On Reach and Grasp in Criminal Procedure: Crawford in California

Donald A. Dripps

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On Reach and Grasp in Criminal Procedure: Crawford in California

Cover Page Footnote
International Law; Commercial Law; Law
On Reach and Grasp in Criminal Procedure: Crawford in California

Donald A. Dripps†

"Ah, but a man's reach should exceed his grasp, Or what's a heaven for?" ¹

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I. Introduction

This essay makes four related points. First, it explains, for an international audience, the United States’ peculiar arrangement for adjudicating human rights claims in the federal criminal system.

† Professor, University of San Diego School of Law. This article benefitted greatly from comments received during the University of North Carolina School of Law’s third conference on “The Future of the Adversary System: What Can Europe Learn from the American Experience?” held in Chapel Hill on April 1, 2011.

¹ ROBERT BROWNING, ANDREA DEL SARTO (1855).
In addition, it documents the modern retreat by the Supreme Court of the United States from 1960s era interventions into state criminal procedure. Third, it exposes the irony of this modern retreat, meant to reduce the practical significance of the Court’s prior jurisprudence on rights in the criminal process, given the current Court’s recent pro-defense stance on one important issue. Fourth, it addresses the interesting question of whether there is anything to be said from a normative point of view on behalf of affirming unenforceable rights in the criminal process. The Court has announced a robust confrontation right in state cases, but it has little practical power to enforce this prescription due to self-imposed limits on its remedial options. Hence my title—the Court’s “reach” exceeds its “grasp” in the criminal procedure context.

II. The Bill of Rights, the Supreme Court, and the Administration of Criminal Justice in the Several States

A. The Primacy of the States in Enforcing Criminal Law

The Constitution of the United States, adopted in 1789, imposed a federal government on the existing state republics. Although federal authority has grown over time, the states continue to have primary responsibility for investigating, prosecuting, and punishing crime. State courts enter approximately one million felony convictions per year, while federal courts enter only 90,000—nearly one-tenth of that amount. The federal docket includes major cases such as prosecutions for terrorism, organized crime, and high-volume drug...
distribution. Not all federal cases are so momentous, however. For example, certainly whether Barry Bonds lied under oath matters, but consider how much it matters. On the other hand, the states continue to handle the great majority of forcible felonies, such as homicide, rape, and aggravated assault. It remains fair to say that criminal justice in the United States is primarily a state responsibility.

State governments are subject to both their own constitutions and to the United States Constitution. Under the doctrine of judicial review, any legislative act—state or federal—that violates the Constitution can be held invalid by the courts. State courts are the final authority for state law, including state constitutional law. State courts also have the authority to decide any issue of federal law, including federal constitutional law, if a federal issue is raised in an actual case. Neither the federal courts nor the great majority of state courts, however, have the authority to issue advisory opinions. The courts, therefore, can only issue constitutional rulings when litigation presents constitutional issues.

The Federal Constitution imposes limits on the state criminal

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6 Id.
7 Id.
10 See, e.g., id. at 1 (recognizing that state courts accounted for 94% of U.S. felony convictions in 2002).
11 U.S. CONST. amend. X.
13 See, e.g., Michigan v. Long, 463 U.S. 1032, 1041 (1983) (“If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”).
14 See Bos. Stock Exch. v. State Tax Comm’n., 429 U.S. 318, 320 n.3 (1977) (“[S]tate courts of general jurisdiction have the power to decide cases involving federal constitutional rights where, as here, neither the Constitution nor statute withdraws such jurisdiction.”).
16 Id.
process—primarily via the Fourteenth Amendment. The Fourteenth Amendment was adopted in the aftermath of the Civil War and was designed to prevent the states that rebelled during the war from oppressing freed slaves and southern Unionists. The first section of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property, without due process of law."

From the 1880s to the 1960s, the Supreme Court interpreted the Due Process Clause as requiring "fundamental fairness," but the Court did not interpret the clause to require the more specific procedural safeguards established by the Bill of Rights. The Bill of Rights is the set of amendments to the Federal Constitution that was adopted in 1791. The Fourth, Fifth and Sixth Amendments, set forth the rights guaranteed in the criminal process. Even under the "fundamental fairness" standard, the Supreme Court reversed many state convictions when they involved practices, such as conducting a capital trial without defense counsel and allowing admission of evidence obtained during a brutal police interrogation.

Before describing the criminal procedure provisions in the Bill

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17 U.S. Const. amend. XIV.
18 Id.
19 Id. § 1.
20 See, e.g., Lisenba v. California, 314 U.S. 219, 236 (1941) ("As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.").
21 See, e.g., Betts v. Brady, 316 U.S. 455, 473 (1942) ("[F]undamental fairness" does not require state compliance with the Sixth Amendment right to appointed counsel for the indigent absent special circumstances); Twining v. New Jersey, 211 U.S. 78 (1908) (the Fifth Amendment privilege against self-incrimination is made binding on the states by the Fourteenth Amendment); Hurtado v. California, 110 U.S. 516, 534 (1884) (Fourteenth Amendment due process in state prosecutions does not require grand jury indictment in "infamous" cases, as is required in federal prosecutions by the Fifth Amendment).
22 U.S. Const. amends. I-X.
23 U.S. Const. amends. IV-VI.
of Rights, two additional features of the U.S. law deserve notice. Under the “state action” doctrine, the Constitution only limits the conduct of state and federal governments. The Constitution does not confer rights on private persons as against one another. In criminal cases, this means that the Constitution is the defendant’s shield against private prosecution. When public prosecutions began replacing private prosecutions, victims started to play relatively minor roles in the U.S. criminal process, other than their role as witnesses.

Another distinctively American rule is the rigid ban on government appeals of acquittals. When an inferior court finds a defendant not guilty, the issue is not appealable to a higher court. A constitutional ruling for the defense, followed by an acquittal, is not subject to appellate scrutiny.

B. The Due Process Era’s Remedial Structure

An individual prosecuted for a crime in state court clearly has at least some rights in the state process that are guaranteed by the Federal Constitution. Under Article VI of the Federal

25 U.S. Const. amend. XIV, § 1. See generally Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (Fourth Amendment does not apply to unreasonable searches and seizures performed by private parties); David A. Sklansky, The Private Police, 46 UCLA L. Rev. 1165, 1221-70 (1999) (explaining how privatized coercive social control makes the already blurred public/private distinction even less clear than usual).

26 U.S. Const. amend. XIV, § 1.

27 For a discussion of this transformation, see Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment, 1994 Utah L. Rev. 1373, 1379-80 (1994). According to Cassell, the reasons for the transformation are unclear. The effect, however, is clear: victims gradually were excluded from participation in the criminal justice process. Id. They lost any status as parties to the case. Their primary role became to report crimes to police and to serve as witnesses. Id.

28 See generally Kate Stith, The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal, 57 U. Chi. L. Rev. 1, 3 n.2 (1990) (explaining the ban’s origin is the prohibition on double jeopardy).

29 See id. at 4-5 (noting that “a defendant can appeal a conviction by alleging pro-government legal error in the trial court, but the government cannot appeal an acquittal by alleging pro-defendant error” and suggesting that “the asymmetry in criminal appeals may distort the perceptions and incentives of both judges and litigants and thereby bias the development and application of standards of law”).

30 Id. at 5.

31 See generally supra Part II.A (discussing Fourteenth Amendment due process
Constitution, states and federal judges are required to take an oath of allegiance to the Federal Constitution. However, good faith adherence to the language of the Constitution is not an inevitable feature of political practice. Consequently, enforcement of federal constitutional rights is necessary in state criminal proceedings.

Federal court enforcement of federal constitutional rights in state criminal prosecutions takes two different procedural forms. The first is direct review by the Supreme Court of the United States. Section 25 of the Judiciary Act, passed by the first Congress of 1789, gave the Supreme Court jurisdiction to issue writs of error to reverse any final judgment of a state court that upheld "a statute of, or an authority exercised under any State" against a claim that the statute or authority was "repugnant" to the Federal Constitution. As soon as the Fourteenth Amendment recognized substantive federal rights in state criminal cases, state defendants began seeking writs of error on the ground that their convictions were rendered in violation of the Federal Constitution. In 1928, Congress abolished the writ of error and replaced it with the discretionary writ of certiorari. Ever since, the Supreme Court has had the right, but not the duty, to review state criminal convictions for violations of the Federal Constitution.

The other procedure for reviewing state court decisions on a constitutional basis is the petition for a writ of habeas corpus.

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32 U.S. CONST. art. VI.
33 See generally Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill, 100 COLUM. L. REV. 1643, 1649-51 (2000) (discussing the Supreme Court’s Article III jurisdiction).
34 See Hartnett, supra note 34, at 1650 (explaining how the Supreme Court’s docket grew after the Civil War).
35 Id. at 1646 (explaining the development of the Judges’ Bill, which developed the certiorari practice of the Supreme Court).
36 Id. at 1713 (noting how the Court has “whittled away at the small remaining portion of its jurisdiction that was intended to be obligatory”).
37 See, e.g., RANDALL KENNEDY, RACE, CRIME AND THE LAW 99 (1997) (explaining how the petition for a writ of habeas corpus was enforced by the Supreme Court in Moore v. Dempsey).
After the Civil War, Congress was rightly suspicious of the administration of justice in the rebellious former Confederate states. The Habeas Corpus Act of 1867 gave federal courts the power to issue writs of habeas corpus in “all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”

A petition for habeas corpus is a civil action that tests the legality of detention. A petition for habeas corpus may be filed in the federal district court that has jurisdiction over the place of detention. The district court’s decision is then appealable within the federal system, provided the court issues a “certificate of appealability.”

At the time the Habeas Corpus Act of 1867 was passed, habeas was not a remedy for errors in criminal trials. Alleged legal errors were tested either in trial courts on motion in arrest of judgment or by writs of error sought from higher courts. The basic purpose of habeas corpus was the prohibition of extrajudicial detention. The classic application of habeas corpus forces the authorities to charge and try a prisoner or to release him.

A distinction emerged, however, when a committing court acted outside of its jurisdiction. When a conviction was rendered for violation of an unconstitutional statute, or a court imposed a

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40 See, e.g., id. at 85 (discussing Congress’ proposal of the Fourteenth Amendment in response to local law enforcement of “Black Codes” in the Reconstruction South).


43 See generally Wales v. Whitney, 114 U.S. 564, 574 (1885) (petition should name the person with custody of the petitioner as the respondent).


46 See id. at 1189-91.

47 Id. at 1188 n.295.

48 See, e.g., Dallin H. Oaks, Legal History in the High Court--Habeas Corpus, 64 MICH. L. REV. 451, 461 (1966) (stating that habeas corpus relief was not available historically when the defendant had been judged “on an indictment according to the course of common law”).
sentence more severe than that allowed by law, habeas corpus was an appropriate remedy.\textsuperscript{49} This exception for jurisdictional error gradually eliminated the rule that habeas was not a medium for re-litigating the merits of constitutional claims.\textsuperscript{50}

Theoretically, holding a prisoner on the basis of a judgment rendered without jurisdiction was no different from holding a prisoner without a trial. Some constitutional errors were of this magnitude, as when a show trial was held under the immediate domination of a lynch mob.\textsuperscript{51} Over time, however, the federal courts became increasingly willing to conclude that a federal constitutional error ousted a state trial court's jurisdiction.\textsuperscript{52}

In a trio of cases decided in 1953 under the general title \textit{Brown v. Allen},\textsuperscript{53} the Supreme Court held that \textit{any} violation of the Federal Constitution was jurisdictional and thus grounds for the federal courts to issue a writ.\textsuperscript{54} At that point in time, there was no fixed limitations period within which the petitions had to be filed, no ban on successive petitions raising different claims, and no rigid requirement of raising federal issues before state courts in the first instance.\textsuperscript{55}

The federal habeas jurisdiction filled the gap in the Supreme Court's direct review process following the shift from writs of error to writs of certiorari.\textsuperscript{56} Yet, the caseloads of the state criminal courts and the Supreme Court made it impossible for the Supreme Court to hear every constitutional challenge to every

\textsuperscript{49} See, e.g., \textit{Ex parte Siebold}, 100 U.S. 371 (1879); \textit{Ex parte Lange}, 85 U.S. 163 (1873).

\textsuperscript{50} \textit{See generally} Hoffstadt, supra note 45, at 1190 (explaining how the Court has not applied the general principle of res judicata to claims of habeas corpus).


\textsuperscript{52} \textit{See Dripps}, supra note 2, at 21.

\textsuperscript{53} 344 U.S. 443, 449-50 (1953).

\textsuperscript{54} \textit{Id. See generally} Dripps, supra note 2, at 41-42 (explaining the trend of the Court to allow any constitutional violation to warrant a petition for habeas corpus).


\textsuperscript{56} \textit{See generally Developments in the Law: Federal Habeas Corpus, supra} note 42, at 1053-55 (explaining the role of federal habeas jurisdiction in the changing landscape of the Court's jurisdiction).
state conviction. In the modern era, the Supreme Court has decided a few hundred cases per year at most. As we have seen, the Court has jurisdiction over hundreds of thousands of state criminal cases in addition to important civil and administrative cases. Since a denial of certiorari by the Supreme Court is not a decision on the merits, state defendants may have their federal claims heard in a federal district court even after the Supreme Court turns them away.

The federal habeas corpus jurisdiction has always been controversial, but until the 1960s, the friction it created with the state courts was kept to tolerable levels; substantive federal constitutional law was relatively undemanding. State prisoners remained in prison, serving their sentences, while federal courts considered habeas petitions. Since there was no federal constitutional law restricting capital punishment, federal habeas law did not pose an insurmountable obstacle to the execution of sentences, even when a state's purpose was to kill, rather than to confine a criminal.

C. The Warren Court Applies the Bill of Rights to the States

The situation changed in the 1960s. In landmark cases such as Mapp v. Ohio and Gideon v. Wainwright, the Supreme Court held that the criminal procedure provisions in the Bill of Rights applied to the states by force of the Fourteenth Amendment's more general due process language. Over the course of a decade, the major rules about the conduct of the state criminal process became

57 See generally Hartnett, supra note 34, at 1649-57 (explaining the development of the Court's docket).
59 Id. at 405-06.
60 See generally Allen, 344 U.S. at 489-97 (explaining that denials of certiorari are not to be considered judgments on the merits, and thus they do not preclude the defendant from bringing a petition of habeas corpus).
61 See DRIPPS, supra note 2, at 66-67.
62 Id.
63 Id.
66 DRIPPS, supra note 2, at 66-69.
creatures of federal constitutional law. The Fourth Amendment, including the exclusionary rule as followed in the federal courts, applied to police search and arrest practices. In all felony cases, the Constitution required states to appoint defense counsel for indigent defendants at the state’s expense. The *Miranda* rules ushered in operational changes to state and federal police interrogations.

The Warren Court’s rulings, including the criminal procedure cases, angered political conservatives. When Richard Nixon became President in 1968, he appointed new justices who were more sympathetic to the prosecution than the justices they replaced. Jimmy Carter, the one Democrat who held the presidency between 1969 and 1992, made no appointments to the Supreme Court. President Reagan continued the pattern of appointing relatively conservative judges to the Court. As a result, the Supreme Court became increasingly conservative and hostile to the Warren Court’s criminal procedure decisions.

The more conservative Court, however, still produced some liberal rulings. The Burger Court subjected capital punishment to a so-called “guided discretion” requirement under the Eighth

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67 See generally id. at 69 (“[C]oncluding that criminal procedure is subject largely to the Bill of Rights and interest-balancing.”).


72 See, e.g., Suzanna Sherry, *All the Supreme Court Really Needs to Know it Learned from the Warren Court*, 50 VAND. L. REV. 459, 475-76 (1997) (explaining the downplay of ideological differences between the Warren and Rehnquist Courts that “the current Court is almost incontrovertibly more conservative than the Warren Court” on criminal procedure, a field in which “although few major Warren Court cases have been overruled, many have been so narrowly interpreted as to render them almost meaningless”).
Amendment’s Cruel and Unusual Punishment Clause.\textsuperscript{73} The death penalty cases divided the justices into multiple camps, resulting in a complicated and confusing body of case law that has grown steadily over the years.\textsuperscript{74}

The Court’s ideological turn to favor the prosecution in procedural matters and its substantive intervention in capital cases had implications for the remedial structure that operated during the Warren Court era. Both direct review in the Supreme Court and the habeas process in the lower federal courts became less credible.\textsuperscript{75} Except in capital cases, the threat of federal court review of state convictions for federal constitutional violations became highly unusual.

\section*{III. The Supreme Court’s Gradual Abdication}

In response to the judicial activism of the Warren Court,\textsuperscript{76} conservative justices faced a dilemma.\textsuperscript{77} On the one hand, these justices opposed the Warren Court’s decisions on first principles.\textsuperscript{78} On the other hand, these same justices proclaimed a strong respect for the precedent.\textsuperscript{79} Rather than overrule the Warren Court’s landmark decisions, the Burger and Rehnquist Courts found ways to limit the practical effect of these decisions, one step in this direction was to limit the remedies available for constitutional violations. The Court generally avoided striking down precedent, but strategically curtailed the remedies available for the rights

\begin{footnotesize}
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\item \textsuperscript{73} Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (holding that standardless jury discretion to impose death or life imprisonment for murder violates the Eighth Amendment).
\item \textsuperscript{74} See, e.g., Callins v. Collins, 998 F.2d 269 (5th Cir. 1993), cert. denied, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from the denial of certiorari) (arguing that the Court’s capital punishment jurisprudence requires both rationality and discretion, and these are incompatible; therefore, capital punishment cannot be administered in a constitutional manner).
\item \textsuperscript{76} Id. at 179.
\item \textsuperscript{77} DRIPPS, \textit{supra} note 2, at xiii.
\item \textsuperscript{79} Id. at 69.
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declared in the Fourth, Fifth, and Sixth Amendments.  

A. Rules and Practices Limiting the Supreme Court's Power of Direct Review

In the post-Warren Court era, the Supreme Court limited its own power of direct review in several ways. First, in several areas of doctrine, the Court held that constitutional violations did not require reversal of the conviction unless the outcome would have been different had the violation not occurred. The defense has the burden of showing that, but for violations of the right to effective assistance of counsel or to pretrial disclosure of exculpatory evidence, the outcome might have been different. The Court also adopted an "inevitable discovery" exception to the exclusionary rule under which the government must prove that, but for the constitutional violation, illegally obtained evidence would have been discovered by legal means. Regardless of where the burden of proof lies, these prejudice requirements permit the government to punish the accused despite constitutional violations in the process.

Secondly, the Court has recognized a variety of "good faith" exceptions for police and prosecutors. When police reasonably rely on a defective warrant, an unconstitutional statute, or an erroneous court record, there is an exception to the exclusionary

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80 Id.
81 See Strickland v. Washington, 466 U.S. 668, 694 (1984) (requiring a defendant claiming ineffective assistance of counsel to show both deficient performance and prejudice, and a "reasonable probability" that the outcome would have been more favorable for the defendant but for counsel's deficient performance); see also United States v. Bagley, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").
82 See Strickland, 466 U.S. at 694.
83 See Bagley, 473 U.S. at 682.
87 See Leon, 468 U.S. at 907.
88 See Krull, 480 U.S. at 342.
rule. This "qualified immunity" defense protects officers from tort liability in each of these situations as well as in many others. Recently, the Court held that in damage actions against the police, the trial court need not address the merits of the constitutional issue if the police have a meritorious immunity defense.

The third method through which the Court has reduced its power of direct review is the crude but consequential device of reducing its caseload. Since the Court can refuse to hear cases, the justices set the volume of the work themselves. During the Warren and Burger periods, the Court heard about 150 cases per year. The figure is now under 100. Chief Justice Rehnquist persuaded his colleagues to hear fewer cases when he took charge of the Court, and the modern Court has continued this trend.

As mentioned previously, there are nearly one million state felony convictions per year. About 5% of these convictions

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89 See Evans, 514 U.S. at 4.
92 See, e.g., Joan Maisel Leiman, The Rule of Four, 57 COLUM. L. REV. 975, 976 (1957) (explaining the lex non scripta but clearly established "rule of four": four of the nine Justices must vote to hear the case before it is brought to the Court on certiorari).
93 Tara Leigh Grove, The Structural Case for Vertical Maximalism, 95 CORNELL L. REV. 1, 57 (2009) ("In the 1980s, the Court had approximately 5,000 cases on its annual docket, and it decided around 150 of those cases (3 percent).") (footnotes omitted).
94 See id. ([T]he Court's docket today includes about 9,000 cases, and it decides fewer than ninety cases (less than 1%). There have, of course, been calls in recent years for the Court to issue more rulings on the merits. But even if the Court decided 150 or 200 cases per year (as some have suggested), it would dispose of only a fraction of its nine thousand case docket and could not possibly correct every error in lower court interpretations of federal law.") (footnotes omitted).
95 Hellman, supra note 58, at 430.
result from trials rather than a guilty pleas.\textsuperscript{98} Twenty-eight is 0.056% of 50,000. In comparison, the IRS audits about 0.77% of all tax returns for compliance, a prospect remote enough to be known as “the audit lottery.”\textsuperscript{99}

\textbf{B. Limitations on Federal Habeas for State Prisoners}

The ideologically reoriented Court had a jaundiced view of federal habeas jurisdiction over state convictions.\textsuperscript{100} The Burger Court did not attempt to revive the “jurisdictional error” theory of the early twentieth century.\textsuperscript{101} It ruled that search-and-seizure claims were not cognizable on habeas, coming too late to deter police misconduct.\textsuperscript{102} More significantly, in \textit{Wainwright v. Sykes},\textsuperscript{103} the Burger Court ruled that the failure to raise a federal claim at the state level precluded litigating it on habeas, absent a showing of good cause for the failure to raise the claim and a showing of prejudice to the defense.\textsuperscript{104}

In noncapital cases, habeas litigation does not defeat the government’s penal objectives. In capital cases, however, the very process of prolonged litigation keeps the condemned prisoner alive when the state wants him dead.\textsuperscript{105} The notorious serial killers John Wayne Gacy and Theodore “Ted” Bundy were both executed more than a decade after their convictions.\textsuperscript{106} Some other cases


\textsuperscript{99} See, e.g., Vincent C. Kalafat, \textit{Rethinking Treasury Regulation § 1.162-5 and Slaying the Monster in the Education Tax Maze}, 80 NOTRE DAME L. REV. 1085, 2022 (2005) (explaining how unlikely it is that the IRS will audit a taxpayer’s return).

\textsuperscript{100} See generally Dripps, supra note 2, at 67-69 (explaining the shift in habeas structure after the Warren Court).

\textsuperscript{101} \textit{Id.} at 66.


\textsuperscript{103} 433 U.S. 72 (1977).

\textsuperscript{104} \textit{Id.} at 91.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} See Gacy v. Illinois, 468 N.E.2d 1171 (1984), \textit{cert. denied} 470 U.S. 1037 (1985) (showing that the Supreme Court denied Gacy’s habeas petition in 1985); see also Rob Karwath & Susan Kuczka, \textit{All Appeals Fail: Gacy is Executed}, CHI. TRIB., May 10, 1994, at 1 (noting that Gacy’s execution was delayed by collateral attack proceedings for nine years). Bundy was convicted at trials in 1979 and 1980, and he was executed in
took longer. Pressure grew to limit the potential of federal habeas to support indefinite litigation.

Following the Court’s ruling in Sykes, a habeas petitioner may not raise a federal claim unless he raised the same claim in the state courts. What about claims that were raised in the state courts? In Teague v. Lane, a plurality of the Court held that newly-fashioned constitutional rules of criminal procedure did not apply retroactively in habeas corpus proceedings. If a state defendant’s case could still, at least theoretically, reach the Supreme Court on direct review, the new Supreme Court rules would apply. Once, however, the direct review process concluded, the state conviction could be set aside only if the federal court determined the state decision to be contrary to federal law at the time of the state decision.

After much controversy, Congress addressed federal habeas in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996. AEDPA provides a one-year limitations period—running from the date of “the conclusion of direct review or the expiration of the time for seeking such review”—for filing a habeas petition. The Act carries over the exhaustion requirement from Sykes and goes further than Teague by requiring

1989. In Bundy’s case, however, most of the delay occurred during the process of direct review; the habeas process took two and a half years. See Donald P. Lay, The Writ of Habeas Corpus: A Complex Procedure for a Simple Process, 77 MINN. L. REV. 1015, 1048-49 (1993).

107 See Lay, supra note 106, at 1048 (noting that one case took over fourteen years).

108 See id. (discussing dissatisfaction with the delay in death penalty litigation and the creation of an ad hoc committee to study the lengthy procedure).


111 Id. at 298.

112 Id. at 310.

113 Id.

114 See, e.g., Larry W. Yackle, Federal Habeas Corpus Statute, 6 B.U. PUB. INT. L. J. 135, 136 n.4 (1996) (“It is no secret that the 104th Congress was sharply divided along ideological lines. That fact of political life explains much about how and why the bills that contributed provisions to the 1996 Act were developed.”). But see John H. Blume, AEDPA: The 'Hype and the 'Byte', 91 CORNELL L. REV. 259, 261 (2006)


116 Blume, supra note 114, at 270.
the federal courts to defer to state court interpretations of federal law. Under AEDPA, the federal court may vacate a state conviction only when the state court’s ruling “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

In Williams v. Taylor, a majority of the Court concluded that this provision permits the federal courts to overturn state convictions only when the state court’s interpretation of Supreme Court jurisprudence was “objectively unreasonable.”

Today, a state prisoner faces a series of very serious practical obstacles to securing federal habeas relief. First, the exhaustion requirement means that only prisoners serving substantial sentences only have an incentive to file after the state process has run its course. Second, while Gideon requires appointment of counsel for indigent defendants at trial, there is no constitutional right to appointed counsel after the first appeal of right following conviction.

Third, under AEDPA, any claim not presented to the state court may be heard only after a showing of good cause and prejudice. If the claim is presented to the state court (and rejected), the state court’s ruling stands unless objectively unreasonable under the Supreme Court jurisprudence at the time of the state decision. If all these hurdles are overcome, the petitioner still must succeed on the merits. As mentioned in the

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117 Id. at 260 (discussing the “deference provision” of the law).
120 Id. at 409.
123 See, e.g., Coleman v. Thompson, 501 U.S. 722, 752-54 (1991) (holding there is no right to effective assistance of counsel in a capital state after the conviction proceeding because there is no underlying right to counsel); Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (citing Ross v. Moffitt, 417 U.S. 600, 617 (1974)) (holding no right exists to effective assistance of counsel in a state discretionary appeal because there is no right to counsel in the first place).
124 DOYLE, supra note 121, at 5.
126 DOYLE, supra note 121, at 4.
discussion of direct review, when the merits are reached, reversal of the conviction is not always required even in cases of constitutional error.\textsuperscript{127}

Given all these barriers to success, Joseph Hoffmann and Nancy King have proffered a powerful argument for simply abolishing noncapital habeas.\textsuperscript{128} They note that tens of thousands of petitions are filed each year, but only a handful end in relief on the merits.\textsuperscript{129} John Blume, Sheri Lynn Johnson, and Keir Weyble responded to Hoffmann and King's proposal in a spirited article, stating that "federal habeas corpus continues to play an important role in encouraging meaningful state court review and providing a safety net for deserving prisoners whom the state courts have failed."\textsuperscript{130} Even Blume and his coauthors, however, admit the limited prospects of success under the current law.\textsuperscript{131} They note that their review of four years of federal appellate decisions found only 154 rulings providing some relief on the merits.\textsuperscript{132} So of the tens of thousands of petitions filed annually, on average fewer than forty have succeeded.\textsuperscript{133}

Let us imagine a state court judge who contemplates a dubious ruling on a constitutional question and attempts to estimate the probability of reversal by the federal courts. There is, very roughly, a one in 2,000 chance of direct review by the Supreme Court,\textsuperscript{134} and even then the conviction might stand because the

\textsuperscript{129} \textit{See id.} at 809-10 ("[W]e estimate that fewer than sixty-five of the more than 18,000 petitions filed each year by noncapital petitioners will eventually be granted.") (footnote omitted).
\textsuperscript{131} \textit{Id.} at 452.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} This statement assumes, not unrealistically, that the state will almost always appeal a federal district court decision granting the writ.
\textsuperscript{134} To complete this calculation, I assume that there are about 50,000 felony convictions rendered after trial in the state courts and that twenty-five is the realistic upper limit on the number of certiorari grants by the Supreme Court in state criminal cases. \textit{See generally} Rosenmerkel, Durose & Farole, Jr., \textit{supra} note 97, at 5 (providing estimates of felony convictions in state courts); Hoffmann & King, \textit{supra} note 128, at
defense is unable to show prejudice after the trial. As for habeas, even if the defendant ultimately files a petition, the statistical expectation is that less than one petition in 400 results in some modification of the state decision.

The Supreme Court, however, continues to regulate state criminal procedure under the Federal Constitution. Indeed, in some areas, such as jury selection and sentencing procedure, the modern Court has issued more favorable rulings to the defense than those issued by the Warren Court. The most dramatic pro-defense ruling from the Court in recent years is *Crawford v. Washington*. In the remainder of this article, I pursue the following question: What is the purpose of Supreme Court decisions declaring new rights in the criminal process, when federal courts lack the institutional power to enforce state court compliance with them?

**IV. *Crawford* in California**

*A. Supreme Court Jurisprudence: Crawford and its Progeny*

The Sixth Amendment Confrontation Clause declares that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The provision was inspired by the American revulsion of trial-by-affidavit, exemplified in the treason trial of Sir Walter Raleigh. Modern jurisprudence interpreting the clause began with *Crawford v. Washington*.

In *Crawford*, Michael Crawford and his wife, Sylvia, sought

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809 (explaining that habeas corpus is a "pipe dream" for prisoners).

135 **DOYLE**, *supra* note 121, at 5.

136 This calculation is based on the assumptions that 18,000 petitions are filed per year and that forty of these petitioners ultimately win some relief. Hoffmann & King, *supra* note 128, at 809; *see supra* note 134 and accompanying text (author's calculation).


139 U.S. CONST. amend. VI.

out Kenneth Lee after Kenneth allegedly attempted to rape Sylvia.\textsuperscript{141} Michael stabbed Kenneth during the ensuing confrontation.\textsuperscript{142} Police arrested Michael and administered \textit{Miranda} warnings to Michael and Sylvia.\textsuperscript{143} Sylvia’s subsequent statement to the police cast doubt on Michael’s claim of self-defense, but at Michael’s trial for assault and attempted murder, the invocation of marital privilege meant that Sylvia was unable to testify.\textsuperscript{144} The prosecution offered Sylvia’s taped statement as evidence and claimed a “hearsay exception for statements contrary to penal interest.”\textsuperscript{145} The trial court admitted the evidence and rejected Crawford’s constitutional objection under the Sixth Amendment.\textsuperscript{146} The court found the statement reliable under the test established in \textit{Ohio v. Roberts}.\textsuperscript{147} On appeal, the Supreme Court of Washington upheld Crawford’s conviction.\textsuperscript{148} Crawford then sought review from the Supreme Court of the United States, arguing that \textit{Roberts} “strayed[ed] from the original meaning of the Confrontation Clause.”\textsuperscript{149}

In an opinion authored by Justice Scalia, the majority agreed to replace the \textit{Roberts} test.\textsuperscript{150} Under the Crawford approach, a court considering prosecution hearsay must first characterize the hearsay statement as either “testimonial” or “nontestimonial.”\textsuperscript{151}

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

\textsuperscript{142} Id.
\textsuperscript{143} Id. at 38.
\textsuperscript{144} Id. at 39-40.
\textsuperscript{145} Id. at 40.
\textsuperscript{146} Crawford, 541 U.S. at 40.
\textsuperscript{147} 448 U.S. 56 (1980).
\textsuperscript{148} Id. at 41.
\textsuperscript{149} Id. at 42.
\textsuperscript{150} See id. at 67.
\textsuperscript{151} Id. at 68.
specific type of out-of-court statement.152

If the statement is testimonial, it may be admitted only if the declarant is unavailable and the defense had an opportunity to cross-examine the declarant about the statement before trial.153

Notably, the Crawford Court did not define the precise meaning of “testimonial”154 and left open to interpretation the appropriate legal treatment of statements that are not determined to be testimonial.155 However, Davis v. Washington156 gave the Court ready opportunity to clarify the Crawford test.157 In Davis, a domestic battery victim called 911, but the connection was interrupted before any words were exchanged.158 The 911 operator “reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis.”159 When police arrived, they “observed . . . the ‘fresh injuries on [McCottry’s] forearm and . . . face.’”160 At trial, McCottry did not testify.161 The police testified as to their observations, but the only evidence identifying Davis as

152 See Crawford, 541 U.S. at 51.
153 Id. at 68.
154 Id. at 51-52. (“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, . . . ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,’ . . . 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. 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.”).
155 See id. at 53 (“[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object.”). One wonders how many memos went among the chambers before agreement was reached on this sentence.
157 Id. at 817.
158 Id.
159 Id.
160 Id. at 818.
161 Davis, 547 U.S. at 819.
McCottry’s assailant was a recording of her conversation with the 911 operator.\textsuperscript{162}

In \textit{Hammon v. Indiana},\textsuperscript{163} authorities responded after receiving a report of domestic disturbance at Amy and Hershel Hammon’s home.\textsuperscript{164} Once out of Hershel’s presence, Amy accused Hershel of beating her and completed an affidavit describing her attack.\textsuperscript{165} Although Amy was subpoenaed, she did not appear at trial.\textsuperscript{166}

The trial court allowed an officer to testify as to Amy’s oral statements about Hershel and her affidavit.\textsuperscript{167} The court held that the hearsay rule was satisfied by Indiana’s expansive exceptions for present-sense impressions and excited utterances.\textsuperscript{168} On appeal, the Indiana Supreme Court upheld Hershel Hammon’s conviction, classifying Amy’s statements as nontestimonial.\textsuperscript{169} The court conceded that the affidavit was testimonial under \textit{Crawford}. However, after considering the admissibility of Amy’s statements and the fact that the case was tried by a judge rather than a jury, the Indiana Supreme Court determined that admission of the affidavit was harmless error.\textsuperscript{170}

In an opinion authored by Justice Scalia, the Supreme Court issued three holdings in \textit{Davis} and \textit{Hammon}.\textsuperscript{171} First, the Court held that the Confrontation Clause applies only to testimonial hearsay.\textsuperscript{172} “A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.”\textsuperscript{173}

Second, the Court held that McCottry’s telephone conversation
with a 911 operator was nontestimonial. \(^{174}\) \("[T]he circumstances of McCottry’s interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. [McCottry] simply was not acting as a witness; she was not \textit{testifying}."\(^{175}\) As such, the Court upheld Davis’ conviction based on the admissible evidence of the nontestimonial 911 call.\(^{176}\)

Third, Amy Hammon’s statements to police at her home, accusing Hershel of assaulting her, were held to be testimonial.\(^{177}\) "Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime."\(^{178}\) In \textit{Hammon}, the defense never had an opportunity to cross-examine Amy Hammon.\(^{179}\) The two exceptions to the cross-examination requirement recognized in \textit{Crawford}—dying declarations and forfeiture by wrongdoing—did not apply.\(^{180}\) Therefore, following the test in \textit{Crawford} required the reversal of Hershel Hammon’s conviction.\(^{181}\)

The only dissenting voice on the Supreme Court belonged to Justice Thomas, who would have held that Amy Hammon’s statements to the police were nontestimonial.\(^{182}\) Whereas Chief Justice Rehnquist and Justice O’Connor defended the \textit{Roberts} test in \textit{Crawford}, their replacements, Chief Justice Roberts and Justice Alito, instead followed the precedent set in \textit{Crawford}.\(^{183}\)

\textit{Crawford} recognized an exception for hearsay statements by a witness whose unavailability at trial resulted from the wrongdoing of the accused.\(^{184}\) Some lower courts interpreted this "forfeiture by wrongdoing" to cover statements by murder victims, even when preventing testimony was not the defendant’s apparent

\(^{174}\) \textit{Id.} at 828.

\(^{175}\) \textit{Davis}, 547 U.S. at 828.

\(^{176}\) \textit{Id.} at 834.

\(^{177}\) \textit{Id.} at 830.

\(^{178}\) \textit{Id.}

\(^{179}\) \textit{Id.} at 820.

\(^{180}\) \textit{Davis}, 547 U.S. at 834; \textit{see also} \textit{FED. R. EVID.} 804(b)(2), (6).

\(^{181}\) \textit{Davis}, 547 U.S. at 834.

\(^{182}\) \textit{See id.} at 840.

\(^{183}\) \textit{See id.} at 813-15.

\(^{184}\) \textit{See Crawford}, 541 U.S. at 62.
motive. In Giles v. California, the Court held that the prosecution must establish by a preponderance of the evidence that the defendant silenced the witness with the purpose of preventing testimony in order to show forfeiture by wrongdoing.

In Melendez-Diaz v. Massachusetts, the Court grappled with whether laboratory analysts who prepared sworn certificates as to the criminal nature of a tested substance were “witnesses subject to the defendant’s right of confrontation under the Sixth Amendment.” The justices were divided in a five-four split. The majority, per Justice Scalia, the author of Crawford, concluded that the certificates were tantamount to affidavits, made purely for use at a subsequent criminal trial; as such, the defendant had a right to confront the analysts who created these certificates. The majority characterized this result as a “rather straightforward application of [the Court’s] holding in Crawford.” The dissent, however, maintained that scientific analysts are categorically different from other witnesses, and, therefore, the defendant had no right to confront them.

The Court’s most recent Crawford decision, Michigan v. Bryant, took a somewhat expansive view of the emergency doctrine established in Davis. In Bryant, police officers found a mortally wounded victim, Covington, at a gas station. He had been shot at the defendant Bryant’s house approximately twenty-five minutes earlier. When officers asked Covington to identify

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186 Id. at 358-68.
187 See id.
188 129 S. Ct. 2527 (2009).
189 Id. at 2530.
190 Id.
191 See id. at 2532.
192 Id. at 2533.
193 Melendez-Diaz, 129 S. Ct. at 2543-44.
195 See id. at 1150-67.
196 Id. at 1150.
197 Id.
his shooter, he named Bryant and described the incident.\textsuperscript{198} A few hours later, Covington died at the hospital.\textsuperscript{199}

Over the tart dissent of Justice Scalia, the majority held that Covington’s statements were nontestimonial.\textsuperscript{200} The declarant was grievously wounded, the police questioning was informal, and the gunman was at-large when the statements were made.\textsuperscript{201} Considering these factors, Justice Sotomayor’s opinion for the majority concluded that the “primary purpose” of the police questioning was to deal with an ongoing emergency situation rather than to build a case for trial,\textsuperscript{202} which would have made the statements testimonial.\textsuperscript{203} The majority cautioned, however, that an emergency is not necessarily ongoing “in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose.”\textsuperscript{204} When “the offender flees with little prospect of posing a threat to the public,” the emergency is over.\textsuperscript{205}

Synthesizing the Supreme Court’s case law, one can identify some fairly clear rules, as well as some areas of open texture. Testimonial statements include grand jury testimony, affidavits, and statements made during police interrogation in nonemergency situations, such as the aforementioned stationhouse questioning of Sylvia Crawford.\textsuperscript{206} Testimonial hearsay can be admitted: to prove matters other than the truth of the facts asserted; when the defendant has the opportunity to cross-examine the declarant at the trial; and when the declarant is unavailable, and the defendant had an opportunity to cross-examine the declarant before the trial.\textsuperscript{207} It also seems fairly clear that a genuine dying declaration would be

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\textsuperscript{198} Id.
\textsuperscript{199} See Bryant, 131 S. Ct. at 1150
\textsuperscript{200} Id. at 1150-68.
\textsuperscript{201} Id. at 1163-67.
\textsuperscript{202} Id. at 1166-67.
\textsuperscript{203} See id.
\textsuperscript{204} Bryant, 131 S. Ct. at 1159.
\textsuperscript{205} Id.
\textsuperscript{206} See, e.g., Crawford, 541 U.S. at 58-68 (holding formal statements are testimonial).
\textsuperscript{207} See generally id. at 50-69 (discussing when the admission of testimonial hearsay is constitutionally appropriate under the Sixth Amendment).
admissible, even if it was testimonial in character.\textsuperscript{208} Areas of open texture include: (1) The scope of the ongoing emergency doctrine; (2) the application of \textit{Melendez-Diaz} to lab reports under factually distinct settings, as where a supervisor testifies about the technician’s report or when the report is offered, purportedly, not for truth but as the basis of an expert’s opinion; (3) the efforts that must be made to locate and secure the witness for trial; and (4) the adequacy of a prior opportunity for cross-examination when the prosecution offers testimonial hearsay from an unavailable declarant.

\textbf{B. Crawford in California}

Given the limitations that have emerged over the last three decades on both direct review in the Supreme Court and on habeas corpus review in the federal district courts, what is the effect in the state courts of a new, pro-defendant ruling from the Supreme Court? To investigate this question, I examined \textit{Crawford} cases in the California courts and habeas cases in the California federal district courts. As California is only one jurisdiction, my investigation was limited in scope. Even so, what I have found is suggestive enough to support a conversation.

As a traditionally “blue state” currently represented by two democratic senators and a democratic governor, California is a relatively liberal American jurisdiction.\textsuperscript{209} Nonetheless, California is an extraordinarily punitive jurisdiction. California retains and occasionally inflicts the death penalty, while likewise enforcing a notorious “three strikes” sentencing enhancement.\textsuperscript{210} Recently, the Supreme Court received an appeal by the state of a lower court’s order requiring the state to release enough prisoners to bring the

\textsuperscript{208} See Bryant, 131 S. Ct. at 1176-77 (Ginsburg, J., dissenting).

\textsuperscript{209} See generally CA.Gov, \url{http://gov.ca.gov/} (last visited Nov. 12, 2011) (reporting on the works of Governor Brown); DIANNE FEINSTEIN, \url{http://feinstein.senate.gov/public/} (last visited Nov. 12, 2011) (detailing the works of Senator Feinstein); U.S. SENATOR BARBARA BOXER: CALIFORNIA, \url{http://boxer.senate.gov/} (last visited Nov. 12, 2011) (noting the works of Senator Boxer).

population down to 137.5% of design capacity.\textsuperscript{211}

California appellate judges are appointed by the governor and subject to unopposed retention elections every twelve years.\textsuperscript{212} Given California's "tough on crime" approach to criminal justice, governors have reason to select judges who will be perceived as "tough on crime."\textsuperscript{213} Judges also realize that, other than scandal, a public perception of coddling criminals is sufficient reason to lose a retention election.\textsuperscript{214}

Federal judges appointed under Article III of the U.S. Constitution hold their offices during good behavior and are effectively appointed for life.\textsuperscript{215} While some federal judges may hope for judicial promotions, the federal bench is inherently more insulated from political incentives than a state bench requiring re-election.\textsuperscript{216} The federal bench is also generally regarded as more prestigious than the state bench and is therefore able to attract and retain more qualified personnel.\textsuperscript{217} Given these differences between the state and federal courts, state judges might be more inclined to favor the prosecution than their federal counterparts.

California courts generally resolve cases in areas of open texture in favor of the prosecution.\textsuperscript{218} There appears to be no evidence of blatant nullification. Instead, courts exploit doctrinal ambiguities and procedural tools such as waiver or harmless error to avoid reversing convictions for Crawford violations.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{211} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} U.S. CONST. art. III, § 1.
\item \textsuperscript{217} Neuborne, supra note 216, at 1120 (explaining that federal trial courts tend to be better equipped to analyze complex, often conflicting lines of authority and more likely to produce competently written, persuasive opinions than are state trial courts).
\item \textsuperscript{218} See infra Appendix 1.
\item \textsuperscript{219} See infra Appendix 1.
\end{itemize}
In 2010, the California appellate courts decided seventeen reported *Crawford* cases. Many more cases went unreported. I focus on the reported cases because the criteria for publication provide a good proxy for borderline cases and because the sample size is more manageable.

In eight of the reported cases, the court found that the defendant’s *Crawford* claim was without merit. In two cases, the defendant testified. In two other cases, the facts found on the record indicated the hearsay was not testimonial. A decision recognizing an exception to the *Crawford* doctrine for *bona fide* dying declarations seems reasonable given the Court’s dictum in *Crawford*. I likewise found a decision denying *Crawford*’s applicability in probation cases solidly grounded in the text of the Sixth Amendment. In another case, the court found adequate opportunity to cross-examine at the preliminary hearing, despite limited discovery at that stage of the proceedings. In another case, the court avoided the *Crawford* issue by ruling that if there had been an error, it was harmless. One court has avoided the *Crawford* issue by reversing the conviction on another ground.

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220 See infra Appendix 1.

221 *People v. Redd*, 229 P.3d 101, 136-37 (Cal. 2010) (holding that the *Crawford* objection was without merit, but the defendant nevertheless waived a potential *Crawford* objection to admission of pre-trial identifications by eyewitnesses who testified at trial); see also *People v. Cowan*, 236 P.3d 1074, 1126 (Cal. 2010) (rejecting *Crawford* claim respecting declarant who testified at trial).


223 See *People v. D’Arcy*, 226 P.3d 949, 971-73 (Cal. 2010) (rejecting *Crawford* challenge to dying declaration). But cf. *Crawford*, 541 U.S. at 56 n.6 (“The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed.”).

224 *People v. Minor*, 116 Cal. Rptr. 3d 228, 241 (Cal. Ct. App. 2010) (holding that *Crawford* was inapplicable in proceeding to extend period of probation).

225 *People v. Hollinquest*, 119 Cal. Rptr. 3d 551, 562-65 (Cal. Ct. App. 2010) (holding that the declarant validly claimed Fifth Amendment privilege and was therefore unavailable, and so the opportunity for cross-examination at preliminary hearing was adequate despite a lack of complete discovery at that time).

226 *People v. Jennings*, 237 P.3d 474, 501-02 (Cal. 2010) (declining to reach merits of *Crawford* claim and finding error harmless).

Seven reported cases ruled on more plausible *Crawford* claims. The defense won only one of these cases.\(^{228}\) In several cases, the California courts struggled to distinguish Supreme Court precedents, resulting in dubious rulings.\(^{229}\)

In *People v. Nelson*,\(^ {230}\) a shooting victim who was on the way to the hospital in an ambulance identified “John Paul” as the shooter.\(^ {231}\) The injured victim identified the shooter to a firefighter, not to a police officer, soon after the shooting.\(^ {232}\) The Supreme Court, however, had not yet decided *Bryant*.\(^ {233}\) It seems hard to distinguish the first responder from a 911 operator. The victim’s statement was not a call for help because help had indeed arrived.\(^ {234}\) The statement was both accusatory and retrospective.\(^ {235}\)

In *People v. Johnson*,\(^ {236}\) the victim called 911 to report that her husband had fired a gun at her in their home.\(^ {237}\) The victim made the call from her automobile after escaping from home.\(^ {238}\) If this case had been decided after *Bryant*, the prosecution may have had a stronger position, but at the time of the decision, *Davis* and *Hammon* did not provide the prosecution with a very strong case.\(^ {239}\)

In four cases, California courts dealt with *Crawford* challenges to scientific test reports.\(^ {240}\) In *People v. Benitez*,\(^ {241}\) the lab report was introduced through the testimony of a supervisor, and the

\(^{228}\) See infra Appendix 1.

\(^{229}\) See infra Appendix 1.


\(^{231}\) Id. at 59.

\(^{232}\) Id.


\(^{234}\) Nelson, 119 Cal. Rptr. 3d at 59.

\(^{235}\) Id.

\(^{236}\) People v. Johnson, 117 Cal. Rptr. 3d 132, 133 (Cal. Ct. App. 2010).

\(^{237}\) Id. at 134.

\(^{238}\) Id.

\(^{239}\) Id. at 136-39.


\(^{241}\) 106 Cal. Rptr. 3d 39 (Cal. Ct. App. 2010).
technician who actually performed the test did not testify. The court held that Melendez-Diaz controlled and reversed the conviction.

In the other three cases, the courts rejected the Crawford claim. In People v. Bowman, the facts were virtually identical to those in Benitez. The court, however, held that Melendez-Diaz did not apply because the technician's report recorded contemporaneous observations. The court relied on similar reasoning in People v. Miller. The Supreme Court of California also relied on this distinction in Geier v. California, but this decision was seemingly undone by the Supreme Court's Melendez-Diaz ruling, which rejected the contemporaneous recording distinction.

In People v. Chikosi, the officer who performed the breathalyzer test testified, but the officer who prepared the maintenance report on the machine did not. The court held that the maintenance report was not testimonial given the defendant's ability to cross-examine the testing officer. The basis for this ruling was not entirely clear. The California Supreme Court granted discretionary review in all four cases.

In People v. Herrera, a prosecution witness testified at the preliminary hearing, subject to cross-examination by the defense,

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242 Id. at 42.
243 Id. at 44.
244 See infra Appendix 1.
245 Bowman, 107 Cal. Rptr. 3d at 157-58.
246 Benitez, 106 Cal. Rptr. 3d at 42.
247 Bowman, 107 Cal. Rptr. 3d at 161.
248 161 P.3d 104, 139-40 (Cal. 2007).
249 61 Cal. Rptr. 3d 580, 621-22 (Cal. 2007).
250 Melendez-Diaz, 129 S. Ct. at 2535 (explaining that the dissent's claim that near-contemporaneous declarations are not testimonial "misunderstands the role that 'near-contemporaneity' has played in our case law.").
251 110 Cal. Rptr. 3d 464 (Cal. Ct. App. 2010).
252 Id. at 465-66.
253 Id. at 469.
254 See People v. Benitez, 230 P.3d 1117 (Cal. 2010); People v. Bowman, 232 P.3d 611 (Cal. 2010); People v. Chikosi, 237 P.3d 415 (Cal. 2010); People v. Miller, 242 P.3d 68 (Cal. 2010).
255 232 P.3d 710 (Cal. 2010).
that the defendant had confessed to the charged offense. The witness was subsequently deported to El Salvador, which does not have a treaty with the United States for securing the appearance of witnesses. The fact-bound issue was whether the prosecution made the required good-faith efforts to find the witness before the witness was deemed unavailable under the Confrontation Clause. A majority of the Supreme Court of California held that the prosecution had shown due diligence, but a dissenting judge disagreed and sided with the California Court of Appeal in the decision below.

This limited sample of appellate rulings suggests that the California courts take Crawford claims seriously and in good faith. The Benitez panel reversed, as did the appellate court in Herrera. The California courts tend to favor the prosecution if given doctrinal opportunities, as shown by six of the seven wins for the State in close cases. Moreover, I did not find any cases in which the state courts reversed a conviction based on a robustly pro-defense reading of the Supreme Court cases, even though such a reading is certainly possible, and was more plausible before the Bryant decision.

The habeas corpus decisions in federal district court in 2010 are also informative. Of fifty-eight cases, only one, Saracoglu v. Walker, vacated a conviction on Crawford grounds. In this case, the victim of domestic violence presented herself at the police station where she was questioned by police. She bore visible signs of injury and was clearly upset. The assault took place half an hour before. The victim did not testify at the

256 Id. at 713.
257 Id.
258 Id.
259 Id.
260 Benitez, 230 P.3d at 1117.
261 Herrera, 232 P.3d at 713.
262 This number is based on the results of a search of the Westlaw DCTCA database for "Crawford v. Washington" and "contrary to clearly established" for the year 2010. It is possible, although extremely unlikely, that a district would rule on a habeas petition without quoting the AEDPA standard.
The California Court of Appeal held that the victim's statements to police were "closer to Davis than to Hammon." The federal court held that this ruling was "objectively unreasonable" as required by the Supreme Court's interpretation of the AEDPA standard. This ruling seems entirely correct, given that in Hammon, the Court characterized the victim's statements at the scene as testimonial.

Saracoglu's victory, however, was Pyrrhic. The Los Angeles County Court convicted him in August 2005 and sentenced him to six years in prison. Federal habeas did not vindicate his Crawford claim until March 2010. In the cases I reviewed, California prisoners took five or six years to exhaust the state process and reach federal district court.

In many cases, the defendants' Crawford claims were obviously without merit. In several cases, however, apparent Crawford errors did not lead to habeas relief due to the "objectively unreasonable" standard of review, the harmless error doctrine, or a combination of the two.
California Crawford rulings is a genuine, but remote and improbable prospect. As for direct review in the Supreme Court of the United States, between the Melendez-Diaz ruling in 2009 and the Bryant ruling in 2011, there was no high court Crawford decision from any jurisdiction.

My impressions of the California courts' grudging good-faith in Crawford cases was reinforced by my review of a sample of 100 unreported Crawford cases decided by California appellate courts in 2010. As explained in Appendix 2, I classified these cases as follows:

(1) Decisions (5) reversing convictions on Crawford grounds;
(2) Decisions (43) rejecting Crawford claims where the ruling was clearly correct;
(3) Decisions (23) rejecting Crawford claims where I thought reasonable judges could have ruled either way;
(4) Decisions (5) rejecting Crawford claims where the court was on very doubtful ground; and
(5) Decisions (24) rejecting Crawford claims on procedural grounds, either harmless error or waiver (the California courts use the term “forfeiture” but because that term has some technical applications in confrontation clause jurisprudence I use the term “waiver”).

The most frequently litigated open texture issue is the reliance of a testifying expert on records or reports prepared by a different, non-testifying officer or criminalist. There are twenty-five cases in which this issue was litigated among the reported and unreported decisions. Only three—Benitez, Lopez-Garcia, and

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*8-10, (E.D. Cal. July 21, 2010) (holding a state court’s pre-Davis determination that a victim’s statement to police at the scene was not testimonial was not objectively unreasonable); Clavano v. Clark, No. EDCV 07-276-SVW (OP), 2010 WL 5826179, at *14-15 (C.D. Cal. June 25, 2010) (holding state court’s finding that Crawford errors were harmless was probably correct, and the holding was not objectively unreasonable).

274 See infra Appendix 2.
275 See infra Appendix 2.
276 See Benitez, 106 Cal. Rptr. 3d at 39.
While the specific facts of each case matter, the overall distribution of results is nonetheless suggestive.

On the other hand, I found only five of the unreported cases downright dubious. If the state courts are not following the Supreme Court in only five percent of the sample, the evidence certainly does not suggest “massive resistance.” Mistaken rulings are inevitable. If, however, five incorrect rulings for the state sounds like an acceptable error rate, I did not regard any of the five reversals as highly dubious.

Taken together, the unreported cases support my “grudging good faith” characterization. The California courts are reluctant, but not unwilling, to reverse convictions for Crawford errors. A large number of claims were without merit. In the remaining cases, the prosecution won the great majority, either because the courts err on the side of ruling for the state on debatable legal issues, or resort to procedural default rules to avoid the merits. The number of reversals is very similar to the number of questionable legal rulings for the state.

V. Aspirational Federalism?

In their classic article, Dialectical Federalism, Robert Cover and Alex Aleinikoff point out that the Warren Court relied on the sanction of nullification—reversing convictions—rather than imposing damages or injunctions to implement the criminal procedure revolution. They call this remedial strategy a “redundancy” approach because under the Warren Court’s robust attitude toward federal habeas for state prisoners, defendants got two bites of the constitutional apple.

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278 See infra Appendix 2, § 4.
279 See infra Appendix 2, § 1.
280 See infra Appendix 2, § 2.
281 See infra Appendix 2, §§ 4, 5.
282 Cf. infra Appendix 2, § 1 with § 4.
284 Id. at 1038-41.
285 Id. at 1045.
the state court, the Supreme Court had discretion to hear an appeal by the state, but there was never any jurisdiction in the federal district courts to hear complaints by prosecutors.\textsuperscript{286} Even without the modern exhaustion and deference doctrines, Cover and Aleinikoff argue that federal habeas was not a one-way, top-down avenue.\textsuperscript{287} The Supreme Court could announce “utopian” rules, such as it did in \textit{Gideon v. Wainwright}.\textsuperscript{288} The state courts, however, held the power initially to find the facts in particular cases, as well as the opportunity to point out to federal courts the challenges of prosecuting violent crimes given intractable resource constraints.\textsuperscript{289} In this model of “dialectical federalism,” the federal courts were expected to learn as well as to teach.\textsuperscript{290}

Cover and Aleinikoff note a great irony about the Burger Court’s habeas approach.\textsuperscript{291} By trimming back on habeas, the Supreme Court began to reduce its own institutional significance. In the exclusionary rule and confessions cases, the Burger Court emphasized the value of truth in adjudication.\textsuperscript{292} In curtailing habeas jurisdiction, however, the Burger Court gave innocence-protecting constitutional rules no exception from the procedural default doctrine.\textsuperscript{293}

After \textit{Sykes}, \textit{Teague}, and AEDPA, the national government came close to giving up on redundant enforcement of constitutional rights in criminal procedure. If the California courts can only expect the federal district courts to issue one writ a year in an area as heavily litigated as \textit{Crawford}, they are largely free of

\begin{itemize}
\item \textsuperscript{286} \textit{Id.} at 1051-52.
\item \textsuperscript{287} \textit{Id.} at 1038-39.
\item \textsuperscript{288} Cover \& Aleinikoff, \textit{supra} note 284, at 1039, 1051; \textit{see also} \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963).
\item \textsuperscript{289} \textit{See} Cover \& Aleinikoff, \textit{supra} note 283, at 1052-53.
\item \textsuperscript{290} \textit{Cf. id.} at 1036 (noting that “state and federal courts were required both to speak and listen as equals”).
\item \textsuperscript{291} \textit{See id.} at 1086 (noting that “Chief Justice Burger and Justice Rehnquist’s strong desire for finality and efficiency in the criminal process is empty without the identification of values which we wish to pursue efficiently”).
\item \textsuperscript{292} \textit{See id.} at 1092-94 (discussing the balance between truth-seeking and truth-obstructing rights).
\item \textsuperscript{293} \textit{See id.} at 1101-02 (quoting that “[d]efendant would have to show ‘cause’ for and ‘prejudice’ from the procedural default”).
\end{itemize}
federal court supervision on criminal procedure issues. Crawford reflects the current Court’s view that the Sixth Amendment protects the reliability of the process by mandating cross-examination. The scope of the “testimonial hearsay” category, and the existence vel non of exceptions to the cross-examination requirement for things such as lab reports and expert opinions, implicate the accuracy of the trial process. The Court announced the Crawford doctrine in part because the prior interpretation invited lower courts to admit testimonial hearsay. Given the weakness of the federal remedial scheme, the invitation to courts to admit testimonial hearsay remains despite the doctrinal change.

Some casual computer searches are illustrative. In the last ten years, the California courts have taken the opportunity to point out that Ninth Circuit precedent is not binding in California courts in sixty different criminal cases. If you retrieve Crawford on Westlaw, there are 498 negative references in the lower courts. Some of these are lower federal court decisions, and labels such as “distinguished” or “declined to extend” do not necessarily mean that the lower court was reading Crawford in an unfairly narrow way. Nonetheless, the sheer number of negative citations is suggestive of the fact that state courts do not always choose to strictly follow federal court holdings, even those of the Supreme Court.

If the federal remedial structure is so feeble, and if this situation is not lost on the lower courts, at least two questions remain. First, why do Supreme Court decisions favorable to the accused have as much traction as they do in the state courts? Second, is there a plausible normative defense of the practice of announcing unenforceable constitutional rights in the criminal

294 Crawford, 541 U.S. at 55-59 (discussing the history and constitutional necessity of cross-examination).

295 See id. at 74 (noting that exceptions to the cross-examination requirement have been historically allowed in situations where out of court statements are believed to be as accurate as statements made on cross-examination).

296 See id. at 63-64.


298 Id. (searching the negative history of Crawford)
process?

The aforementioned "history" tab for *Crawford* in Westlaw produced tens of thousands of "positive references." Typically these cases cite *Crawford* as establishing the doctrinal framework for analysis. Courts affirm the conviction as consistent with *Crawford* or, alternatively, on the basis of waiver or harmless error. Nonetheless, there is no overt evidence of massive resistance. Indeed, *Crawford*’s lamentable impact on domestic violence prosecutions reflects state court readiness to enforce the cross-examination requirement.

An illuminating example of grudging acceptance of *Crawford* is *In re Fernando R.*, a 2006 decision of the California Court of Appeal. The appeal arose from a juvenile court adjudication where the defendant was found guilty of purse snatching. At the adjudication, the victim did not testify. A police officer testified

299 *Id.* (examining the positive history of *Crawford*).

300 *See, e.g.*, Chikosi, 110 Cal. Rptr. 3d 464 (Cal. Ct. App. 2010) (rejecting a *Crawford* challenge to police testimony based on alcohol-testing equipment tested by nontestifying officers); People v. Benitez, 106 Cal. Rptr. 3d 39 (Cal. Ct. App. 2010) (finding a reversible *Crawford* error where police lab supervisor testified that a substance seized from defendant was methamphetamine based on report prepared by non-testifying analyst); People v. Bowman, 107 Cal. Rptr. 3d 156 (Cal. Ct. App. 2010) (rejecting a *Crawford* challenge to supervisor’s testimony that substance seized from defendant was methamphetamine, based on reports prepared by nontestifying analyst).

301 *See infra* Appendix 2 (noting the frequent rejection of *Crawford* claims in unpublished California Court of Appeal cases on procedural or harmless error grounds); *see, e.g.*, People v. Johnson, 117 Cal. Rptr. 3d 132 (Cal. Ct. App. 2010) (finding a victim’s 911 call while driving away from scene of attempted murder was not testimonial and, thus, admissible under *Crawford*); People v. Nelson, 119 Cal. Rptr. 3d 56 (Cal. Ct. App. 2010) (finding a shooting victim’s statement to firefighter in ambulance on route to hospital naming the defendant as shooter not testimonial).

302 *See, e.g.*, People v. Younger, A10031, 2010 WL 338962 (Cal. Ct. App. Jan. 29, 2010) (finding victim’s statements at scene of pre-homicide domestic battery to be testimonial and finding no evidence of motive to silence for subsequent homicide that could support forfeiture by wrongdoing; murder conviction reversed); People v. Painia, No. B215733, 2010 WL 2473268 (Cal. Ct. App. June 21, 2010) (finding the admission of preliminary hearing testimony at domestic battery trial was a reversible *Crawford* error because the prosecutor did not make an adequate showing of due diligence in locating the witness).


304 *Id.*

305 *Id.* at 64.

306 *Id.*
to the victim’s account made to the officer during a field interview.\textsuperscript{307}

The court began by expressing some candid skepticism about \textit{Crawford}:

Since March 2004, courts across the country have attempted to apply the United States Supreme Court’s landmark decision in \textit{Crawford v. Washington} in thousands of cases potentially implicating the Sixth Amendment right of confrontation.\ldots

The late Chief Justice Rehnquist lamented (prophetically) that the court’s decision “casts a mantle of uncertainty over future [federal and state] criminal trials” and that the majority’s reluctance to define “testimonial” left federal and state prosecutors temporarily without answers as to what types of statements would be deemed “testimonial” under the new rule announced in \textit{Crawford}.\textsuperscript{308}

With such an opening bow to the minority opinion in \textit{Crawford}, one might expect a decision for the State. Instead, the opinion fended off a plausible claim of procedural default then carefully analyzed the facts to determine whether the hearsay at issue was the product of “police interrogation” within \textit{Crawford}’s “testimonial” taxonomy.\textsuperscript{309} Finding the statements to be testimonial, the \textit{Fernando R.} court held the error not harmless and reversed.\textsuperscript{310}

Despite skepticism about Supreme Court doctrine and practical impunity to subvert it, there is a substantial degree of state court fidelity to the High Court’s rulings.\textsuperscript{311} One plausible reason for this is simply the professional socialization of judges. Another reason may be more particularly American: the prestige, at least within the legal profession, of the Supreme Court.\textsuperscript{312} I suspect,

\textsuperscript{307} Id. at 65.
\textsuperscript{308} \textit{In re Fernando R.}, 40 Cal. Rptr. 3d at 63.
\textsuperscript{309} Id. at 72-73.
\textsuperscript{310} Id. at 79-80.
\textsuperscript{311} See, e.g., Cover & Aleinikoff, \textit{supra} note 283, at 1057-59 (examining the strong deference of the Wisconsin Supreme Court to the holdings of the Seventh Circuit Court of Appeals “in the interest of the harmonious ordering of federal-state court relations”).
\textsuperscript{312} See, e.g., Cover & Aleinikoff, \textit{supra} note 283, at 1054 (explaining that Supreme Court decisions set an agenda for the inferior federal courts and the state courts by
that some of the explanation for compliance with Supreme Court doctrine is the frequency with which constitutional error at trial can be excused on appeal as waived or harmless.

Thus, the normative question is at least partly linked to descriptive questions about criminal procedure. The practically weak federal remedial power raises fairly obvious rule-of-law and human rights concerns.\textsuperscript{313} If \textit{Crawford} is right, an important trial safeguard is at risk in state courts because the remedial scheme is so weak. When a federal habeas court concludes that a state decision was mistaken but must stand under the AEDPA, the federal court essentially enters a judgment that the court regards as an unconstitutional judgment.\textsuperscript{314} What might be said on the other side of the scales?

Three possible values come to mind. The first is finality. When courts disagree about how to apply Supreme Court doctrine, reversal of a verdict five or ten years after the trial will impose serious costs on the state.\textsuperscript{315} A retrial may not be possible. There is a nontrivial chance that the first trial reached a just, if procedurally flawed, result, which will be made nugatory by an insistence on procedural perfection. Even if retrial is possible, providing two trials in one case, when systemic pressures cause nine in ten defendants to forgo trial altogether, is a costly decision.

The second value promoted by the distinctly limited remedial scheme is case sensitivity. Strictly speaking, the Confrontation Clause, like most constitutional procedural rights, is trans-

\textsuperscript{313} See, \textit{e.g.}, United States v. Leon, 468 U.S. 897, 930 (1984) (Brennan, J., dissenting) (if courts “lose their resolve . . . and give to the seductive all of expediency . . . the vital guarantees of the Fourth Amendment are reduced to nothing more than ‘a form of words’.”) (citation omitted).

\textsuperscript{314} See Williams v. Taylor, 529 U.S. 362, 376-77 (2000) (explaining that if federal courts could only grant habeas relief in situations where the state court’s ruling was objectively unreasonable, as was suggested by the holding of the Fourth Circuit, the effect “would wrongly require the federal courts, including this Court, to defer to state judges’ interpretations of federal law”).

\textsuperscript{315} See Hoffmann & King, supra note 128, at 849 n.93 (2009) (quoting the Senate Judiciary Committee testimony of Ronald Eisenberg, Deputy District Attorney, Philadelphia, Pennsylvania: “The truth is that, whether or not they end up reversing a conviction, federal habeas courts drag out litigation for years of utterly unjustifiable delay, creating exorbitant costs for the state.”).
The Clause applies to "all criminal prosecutions" for crimes as disparate as soliciting prostitution and aggravated murder. Yet, it is rational to regard the release of an apparently guilty drug user with more equanimity than the release of an apparently guilty murderer.

The Supreme Court itself is not beyond this temptation. In People v. Geier, the California Supreme Court rejected a Crawford challenge to the introduction of the report of an inculpatory DNA test. A technician who did not testify at the trial had performed the test and prepared the report. Geier held the report not testimonial. For the Geier court, the "crucial point [was] whether the statement represent[ed] the contemporaneous recordation of observable events." The Supreme Court later rejected this distinction in Melendez-Diaz.

Geier's petition for certiorari was pending when Melendez-Diaz came down. From a purely technical point of view, the Court should have vacated Geier's conviction and remanded it for reconsideration in light of Melendez-Diaz. Instead, the High Court denied the petition, leaving Geier to pursue habeas corpus. Melendez-Diaz applies to his case because certiorari was not denied until a few days after the Court decided Melendez-Diaz. If the Supreme Court reversed and remanded, Melendez-Diaz would apply with full force. For Geier's habeas petition, however,

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316 See, e.g., William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 HARV. L. REV. 842, 847 (2001) (noting that the Fourth Amendment is transsubstantive, and thus, in theory, applies the same way across a variety of criminal cases).
317 U.S. CONST. amend. VI, cl. 2.
318 People v. Geier, 161 P.3d 104 (Cal. 2007).
319 Id. at 131.
320 Id. at 140.
321 Id.
322 Melendez-Diaz, 129 S. Ct. at 2542 (holding that the Sixth Amendment does not permit a criminal prosecutor to use "ex parte out-of-court affidavits" in order to prove the case, thereby expanding the Crawford doctrine to preclude the use of state laboratory reports where the analysts did not testify in court).
324 Id. at 2856.
325 Melendez-Diaz, 129 S. Ct. 2527, was decided on June 25, 2009. Certiorari was denied for Geier, 129 S. Ct. 2856, on June 29, 2009.
the standard of review is whether the California court was objectively unreasonable in taking a position similar to the position taken by the four dissenting justices in Melendez-Diaz.\textsuperscript{326}

We can only speculate about denials of certiorari. Geier stood convicted of rape and multiple homicides on the basis of DNA evidence.\textsuperscript{327} Apparently compelling evidence of egregious culpability may have played a role in the Court’s decision. Likewise, the recent decision in Bryant might have taken a narrower view of the “ongoing emergency” doctrine if facts of the case involved domestic battery, like Davis and Hammon, rather than low-level drug dealing, as in Melendez-Diaz.\textsuperscript{328}

When the Supreme Court itself adjusts the doctrine to sustain a murder conviction, as in Bryant, the new doctrine has general effect.\textsuperscript{329} By contrast, when a state court works overtime to find waiver, harmless error, or “nontestimonial hearsay,” the tension with rule of law values is more locally confined.\textsuperscript{330} Reversals on Crawford grounds were more likely to occur in relatively minor cases. In Fernando R., the issue was a delinquency adjudication

\begin{footnotes}
\item[327] Geier, 161 P.3d at 110.
\item[328] Cf. Michigan v. Bryant, 131 S. Ct. 1143, 1147 (2011) (holding out-of-court “identification and description of the shooter and the location of the shooting were not testimonial statements because they had a ‘primary purpose . . . to enable police assistance to meet an ongoing emergency’”) and Davis, 126 S. Ct. at 2268 (holding witness statements are not testimonial, and therefore may be used in court, if the “primary purpose of interrogation is to enable police assistance to meet an ongoing emergency”), with Melendez-Diaz, 129 S. Ct. at 2542 (holding drug purity evidence against a defendant could not be admitted because the lab analyst was not in court).
\item[329] See Bryant, 131 S. Ct. at 1168 (Scalia, J., dissenting) (noting that in creating a substantial exception to the Confrontation Clause in Bryant, the Court “distorts our Confrontation Clause jurisprudence and leaves it in a [sic] shambles”).
\item[330] See, e.g., People v. Redd, 229 P.3d 101, 136 (Cal. 2010) (finding that the defendant waived a Crawford objection to admission of pre-trial identifications by eyewitnesses who testified at trial because the objection was not raised at the initial trial); People v. Molina, No. B210718, 2010 WL 60127 (Cal. Ct. App. Jan. 11, 2010) (holding that post-crime statements to police reporting suspect’s vehicle’s license plate number were not testimonial because statements were spontaneous and informal); People v. Rincon, No. B217776, 2010 WL 4355584 (Cal. Ct. App. Nov. 4, 2010) (finding that a police officer is permitted to testify on an anonymous neighbor’s statements that the neighbor had witnessed an apparent drug sale. This anonymous statement was the basis of officer’s expert opinion issue of whether drugs were possessed by defendant for sale).
\end{footnotes}
for unarmed robbery.\textsuperscript{331} In the only habeas case won by a California prisoner under \textit{Crawford} in 2010,\textsuperscript{332} defendant Saracoglu was given six years for battery, his sentence being enhanced for prior offenses.\textsuperscript{333} He won his case five years after conviction.

My sample of California cases included six convictions reversed on \textit{Crawford} grounds: Benitez and Schwarz were drug prosecutions;\textsuperscript{334} Painia was a domestic battery prosecution,\textsuperscript{335} Lopez-Garcia was a prosecution for serial rape, but the reversal on \textit{Crawford} grounds threw out only five of nine counts of conviction;\textsuperscript{336} Younger was a murder case litigated by the State on the theory of reflexive forfeiture.\textsuperscript{337}

When the Supreme Court threw out that theory in \textit{Giles}, the prosecution had little left to work with in its third trip to the California Court of Appeal.\textsuperscript{338} Ruiz was also a murder case, but the confrontation error was relatively clear. Murder convictions, whether punctuated by a sentence of death or of life imprisonment, are also virtually certain to call forth a substantial petition for

\begin{footnotes}
\footnotetext[331]{See \textit{In re Fernando R.}, 40 Cal. Rptr. 3d 61, 63-64 (2006).}
\footnotetext[333]{People v. Saracoglu, 62 Cal. Rptr. 3d 418 (2007).}
\footnotetext[334]{Benitez, 106 Cal. Rptr. 3d at 42 (finding a reversible \textit{Crawford} error where police lab supervisor testified that, based on report prepared by non-testifying analyst, the substance seized from defendant was methamphetamine); People v. Schwarz, No. C059021, 2010 WL 193603 (Cal. Ct. App. Jan. 21, 2010) (reversing a drug conviction based on testimony by an analyst who did not actually perform the lab test showing substance was controlled substance).}
\footnotetext[335]{People v. Painia, No. B215733, 2010 WL 2473268 (Cal. Ct. App. June 21, 2010) (holding admission of preliminary hearing testimony at a domestic battery trial without adequate showing of due diligence by prosecution in locating the witness was reversible \textit{Crawford} error).}
\footnotetext[337]{People v. Younger, No. A110031, 2010 WL 338962 (Cal. Ct. App. Jan. 29, 2010) (finding victim's statements at scene of pre-homicide domestic battery to be testimonial and finding no evidence of motive to silence for subsequent homicide that could support forfeiture by wrongdoing; murder conviction reversed).}
\footnotetext[338]{See \textit{Giles v. California}, 554 U.S. 353, 353 (2008) (holding the theory that the accused forfeits his right to cross-examine witnesses against him because of his wrongdoing is not a legitimate exception to the Sixth Amendment).}
\end{footnotes}
federal habeas. The reversals in the sample support the proposition that the California courts are aware of the specific circumstances of each case, and reversal typically is accompanied by some comforting sense that a ruling for the defense either did little insult to substantial justice or would be required in due time by the federal courts.

Case-sensitivity suggests a third value that might be served by the announcement of practically unenforceable rights: the articulation of broader individual rights than society is prepared to accept in practice. Knowledge that a "utopian" rights declaration will not have catastrophic practical consequences encourages such Supreme Court declarations because lower courts will avoid the consequences by resorting to waiver, harmless error, and borderline interpretations shielded by the AEDPA. As Gideon suggests, it may be better for the Supreme Court to declare an ideal that takes decades to fulfill than to have the Court confine itself to rights declarations it can implement directly.

I offer no fixed opinion as to whether finality, case-sensitivity, and articulation values justify AEDPA's deference standard. These values are served by the current habeas regime without wholly abandoning national enforcement of constitutional rights in state cases. The Court's rendering of AEDPA's actual language into the "objectively unreasonable" form retains more power of federal review than the face of the statute might suggest. As divisions on the Court about how to apply "objectively reasonable" suggest, the standard is fairly plastic.


340 See Cover & Aleinikoff, supra note 283, at 1053 (noting that "[s]ince the federal court lacks administrative supervisory power over the state courts, and since the political constituencies of the two courts are largely distinct, the reformatory strategy of the Utopian [federal] court can be effectively blocked by state court non-acceptance of a new constitutional rule.").

341 See Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing the Sixth Amendment right to counsel as a fundamental right for all individuals accused of a crime regardless of their ability to pay for the representation).

342 See Williams, 529 U.S. at 365 (announcing "the federal court should ask whether the state court's application of clearly established federal law was objectively unreasonable").

343 See, e.g., Rompilla v. Beard, 545 U.S. 374, 404-05 (2005) (Kennedy, J.,
In *Williams v. Taylor*, the source of the “objectively unreasonable” reading of AEDPA, four justices would have gone further and held Section 2254(d)’s contrary-to-established-precedent provision merely hortatory. If a majority suspects that their rulings are subverted behind the shield of deference, they might revisit the issue and return to a regime without deference. The Court thus retains, without statutory amendment or a constitutional ruling, the option of reinvigorating federal habeas review if the Justices sense that their rulings are not substantially followed. The Justices also retain the power to greatly increase the number of cases they take on direct review.

Eliminating noncapital habeas would advance finality values and reduce litigation costs without further diluting the exceedingly limited federal review power. Statutory abolition of the noncapital habeas jurisdiction would eliminate the prospect that the Supreme Court could, by statutory interpretation, return the habeas standard more or less to where it stood before AEDPA.

Abolishing noncapital habeas also threatens articulation values. One source of the Supreme Court’s criminal procedure caseload consists of appeals from decisions denying, or granting, habeas relief to state prisoners. If that jurisdiction were

dissenting) (accusing majority of paying only “lip service” to the “objectively unreasonable” *Williams* standard).

344 529 U.S. 362 (2000)

345 See *id.* at 389 (opinion of Stevens, J.) (“In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law.”).

346 *Id.* (noting that the independent judgment of a federal court on questions of federal law should prevail).


349 See *id.* at 840 (noting “only four narrow avenues of federal judicial review of noncapital state criminal cases would remain” if the author’s suggestion of limiting habeas claims was undertaken).

confined to capital cases, the Court would decide more cases of egregious culpability than otherwise. Such a change would add corresponding practical pressure to affirm convictions, pressures that could exert perverse influence on doctrinal evolution.

VI. Conclusion: Reach and Grasp in Criminal Procedure

The Supreme Court’s reach exceeds its grasp in the criminal procedure field.351 Although the Court holds final responsibility for declaring the meaning of the Bill of Rights, it lacks practical power to compel state compliance with constitutional rulings such as Crawford. Nonetheless, there is a substantial amount of compliance with Crawford despite this remedial weakness.352 At the margins, some state courts give Crawford narrow application and look for procedural opportunities to avoid reversal when a finding of Crawford error is ineluctable.353

Announcing unenforceable rights compromises the rights announced (in this instance, confrontation) and rule of law values. However, announcing such rights also advances finality, case-sensitivity, and articulation values.354 Without advancing a strong view on how to sort out the conflict among these values, my hope is that explaining these values in the context of the U.S. experience may help not only American lawyers pondering the mysteries of the federal habeas practice, but also an international audience that regularly faces the same typology of rights in the

351 See Cover & Aleinikoff, supra note 283, at 1053 (noting that “the reformative strategy of the Utopian court can be effectively blocked by state court non-acceptance of a new constitutional rule.”).

352 See Westlaw search, supra note 299 (noting positive applications of the Crawford decision in state courts).


criminal process that are declared by a central authority but implemented (or not) by substantially autonomous local systems.

Appendix I: 2010 Reported California Crawford Cases

*People v. Johnson*, 117 Cal. Rptr. 3d 132 (Cal. Ct. App. 2010) (victim’s 911 call while driving away from scene of attempted murder were nontestimonial)

*People v. Nelson*, 119 Cal. Rptr. 3d 56 (Cal. Ct. App. 2010) (shooting victim’s statement to firefighter in an ambulance while en route to hospital naming defendant as shooter was nontestimonial)

*People v. Redd*, 229 P.3d 101 (Cal. 2010) (defendant waived Crawford objection to admission of pre-trial identifications by eyewitnesses who testified at trial and concluding the objection was without merit)

*People v. Cowan*, 236 P.3d 1074 (Cal. 2010) (rejecting Crawford claim regarding declarant who testified at trial)

*People v. Hollinquest*, 119 Cal. Rptr. 3d 551 (Cal. Ct. App. 2010) (holding declarant validly claimed Fifth Amendment privilege and was consequently deemed unavailable and concluding the opportunity for cross-examination at the preliminary hearing was adequate despite lack of complete discovery at that time)

*People v. Chikosi*, 110 Cal. Rptr. 3d 464 (Cal. Ct. App. 2010) (rejecting Crawford challenge to police testimony based on alcohol-testing equipment tested by non-testifying officers, review granted, 114 Cal. Rptr. 3d 62 (Cal. Aug. 11, 2010))

*People v. Benitez*, 106 Cal. Rptr. 3d 39 (Cal. Ct. App. 2010) (finding reversible Crawford error where police lab supervisor testified based on a report prepared by a non-testifying analyst that a substance seized from defendant was methamphetamine, review granted, 109 Cal. Rptr. 3d 329 (Cal. May 12, 2010))
People v. Bowman, 107 Cal. Rptr. 3d 156 (Cal. Ct. App. 2010) (rejecting Crawford challenge to supervisor’s testimony that a substance seized from defendant was methamphetamine when this testimony was based on reports prepared by non-testifying analyst, review granted, 110 Cal. Rptr. 3d 611 (Cal. June 9, 2010))

People v. Navarrete, 104 Cal. Rptr. 3d 666 (Cal. Ct. App. 2010) (reversing on other grounds and not passing on defendant’s Crawford claim, review granted, 117 Cal. Rptr. 3d 614 (Cal. Nov. 10, 2010))

People v. Miller, 114 Cal. Rptr. 3d 629 (Cal. Ct. App. 2010) (rejecting Crawford challenge to DNA expert’s testimony based on reports of a non-testifying analyst)

People v. Herrera, 232 P.3d 710 (Cal. 2010) (finding the state had exercised due diligence in attempting to secure attendance of a preliminary hearing witness at trial and therefore reversing the appellate decision and reinstating defendant’s conviction)

People v. Minor, 116 Cal. Rptr. 3d 228 (Cal. Ct. App. 2010) (holding Crawford inapplicable in a proceeding to extend the period of probation)

People v. D’Arcy, 226 P.3d 949 (Cal. 2010) (rejecting Crawford challenge to admission of a dying declaration)

People v. Lynch, 237 P.3d 416 (Cal. 2010) (holding conversation between victim and victim’s mother in hospital was nontestimonial absent record evidence of police participation in the conversation)

People v. Jennings, 237 P.3d 474 (Cal. 2010) (declining to reach merits of Crawford claim and finding any error harmless)

People v. Letner, 235 P.3d 62 (Cal. 2010) (holding letters between defendants and an associate were nontestimonial hearsay)

Appendix II: A Sample of 100 Unreported California Cases Applying Crawford in 2010
A search in the Westlaw California Cases database for “date(2010) and Crawford v. Washington” returned 204 results. I focused on the first 100 of these results not otherwise discussed in this article and in which a genuine Crawford issue was present. Cases in which the defense did not assert a Crawford violation were excluded. The remaining 100 California Court of Appeal decisions applying Crawford were then sorted into five groups:

1. Decisions (5) reversing convictions on Crawford grounds;
2. Decisions (43) rejecting Crawford claims where the ruling was clearly correct;
3. Decisions (23) rejecting Crawford claims where reasonable judges could have ruled either way;
4. Decisions (5) rejecting Crawford claims where the court was on very doubtful ground; and
5. Decisions (24) rejecting Crawford claims on procedural grounds, either harmless error or waiver (the California courts use the term “forfeiture” but because that term has some technical applications in Confrontation Clause jurisprudence, I use the term “waiver”).

Because many cases state alternative grounds for rejecting the defendant’s claim, I was often not entirely sure whether to place some cases in category 5 or not. In the end, I included those cases where, because the procedural ruling received the most emphasis or the merits ruling was relatively weak, I thought the primary ground of decision was procedural. Likewise, cases where a procedural ground was given but the primary emphasis was on the merits were included in categories 2 and 3.

The usual caveats apply. I expect many evidence specialists would disagree with at least some of my characterizations. Nonetheless I think the overall picture survives the possibility that my views of some of the cases in the sample are eccentric. I re-emphasize that, as of the time of these decisions, the U.S. Supreme Court had not handed down Bryant.
By far the largest number of "close call" affirmances concerned expert testimony including or based on statements or reports by declarants who did not testify at the trial. There were twenty-one such cases. The defense won only three of these. The issues are murky enough that the California Supreme Court has granted review in a substantial number of cases raising issues under Melendez-Diaz and Geier. In one of these expert-basis cases, People v. Rincon, the court approved qualifying a police officer as an expert on drug dealing and permitted the officer to testify that an anonymous neighbor reported having seen apparent drug sales out of the defendant's home as the basis of the expert's opinion. The hearsay aspect of the testimony so dominates the basis-of-opinion aspect in this instance that, granting the legal plausibility of the expert's-basis theory, I have classified the ruling as "dubious" rather than "close call."

Category 1: Cases Finding Reversible Crawford Error

People v. Painia, No. B215733, 2010 WL 2473268 (Cal. Ct. App. June 21, 2010) (admission of preliminary hearing testimony domestic battery trial was reversible Crawford error where there was not an adequate showing of due diligence by the prosecution to locate the witness)


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356 Geier v. California, 61 Cal. Rptr. 3d 580, 621-22 (Cal. 2007).
People v. Ruiz, No. B209622, 2010 WL 1463149 (Cal. Ct. App. Apr. 14, 2010) (codefendant’s confession to police was testimonial and redaction of the confession was inadequate to eliminate incrimination of non-confessing codefendants)

People v. Schwarz, No. C059021, 2010 WL 193603 (Cal. Ct. App. Jan. 21, 2010) (reversing drug count conviction based on testimony by an analyst other than the analyst who performed the lab test showing substance was controlled substance)

Category 2: Cases Rejecting Crawford Claims on the Merits Where the Ruling Was Clearly Correct

People v. Garcia, No. E048866, 2010 WL 3442045 (Cal. Ct. App. Sept. 2, 2010) (no Crawford violation found where a prosecutor was permitted to ask questions a contumacious witness would refuse to answer)

In re J.C., No. C061444, 2010 WL 1691429 (Cal. Ct. App. Apr. 28, 2010) (holding DMV records made before an alleged offense were nontestimonial)


People v. King, No. B213358, 2010 WL 2016181 (Cal. Ct. App. May 21, 2010) (where doctors A and B were both present at an autopsy, A’s use of B’s report to refresh A’s recollection when B did not testify was nontestimonial hearsay)


statement was not testimonial; due process objection to nontestimonial hearsay rejected)

People v. Acuna, No. B215134, 2010 WL 2816802 (Cal. Ct. App. July 20, 2010) (finding that the prosecution had exercised due diligence in attempting to secure the appearance of a witness before introducing preliminary hearing testimony)


People v. Chaidez, 2d Crim. No. B209623, 2010 WL 2028500 (Cal. Ct. App. May 24, 2010) (murder victim’s statement to victim’s girlfriend two weeks before the murder was nontestimonial)


In re Fernando L., No. A127795 (Cal. Ct. App. Dec. 21, 2010) (holding 911 call made during armed burglary was nontestimonial and admission of testimonial accomplice’s statements during interrogation was proper because accomplice was subject to cross-examination at trial)


People v. Muesse, No. G042887, 2010 WL 4546664 (Cal. Ct. App. Nov. 12, 2010) (where 911 call by non-testifying bystander was made during an attack on a victim, the call fell under Davis358 rather than Hammon359)


359 829 N.E.2d 444 (Ind. 2005).


People v. Perez, No. B211325, 2010 WL 1509798 (Cal. Ct. App. Apr. 16, 2010) (holding accomplice’s statements to undercover informant were nontestimonial)


People v. Paschal, 2d Crim. No. B213495, 2010 WL 3007501 (Cal. Ct. App. Aug. 3, 2010) (holding defendant had adequate opportunity to cross-examine at a preliminary hearing when the witness was unavailable at trial)

People v. Wilson, No. A119963, 2010 WL 2126726 (Cal. Ct. App. May 27, 2010) (where the jury was instructed to consider a testifying witness’s conclusory statement identifying defendant as shooter only if the jury found witness had seen the shooting, the statement was not testimonial hearsay, nor was it hearsay at all)

People v. Madera, No. B213628, 2010 WL 1951136 (Cal. Ct. App. May 17, 2010) (where officer testified that defendant stated perpetrator had worn a bandana, eyewitnesses had described the assailant as wearing a bandana, and two eyewitnesses testified at trial that the assailant wore a bandana, no Crawford violation in officer’s testimony)


People v. Wheeler, No. C059987, 2010 WL 4630866 (Cal. Ct. App. Nov. 17, 2010) (accusations of prior, uncharged misconduct offered to explain the actions of security guards in focusing on defendant consistent with Crawford because not offered for truth’ error on other grounds in admitting the evidence, but error held harmless)


expert about victim’s mental condition and relied on a report prepared years earlier by another mental health professional to assess the victim’s eligibility for government benefits, prior report held not testimonial hearsay)


People v. Hess, No. B212089, 2010 WL 1294481 (Cal. Ct. App. Apr. 6, 2010) (statement of bank employee to agent of another financial institution that checks the defendant attempted to cash were “not ok” held not testimonial)

People v. Santana, No. C060202, 2010 WL 2336530 (Cal. Ct. App. June 10, 2010) (accomplice’s statements to accomplice’s girlfriend were not testimonial; harmless error alternative holding)

Category 3: Cases Rejecting Crawford Claims on the Merits Where Reasonable Judges Might Disagree


People v. Mundell, 2d Crim. No. B215133, 2010 WL 1053612 (Cal. Ct. App. Mar. 24, 2010) (rejecting claim that a police expert on gangs had used court records as the basis for opining that a gang was violent and finding this nontestimonial)


361 829 N.E. 2d 444 (Ind. 2005).
by non-testifying analysts were found not to be testimonial hearsay under Crawford.

People v. Green, No. B213820, 2010 WL 822583 (Cal. Ct. App. Mar. 11, 2010) (expert testimony about whether a substance was an illegal drug based on notes of tests performed by a non-testifying analyst was not testimonial hearsay)


People v. True, No. A121975, 2010 WL 1553770 (Cal. Ct. App. Apr. 20, 2010) (defendant, charged with possessing stolen vehicle, claimed he had purchased in good faith from Jon Davis in southern Oregon; officer testified that multiple interviewees told him they had never heard of Jon Davis; statements to officer held not testimonial)


expert’s opinion, based on statements from non-testifying declarants, that a shooting was gang-related)


Category 4: Cases Rejecting Crawford Claims on Doubtful Grounds


People v. Molina, No. B210718, 2010 WL 60127 (Cal. Ct. App. Jan. 11, 2010) (post-crime statements to police reporting a suspect’s vehicle’s license plate number held not testimonial because the statements were spontaneous and informal)

People v. Rincon, No. B217776, 2010 WL 4355584 (Cal. Ct. App. Nov. 4, 2010) (on issue of whether drugs were possessed by defendant for sale, officer was permitted to testify to an anonymous neighbor’s statements that the neighbor had seen apparent drug sale and use this as the basis of the officer’s expert opinion)
Category 5: Cases Affirming Convictions Exclusively or Primarily because Defendant Waived the Claim or because Any Error Was Harmless

*People v. Marlow*, No. G041710, 2010 WL 2332967 (Cal. Ct. App. June 10, 2010) (if computerized record of 911 call was testimonial, any error was harmless)

*People v. Madrid*, No. B214013, 2010 WL 3245775 (Cal. Ct. App. Aug. 18, 2010) (holding that post-robbery 911 call was not testimonial; harmless error is alternative ground)

*People v. Colon*, No. F056334, 2010 WL 612245 (Cal. Ct. App. Feb. 22, 2010) (rejecting *Crawford* challenge to trial testimony by lab supervisor based on tests performed by non-testifying analyst; waiver given as alternative ground)


*People v. Mosqueda*, No. C059252, 2010 WL 424974 (Cal. Ct. App. Feb. 8, 2010) (assuming, without deciding that admission of undercover informants' recorded statements were testimonial hearsay, any error held harmless)

*People v. Ayala*, No. B216952, 2010 WL 5175463 (Cal. Ct. App. Def. 22, 2010) (holding multiple *Crawford* violations were either waived or harmless)

*People v. Chavez*, No. E047836, 2010 WL 597186 (Cal. Ct. App. Feb. 19, 2010) (alternate holdings that testifying expert's reliance on non-testifying analyst's report was not testimonial, objection waived and any error harmless and thus not prejudicial under *Strickland*\(^{362}\))

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People v. Felix, No. B210054, 2010 WL 7124 (Cal. Ct. App. Jan. 4, 2010) (holding testimonial a witness's statement that the murder victim had told witnesses the defendant had threatened her, but the error was harmless)


People v. Hill, 2d Crim. No. B212445, 2010 WL 277065 (Cal. Ct. App. Jan. 26, 2010) (primary holding was that the defense waived its Crawford objection to hearsay statements about a prior offense; secondary holding that the defendant had prior opportunity to cross-examine declarant during a prior prosecution was dubious)


People v. Simmons, No. B211208, 2010 WL 550449 (Cal. Ct. App. Feb. 18, 2010) (Crawford error was held harmless)


People v. Calderon, No. F057554, 2010 WL 3133594 (Cal. Ct. App. Aug. 10, 2010) (Crawford objection was made to expert testimony based on the report of non-testifying medical examiner waived; ineffective assistance of counsel claim based on failure to object because the failure was not prejudicial)

People v. Gonzalez, No. B217424, 2010 WL 1463197 (Cal. Ct. App. Apr. 14, 2010) (Crawford claim rejected as waived and any error which occurred was harmless; alternative ground: debatable holding that out-of-court statements were not offered for the truth)


found characterization of waiver victim’s report of an attack to patrolling police was debatable and the victim’s identification of the defendant as one of the assailants not testimonial)


*People v. Johnson*, 117 Cal. Rptr. 3d 132 (Cal. Ct. App. 2010) (victim’s 911 call while driving away from scene of attempted murder held not testimonial)

*People v. Nelson*, 119 Cal. Rptr. 3d 56 (Cal. Ct. App. 2010) (shooting victim’s statement to firefighter in ambulance en route to hospital naming defendant as shooter held not testimonial)

*People v. Redd*, 229 P.3d 101 (Cal. 2010) (defendant waived *Crawford* objection to admission of pre-trial identifications by eyewitnesses who testified at trial; objection without merit in any event)

*People v. Cowan*, 236 P.3d 1074 (Cal. 2010) (rejecting *Crawford* claim respecting declarant who testified at trial)

*People v. Hollinquest*, 119 Cal. Rptr. 3d 551 (Cal. Ct. App. 2010) (holding declarant validly claimed Fifth Amendment privilege and so was unavailable, and that opportunity for cross-examination at preliminary hearing was adequate despite lack of complete discovery at that time)


*People v. Benitez*, 106 Cal. Rptr. 3d 39 (Cal. Ct. App. 2010) (finding reversible *Crawford* error where police lab supervisor testified that based on report prepared by nontestifying analyst
substance seized from defendant was methamphetamine), *review granted*, 109 Cal. Rptr. 3d 329 (Cal. May 12, 2010)

*People v. Bowman*, 107 Cal. Rptr. 3d 156 (Cal. Ct. App. 2010) (rejecting Crawford challenge to supervisor’s testimony that substance seized from defendant was methamphetamine, based on reports prepared by nontestifying analyst), *review granted*, 110 Cal. Rptr. 3d 611 (Cal. June 9, 2010)

*People v. Navarrete*, 104 Cal. Rptr. 3d 666 (Cal. Ct. App. 2010) (reversing on other grounds and so not passing on defendant’s Crawford claim)


*People v. Herrera*, 232 P.3d 710 (Cal. 2010) (finding state had exercised due diligence in attempting to secure attendance of preliminary-hearing witness at trial, reversing court of appeals and reinstating conviction)

*People v. Minor*, 116 Cal. Rptr. 3d 228 (Cal. Ct. App. 2010) (holding Crawford inapplicable in proceeding to extend period of probation)

*People v. D’Arcy*, 226 P.3d 949 (Cal. 2010) (rejecting Crawford challenge to dying declaration)

*People v. Lynch*, 237 P.3d 416 (Cal. 2010) (holding conversation between victim and victim’s mother in hospital not testimonial absent record evidence of police participation in the conversation)

*People v. Jennings*, 237 P.3d 474 (Cal. 2010) (declining to reach merits of Crawford claim finding any error harmless)

*People v. Letner*, 235 P.3d 62 (Cal. 2010) (holding letters between defendants and an associate not testimonial hearsay)