cross-check? The "when used to evade" language sounds like an inquiry into purpose. The point of the formalized materials categorical test is in part to avoid inquiries into purpose.

But if the categorical test is the starting point, then it is likely a number of case-by-case scenarios will resolve without further ado. Consider, for example, the 911 call category. In the run of the mill scenario, will police dispatchers construct 911 calls "informally" to "evade" Confrontation Clause issues that otherwise would have been present had the calls been "formal"? That seems doubtful, as they are simply not formal typically now, which is why Justice Thomas voted against exclusion in

79. *Id.*

80. *Id.*

81. *Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in part and dissenting in part).

Davis.⁸² At least the categorical test does not commence with a purpose inquiry, and that is beneficial.⁸³

Nonetheless, a case such as *Bobadilla v. Carlson*⁸⁴ illustrates the potential difficulties. A Minnesota state court convicted Bobadilla of sexually assaulting his three-year old nephew.⁸⁵ Part of the evidence consisted of a recorded interview that a social worker conducted of the child to “assist” the police and while a police officer was present.⁸⁶ The interview proceeded pursuant to Minnesota Statute § 626.556, which allows social workers to interview children in abuse cases in coordination with “the local law enforcement agency and local welfare agency” for the purpose of “protect[ing] children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse.”⁸⁷ The child in due course did not testify live at trial, but the social worker did, and the trial court allowed the jury to see the video of the interview.⁸⁸ The question on appeal in a writ of habeas corpus proceeding was whether the video constituted “testimony” for purposes of the defendant’s Confrontation Clause rights.⁸⁹

The Eighth Circuit concluded that the answer was yes. The Court’s logic was that, despite the articulated health and welfare purpose of the Minnesota Statute, the social worker’s interview in the case “is a substitute for, and functions as, the police interrogation.”⁹⁰ The “interview consisted of highly structured questioning aimed at getting [the child] to repeat, on videotape, his allegation of abuse.”⁹¹

82. *Id.* at 840.

83. Another legitimate concern is that the focus on formality to achieve predictability simply allows too many un-cross-examined statements directed at convicting the accused defendant into evidence even without attempts to circumvent formality. After all, at least in theory, fewer out-of-court declarations qualify for exclusion under the narrow definition of “testimonial” in Justice Thomas’s test than qualify for exclusion under Confrontation Clause objections in the majority’s test. Whether that has actual practical consequences deserves empirical study as the body of post-*Crawford* court decisions expands. The above examination of the results in the current Supreme Court case law inventory suggests that the answer might be no, but at this point the answer is unknown.

84. No. 08-3010, 2009 WL 2392182 (8th Cir. Aug. 6, 2009).

85. *Id.* at *1.

86. *Id.*

87. *Id.* at *3; *see also* MINN. STAT. § 626.556(1).

88. *Id.* at *1–2.

89. *Id.* at *4.

90. *Id.* at *6.

91. *Id.*

Would application of Justice Thomas's test produce the same result? The likely answer is yes. The interview in *Boba-dilla* was quite structured in nature. A police officer was in attendance. The interview of the child took place at the police department, after a request for assistance by the police several days after the incident.⁹²

But one can imagine a hypothetical case in which an interview of a child does not take place with an officer present. And the interview is not at the police department. And the interview is "coordinated" with a police investigation but is not exactly requested by the police. And the interview is conducted only a day or two after the incident. And the interview is not video-taped, but the relevant social worker takes almost verbatim notes. And the social worker has an outline for questions, but not a formal script. If the social worker testifies at trial, and repeats the unavailable child's answers to her questions, would the testimony consist of "technically informal statements . . . used to evade the formalized process"? A purpose analysis would be needed to decide the question. The only advantage to Justice Thomas's test in the hypothetical, therefore, would be that the Confrontation Clause inquiry would not start with that particularized purpose inquiry. The bright-line formalized process test would not resolve simply and neatly all *Crawford* issues.

CONCLUSION

The Court has created a case-by-case debate over the definition of "testimony" for Confrontation Clause purposes. To the extent that the Court objected to the *Roberts* "reliability" framework as creating unpredictability, the Court did not actually create a more predictable construct. While Justice Thomas's approach does not neatly resolve all Confrontation Clause scenarios, it nonetheless starts out more consistently with the Court's articulated reasoning, and will resolve a number of scenarios more simply than a case-by-case purpose test does.⁹³

92. *Id.* at *5.

93. One last question: Does any of this discussion actually matter given that ultimately the Court has said, "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"? *Crawford v. Washington*, 541 U.S. 36, 63 (2006). The answer is yes, because courts and litigants still have to be able to apply the rule consistently. If "reliability" test results were inconsistent, the Court should be trying to reduce inconsistency in the replacement "testimonial" test.