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Supreme Court of Florida.
Jack R. SLINEY, Appellant,
v.
STATE of Florida, Appellee.
No. 83302.

July 17, 1997.
Rehearing Denied Sept. 18, 1997.

Defendant was convicted of first-degree murder and armed robbery, and was sentenced to death, by the Circuit Court, Charlotte County, Donald E. Pellecchia, J. Appeal was taken. The Supreme Court held that: (1) confession was knowingly, intelligently and voluntarily made, even though defendant had not signed bottom of form advising him of his *Miranda* rights; (2) offensive language was not required to be excised from tape recording of defendant selling gun obtained from robbery of pawn shop whose owner was killed; (3) trial court committed harmless error at most by admitting gun register from pawnshop without laying adequate foundation for register as business record; (4) trial court could bar testimony of inmates in jail with co-perpetrator of pawnshop robbery, that co-perpetrator told them he shot victim; (5) trial court did not abuse discretion by denying continuance when defendant fired his attorney after guilty verdict was entered and requested that expert be appointed to search for mitigating evidence to use in penalty phase; (6) evidence supported aggravating factor that murder was committed during course of robbery; (7) evidence supported aggravating factor that murder was committed to avoid apprehension for another crime; (8) death sentence was not disproportionate; (9) defendant could be sentenced to death even though co-perpetrator of robbery was given life sentence; (10) upward departure sentence could be given for armed robbery, based on murder occurring in same incident; and (11) assessment of costs would be set aside, to allow for notice to defendant and opportunity to be heard.

Convictions and sentences affirmed; fees and costs award set aside.

Kogan, C.J., concurred in part and dissented in part and filed opinion, in which Overton and Anstead, JJ., concurred.

West Headnotes

[1] Criminal Law 110 ⚿519(1)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(1) k. What Confessions Are Voluntary. Most Cited Cases
Confession obtained by means of physical or psychological coercion or violation of constitutional right will be deemed involuntary and inadmissible.

[2] Criminal Law 110 ⚿531(3)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k531 Evidence
110k531(3) k. Weight and Sufficiency of Evidence. Most Cited Cases
In order for confession to be admissible, State must demonstrate by preponderance of evidence that confession was voluntary.

[3] Criminal Law 110 ⚿519(1)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(1) k. What Confessions Are Voluntary. Most Cited Cases
Whether confession is voluntary depends on totality of circumstances surrounding confession.

[4] Criminal Law 110 ⚿412.2(5)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(5) k. Failure to Request Counsel; Waiver. Most Cited Cases
To determine if waiver of right to remain silent is valid, court must first determine if waiver was voluntary in sense that it was product of free and deliberate choice rather than intimidation, coercion, or deception, and court must then determine whether waiver was executed with full awareness of nature of rights being abandoned and consequences of their abandonment.

[5] Criminal Law 110 ⚿412.2(5)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(5) k. Failure to Request Counsel; Waiver. Most Cited Cases
Court must use totality-of-the-circumstances analysis to determine whether waiver of *Miranda* rights is voluntary and thus valid.

[6] Criminal Law 110 ⚿414

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k414 k. Proof and Effect. Most Cited Cases
State has burden of proving that waiver of right to remain silent is valid by preponderance of evid- ence.

[7] Criminal Law 110 ⚿531(3)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k531 Evidence
110k531(3) k. Weight and Sufficiency of Evidence. Most Cited Cases
Evidence supported determination that capital murder defendant's waiver of his right to remain silent was knowingly, intelligently and voluntarily made, even though defendant did not sign bottom of *Miranda* warnings acknowledgment form; officers testified they read defendant his rights from *Miranda* form, and he acknowledged he understood them and signed top of form, officer failed to secure signature at bottom because he was distracted by questions defendant began asking, defendant spontaneously confessed and during tape recorded second confession defendant read out loud without objection waiver of rights he had not signed prior to confession.

[8] Criminal Law 110 ⚿412.2(5)

110 Criminal Law
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(5) k. Failure to Request Counsel; Waiver. Most Cited Cases
When reasonably practical, prudence suggests that waiver of constitutional rights should be in writing.

[9] Criminal Law 110 ⚿519(1)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(1) k. What Confessions Are Voluntary. Most Cited Cases
While not determinative, failure of police to secure signature to form acknowledging that defendant is making voluntary, intelligent and knowing waiver of right to remain silent is factor to be considered in determining voluntariness of confession.

[10] Criminal Law 110 ⚿531(3)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k531 Evidence
110k531(3) k. Weight and Sufficiency of Evidence. Most Cited Cases
Evidence supported determination that capital murder defendant's confession was knowingly, intelligently and voluntarily made, even though defendant did not sign bottom of *Miranda* warnings acknowledgment form; officers testified they read defendant his rights from *Miranda* form, and he acknowledged he understood them and signed top of form, officer failed to secure signature at bottom because he was distracted by questions defendant began asking, defendant spontaneously confessed, and during tape recorded second confession defendant read out loud without objection waiver of rights he had not signed prior to confession

[11] Criminal Law 110 ⚿519(1)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(1) k. What Confessions Are Voluntary. Most Cited Cases

Criminal Law 110 ⚿531(3)

110 Criminal Law
110XVII Evidence
110XVII(T) Confessions
110k531 Evidence
110k531(3) k. Weight and Sufficiency of Evidence. Most Cited Cases
Valid waiver of right to remain silent, while it may be significant proof that confession is voluntary, does not always result in voluntary confession.

[12] Criminal Law 110 ⚿663

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k663 k. Introduction of Documentary and Demonstrative Evidence. Most Cited Cases
Tape recordings of conversations between capital murder defendant accused of killing pawnbroker, and police agent attempting to purchase guns taken from shop at time of killing, could be admitted in their entirety despite defendant's request that they be edited to excise offensive language and racial epithets claimed to be lacking in probative value and tending only to portray defendant in bad light.

[13] Criminal Law 110 ⚿1169.1(10)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(10) k. Documentary and Demonstrative Evidence. Most Cited Cases
Trial court committed harmless error at most, by admitting as evidence in capital murder case firearms register alleged to be from pawnshop in which owner was killed, without laying more of a foundation for introduction under business records exception to hearsay rule than statement from wife of owner that register came from shop; wife testified that gun defendant sold day after incident was in shop on day of incident, and there was other evidence of guilt.

[14] Criminal Law 110 ⚿422(5)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k422 Grounds of Admissibility in General
110k422(5) k. Declarations Against Interest. Most Cited Cases
Trial court in capital murder case could preclude testimony of inmates, incarcerated with nontestifying co-participant in robbery during which capital murder occurred, that co-participant admitted killing of victim, even though statement was

claimed to be against co-participant's interest; statement was not sufficiently trustworthy, as state did not prosecute co-participant on theory that he committed the murder. West's F.S.A. § 90.084(2)(c).

[15] Criminal Law 110 ⚿422(5)

110 Criminal Law
110XVII Evidence
110XVII(O) Acts and Declarations of Conspirators and Codefendants
110k422 Grounds of Admissibility in General
110k422(5) k. Declarations Against Interest. Most Cited Cases
Trial court in capital murder case was not required to admit, without regard to admissibility under Rules of Evidence, testimony from two jail inmates incarcerated with co-perpetrator of robbery during which murder was committed, that co-participant told them he killed victim, even though it was claimed it was critical to defense that someone other than defendant committed crime.

[16] Criminal Law 110 ⚿1151

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1151 k. Time of Trial; Continuance. Most Cited Cases
Trial court's ruling on motion for continuance will not be overturned on appeal unless defendant demonstrates palpable abuse of discretion.

[17] Criminal Law 110 ⚿1147

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases
Trial court's ruling on motion for appointment of experts will be affirmed on appeal in absence of abuse of discretion.

[18] Criminal Law 110 ⚿649(3)

110 Criminal Law
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k649 Adjournments Pending Trial
110k649(3) k. For Absence of Counsel. Most Cited Cases
Trial court did not abuse discretion. in capital murder case, by not allowing continuance after defendant fired his own attorney and asked for public defender at close of guilt phase, and by not appointing investigator to research mitigating evidence; penalty phase was scheduled to begin one month after appointment of counsel who had worked on case in its earlier stages, and matter had continued over one year from date of indictment.

[19] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k358(1))
There was sufficient evidence in record of capital murder case, including defendant's own confession, to support aggravating circumstance that murder was committed during course of robbery; confession established that defendant knocked owner to floor, stabbed him in neck with scissors and hit him on head with hammer, while co-perpetrator cleaned out display case of jewelry and firearms.

[20] Sentencing and Punishment 350H ⚿1682

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1682 k. Escape or Other Obstruction of Justice. Most Cited Cases
(Formerly 203k357(8))

Sentencing and Punishment 350H ⚿1733

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(F) Factors Related to Status of Victim
350Hk1733 k. Witnesses. Most Cited Cases
(Formerly 203k357(8))
In order to establish aggravating factor in sentencing phase of capital murder case, that murder was committed to avoid lawful arrest, when victim is not police officer, prosecutor must show that sole or dominant motive for murder was elimination of witness

[21] Sentencing and Punishment 350H ⚿1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited Cases
(Formerly 203k358(1))
Record supported aggravating factor at sentencing phase of capital murder case, that murder was committed for purposes of avoiding lawful arrest; defendant admitted that he knew victim through several visits to victim's pawn shop, where killing occurred, and companion, who was taking jewelry and guns as defendant was beating victim, told him he had better kill victim because someone would find out.

[22] Criminal Law 110 ⚿1134.23

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.23 k. Sentencing. Most Cited Cases
(Formerly 110k1134(2))
In reviewing proportionality of death sentence, Supreme Court must consider totality of circumstances in case and compare it with other capital cases.

[23] Sentencing and Punishment 350H ⚿1686

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1686 k. Other Matters Related to Offense. Most Cited Cases
(Formerly 203k357(11), 203k357(4))
Death penalty for defendant convicted of capital murder was proportionate; although aggravating factor that murder was especially heinous, atrocious or cruel was not found, it was particularly brutal, with victim being struck on head with hammer and speared in neck and ribs with scissors, and court found two aggravating factors and no statutory mitigating factors.

[24] Sentencing and Punishment 350H ⚿1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
(Formerly 110k983)
Defendant could be sentenced to death for killing of pawn shop owner during commission of robbery, even though co-perpetrator received lesser sentence; defendant was more culpable, as he had actually done killing.

[25] Sentencing and Punishment 350H ⚿833

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)2 Upward Departures
350Hk831 Other Offenses, Misconduct or Charges
350Hk833 k. Connected or Inseparable Offenses. Most Cited Cases
(Formerly 110k1287(3))

Sentencing and Punishment 350H ⚿841

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)2 Upward Departures
350Hk841 k. Inadequacy of Criminal History Category. Most Cited Cases
(Formerly 110k1287(11))
Upward departure sentence of life imprisonment could be imposed on defendant's armed robbery conviction, based on first-degree murder conviction arising from same incident, even though points were scored for victim injury on guideline scoresheet.

[26] Criminal Law 110 ⚿1181.5(3.1)

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(3.1) k. In General. Most Cited Cases
Order assessing attorney fees and costs, in capital murder case, would be set aside to allow defendant to have proper notice and opportunity to be heard. West's F.S.A. § 27.56.
***664** James Marion Moorman, Public Defender and Robert F. Moeller, Assistant Public Defender, Tenth Judicial Circuit, Bartow, for Appellant.

Robert A. Butterworth, Attorney General and Candance M. Sabella, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing a death sentence upon Jack R. Sliney. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. Sliney was convicted of first-degree murder and armed robbery. For the armed robbery conviction, the trial judge imposed an upward departure sentence of life imprisonment. We affirm the convictions and sentences.

The victim in this case, George Blumberg, and his wife, Marilyn Blumberg, owned and operated a pawn shop. On June 18, 1992, Marilyn drove to the pawn shop after unsuccessfully attempting to contact George by phone. When she entered the shop, she noticed that the jewelry cases were empty and askew. She then stepped behind the ***665** store counter and saw George lying face down in the bathroom with scissors protruding from his neck. A hammer lay on the floor next to him. Marilyn called 911 and told the operator that she thought someone had held up the shop and killed her husband.

A crime-scene analyst who later arrived at the scene found, in addition to the hammer located next to the victim, parts of a camera lens both behind the toilet and in the bathroom wastepaper basket. The analyst also found traces of blood and hair in the bathroom sink. The only relevant fingerprint found in the shop belonged to codefendant Keith Witteman.

During an autopsy of the victim, the medical examiner found various injuries on the victim's face; three crescent-shaped lacerations on his head; three stab wounds in his neck, one of which still contained a pair of scissors; a number of broken ribs; and a fractured backbone. The medical examiner opined that the facial injuries occurred first and were caused by blunt trauma. When asked whether the camera lens found at the scene could have caused some of the victim's facial injuries, the medical examiner responded affirmatively. The stab wounds, the medical examiner testified, were inflicted subsequent to the facial injuries and were followed by the three blows to the head. The medical examiner confirmed that the three crescent-shaped lacerations found on the victim's head were consistent with the end of the hammer found at the scene. Finally, the medical examiner opined that the broken ribs and backbone were the last injuries the victim sustained and that the cause of these injuries was most likely pressure applied to the victim's

back as he lay on the ground.

The day after the murder, Kenneth Dale Dobbins came forward indicating that he might have seen George Blumberg's assailants. Dobbins had been in the pawn shop on June 18, 1992, and prior to his departure, he saw two young men enter the shop. The two men approached George and began discussing a piece of jewelry that they apparently had discussed with him on a prior occasion.

Dobbins saw the face of one of the men as the two walked past him. Based on the description Dobbins gave, investigators drew and circulated a composite of the suspect. One officer thought his stepdaughter's boyfriend, Thaddeus Capeles, might recognize the suspect because Capeles and the suspect appeared to be close in age. The officer showed Capeles the composite as well as a picture of a gun that had been taken from the Blumbergs' pawn shop. Capeles did not immediately recognize the person in the composite but later contacted the officer with what he believed to be pertinent information. Capeles told the officer that when he visited the Club Manta Ray, Jack Sliney, who managed the teen club, asked him whether he was interested in purchasing a gun. He thought the gun Sliney showed him looked somewhat like the one in the picture the officer had shown him.

The officer arranged a meeting between Capeles and Carey Twardzik, an investigator in the Blumberg case. During that meeting, Capeles agreed to assist with the investigation. At Twardzik's direction, Capeles arranged a controlled buy of the gun Sliney had shown him. His conversations with Sliney, both on the phone and at the time he purchased the gun, were recorded and later played to the jury. After discovering that the serial number on the gun matched the number on a firearms register from the Blumbergs' pawn shop, investigators asked Capeles to arrange a second controlled buy of some other guns Sliney mentioned during his most recent conversation with Capeles. Capeles' conversations with Sliney regarding the second sale, like the conversations surrounding the initial sale, were recorded and later played to the jury. As with the first sale, the serial numbers on the guns Capeles obtained matched the numbers on the firearms register obtained from the Blumbergs' shop. At trial, Marilyn Blumberg identified the guns Sliney sold to Capeles and confirmed that they were present in the pawn shop the day prior to the murder.

Shortly after the second gun transaction, several officers arrested Sliney. The arrest occurred after Sliney left the Club Manta Ray, sometime between 1 and 1:45 a.m. At the time of the arrest, codefendant Keith Witteman and a female were also in Sliney's truck. Despite the testimony of several defense***666** witnesses to the contrary, the arresting officers testified that Sliney did not appear to be drunk or to have any difficulty in following the instructions they gave him.

Following the arrest, Sliney was taken to the sheriff's department. Officer Twardzik read Sliney his *Miranda* [FN1] rights, and Sliney thereafter indicated that he wanted to talk. He gave both written and taped statements in which he confessed to the murder. In his taped statement which was played to the jury, Sliney told the officers that shortly after he and Keith Witteman entered the shop, they began arguing with George Blumberg about the price of a necklace Sliney wanted to buy. According to Sliney, Witteman pressured him to hit Blumberg. Sliney grabbed Blumberg, and Blumberg fell face down on the bathroom floor. Sliney fell on top of Blumberg. Sliney then turned to Witteman and asked him what to do. Witteman responded, "You have to kill him now," and began taking things from the display cases and placing them in a bag. Thereafter, Sliney recalled hitting Blumberg in the head with a camera lens that Sliney took from the counter and stabbing Blumberg with a pair of scissors that Sliney obtained from a drawer. Sliney was somewhat uncertain of the order in which he inflicted these injuries. Next, he recalled removing a hammer from the same drawer in which the scissors were located and hitting Blumberg on the head with it several times.

FN1. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Sliney left Blumberg on the floor. He washed his hands in the bathroom sink, and then he and Witteman left the shop. According to Sliney, Witteman, in addition to taking merchandise from the shop, took money from the register and the shop keys from Blumberg's pocket. He used the keys to lock the door as the two exited the shop.

Before returning home,[FN2] Sliney and Witteman disposed of several incriminating items and transferred the jewelry they obtained from the shop, as well as a .41 caliber revolver,[FN3] into a gym bag. Sliney put the bag in a trunk in his bedroom. Officers conducting a search of Sliney's home later found the gym bag containing the jewelry and gun.

FN2. Both Sliney and Witteman lived with Sliney's parents.

FN3. This gun was not listed on the firearm register found in the Blumbergs' shop.

In addition to recounting the circumstances surrounding the murder, Sliney told the officers that he had been in the pawn shop prior to the murder. He said, however, that he did not decide to kill Blumberg before entering the shop or at the time he and Blumberg were arguing. Rather, he told them that he did not think about killing Blumberg until Witteman said, "[W]e can't just leave now. Somebody will find out or something. We got to kill him."

Prior to trial, Sliney moved to suppress the statements he made to the law enforcement officers. He alleged that the statements were involuntary and thus inadmissible. The trial court denied the motion. At trial, Sliney presented several witnesses to the jury in support of his position that his confession was untrustworthy. Sliney also testified on his own behalf. His testimony was inconsistent with the statements he made to law enforcement officers. He testified that it was actually Witteman who murdered Blumberg. Sliney told the jury that he paid for the necklace he was looking at before he began arguing with Blumberg over the price. During the argument he grabbed Blumberg, and Blumberg fell to the floor. When he saw that Blumberg was bleeding, he left the shop. He lay down in his truck because the sight of the blood made him sick. Several minutes later, Witteman came out to the truck. He removed a pair of weight lifting gloves from Sliney's gym bag and then went back into the shop. When Witteman exited the shop again he had with him a gun and a pillow case full of things. Sliney explained that he did not go to the police when he discovered that Blumberg was dead because Witteman threatened to harm his family.

The jury convicted Sliney of first-degree premeditated murder, first-degree felony murder, and robbery with a deadly weapon. Prior to the penalty phase, Sliney sought to ***667** discharge his privately retained counsel. The trial court permitted the discharge and appointed a public defender to represent Sliney in the penalty proceeding. The trial court also granted a continuance to afford the public defender more time to prepare.

In the penalty phase, the jury returned a death recommendation by a vote of seven to five. The trial court imposed an upward departure sentence of life on the robbery count and concurred with the jury's recommendation as to the murder.[FN4] In aggravation, the trial court found that: (1) the murder was committed while Sliney was engaged in or was an accomplice in the commission of a robbery; [FN5] and (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest.[FN6] In mitigation, the trial court found the statutory factors of (1) youthful age,[FN7] and (2) no significant prior criminal history.[FN8] However, the court afforded little weight to Sliney's age, which was nineteen at the time of the crime. As to nonstatutory mitigators, the trial court gave some weight to the fact that Sliney was a good prisoner but gave only little weight to the following factors urged by Sliney: (1) his politeness; (2) his status as a good neighbor; (3) his being a caring person; (4) his good school re-

cord; and (5) his gainful employment. The court rejected Sliney's request to consider Sliney's confession as a mitigating factor because Sliney had claimed that the confession was involuntary. Finally, the trial court found that Witteman's life sentence for the same offenses was not a mitigating factor in this case because the two defendants were not equally culpable.

> FN4. The trial court did not issue a sentencing order in this case until it completed Witteman's trial. The jury in that case convicted Witteman of the same three charges: first-degree premeditated murder, first-degree felony murder, and robbery with a deadly weapon. The jury then recommended a life sentence. The trial court concurred and sentenced Witteman to life for first-degree premeditated murder.
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> FN5. § 921.141(5)(d), Fla. Stat. (1993).
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> FN6. § 921.141(5)(e), Fla. Stat. (1993).
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> FN7. § 921.141(6)(g), Fla. Stat. (1993).
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> FN8. § 921.141(6)(a), Fla. Stat. (1993).

On appeal, Sliney raises ten issues: (1) Sliney's confession was involuntary and should have been suppressed; (2) the trial court erred in admitting into evidence portions of the transcript of Marilyn Blumberg's 911 call; (3) the trial court erred in allowing the jury to hear taped conversations between Capeles and Sliney which included expletives and racial epithets; (4) the firearms register from the Blumbergs' pawn shop constituted inadmissible hearsay; (5) the trial court erred in excluding testimony from several inmates to whom Witteman admitted killing Blumberg; (6) the trial court erred in refusing to appoint an investigator to research mitigating evidence and in failing to allow the public defender adequate time to prepare for the penalty proceeding; (7) the trial court erroneously found both aggravating factors; (8) death is disproportionate; (9) the trial court erred in giving an upward departure sentence for the armed robbery count; and (10) the trial court improperly assessed fees and costs against Sliney.

Guilt Phase

[1][2][3] Sliney first claims that the trial court should have suppressed the statements he gave to Officers Twardzik and Sisk because the statements were involuntary as a matter of law. Specifically, he alleges that such factors as his age, intoxication, isolation during questioning, previous acquaintance with the officers, and mental state establish that his confession was involuntary. A confession obtained by means of physical or psychological coercion or a violation of a constitutional right will be deemed involuntary and inadmissible. In order for a confession to be admissible, the State must demonstrate by a preponderance of the evidence that the confession was voluntary. *Roman v. State,* 475 So.2d 1228, 1232 (Fla.1985), *cert. denied,* 475 U.S. 1090, 106 S.Ct. 1480, 89 L.Ed.2d 734 (1986); *DeConingh v. State,* 433 So.2d 501, 503 (Fla.1983), *cert. denied,* 465 U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984). Whether a confession is voluntary depends on the totality of the circumstances surrounding the confession. *Traylor v. State,* 596 So.2d 957, 964 (Fla.1992); ***668***Thompson v. State,* 548 So.2d 198, 203-04 (Fla.1989); *Roman,* 475 So.2d at 1232.

[4][5][6] In addition to claiming his confession was involuntary, Sliney alleges that the State failed to establish that he validly waived his rights prior to his confession because the investigating officers did not obtain Sliney's signature on the bottom of the *Miranda* rights warning form. An invalid waiver, like an involuntary confession, can serve as a basis for suppressing Sliney's statements. *See Traylor,* 596 So.2d at 966; *State v. Graham,* 240 So.2d 486, 488 (Fla. 2d DCA 1970), *disapproved on other grounds, Johnson v. State,* 294 So.2d 69 (Fla.1974). To determine if a waiver is valid a court must make two inquiries. First, the court must determine if the waiver was voluntary in the sense that it was the product of free and deliberate choice rather than in-

timidation, coercion, or deception. *Fare v. Michael C.,* 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979); *see also State v. Mallory,* 670 So.2d 103, 106 (Fla. 1st DCA 1996). Second, the court must determine whether the waiver was executed with a full awareness of the nature of the rights being abandoned and the consequences of their abandonment. *Fare,* 442 U.S. at 725, 99 S.Ct. at 2572; *Mallory,* 670 So.2d at 106. As with determining the voluntariness of a confession, a court must use a totality-of-the-circumstances analysis to determine whether a waiver of *Miranda* rights meets these criteria and is thus valid. Likewise, the State has the burden of proving the waiver is valid by a preponderance of the evidence. *See Colorado v. Connelly,* 479 U.S. 157, 168-69, 107 S.Ct. 515, 522-23, 93 L.Ed.2d 473 (1986).

[7] First, we address Sliney's contention that his waiver of rights was invalid. There is no question that Sliney waived his rights in this case. The question we must answer is whether the waiver was knowing, intelligent, and voluntary. We do not find that the failure to sign the *Miranda* form in full in this case invalidated the waiver. Moreover, we conclude that no other basis exists for finding that the trial court abused its discretion in finding Sliney's waiver valid.

The record reflects that after Sliney's arrest, Officers Twardzik and Sisk accompanied Sliney into an interview room. Twardzik and Sisk testified at the suppression hearing that Twardzik read Sliney his *Miranda* rights from a form. Twardzik then asked Sliney, in accordance with the form, whether Sliney understood each of his rights and whether, having these rights in mind, he wished to talk to the officers. Sliney responded affirmatively to both questions and thereafter signed his name to the top portion of the form.

After signing the form, Sliney began asking the officers questions. As a result of Sliney's questions, Twardzik got sidetracked and forgot to have Sliney sign the waiver-of-rights provision located at the bottom of the form. [FN9] Instead, in response to Sliney's questions, Twardzik told Sliney that he had been arrested because the weapons he sold to Capeles were stolen. Sliney responded that he had been forced to buy the weapons and some jewelry from a man in Port Charlotte three weeks earlier.

> FN9. Subsequently, during his taped statement, Sliney read the waiver of rights which he failed to sign. As indicated by Sliney's taped confession the waiver reads as follows:
>
> > I have read this statement waiver of rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want any attorney at this time. I understand and know what I'm doing. No promises or threats have been made to me. No pressure or coercion of any kind has been used against me.

After briefly exiting the interview room, Twardzik returned and told Sliney that he had trouble believing the story because the guns were taken only ten days earlier. At that point, Sliney said, "I know both of you guys," and said to Officer Sisk, "I know your sons." Sliney's eyes began to well up with tears. He requested a pen and paper and began writing a statement in which he confessed to the murder. Once the written statement was complete and Sliney had regained his composure, Twardzik took a taped statement. In that statement, Sliney orally confessed to the murder. Sliney testified at the suppression hearing that he was intoxicated at the time of his arrest and did not ***669** recall being read his rights or making any statement to the police.

We find this case similar to *Hogan v. State,* 330 So.2d 557 (Fla. 2d DCA 1976), authored by then Judge Grimes. In *Hogan,* an officer read the defendant his *Miranda* rights but failed to obtain a written waiver of counsel. *Hogan,* 330 So.2d at 557. The failure to obtain the written waiver, however, was not fatal to the admissibility of the confession, wherein Hogan stated that he under-

stood those rights and was willing to talk to the officer. *Id.* at 559. In accord with *Hogan,* we do not find that the officers' failure to obtain Sliney's signature on the bottom portion of the *Miranda* form necessarily invalidated his waiver. Rather, we agree with the trial court's conclusion in the instant case.

[8][9] The trial court, after listening to various witnesses, including Sliney, listening to Sliney's taped statement, and reviewing Sliney's written statement, found that Sliney was not at the time of the arrest impaired by alcohol to the extent that he lacked the ability to exercise his free will. Additionally, the court found that no threats or promises were used to obtain Sliney's confession. Based on these findings, the trial court concluded that Sliney's waiver was voluntarily and knowingly made. We conclude that there is competent, substantial evidence in the record to support the trial court's findings. Thus, as the court did in *Hogan,* we find that the totality of the circumstances reflect that Sliney's waiver was knowing, intelligent, and voluntary.[FN10]

> FN10. Although we find that the failure to obtain a complete signed waiver in this case did not make the waiver invalid, we reiterate our statement in *Traylor* that, where reasonably practical, prudence suggests that a waiver of constitutional rights should be in writing. 596 So.2d at 966. We also note that the officers' failure to obtain Sliney's signature on the bottom of the form remains a factor that we must consider in evaluating the totality of the circumstances surrounding Sliney's confes- sion.

[10][11] We now turn to Sliney's contention that his confession was involuntary. In this case, the factors we considered in determining whether Sliney's waiver was knowing, intelligent, and voluntary, and thus valid, are also relevant to our analysis of his confession. Consequently, we find that Sliney's confession, like his waiver, was voluntary. We note, however, that a separate analysis of Sliney's confession was necessary because a valid waiver, while it may be significant proof that a confession is voluntary, does not always result in a voluntary confession. *See Traylor,* 596 So.2d at 966. Other circumstances independent of the waiver might exist that make the confession involuntary. However, we find that this is not the case here.

In his second claim, Sliney alleges that the trial court erred in allowing the prosecutor to read to the jury the transcript of Marilyn Blumberg's 911 call because it was inadmissible hearsay; it was irrelevant; and any probative value the transcript may have had was outweighed by the danger of unfair prejudice. Although we agree with Sliney that the trial court's finding as to the hearsay issue was somewhat confusing,[FN11] we find that the statement was admissible as an excited utterance pursuant to section 90.803(2), Florida Statutes (1993). *See Allison v. State,* 661 So.2d 889, 894 (Fla. 2d DCA 1995); *Ware v. State,* 596 So.2d 1200, 1202 (Fla. 3d DCA 1992). Furthermore, we do not find the trial court abused its discretion in finding the statement relevant. In rejecting Sliney's final challenge to the transcript as without merit, we note that in an abundance of caution, the trial court had the prosecutor read the transcript rather than play the tape of the 911 call in order to avoid any unfair prejudice that might have resulted from Marilyn Blumberg's excited voice. Additionally, the trial court, at Sliney's request, removed any paraphrasing from the transcript that described Marilyn's tone.

> FN11. The trial court initially found that the 911 call was an excited utterance but then, in discussing the probative value of the transcript, stated "the tape is not excited utterances because a question and answer session begins towards the later part of the tape in an attempt to gain information."

[12] As his third issue, Sliney contends that the trial court erred in admitting certain portions of the tape-recorded conversations between Sliney and Thaddeus Capeles. At ***670** trial, Sliney initially objected to the admission of the tapes on relevancy

grounds. Thereafter, Sliney asked that if the recordings were found relevant, certain objectionable portions containing offensive language and racial epithets be omitted. Sliney maintains that these particular portions of the transcript lacked any probative value and served only to portray Sliney in a bad light. We agree with the trial court, which reviewed the tapes before they were admitted to the jury, that the taped statements were relevant and that their probative value was not outweighed by their prejudicial effect.

[13] In his fourth claim, Sliney contends that the firearms register which the State introduced into evidence was inadmissible hearsay. According to Sliney, the register could not be introduced pursuant to the business-records exception to the hearsay rule because Marilyn Blumberg's testimony indicating that the register came from the Blumbergs' shop did not lay a proper foundation for this exception. Assuming that the firearms register was improper hearsay, we find that its introduction was harmless beyond a reasonable doubt in light of the remaining evidence against Sliney and in light of Marilyn Blumberg's testimony at trial that the guns Capeles purchased from Sliney had been in the Blumberg's pawn shop the day prior to the murder.

[14] In his fifth claim, Sliney contends that the trial court erred in precluding the testimony of several witnesses whose testimony was critical to Sliney's defense. Before Sliney presented his case to the jury, he proffered the testimony of Witteman and several inmates who were incarcerated with Witteman. When Witteman was called to the stand, he invoked his privilege against self-incrimination, thereby establishing his unavailability. Two of the inmates then testified that during a particular sequence of events, Witteman told one of them to shut up or "he'd kill him like he did the other old bastard." The trial court found that Witteman's statement as relayed by the two inmates was untrustworthy and thus did not meet the requirements of section 90.804(2)(c), Florida Statutes (1993). Sliney contends that Witteman's statement was trustworthy and that even if the statement did not meet the requirements of section 90.804(2)(c), his constitutional right to present a defense should have taken precedence over the exclusionary rules of evidence. We reject Sliney's contentions.

First, we find that there is competent, substantial evidence in the record to support the trial court's finding that there were insufficient corroborating circumstances to show the trustworthiness of Witteman's statement. Sliney's claim that the State should not have been permitted to argue that Witteman's statement was untrustworthy because it prosecuted Witteman for the same murder is baseless. In Witteman's case, the State did not proceed on a theory that Witteman actually performed the murder.

[15] Likewise, we reject Sliney's contention that the hearsay testimony should be admitted without regard to the Rules of Evidence because it was critical to his defense that someone other than himself committed the murder. Sliney's claim is based upon *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Sliney fails to recognize, however, that in *Chambers,* the court held that the hearsay statements of a third person who orally confessed to the murder with which the defendant was charged should have been admitted because the statements' reliability was clearly established. *See Lightbourne v. State,* 644 So.2d 54, 57 (Fla.1994), *cert. denied,* 514 U.S. 1038, 115 S.Ct. 1406, 131 L.Ed.2d 292 (1995); *Czubak v. State,* 644 So.2d 93, 95 (Fla. 2d DCA 1994), *review denied,* 652 So.2d 816 (Fla.1995). The same cannot be said for the hearsay statement at issue here. Consequently, we reject Sliney's final guilt-phase claim, and we affirm Sliney's convictions as we find that the record contains competent, substantial evidence to support them.

Penalty Phase

[16][17][18] Sliney raises several issues concerning his death sentence. In issue six, Sliney claims the

trial court erred in its interrelated rulings in which the court denied Sliney's motions for a continuance and for the appointment of an investigator to research*671 mitigating evidence. Regarding the trial court's ruling on a motion for continuance, such a ruling will not be overturned on appeal unless a defendant demonstrates a palpable abuse of discretion. *See Fennie v. State,* 648 So.2d 95, 97 (Fla.1994); *Echols v. State,* 484 So.2d 568, 572 (Fla.1985). Similarly, a trial court's ruling on a motion for appointment of experts will be affirmed on appeal in the absence of an abuse of discretion. *See Martin v. State,* 455 So.2d 370, 371-72 (Fla.1984). We have reviewed the record in this case, which shows that after the jury returned its guilty verdicts, Sliney moved to discharge private counsel. The trial court asked Sliney specific questions to ensure that the decision was knowing, intelligent, and voluntary. The trial court explained the pitfalls of this decision, and Sliney agreed to discharge his private counsel and accept representation by a public defender. Thereafter, the trial court appointed the public defender who had represented Sliney in the early stages of the case to represent him in the penalty phase. [FN12] Counsel was appointed on October 4, 1993, with the penalty phase postponed until November 4, 1993, over one year from Sliney's indictment on September 3, 1992. Under these circumstances, we find the trial court did not abuse its discretion in denying these motions.

> FN12. At the hearing on the motions, it was borne out by the State that this public defender was originally assigned to the case, was familiar with the facts of the case, and was present during the depositions of the witnesses.

In issue seven, Sliney challenges the trial court's instructions and findings regarding the aggravating circumstances. First, Sliney challenges the aggravator that the murder was committed during a robbery. In a footnote, he also contends that the trial court erred in denying his motion for directed verdict on the robbery charge. With respect to this aggravator, the trial court found:

> The Defendant was charged and convicted of committing robbery. The evidence established that the Defendant and Co-Defendant, Keith [Witteman], entered Ross' Pawn Shop, the business establishment of George Blumberg and took gold jewelry and firearms from George Blum- berg.
>
> The Defendant's confession clearly established that the Defendant knocked the victim to the floor injuring him. The Defendant further elaborated that while he was attacking the victim, repeatedly stabbing him in the neck with a pair of scissors and ultimately striking the victim in the head with a hammer, inflicting the fatal wounds, Co-Defendant, Keith [Witteman], was cleaning out the victim's display cases of jewelry and firearms.
>
> The Defendant later sold the firearms taken from the victim's pawn shop. Further, the gold jewelry taken at the robbery was recovered from the Defendant's bedroom at his residence.

[19] We agree with the trial court's finding that there was sufficient evidence in the record, including Sliney's own confession, to support the robbery charge to the jury, the guilty verdict on the charge, and the aggravating circumstance that the murder was committed during the course of a robbery. *See generally Jones v. State,* 652 So.2d 346, 349-50 (Fla.), *cert. denied,* 516 U.S. 875, 116 S.Ct. 202, 133 L.Ed.2d 136 (1995); *Perry v. State,* 522 So.2d 817, 820 (Fla.1988) (contemporaneous conviction for armed robbery warranted finding in aggravation that murder was committed during course of robbery).

[20][21] We next address the challenge to the aggravator that the murder was committed for purpose of avoiding a lawful arrest. We have long held that in order to establish this aggravating factor where the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the murder was the elimination of the witness.

Preston v. State, 607 So.2d 404, 409 (Fla.1992). In this case, Sliney admitted to being in the pawn shop between five and fifteen times prior to the murder. Sliney also stated that he had bargained with the victim on several prior occasions. In Sliney's taped confession, which was played to the jury, Sliney stated that after he initially grabbed the victim, Keith told Sliney that Sliney would have to kill the victim because "[s]omebody will find out or something." Thereafter, Sliney hit the victim with a camera lens, stabbed him with a pair of scissors, ***672** and hit him in the head with a hammer. We find this evidence sufficient to support this aggravator beyond a reasonable doubt. *See Consalvo v. State,* 697 So.2d 805 (Fla.1996). We find the record permissibly supports beyond a reasonable doubt the finding of both of these aggravators. *See Echols.*

[22][23][24] We next address Sliney's issue eight: whether the death penalty is proportionate. In reviewing the proportionality of a death sentence, we must consider the totality of the circumstances in a case and compare it with other capital cases. *Terry v. State,* 668 So.2d 954, 965 (Fla.1996). Although the trial court did not find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, this was a particularly brutal murder. The victim was beaten with a hammer to the face and was found with a pair of scissors stuck in his neck, with fractured ribs, and with a fractured backbone. The trial court did find two aggravating circumstances. Moreover, the trial court did not find any statutory mental mitigation. Comparing this to other cases in which the death penalty was imposed, we do not find that the mitigating circumstances which were found to exist in this case make the death sentence disproportionate. *See Smith v. State,* 641 So.2d 1319 (Fla.1994); *see generally Geralds v. State,* 674 So.2d 96 (Fla.), *cert. denied,* 519 U.S. 891, 117 S.Ct. 230, 136 L.Ed.2d 161 (1996); *Finney v. State,* 660 So.2d 674 (Fla.1995), *cert. denied,* 516 U.S. 1096, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996). Furthermore, we agree with the trial court that the codefendant's life sentence does not require a different result because Sliney was more culpable than his codefendant. *See Heath v. State,* 648 So.2d 660 (Fla.), *cert. denied,* 515 U.S. 1162, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995).

[25] In addition to imposing the death penalty, the trial court imposed an upward departure sentence of life for Sliney's armed robbery conviction. Sliney contends that the upward departure was improper because it was based on victim injury which was already scored. We reject Sliney's contention because the trial court's sentencing order clearly indicates that the upward departure was based upon Sliney's first-degree murder conviction. We have held that a first-degree murder conviction may constitute a valid reason for departure. *Bedford v. State,* 589 So.2d 245, 254 (Fla.1991), *cert. denied,* 503 U.S. 1009, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992). This is true regardless of whether points have been scored for victim injury on the guideline scoresheet. *Id.*

[26] Having reviewed the entire record and finding no reversible error, we affirm Sliney's convictions and sentences. However, we set aside the order assessing attorney fees and costs and direct the trial court to provide Sliney with the proper notice and an opportunity to be heard concerning any assessment of fees and costs made pursuant to section 27.56, Florida Statutes (1993). *See Bull v. State,* 548 So.2d 1103 (Fla.1989). To ensure meaningful appellate review, we also ask that the trial court list any other statute upon which it bases an assessment of costs. *See State v. Beasley,* 580 So.2d 139 (Fla.1991); *Bradshaw v. State,* 638 So.2d 1024 (Fla. 1st DCA 1994).

It is so ordered.

SHAW, GRIMES, HARDING and WELLS, JJ., concur.
KOGAN, C.J., concurs in part and dissents in part with an opinion, in which OVERTON and ANSTEAD, JJ., concur.KOGAN, Chief Justice, concurring in part and dissenting in part.
I concur with the majority in affirming the defend-

ant's convictions for first-degree murder and armed robbery. Further, I agree with the majority's finding that the trial court did not improperly impose an upward departure sentence for Sliney's armed robbery conviction. However, I dissent as to the imposition of the death penalty and would reduce the sentence to life imprisonment based upon proportionality.

Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. *Terry v. State,* 668 So.2d 954, 965 (Fla.1996); *Sinclair v. State,* 657 So.2d 1138, 1142 (Fla.1995); ***673***Porter v. State,* 564 So.2d 1060, 1064 (Fla.1990) . It requires a discrete analysis of the facts. *Terry,* 668 So.2d at 965. The Court must consider the circumstances as set forth in the record in relation to other decisions. *Livingston v. State,* 565 So.2d 1288, 1292 (Fla.1988). However, the Court cannot consider an aggravator that the trial court did not find. That is essentially what the majority has done here by relying on its own factual finding that the murder was particularly brutal. The trial court did not find the murder in this case was especially heinous, atrocious, or cruel, but the majority finds the "brutality" of the murder distinguishes it from robbery-murder cases such as *Terry, Sinclair, Thompson v. State,* 647 So.2d 824 (Fla.1994), *Livingston,* and *Caruthers v. State,* 465 So.2d 496 (Fla.1985), in which this Court found the death sentence was disproportionate.

In *Terry* the appellant and a codefendant robbed a convenience store/gas station. 668 So.2d at 957. Appellant entered the convenience store and shot the clerk while the codefendant held the clerk's husband at bay in the station's garage. *Id.* The jury recommended death by a vote of eight to four and the trial judge followed the recommendation. *Id.* at 958. In aggravation, the trial court found a prior violent felony and that the murder was committed while engaged in the commission of a robbery. *Id.* The court found no mitigators. *Id.*

In reversing Terry's sentence, this Court determined that although there was not a great deal of mitigation, the aggravation was not extensive given the totality of the underlying circumstances. *Id.* at 965. In particular, the Court noted that the prior violent felony aggravator was based on the appellant's conviction for the contemporaneous assault committed simultaneously by the codefendant rather than a crime committed by the appellant himself. *Id.* at 965-66. The Court then compared the case to *Sinclair* and *Thompson. Id.* at 966. While both *Sinclair* and *Thompson* involved only one aggravator-that the murder was committed in the course of a robbery-the cases are factually similar to and involve less mitigation than the instant case. Consequently, I find that like *Terry,* they support a finding that the death sentence is disproportionate in this case.

Livingston also involved the robbery of a convenience store/gas station during which the store clerk was shot. 565 So.2d at 1289. The trial court found three aggravating factors: previous conviction of violent felony, committed during armed robbery, and committed to avoid or prevent arrest. *Id.* at 1292. In mitigation, the trial court considered the appellant's age and his unfortunate home life and rearing. *Id.* This Court struck the avoiding arrest aggravator and, although two valid aggravators remained, as they do in the instant case, found that death was disproportionate. *Id.*

In *Caruthers,* as in *Livingston,* the Court struck the avoiding arrest aggravator.[FN13] 465 So.2d at 499. Unlike *Livingston,* however, the Court was left with only a single aggravator-committed during a robbery. *Id.* In mitigation, the trial court found no significant history of prior criminal activity, as well as several nonstatutory mitigators. *Id.* Although the instant case involves slightly more aggravation than *Caruthers,* I cannot say in reviewing the totality of the circumstances in the two cases that they require different sentences.

> FN13. We also struck the cold, calculated, and premeditated aggravator.

Accordingly, I find that the circumstances in this case do not place the murder in the category of the most aggravated and least mitigated and, therefore,

do not warrant the death penalty. I would vacate Sliney's death sentence and direct the trial court upon remand to resentence Sliney to life imprisonment with no possibility of parole for twenty-five years, which sentence should run consecutively to his life sentence for armed robbery.

OVERTON and ANSTEAD, JJ., concur.
Fla.,1997.
Sliney v. State
699 So.2d 662, 22 Fla. L. Weekly S476

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Effective: July 1, 2003

West's Florida Statutes Annotated Currentness
Title VII. Evidence (Chapters 90-92)
Chapter 90. Evidence Code (Refs & Annos)
→ 90.803. Hearsay exceptions; availability of declarant immaterial

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(1) Spontaneous statement.--A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

(2) Excited utterance.--A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then-existing mental, emotional, or physical condition.--

(a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

2. Prove or explain acts of subsequent conduct of the declarant.

(b) However, this subsection does not make admissible:

1. An after-the-fact statement of memory or belief to prove the fact remembered or believed, unless such statement relates to the execution, revocation, identification, or terms of the declarant's will.

2. A statement made under circumstances that indicate its lack of trustworthiness.

(4) Statements for purposes of medical diagnosis or treatment.--Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has know-

ledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inceptions or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.--A memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. A party may read into evidence a memorandum or record when it is admitted, but no such memorandum or record is admissible as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted business activity.--

(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) Evidence in the form of an opinion or diagnosis is inadmissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(c) A party intending to offer evidence under paragraph (a) by means of a certification or declaration shall serve reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence. If the evidence is maintained in a foreign country, the party intending to offer the evidence must provide written notice of that intention at the arraignment or as soon after the arraignment as is practicable or, in a civil case, 60 days before the trial. A motion opposing the admissibility of such evidence must be made by the opposing party and determined by the court before trial. A party's failure to file such a motion before trial constitutes a waiver of objection to the evidence, but the court for good cause shown may grant relief from the waiver.

(7) Absence of entry in records of regularly conducted activity.--Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness.

(8) Public records and reports.--Records, reports, statements reduced to writing, or data compilations, in any

form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

(9) Records of vital statistics.--Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if a report was made to a public office pursuant to requirements of law. However, nothing in this section shall be construed to make admissible any other marriage of any party to any cause of action except for the purpose of impeachment as set forth in s. 90.610.

(10) Absence of public record or entry.--Evidence, in the form of a certification in accord with s. 90.902, or in the form of testimony, that diligent search failed to disclose a record, report, statement, or data compilation or entry, when offered to prove the absence of the record, report, statement, or data compilation or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation would regularly have been made and preserved by a public office and agency.

(11) Records of religious organizations.--Statements of births, marriages, divorces, deaths, parentage, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.--Statements of facts contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, when such statement was certified by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and when such certificate purports to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records.--Statements of fact concerning personal or family history in family Bibles, charts, engravings in rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.--The record of a document purporting to establish or affect an interest in property, as proof of the contents of the original recorded or filed document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording or filing of the document in the office.

(15) Statements in documents affecting an interest in property.--A statement contained in a document purporting to establish or affect an interest in property, if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.--Statements in a document in existence 20 years or more, the authenti-

city of which is established.

(17) Market reports, commercial publications.--Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations if, in the opinion of the court, the sources of information and method of preparation were such as to justify their admission.

(18) Admissions.--A statement that is offered against a party and is:

(a) The party's own statement in either an individual or a representative capacity;

(b) A statement of which the party has manifested an adoption or belief in its truth;

(c) A statement by a person specifically authorized by the party to make a statement concerning the subject;

(d) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or

(e) A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

(19) Reputation concerning personal or family history.--Evidence of reputation:

(a) Among members of a person's family by blood, adoption, or marriage;

(b) Among a person's associates; or

(c) In the community,

concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) Reputation concerning boundaries or general history.--Evidence of reputation:

(a) In a community, arising before the controversy about the boundaries of, or customs affecting lands in, the community.

(b) About events of general history which are important to the community, state, or nation where located.

(21) Reputation as to character.--Evidence of reputation of a person's character among associates or in the community.

(22) Former testimony.--Former testimony given by the declarant which testimony was 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, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

(23) Hearsay exception; statement of child victim.--

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsec- tion.

(24) Hearsay exception; statement of elderly person or disabled adult.--

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by an elderly person or disabled adult, as defined in s. 825.101, describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant elderly person or disabled adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate; and

2. The elderly person or disabled adult either:

a. Testifies; or

b. Is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the elderly person's or disabled adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before the trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the elderly person's or disabled adult's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsec- tion.

CREDIT(S)

Laws 1976, c. 76-237, § 1; Laws 1977, c. 77-174, § 1; Laws 1978, c. 78-361, § 20. Amended by Laws 1985, c. 85-53, § 4, eff. July 1, 1985; Laws 1987, c. 87-224, § 11; Laws 1990, c. 90-139, § 2, eff. Oct. 1, 1990; Laws 1990, c. 90-174, § 3, eff. Oct. 1, 1990; Laws 1991, c. 91-255, § 12, eff. July 1, 1991; Laws 1995, c. 95-147, § 498, eff. July 10, 1995; Laws 1995, c. 95-158, § 1, eff. July 1, 1995; Laws 1996, c. 96-330, § 2, eff. July 1, 1996

West's Florida Statutes Annotated Currentness
Code of Judicial Conduct (Refs & Annos)
➡ **Canon 3. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**

A. Judicial Duties in General.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the specific standards set forth in the following sections apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is re- quired.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, so-

cioeconomic status, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not, with respect to parties or classes of parties, cases, controversies or issues likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of

the adjudicative duties of the office.

(11) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary Responsibilities.

(1) A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.

(2) A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge;

(f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:

(i) parties or classes of parties in the proceeding;

(ii) an issue in the proceeding; or

(iii) the controversy in the proceeding.

(2) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification.

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

CREDIT(S)

Amended Jan. 23, 2003 (838 So.2d 521); Jan. 5, 2006 (918 So.2d 949).

COMMENTARY

Canon 3B(4). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.

Canon 3B(5). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Canon 3B(7). The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert

West's Florida Statutes Annotated Currentness
Code of Judicial Conduct (Refs & Annos)
➡ Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge should not hold membership in an organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership in a fraternal, sororal, religious, or ethnic heritage organization shall not be deemed to be a violation of this provision.

CREDIT(S)

Amended Jan. 5, 2006 (918 So.2d 949).

COMMENTARY

Canon 2A. Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3B(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judi-

West's Florida Statutes Annotated Currentness
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-3. Advocate
Rule 4-3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

CREDIT(S)

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); March 23, 2006, effective May 22, 2006 (933 So.2d 417).

COMMENT

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

LIBRARY REFERENCES

Effective:[See Text Amendments]

West's Florida Statutes Annotated Currentness
Title VII. Evidence (Chapters 90-92)
Chapter 90. Evidence Code (Refs & Annos)
90.802. Hearsay rule

Except as provided by statute, hearsay evidence is inadmissible.

CREDIT(S)

Laws 1976, c. 76-237, § 1.

LAW REVISION COUNCIL NOTE--1976

This section restates the general rule that excludes hearsay testimony. In State Farm Mut. Auto. Ins. Co. v. Ganz, 119 So.2d 319, 321 (Fla.3rd Dist. 1960) the court stated:

The general rule which bars the admission of evidence falling within the definition of hearsay is so firmly established and so well known that the citation of authority affirming the general principle seems hardly warranted.

The main objection to the introduction of hearsay testimony is the lack of an opportunity for the adverse party to cross-examine the declarant. In addition, the hearsay statement is usually not under oath and the jury does not have the opportunity to observe the demeanor of the witness. See McCormick, *Evidence* § 245 (2nd ed. 1972).

Exceptions to the hearsay rules are contained in subsequent statutory provisions. In addition, certain types of statements, which are technically included in the definition of hearsay, are admissible under the Rules of Procedure. For example, Fla.R.Civ.Pro. 1.330(a)(3) provides *inter alia* for the use of a deposition at trial when the witness is at a greater distance than 100 miles from the place of trial or hearing.

HISTORICAL AND STATUTORY NOTES

Federal Evidence Rules:

For rule relating to hearsay rule, see Rule 802, Fed.Rules Evid., 28 U.S.C.A.

Uniform Rules of Evidence:

541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 72 USLW 4229, 63 Fed. R. Evid. Serv. 1077, 04 Cal. Daily Op. Serv. 2017, 2004 Daily Journal D.A.R. 2949, 17 Fla. L. Weekly Fed. S 181
(Cite as: 541 U.S. 36, 124 S.Ct. 1354)

Supreme Court of the United States
Michael D. CRAWFORD, Petitioner,
v.
WASHINGTON.
No. 02-9410.

Argued Nov. 10, 2003.
Decided March 8, 2004.

Background: Defendant was convicted, after a jury trial in the Washington Superior Court, Thurston County, Richard A. Strophy, J., of first-degree assault while armed with deadly weapon. Defendant appealed. The Washington Court of Appeals reversed. On review, the Washington Supreme Court, 147 Wash.2d 424, 54 P.3d 656, reversed and reinstated defendant's conviction. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:
(1) out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, and
(2) admission of wife's out-of-court statements to police officers, regarding incident in which defendant, her husband, allegedly stabbed victim violated the Confrontation Clause.

Reversed, and remanded.

Chief Judge Rehnquist filed opinion concurring in judgment, in which Justice O'Connor joined.

West Headnotes

[1] Criminal Law 110 ⚖662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In General. Most Cited Cases
Principal evil at which the Confrontation Clause was directed was civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against accused. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 ⚖662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases
The Confrontation Clause, providing that accused has right to confront and cross-examine witnesses against him, applies not only to in-court testimony, but also to out-of-court statements introduced at trial, regardless of admissibility of statements under law of evidence. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ⚖662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In General. Most Cited Cases

Criminal Law 110 ⚖662.7

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront

Witnesses
110k662.7 k. Cross-Examination and Impeachment. Most Cited Cases
Defendant's right to confront and cross-examine witnesses against him, under the Confrontation Clause, applies to those who bear testimony against him, which is typically a solemn declaration or affirmation made for purpose of establishing or proving some fact. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⚿662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases

Criminal Law 110 ⚿662.9

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.9 k. Availability of Declarant. Most Cited Cases

Criminal Law 110 ⚿662.60

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.60 k. Testimony at Preliminary Examination, Former Trial, or Other Proceeding. Most Cited Cases
Out-of-court statements that qualify as testimonial, and thus that are not admissible, under the Confrontation Clause, unless witness is unavailable and defendant had prior opportunity to cross examine witness, include at a minimum prior testimony at preliminary hearing, before a grand jury, or at a former trial, and statements elicited during police interrogations. U.S.C.A. Const.Amend. 6.

[5] Criminal Law 110 ⚿662.60

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.60 k. Testimony at Preliminary Examination, Former Trial, or Other Proceeding. Most Cited Cases
Out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court; where testimonial statements are at issue, only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes, i.e., confrontation; abrogating *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 ⚿662.9

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.9 k. Availability of Declarant. Most Cited Cases

Criminal Law 110 ⚿662.60

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.60 k. Testimony at Preliminary Examination, Former Trial, or Other Proceeding. Most Cited Cases
When declarant appears for cross-examination at

trial, Confrontation Clause places no constraints at all on the use of his prior out-of-court testimonial statements. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 ⚖662.1

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.1 k. In General. Most Cited Cases

Criminal Law 110 ⚖662.7

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.7 k. Cross-Examination and Impeachment. Most Cited Cases
Ultimate goal of the Confrontation Clause is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee, in that it commands, not that evidence be reliable, but that reliability be assessed in a particular manner, i.e., by testing in crucible of cross-examination. U.S.C.A. Const.Amend. 6.

[8] Criminal Law 110 ⚖662.8

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k662 Right of Accused to Confront Witnesses
110k662.8 k. Out-Of-Court Statements and Hearsay in General. Most Cited Cases
Admission of wife's out-of-court statements to police officers, regarding incident in which defendant, her husband, allegedly stabbed victim, violated the Confrontation Clause, regardless of whether statements were deemed reliable by court, where statements were testimonial and defendant was not given prior opportunity to cross-examine wife. U.S.C.A. Const.Amend. 6.

***36 **1355** *Syllabus* [FN*]

FN* 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, 26 S.Ct. 282, 50 L.Ed. 499.

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, 100 S.Ct. 2531, 65 L.Ed.2d 597, 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, 100 S.Ct. 2531. 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. 1359-1374.

(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 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. English authorities and early state cases indicate that this was the ****1356** 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, 15 S.Ct. 337, 39 L.Ed. 409. Pp. 1359-1367.

***37** b) This Court's decisions have generally remained faithful to the Confrontation Clause's original meaning. See, *e.g., Mattox, supra.* Pp. 1367-1369.

(c) However, the same cannot be said of the rationales of this Court's more recent decisions. See *Roberts, supra,* at 66, 100 S.Ct. 2531. The *Roberts* test departs from historical principles because it admits statements consisting of *ex parte* testimony upon a mere reliability finding. Pp. 1369-1370.

(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. 1370-1371.

(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. 1371-1372.

(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. 1372-1374.

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, *post,* p. 1374.
Jeffrey L. Fisher, appointed by this Court, Seattle, WA, for petitioner,

Michael R. Dreeben, Washington, DC, for United States as amicus curiae, by special leave of the Court.

Steven C. Sherman, Olympia, WA, for respondent.

Edward G. Holm, Prosecuting Attorney, Thurston County, Washington, John Michael Jones, Senior Deputy Prosecuting Attorney, Counsel of Record, Steven C. Sherman, Senior Deputy Prosecuting Attorney, Olympia, WA, for respondent.

Bruce E. H. Johnson, Jeffrey L. Fisher, Counsel of Record, Scott Carter-Eldred, Davis, Wright, Tremaine, LLP, Seattle, WA, for petitioner.

For U.S. Supreme Court briefs, see:2003 WL 21939940 (Pet.Brief)2003 WL 22228001

(Resp.Brief)

Justice SCALIA delivered the opinion of the Court.

***38** Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for ****1357** 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 could a swore I seen him goin' for somethin' before, right before everything happened. He was like ***39** 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?

***40** "A. (pausing) um um (no)." *Id.,* at 137 (punctuation added).

The State charged petitioner with assault and at-

tempted 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). ****1358** 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, 100 S.Ct. 2531, 65 L.Ed.2d 597 (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, 100 S.Ct. 2531. 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 ***41** 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....
>
> ****1359 *42** "[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 state-

ments and makes Sylvia's statement reliable." 147 Wash.2d, at 438-439, 54 P.3d, at 664 (internal quotation marks omitted).[FN1]

FN1. 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.

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause. 539 U.S. 914, 123 S.Ct. 2275, 156 L.Ed.2d 129 (2003).

II

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall 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, 85 S.Ct. 1065, 13 L.Ed.2d 923 (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, 100 S.Ct. 2531. 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 ***43** 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 1364. 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, 108 S.Ct. 2798, 101 L.Ed.2d 857 (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 ****1360** 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). ***44** 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, ***45** *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, ch. 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 answered 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 ****1361** 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 ***46** 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, 120 S.Ct. 1620, 146 L.Ed.2d 577 (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); ***47** 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.).[FN2]

FN2. There is some question whether the requirement of a prior opportunity 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,* 30 S.C.L. 124, 130 (App.L.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.

****1362** 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 de-

fend 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***48** 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, argued: "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* (Oct. 1768 - Mar. 1769), in 2 Legal Papers of John Adams 194, 207 (L. 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 ***49** 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 ****1363** 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 (Super. L. & Eq. 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,* 30 S.C.L. 124, 1844 WL 2558 (App.L.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 depos-

itions 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 ***50** 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 (Super. L. & Eq. 1807) *(per curiam).* Most courts rejected that view, but only after reaffirming that admissibility depended 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,* 20 S.C.L. 607, 608-610 (App. 1835); *Johnston v. State,* 10 Tenn. 58, 59 (Err. & App. 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

[1] 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.

****1364** [2] 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 ***51** 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, 91 S.Ct. 210, 27 L.Ed.2d 213 (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.

[3] The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused-in other words, those who "bear testimony." 2 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.

[4] 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 ... ***52** contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois,* 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (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,* 30 S.C.L., at 130. Under the Marian statutes, witnesses were typically put on oath, ****1365** 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 1360.[FN3]

> FN3. These sources-especially Raleigh's trial-refute THE CHIEF JUSTICE's assertion, *post,* at 1375 (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 1374, n. 1, is belied by the very existence of a 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 1375-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.

***53** 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.[FN4]

> FN4. 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, 100 S.Ct. 1682, 64 L.Ed.2d 297 (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.

B

[5] The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial***54** 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, 15 S.Ct. 337, 39 L.Ed. 409 (1895); cf. *Houser,* 26 Mo., at 433-435. As the English authorities above reveal,****1366** 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.[FN5]

> FN5. THE CHIEF JUSTICE claims that English law's treatment of testimonial statements was inconsistent at the time of the framing, *post,* at 1376, 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 1361. 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 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 1363; see also *supra,* at 1361-1362, n. 2 (coroner statements). The common-law rule had been settled since *Paine* in 1696. See *King v. Paine,* 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K.B.).

55** 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*1367** of testimonial statements. They suggest that this requirement was dispositive,***56** 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 1377. 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.[FN6] 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, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion) ("[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule").[FN7]

FN6. 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, 15 S.Ct. 337, 39 L.Ed. 409 (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, *supra,* 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.*

FN7. 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 1377. 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.

***57** 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, 15 S.Ct. 337, 39 L.Ed. 409 (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, 15 S.Ct. 337.

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, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *California v. Green,* 399 U.S. 149, 165-168, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *Pointer v. Texas,* 380 U.S., at 406-408, 85 S.Ct. 1065; cf. *Kirby v. United States,* 174 U.S. 47, 55-61, 19 S.Ct. 574, 43 L.Ed. 890 (1899). Even where the defendant had such an opportunity, ****1368** we excluded the testimony where the government had not established unavailability of the witness. See *Barber v. Page,* 390 U.S. 719, 722-725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); cf. *Motes v. United States,* 178 U.S. 458, 470-471, 20 S.Ct. 993, 44 L.Ed. 1150 (1900). We similarly excluded accomplice confessions where the defendant

had no opportunity to cross-examine. See *Roberts v. Russell,* 392 U.S. 293, 294-295, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968) *(per curiam); Bruton v. United States,* 391 U.S. 123, 126-128, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Douglas v. Alabama,* 380 U.S. 415, 418-420, 85 S.Ct. 1074, 13 L.Ed.2d 934 (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, 91 S.Ct. 210 (plurality opinion).

***58** Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio v. Roberts,* 448 U.S., at 67-70, 100 S.Ct. 2531, 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, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), admitted statements made unwittingly to a Federal Bureau of Investigation informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement. [FN8]

FN8. 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, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992), which involved, *inter alia,* statements of a child victim to an investigating police officer admitted as spontaneous declarations. *Id.,* at 349-351, 112 S.Ct. 736. 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.1693). 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, 112 S.Ct. 736. 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, 112 S.Ct. 736 .

Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (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, 106 S.Ct. 2056. Respondent argues that "[t]he logical inference of this statementis ***59** 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****1369** *own* confession against him in a joint trial. See *Parker v. Randolph,* 442 U.S. 62, 69-76, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979) (plurality opinion), abrogated by *Cruz v. New York,* 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987).

[6] 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.[FN9]

> FN9. 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, 15 S.Ct. 337, 39 L.Ed. 409 (1895), *Kirby v. United States,* 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), and *United States v. Burr,* 25 F.Cas. 187 (No. 14,694) (CC Va. 1807) (Marshall, C. J.). *Post,* at 1376-1377. But nothing in these cases contradicts our holding in any way. *Mattox* and *Kirby* allowed or excluded evidence depending on whether the defendant had had an opportunity for cross-examination. *Mattox, supra,* at 242-244, 15 S.Ct. 337; *Kirby, supra,* at 55-61, 19 S.Ct. 574. 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 1368, 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, 90 S.Ct. 1930, 26 L.Ed.2d 489 (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 1377 (quoting *United States v. Inadi,* 475 U.S. 387, 395, 106 S.Ct. 1121, 89 L.Ed.2d 390 (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, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985).)

***60** 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, 100 S.Ct. 2531. This test departs from the historical principles identified above in two respects. First, it is too 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 ad-

mits 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.*, ****1370***Lilly,* 527 U.S., at 140-143, 119 S.Ct. 1887 (BREYER, J., concurring); *White,* 502 U.S., at 366, 112 S.Ct. 736 ***61** 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, 112 S.Ct. 736. 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

[7] 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 ***62** 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, 25 L.Ed. 244 (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****1371*** 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. ***63** 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 (C.A.4 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, ¶ 13, 650 N.W.2d 913, ¶ 13. 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 (Colo.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, 119 S.Ct. 1887, that it was "highly unlikely" that ***64** 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 Or.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, 246 Ill.Dec. 593, 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); ****1372** *People v. Campbell,* 309 Ill.App.3d 423, 431-432, 242 Ill.Dec. 694, 699, 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 (C.A.9

2002) (plea allocution showing existence of a conspiracy); *United States v. Centracchio,* 265 F.3d 518, 527-530 (C.A.7 2001) (same); *United States v. Dolah,* 245 F.3d 98, 104-105 (C.A.2 2001) (same); *United States v. Petrillo,* 237 F.3d 119, 122-123 (C.A.2 2000) (same); *United States v. Moskowitz,* 215 F.3d 265, 268-269 (C.A.2 2000) *(per curiam)* (same); *United States v. Gallego,* 191 F.3d 156, 166-168 (C.A.2 1999) (same); *United States v. Papajohn,* 212 F.3d 1112, 1118-1120 (C.A.8 2000) (grand jury testimony); *United States v. Thomas,* 30 Fed.Appx. 277, 279 (C.A.4 2002) *(per curiam)* (same); ***65***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

[8] *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 ***66** 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. ****1373** The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law enforcement, 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 could a 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 (punctuation added). Moreover, Sylvia specifically***67** 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, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (SCALIA, J., concurring). By replacing categorical constitutional guarantees with ***68** 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 ****1374** 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." FN10 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.

> FN10. We acknowledge THE CHIEF JUSTICE's objection, *post,* at 1378, 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

> 1371-1373, and cases cited. The difference is that the *Roberts* test is *inherently,* and therefore *permanently,* unpredictable.

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 ***69** 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.

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, 100 S.Ct. 2531, 65 L.Ed.2d 597 (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. [FN1] See, *e.g., King v.* ****70** Brasier,* 1 ****1375** 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).[FN2] 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. [FN3] See *King v. Woodcock,* 1 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). ***71** Without an oath, one usually did not get to the second step of whether confrontation was required.

> FN1. 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 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.

FN2. 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 ...."

FN3. 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 points out, see *ante,* at 1365, and in cases of treason, were insufficient to support even the conviction of the confessor, 2 W. Hawkins, Pleas of the Crown, ch. 46, § 4, p. 604, n. 3 (T. Leach 6th ed. 1787).

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 2 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.[FN4]

FN4. The fact that the prosecution introduced an unsworn examination in 1603 at Sir Walter Raleigh's trial, as the Court notes, see *ante,* at 1365, 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, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (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.

****1376** 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, 15 S.Ct. 337, 39 L.Ed. 409 (1895); ***72** *Kirby v. United States,* 174 U.S. 47, 54-57, 19 S.Ct.

574, 43 L.Ed. 890 (1899), and through today, *e.g., White v. Illinois,* 502 U.S. 346, 352-353, 112 S.Ct. 736, 116 L.Ed.2d 848 (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 1363 (citing *Finn v. Commonwealth,* 26 Va. 701, 708 (1827); *State v. Atkins,* 1 Tenn. 229 (Super. L. & Eq. 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 ***73** 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).

****1377** 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 ***74** 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 de-

rived 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, 106 S.Ct. 1121, 89 L.Ed.2d 390 (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, 106 S.Ct. 1121 (quoting *Tennessee v. Street,* 471 U.S. 409, 415, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) (some internal quotation marks omitted)). Similar reasons justify the introduction of spontaneous declarations, see *White,* 502 U.S., at 356, 112 S.Ct. 736, statements made in the course of procuring medical services, see *ibid.,* dying declarations, see *Kirby, supra,* at 61, 19 S.Ct. 574, 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, 107 S.Ct. 2658, 96 L.Ed.2d 631 (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, 110 S.Ct. 3157, 111 L.Ed.2d 666 (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***75** 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 ****1378** 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, 15 S.Ct. 337; see also *Salinger v. United States,* 272 U.S. 542, 548, 47 S.Ct. 173, 71 L.Ed. 398 (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, 100 S.Ct. 2531, 65 L.Ed.2d 597 (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, 111 S.Ct. 2597, 115 L.Ed.2d 720 (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, 111 S.Ct. 2597. 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 1374. 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 throughoutthe ***76** country, and parties should not be left in the dark in this manner.

To its credit, the Court's analysis of "testimony" ex-

cludes at least some hearsay exceptions, such as business records and official records. See *ante,* at 1367. 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 1359, 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, 110 S.Ct. 3139, 111 L.Ed.2d 638 (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 1373, the Supreme Court of Washington gave decisive weight to the "interlocking nature of the two statements." No re-weighing of the "reliability factors," which is hypothesized by the Court, *ibid.,* 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.

U.S.Wash.,2004.
Crawford v. Washington
541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 72 USLW 4229, 63 Fed. R. Evid. Serv. 1077, 04 Cal. Daily Op. Serv. 2017, 2004 Daily Journal D.A.R. 2949, 17 Fla. L. Weekly Fed. S 181

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