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.