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Friend or Foe: The Sixth Amendment Confrontation Clause in Post-Conviction Formal Revocation Proceedings

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FRIEND OR FOE? THE SIXTH AMENDMENT CONFRONTATION CLAUSE IN POST-CONVICTION FORMAL REVOCATION PROCEEDINGS

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Life is very short, and there's no time
For fussing and fighting, my friend.
I have always thought that it's a crime,
So I will ask you once again.
Try to see it my way,
Only time will tell if I am right or I am wrong.
While you see it your way
There's a chance that we may fall apart before too long.
We can work it out,
We can work it out.[1]

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1. THE BEATLES, WE CAN WORK IT OUT (Capitol Records 1965).

I. INTRODUCTION

THIS Article examines the relationship between the Sixth Amendment right to confrontation in criminal prosecutions and the Fourteenth Amendment right to confrontation in formal parole, probation, and supervised release revocation proceedings. Although in most revocation hearings the Sixth Amendment Confrontation Clause presently has little-to-no influence over the Fourteenth Amendment due process right to confrontation, the jurisprudence for the due process right to confrontation in revocation proceedings must change to more closely mirror Sixth Amendment Confrontation Clause jurisprudence because of their entangled past, significant similarities between criminal prosecutions and revocation proceedings, and constitutional concerns.[2]

Before analyzing this relationship, a quick introduction to the two main characters of this Article is in order. First, the Sixth Amendment Confrontation Clause provides a criminal defendant with a nearly absolute right to confront and cross-examine a court witness who made out-of-court testimonial statements against the defendant unless the witness is unavailable and the defendant had a prior opportunity to confrontation.[3] Otherwise, prosecutors cannot introduce those testimonial statements in criminal prosecutions.[4]

Second, the Fourteenth Amendment due process confrontation right provides a probationer, parolee, or supervised releasee with a limited right to confront and cross-examine out-of-court declarants in revocation proceedings.[5] In revocation proceedings, the confrontation requirement is determined under various tests, which, among other factors, weigh the reliability of the hearsay evidence at issue.[6]

In examining the Fourteenth Amendment due process right to confrontation, there is no constitutional difference between probation,[7]

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2. *See infra* Part V.

3. *See* U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 42 (2004). The only exceptions to this rule are those that were already established at common law when America was founded, such as dying declarations and forfeiture by wrongdoing. *Crawford*, 541 U.S. at 54, 56 n.6.

4. *See Crawford*, 541 U.S. at 42.

5. *See* U.S. CONST. amend. XIV, § 1; Gagnon v. Scarpelli, 411 U.S. 778, 781–82 (1973); Morrissey v. Brewer, 408 U.S. 471, 486–89 (1972). The Fourteenth Amendment provides confrontation rights in other settings as well, such as civil cases, but this Article focuses on the confrontation right in formal revocation proceedings. *See, e.g.*, Greene v. McElroy, 360 U.S. 474, 508 (1959) (barring the government from taking away government contractor's position without right to confront and cross-examine adverse witnesses).

6. *See infra* Part III.

7. The U.S. Department of Justice defines probation as "a court-ordered period of correctional supervision in the community, generally as an alternative to incarceration. In some cases, probation can be a combined sentence of incarceration followed by a period of community supervision." LAUREN M. MARUSCHAK & ERIKA PARKS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 239686, PROBATION AND PAROLE IN THE UNITED STATES, 2011, at 2 (2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus11.pdf.

parole,[8] or supervised release[9] revocation proceedings.[10] Probationers, parolees, and supervised releasees (collectively referred to as "releasees"), who totaled over 4.8 million in America in 2010 (or one in every fifty U.S. adult residents),[11] are supervised outside of prison and have the right to a hearing with specific due process rights before a court may revoke their probation, parole, or supervised release.[12] Revocation may occur for committing new crimes or even non-criminal acts, such as missing an appointment.[13] In 2011, for example, approximately 15% of all probationers, or nearly 600,000 individuals, had their probations revoked for new offenses or failing to meet probation conditions.[14] Approximately 13% of all parolees, or over 111,000 individuals,[15] were incarcerated due to parole revocations that did not involve a new sentence.[16] Because these figures only pertain to individuals who actually had probation, parole, or other community supervision revoked, hundreds of thousands more releasees might have made appearances at revocation hearings where the right to confront adverse out-of-court declarants would have been imperative.

The Sixth Amendment confrontation right has received more attention than the Fourteenth Amendment due process right to confrontation. Although a plethora of legal scholarship examines the Sixth Amendment

8. Parole, including supervised release, is granted after a defendant has served some or all of his or her sentence. *See id.* The U.S. Department of Justice defines parole as "a period of conditional supervised release in the community following a prison term. It includes parolees released through discretionary or mandatory supervised release from prison, those released through other types of post-custody conditional supervision, and those sentenced to a term of supervised release." *Id.*; *see also* Brett M. Shockley, Note, *Protecting Due Process from the Protect Act: The Problems with Increasing Periods of Supervised Release for Sexual Offenders*, 67 WASH. & LEE L. REV. 353, 361–62 (2010).

9. Supervised release differs from parole in that a parole revocation only affects the time of confinement as defined by the parameters of the original prison sentence, while a revocation of supervised release can result in imprisonment that exceeds those parameters. *See* Shockley, *supra* note 8, at 362 (quoting United States v. McNeil, 415 F.3d 273, 276–77 (2d Cir. 2005)).

10. *See Gagnon*, 411 U.S. at 782 ("[There is no] difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation . . . ."); United States v. Hall, 419 F.3d 980, 985 n.4 (9th Cir. 2005) ("Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner."); *see also* Johnson v. United States, 529 U.S. 694, 710–11 (2000). Therefore, the general term "revocation proceedings" or "revocation hearings" will be used throughout this Article, and the term "releasees" will apply to probationers, parolees, and supervised releasees, unless otherwise specifically stated.

11. MARUSHAK & PARKS, *supra* note 7, at 1. In 2011, there were approximately 3.97 million individuals on probation and over 850,000 individuals on parole. *Id.* at 1, 2.

12. *See supra* note 5 and accompanying text. This Article does not discuss those individuals seeking parole or probation. The grant or denial of parole or probation is a discretionary decision, and there is no right to confrontation in these circumstances. *See* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 15–16 (1979).

13. *See* Peggy Burke, Public Safety Policy Brief, *When Offenders Break the Rules: Smart Responses to Parole and Probation Violations*, THE PEW CENTER ON THE STATES, No. 3, November 2007, at 2.

14. MARUSCHAK & PARKS, *supra* note 7, at 2, 5.

15. *Id.* at 1, 8.

16. In 2011, 5% of parolees returned to incarceration due to a new sentence. MARUSHAK & PARKS, *supra* note 7, at 8.

Confrontation Clause, articles that focus on the due process right to confrontation, especially in post-conviction revocation proceedings, are few.[17] At times, Sixth Amendment scholars have looked to due process principles to resolve specific Confrontation Clause issues.[18] Missing from this discourse, however, are (1) an in-depth examination of whether the Sixth Amendment should have substantial influence, or even any influence, on the Fourteenth Amendment confrontation right in revocation proceedings; and (2) a detailed analysis of the Fourteenth Amendment confrontation right in revocation hearings.[19] This Article provides such an analysis.

The unbalanced scholarly treatment may be due in part to the Supreme Court's reticence in one field and loquaciousness in the other. While the Supreme Court has not issued a major decision regarding the due process right to confrontation in revocation proceedings since its 1970s opinions in *Gagnon* and *Morrissey*,[20] it has issued more than twenty major decisions from 1980 to 2012 that clarified, shaped, or re-shaped the Sixth Amendment confrontation right.[21]

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17. *See, e.g.*, Brent M. Pattison, *Questioning School Discipline: Due Process, Confrontation, and School Discipline Hearings*, 18 TEMP. POL. & CIV. RTS. L. REV. 49, 53–57 (2008) (stating that students should have the right to confront at in-school discipline hearings); Bruce Zucker, *The Right to Confront Adverse Witnesses at Post-Conviction Release Revocation Hearings*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 87, 87–89 (2008) (analyzing limited right to confrontation in revocation proceedings and stating that there should be more limitations on using only hearsay evidence at revocation proceedings); Christine Holst, Note, *The Confrontation Clause and Pretrial Hearings: A Due Process Solution*, 2010 U. ILL. L. REV. 1599, 1627 (proposing a due process solution to a defendant's right to confrontation in pretrial proceedings). The due process right to confrontation in revocation proceedings has been examined in the context of larger ideas. *See, e.g.*, Thomas J. Bamonte, *The Viability of* Morrissey v. Brewer *and the Due Process Rights of Parolees and Other Conditional Releasees*, 18 S. ILL. U. L.J. 121, 124, 134, 136, 138 (1993) (arguing that *Morrissey*'s overall due process requirements are "outmoded" and explaining in one section that confrontation and cross-examination rights under *Morrissey* have been "non existent"); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 134–35 (1984) (citing example of lax enforcement of due process right to confrontation in revocation proceedings to show that *Morrissey* did not rid all procedural injustices in revocation proceeding while also noting improvement in general); Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 310–14 (2006) (discussing confrontation rights in domestic abuse cases after *Davis v. Washington*, 547 U.S. 813 (2006), and recommending that state legislatures revise their criminal procedure codes to admit hearsay in revocation proceedings as constitutionally required); Daniel F. Piar, *A Uniform Code of Procedure for Revoking Probation*, 31 AM. J. CRIM. L. 117, 153–61 (2003) (proposing code of procedure for probation revocation, including a balancing test to analyze a probationer's confrontation rights).

18. *See, e.g.*, Lininger, *supra* note 17, at 307 (discussing due process confrontation theory as one possibility for solving problems raised by the Confrontation Clause in domestic abuse cases after *Davis v. Washington*, but finding that "reliance on the Due Process Clause is far from ideal").

19. *See, e.g.*, *id.* at 326.

20. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

21. *See, e.g.*, Williams v. Illinois, 132 S. Ct. 2221 (2012); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); Michigan v. Bryant, 131 S. Ct. 1143 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Giles v. California, 554 U.S. 353 (2008); Davis v. Washington, 547 U.S. 813; Crawford v. Washington, 541 U.S. 36 (2004); Lilly v. Virginia, 527 U.S. 116 (1999); White v. Illinois, 502 U.S. 346 (1992); Maryland v. Craig, 497 U.S. 836 (1990);

Lower courts, however, have not remained silent. After the pivotal decisions regarding the Sixth Amendment Confrontation Clause, lower courts have grappled with the question of how much influence Confrontation Clause principles should have on the due process right to confrontation in revocation proceedings. The present-day consensus among lower courts regarding the relationship between the two confrontation rights is simply that no such relationship exists, and the courts have little-to-no desire to bridge the divide.[22]

This Article challenges the status quo and proposes that the due process right to confrontation in revocation proceedings should be more closely tied to the Sixth Amendment Confrontation Clause, and newly issued Confrontation Clause principles should directly impact due process confrontation analysis in revocation proceedings.

In pursuit of these goals, Part II summarizes the seminal cases that have shaped and defined each confrontation right. Part III details the due process right to confrontation in revocation hearings and sets forth the different tests that federal and state courts employ to analyze a releasee's due process right to confrontation. Part IV details the history between the Sixth Amendment and Fourteenth Amendment confrontation rights. Primarily by examining how courts analyzed the admissibility of hearsay forensic laboratory reports in revocation hearings after the Supreme Court decided major Sixth Amendment Confrontation Clause cases, Part IV shows that until recently courts freely relied on Sixth Amendment Confrontation Clause cases to analyze the due process right to confrontation in revocation proceedings. Part V examines the theoretical and practical reasons why the Sixth Amendment Confrontation Clause should exert more influence on the due process right to confrontation. In Part VI, the Article recommends two changes to the due process right to confrontation in revocation proceedings. First, the Article proposes that the right to confrontation in revocation hearings should arise from the Sixth Amendment, not the Fourteenth Amendment, so that the same *Crawford* standards apply in revocation proceedings as in criminal prosecutions. Second, if, in the alternative, the right to confrontation remains rooted in the Fourteenth Amendment, it should still share the main framework of the Sixth Amendment Confrontation Clause jurisprudence while maintaining its quintessential trait of flexibility. Specifically, following the current Sixth Amendment Confrontation Clause jurisprudence, a releasee should have the due process right only to confront declarants of testimonial hearsay evidence. Additionally, slight modifications to the federal balancing test should be made so that judges and hearing officers no

Idaho v. Wright, 497 U.S. 805 (1990); Coy v. Iowa, 487 U.S. 1012 (1988); United States v. Owens, 484 U.S. 554 (1988); Kentucky v. Stincer, 482 U.S. 730 (1987); Cruz v. New York, 481 U.S. 186 (1987); Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Lee v. Illinois, 476 U.S. 530 (1986); United States v. Inadi, 475 U.S. 387 (1986); Delaware v. Fensterer, 474 U.S. 15 (1985); Tennessee v. Street, 471 U.S. 409 (1985); Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36.

22. *See infra* Part IV.

longer weigh the reliability of the hearsay evidence to determine whether a releasee has the right to confrontation.

II. CASE HISTORY OF THE FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO CONFRONTATION IN REVOCATION HEARINGS AND THE SIXTH AMENDMENT RIGHT TO CONFRONTATION IN CRIMINAL PROSECUTIONS

This Part presents a survey of the seminal Supreme Court cases for each confrontation right. The survey starts in the early 1970s when the Supreme Court identified the due process requirements that applied in revocation hearings, including the right to confrontation and cross-examination in *Morrissey v. Brewer* and *Gagnon v. Scarpelli*.[23] The survey then goes through time to examine the numerous Sixth Amendment Confrontation Clause cases issued by the high Court, beginning with *Ohio v. Roberts*[24] and ending with *Williams v. Illinois*.[25]

A. *Morrissey & Gagnon*: The Fourteenth Amendment Due Process Right to Confrontation in Revocation Proceedings

Only two Supreme Court cases analyze in-depth the due process rights required at revocation proceedings—*Morrissey* and *Gagnon*—and neither of which places its main focus on the due process right to confrontation.[26]

In *Morrissey* and *Gagnon*, the Supreme Court recognized a due process right to confrontation and cross-examination in both the informal and formal stages of the revocation process.[27] The Court did not rationalize or justify these rights; they were assumed inherent once the Court determined that the Due Process Clause applied.[28] The Court emphasized that because revocation proceedings are not criminal prosecutions, the "full panoply of rights" of criminal prosecutions does not apply in revocation hearings,[29] and flexibility is required, especially with respect to the confrontation right.[30]

1. Morissey v. Brewer

In 1972, the Court in *Morrissey* expressly acknowledged for the first time that the Fourteenth Amendment Due Process Clause applied in parole revocation hearings and that this due process right included certain procedural guarantees, including the right to confrontation and cross-examination.[31] The Court identified two stages of a typical revocation pro-

23. *Gagnon*, 778 U.S. at 779; *Morrissey*, 408 U.S. at 472.
24. *Roberts*, 448 U.S. at 56.
25. 132 S. Ct. 2221 (2012).
26. *See Gagnon*, 411 U.S. at 779; *Morrissey*, 408 U.S. at 472.
27. *Gagnon*, 411 U.S. at 781–82; *Morrissey*, 408 U.S. at 484–85.
28. *Gagnon*, 411 U.S. at 781–82; *Morrissey*, 408 U.S. at 482, 485–87.
29. *Gagnon*, 411 U.S. at 781–82; Morrissey, 408 U.S. at 480.
30. *Gagnon*, 411 U.S. at 782 n.5, 788; Morrissey, 408 U.S. at 488–89.
31. *Morrissey*, 408 U.S. at 482, 485–87.

cess—(1) an arrest and preliminary hearing and (2) a revocation hearing—and set forth minimum due process requirements for each stage.[32]

In the first, less-formal stage of the revocation process, an independent officer determines whether probable cause or reasonable grounds exist to find a violation of parole.[33] The minimum due process requirements at this first stage include the right to confrontation and cross-examination.[34] Specifically, the Supreme Court stated that "[o]n request of the parolee, [the] person who has given *adverse information on which parole revocation is to be based is to be made available for questioning in his presence.*"[35] "However, if the hearing officer determines that an informant would be *subjected to risk of harm if his identity were disclosed*, he need not be subjected to confrontation and cross-examination."[36]

In the second stage of the revocation process—the formal revocation hearing—a neutral and detached body makes a "final evaluation" of contested facts and determines if parole should be formally revoked.[37] Six minimum due process requirements apply, one of which is "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)."[38] The Court did not expressly state what constitutes good cause for dispensing with the right to confrontation at the formal revocation hearing, although it presumably includes risk of harm to the witness, as the Court noted when discussing the right to confrontation in the first, informal stage of revocation.[39]

An overarching principle—the start and end point of the Court's reasoning in *Morrissey*—is that "the revocation of parole is not part of the criminal prosecution and [therefore] the full panoply of rights" in a crimi-

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32. *Id.* at 485–87.

33. *Id.* at 485.

34. *Id.* at 485–86. The Court also required that a neutral individual make a preliminary evaluation that the parolee receive notice of the hearing and its purpose and alleged violations; that the parolee have the opportunity to appear and speak on his own behalf, including bringing letters, documents, and relevant individuals; and that a parolee be given a summary or digest of what occurred at the hearing and the reasons for the hearing officer's determination. *Id.* at 485–87.

35. *Id.* at 487 (emphasis added).

36. *Id.* (emphasis added).

37. *Id.* at 489.

38. *Id.* at 488–89. The other minimum requirements at revocation hearings include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; . . . (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489.

39. *See id.* at 487 ("[I]f the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.").

nal prosecution does not apply in parole revocation hearings.[40] Unlike a criminal prosecution, the formal revocation hearing "is a narrow inquiry; the process . . . [is] flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."[41]

2. Gagnon v. Scarpelli

Approximately seven months later, in *Gagnon*, the Supreme Court extended *Morrissey*'s requirements to state probation revocation hearings.[42] The Court reasoned that similar to parole revocation, a state probation revocation "is not a stage of a criminal prosecution, but does result in a loss of liberty."[43] Therefore, it "h[e]ld that a probationer . . . [was] entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey*," including the right to confrontation and cross-examination.[44]

The Court also addressed the state's greatest concern regarding the probationer's right to confront and cross-examine adverse witnesses: "the difficulty and expense of procuring witnesses from perhaps thousands of miles away."[45] The Court stated that "[w]hile in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence."[46] The Court also encouraged states to develop "creative solutions to the practical difficulties of the *Morrissey* requirements," such as holding both the preliminary and the final hearings at the place of violation.[47]

The only other significant mention of the probationer's right to confrontation arose in the context of determining whether a probationer has a right to an attorney at a revocation hearing.[48] The Court acknowledged that "[d]espite the informal nature of the proceedings and the absence of technical rules of procedure or evidence," an attorney may be required to examine or cross-examine witnesses.[49] Ultimately, the Court held that "the need for counsel must be made on a case-by-case basis."[50]

After *Morrissey* and *Gagnon*, the Supreme Court did not revisit the issue of confrontation rights under the Due Process Clause in revocation hearings. While the Court has been silent in further defining the Fourteenth Amendment right to confrontation in revocation hearings, it has

40. *Id.* at 480.
41. *Id.* at 489.
42. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).
43. *Id.*
44. *Id.*
45. *Id.* at 782 n.5.
46. *Id.*
47. *Id.*
48. *Id.* at 786–87.
49. *Id.*
50. *Id.* at 790.

issued numerous decisions regarding the Sixth Amendment right to confrontation in criminal trials.

B. FROM *ROBERTS* TO *CRAWFORD* TO TODAY: THE SIXTH AMENDMENT RIGHT TO CONFRONTATION IN CRIMINAL PROSECUTIONS

The Supreme Court first applied the Sixth Amendment Confrontation Clause in *Mattox v. United States*.[51] Throughout the 1900s, the Court maintained a "pragmatic perspective on the Confrontation Clause," warning that the right to confrontation must at times cede to public policy and case necessities.[52] In *Roberts*, which began the modern-day Sixth Amendment Confrontation Clause jurisprudence,[53] the Court "drew the line" between the right to confrontation and other necessities at reliability.[54]

After *Roberts*, the Supreme Court continued to clarify the Sixth Amendment right to confrontation in opinions that applied or restricted the use of the *Roberts* rule to different types of evidence.[55] Then came *Crawford v. Washington*.[56]

As one news report aptly summarized, *Crawford* was viewed as "an earthquake rocking America's criminal justice foundations."[57] *Crawford* overruled *Roberts* and presented a completely new interpretation of the Confrontation Clause.[58] Under *Crawford*, the Confrontation Clause bars prosecutors from introducing out-of-court testimonial statements into evidence against a defendant unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the declarant.[59] After *Crawford*, the Court issued numerous decisions that applied the new standard to different types of evidence.[60]

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51. 156 U.S. 237 (1895).

52. David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1647 (2009) (citing *Mattox*, 156 U.S. at 243).

53. Lininger, *supra* note 17, at 276.

54. Sklansky, *supra* note 52, at 1647–48.

55. *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 120 (1999); White v. Illinois, 502 U.S. 346, 357 (1992).

56. 541 U.S. 36 (2004).

57. Fred O. Smith, Jr., Note, Crawford*'s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1498 (2008) (quoting Kevin Drew, *At 33, He's a Two-Time Supreme Court Winner*, CNN.COM (July 23, 2004, 2:31 PM), http://www.cnn.com/2004/LAW/07/21/seattle. attorney) (internal quotation marks omitted).

58. *See Crawford*, 541 U.S. at 57–69.

59. *Id.* at 58. The only exceptions that applied are those exceptions that were established when the Confrontation Clause was promulgated, such as dying declarations and forfeiture by wrongdoing. *Id.* at 56 n.6.

60. *See, e.g.*, Williams v. Illinois, 132 S. Ct. 2221 (2012); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); Michigan v. Bryant, 131 S. Ct. 1143 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Giles v. California, 554 U.S. 353 (2008); Davis v. Washington, 547 U.S. 813 (2006).

1. Ohio v. Roberts

In *Roberts*, the Supreme Court held that the testimony of an unavailable witness was admissible against a criminal defendant as long as the statements met "adequate 'indicia of reliability.'"[61] Reliability was inferred when the evidence fell under "a firmly rooted hearsay exception" or there was "a showing of particularized guarantees of trustworthiness."[62]

Roberts was the Court's first significant attempt to define the relationship between the Confrontation Clause and the hearsay rule.[63] The Court acknowledged that the Confrontation Clause and the hearsay rule were both "generally designed to protect similar values" and that they "stem[med] from the same roots."[64]

The meaning and purpose of the Confrontation Clause helped shape or "restrict the range of admissible hearsay."[65] And according to the Court, the purpose of the Confrontation Clause was to showcase the "Framers' preference for face-to-face accusation" and to "augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence."[66] This purpose resulted in the Court's requirements that: (1) the prosecution carry the burden to "demonstrate the unavailability of [ ] the declarant" and (2) an unavailable witness's testimony bear some indicia of reliability.[67] Specifically, a witness was "unavailable" when the prosecution showed that it made a good faith effort to obtain that witness's presence.[68] "The lengths to which the prosecution must go to produce a witness . . . [was] a question of reasonableness."[69] Next, the testimony bore some indicia of reliability if the evidence fell under "a firmly rooted hearsay exception" or there was "a showing of particularized guarantees of trustworthiness."[70]

After *Roberts*, the Court further clarified its rule as it deciphered which hearsay exceptions were firmly rooted, what type of evidence contained sufficiently particularized guarantees of trustworthiness, and when the Confrontation Clause did not apply.[71]

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61. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. at 36.

62. *Id.*

63. *See id.* at 64–66.

64. *Id.* at 66 (quoting California v. Green, 399 U.S. 149, 155 (1970); Dutton v. Evans, 400 U.S. 74, 86 (1970)) (internal quotation marks omitted).

65. *Id.* at 65.

66. *Id.*

67. *Id.* at 65–66.

68. *Id.* at 74.

69. *Id.* (quoting *Green*, 399 U.S. at 189 n.22 (Harlan, J., concurring)) (internal quotation marks omitted).

70. *Id.* at 66.

71. *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 125–39 (1999) (finding that accomplice's confessions that incriminate defendants are not firmly rooted hearsay exception) (plurality opinion).

2. Crawford v. Washington

A little more than two decades after *Roberts*, the Supreme Court in *Crawford v. Washington*[72] significantly changed the landscape of the Confrontation Clause. Rather than relying on the "amorphous" concept of reliability, the Court announced that the Confrontation Clause bars the prosecution from introducing out-of-court testimonial statements against a defendant unless that witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.[73] The only exceptions are those that were established at common law, such as dying declarations and forfeiture by wrongdoing.[74] As for nontestimonial hearsay statements, it is unclear whether the Confrontation Clause applied at all.[75]

The court left the all-important, comprehensive definition of "testimonial" for another day.[76] However, the term "testimonial" at least applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations."[77] To support this new interpretation of the Confrontation Clause, the Court harked back to Roman times, the 16th and 17th centuries (specifically, the 1603 trial of Sir Walter Raleigh for treason), the founding era of the United States, the early cases interpreting Sixth Amendment history, and the unworkability of the *Roberts* rule.[78]

The Court's history lesson underscored the primary concern of the Sixth Amendment Confrontation Clause—"testimonial," out-of-court statements.[79] The Confrontation Clause was created to fight "the principal evil" of using "the civil-law mode of criminal procedure, and particularly . . . *ex parte* examinations as evidence against the accused."[80] The historical record also showed that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[81] Furthermore, the unpredictability and erroneous applications of the *Roberts* test supported the

72. Crawford v. Washington, 541 U.S. 36 (2004).

73. *Id.* at 63, 68.

74. *Id.* at 56 n.6. The "forfeiture by wrongdoing" exception to the Confrontation Clause only applies when "the defendant engage[s] in conduct *designed* to prevent the witness from testifying." Giles v. California, 554 U.S. 353, 359 (2008).

75. *See* Lininger, *supra* note 17, at 278, 286 (observing that "the *Crawford* opinion did not explicitly overturn *Roberts* as a test for the admission of nontestimonial hearsay" and finding that after *Crawford*, most lower courts still applied the *Roberts* test to nontestimonial hearsay until the Supreme Court decided *Davis v. Washington*, 547 U.S. 813 (2006)); Sklansky, *supra* note 52, at 1651 (stating that the *Crawford* court did not convey "whether the *Roberts* test, or any other requirements derived from the Confrontation Clause, would continue to apply to nontestimonial hearsay introduced against a criminal defendant").

76. *Crawford*, 541 U.S. at 68.

77. *Id.*

78. *Id.* at 43–50.

79. *See id.* at 51–53.

80. *Id.* at 50.

81. *Id.* at 53–54.

Court's proclamation that a new rule was needed.[82] Rather than rely on a judicial determination of reliability, which was anathema to the Framers,[83] the Court held that the only way to get to reliability—the Confrontation Clause's ultimate goal—was to test the evidence "in the crucible of cross-examination."[84]

3. *After* Crawford

A succession of Supreme Court cases after *Crawford* applied the new standard to different types of evidence and attempted to create a more precise test or definition of "testimonial."[85] In *Davis v. Washington*,[86] the Supreme Court "completely overturned *Roberts* as a test for confrontation in any context," regardless of whether the hearsay evidence was testimonial or non-testimonial, and also attempted to clarify the term "testimonial."[87] As Professor Fisher observed, the Court created three tests to separate testimonial statements from nontestimonial ones: the emergency–non-emergency dichotomy, the past–present dichotomy, and the "'what-a-witness-does' test."[88] Professor Fisher also observed that most courts after *Davis* relied on the emergency–non-emergency dichotomy to determine if statements were testimonial.[89] Thus, statements made in police interrogations with the primary purpose of helping police meet an emergency were nontestimonial, and statements made when there was no ongoing emergency were testimonial.[90] Later, in *Michigan v. Bryant*,[91] the Supreme Court applied the "primary purpose of interrogation" rule to find that a dying victim's statements to police were nontestimonial because the victim answered police officers' questions before emergency medical services arrived and the primary purpose of the interrogation was to respond to an ongoing emergency.[92] In *Giles v. California*,[93] the Court opined on the "forfeiture by wrongdoing" exception to the Confrontation Clause and held that "the exception applies only when the defendant engaged in conduct *designed* to prevent the witness from testifying."[94]

After *Giles*, the Supreme Court applied the Confrontation Clause in cases involving forensic evidence. In *Melendez-Diaz v. Massachusetts*, the

82. *Id.* at 60.
83. *Id.* at 67.
84. *Id.* at 61.
85. *See, e.g.*, Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011); Davis v. Washington, 547 U.S. 813 (2006).
86. 547 U.S. 813 (2006).
87. Lininger, *supra* note 17, at 286; *see also* Sklansky, *supra* note 52, at 1651.
88. Jeffrey L. Fisher, *What Happened—and What Is Happening—to the Confrontation Clause*, 15 J.L. & POL'Y 587, 588–89 (2007).
89. *Id.* at 589.
90. *Davis*, 547 U.S. at 822.
91. 131 S. Ct. 1143 (2011).
92. *Id.* at 1150, 1162–67 (quoting *Davis*, 547 U.S. at 822) (internal quotation marks omitted).
93. 554 U.S. 353 (2008).
94. *Id.* at 359.

Court held that certifications of forensic laboratory test results are testimonial statements.[95] In *Bullcoming v. New Mexico*, the Court emphasized its holding in *Melendez-Diaz* and found that the Sixth Amendment prohibited a surrogate analyst—one who did not prepare the certifications and did not perform or observe the forensic test—from testifying in trial about the forensic laboratory report.[96] Most recently, in *Williams v. Illinois*, a majority of Justices held that testimonial statements in forensic reports are still testimonial even if introduced through expert witnesses.[97] However, a plurality of the Justices found that the DNA profile at issue in the case, which was introduced through expert-opinion testimony, was not testimonial because it was not introduced for the truth of the matter asserted,[98] and even if it were, it still did not violate the Confrontation Clause because the primary purpose of the report was not to prove a defendant's guilt.[99] However, Justice Thomas, in his concurrence, found that the laboratory's out-of-court statements entered into evidence through expert testimony were not "testimonial" because they lacked sufficient "formality and solemnity."[100]

This Part presented a summary of the important decisions of each confrontation right. In comparing the Supreme Court's treatment of the two confrontation rights, there are two obvious differences. First, the number of opinions discussing each confrontation right is vastly different. The Supreme Court issued at least twenty opinions about the Sixth Amendment Confrontation Clause from 1980 to 2012.[101] The Court created two different tests (one in *Roberts* and one in *Crawford*) to determine a defendant's Sixth Amendment confrontation right and then issued numerous opinions that clarified each test.[102] In contrast, the Supreme Court only discussed the due process right to confrontation in revocation proceedings in two cases, *Morrissey* and *Gagnon*,[103] and the due process right to confrontation was a small part of the larger discussion of general due process requirements in revocation proceedings in those cases. Also, in the Sixth Amendment context, the Supreme Court aimed to give clear direction to lower courts on how they were to uphold a defendant's Sixth Amendment confrontation right in criminal trials.[104] However, the Supreme Court specifically delegated to states and lower courts the task of working out the exact details and rules of the due process requirements in revocation hearings, including the right to confrontation and cross-examination.[105] The Court has yet to take an in-depth look at the right to con-

95. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309, 329 (2009).
96. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011).
97. Williams v. Illinois, 132 S. Ct. 2221, 2228 (2012) (plurality opinion).
98. *Id.* at 2235–38.
99. *Id.* at 2243–44.
100. *Id.* at 2255 (Thomas, J., concurring).
101. *See supra* note 21 and accompanying text.
102. *See supra* Part II.B.
103. *See supra* Part II.A.
104. *See supra* Part II.B.
105. Morissey v. Brewer, 408 U.S. 471, 488–89 (1972).

frontation in revocation hearings.

The next part picks up where the Supreme Court left off after *Morrissey* and *Gagnon* and explains the different tests that lower federal and state courts use to analyze a releasee's due process right to confrontation in revocation proceedings.

III. THE DUE PROCESS RIGHT TO CONFRONTATION IN REVOCATION HEARINGS: BALANCING TEST, RELIABILITY TEST, AND FEDERAL RULE OF CRIMINAL PROCEDURE 32.1(B)

After *Morrissey* and *Gagnon*, two main tests emerged in the federal courts to analyze a releasee's Fourteenth Amendment right to confrontation in revocation hearings: the balancing test and the reliability test.[106] Recently, however, amendments to Federal Rule of Criminal Procedure 32.1(b) have cast doubt on whether the reliability test is still good law.[107] States have followed one of these two federal tests, or have adopted their own tests, which share similarities with the federal tests.[108]

In each of these tests, a judicial determination regarding the reliability of the hearsay evidence is pivotal to determining whether confrontation is required.[109] Specifically, in the federal reliability test, judges weigh only the reliability of the hearsay evidence before deciding whether confrontation is required.[110] In the federal balancing test, a judicial determination of the hearsay evidence's reliability determines the good cause the government must show to overcome a releasee's right to confrontation.[111] Also, many state courts that apply their own tests for confrontation use either a more difficult or an easier standard for the government to overcome a releasee's right to confrontation based on pre-determined beliefs about the reliability of certain types of evidence.[112]

The emphasis on a judicial determination of reliability is the key difference between the Sixth Amendment right to confrontation and the Fourteenth Amendment right to confrontation.[113] In other words, although the *Crawford* Court held that the only way to determine reliability (the Confrontation Clause's ultimate goal) is to test the evidence "in the crucible of cross-examination,"[114] courts continue to rely on a judicial determination of reliability under the Fourteenth Amendment right to

106. *See infra* Part III.A–B.

107. *See* FED. R. CRIM. P. 32.1.

108. *See infra* Part III.D.

109. *See, e.g.*, United States v. Martin, 984 F.2d 308, 312–13 (9th Cir. 1993) (citing United States v. Simmons, 812 F.2d 561, 564 (9th Cir. 1987) (applying the federal balancing test); Gagnon v. Scarpelli, 411 U.S. 778, 783 n.5 (1973)).

110. *See infra* Part III.A, C, E.

111. *See infra* notes 117–24 and accompanying text.

112. *See infra* Part III.E.

113. *Compare* Crawford v. Washington, 541 U.S. 36, 61 (2004), *with* Ohio v. Roberts, 448 U.S. 56, 65–66 (1980), *abrogated by Crawford*, 541 U.S. 36.

114. *Crawford*, 541 U.S. at 61 (2004).

confrontation.[115] In this way, courts are still firmly grasping the overruled concept from *Roberts* that hearsay evidence determined to have sufficient indicia of reliability does not require confrontation.[116]

A. The Federal Balancing Test

The majority of the federal appellate courts[117]—the First,[118] Third,[119] Fourth,[120] Fifth,[121] Eighth,[122] Ninth,[123] and Eleventh[124] Circuits—apply the federal balancing test to a releasee's due process right to confrontation in revocation hearings. The balancing test consists of two major prongs: (1) a releasee's right to or interest in confrontation and (2) the government's good cause for denying the releasee's right to confrontation.[125] When the releasee's right to confrontation outweighs the government's good cause, then the hearsay evidence is not admissible.[126] But if the government's good cause outweighs the releasee's right to confrontation, then the hearsay evidence may be admitted in the revocation proceeding without offending the releasee's due process right to confrontation.[127]

Courts have differed in their analysis of the first prong—a releasee's right to confrontation. For example, the Ninth Circuit conducts two separate inquiries to analyze this factor.[128] The first inquiry—the "importance of the evidence to the court's ultimate finding"—signifies that the more important the hearsay evidence is to the court's ultimate ruling in the revocation hearing, the more substantial the releasee's interest in confrontation.[129] The second inquiry examines whether there is a complete denial of any other right to confrontation; if so, then the releasee's interest in confronting the out-of-court declarant is more significant.[130] Another factor—the consequences of finding a violation—increases a releasee's interest in confrontation when the consequences are more severe.[131] Other courts, however, are less keen to engage in such a detailed

115. *See, e.g.*, *Roberts*, 448 U.S. at 65–66; *infra* notes 118–24, 138–41, and accompanying text.
116. *See, e.g.*, *infra* notes 118–24, 138–41, and accompanying text.
117. The Federal Circuit does not hear revocation cases.
118. United States v. Taveras, 380 F.3d 532, 536–37 (1st Cir. 2004).
119. United States v. Lloyd, 566 F.3d 341, 344–45 (3d Cir. 2009).
120. United States v. Doswell, 670 F.3d 526, 530–31 (4th Cir. 2012). The Fourth Circuit recently adopted the balancing test, reasoning that the language of Rule 32.1 of the Federal Rules of Criminal Procedure requires that courts apply the balancing test. *Id.*
121. United States v. Minnitt, 617 F.3d 327, 332–33 (5th Cir. 2010).
122. United States v. Martin, 382 F.3d 840, 844–45 (8th Cir. 2004).
123. United States v. Hall, 419 F.3d 980, 986 (9th Cir. 2005).
124. United States v. Frazier, 26 F.3d 110, 114 (11th Cir.1994).
125. *See supra* notes 117–24 and accompanying text.
126. *See supra* notes 117–24 and accompanying text.
127. *See supra* notes 117–24 and accompanying text.
128. United States v. Martin, 984 F.2d 308, 311–12 (9th Cir. 1993).
129. *Id.* at 311.
130. *Id.* at 311–12.
131. *Id.* at 312. This factor is not always considered. *See, e.g.*, United States v. Comito, 177 F.3d 1166, 1171 & n.7 (9th Cir. 1999).

analysis for this first prong and "have tended to focus nearly exclusively on the 'good cause' side of the balance."[132]

The second prong of the balancing test examines the government's good cause for denying confrontation.[133] This analysis generally consists of two sub-factors: (1) "difficulty and expense of procuring witnesses" and (2) the hearsay evidence's indicia of reliability.[134] Reliability is a very important component in determining whether good cause exists to dispense with confrontation.[135]

When a releasee's interest in confrontation outweighs the government's showing of good cause, the Fourteenth Amendment bars the admission of hearsay evidence.[136] When it does not, then hearsay evidence is admissible without offending a releasee's right to confrontation.[137]

B. The Federal Reliability Test

Four circuit courts—the Sixth,[138] Seventh,[139] Tenth,[140] and D.C.[141] Circuits—follow the reliability test. The reliability test holds that the admission of hearsay evidence does not violate a releasee's due process right to confrontation as long as the hearsay evidence is sufficiently reliable.[142] There is no requirement that the government show good cause for denying confrontation.[143]

For hearsay evidence to be deemed reliable, the evidence must "bear[ ] substantial guarantees of trust-worthiness."[144] Examples of evidence with sufficient "indicia of reliability include: (1) the conventional substitutes for live testimony (e.g., affidavits, depositions, and documentary evidence), (2) statements falling under an established exception to the hearsay rule, (3) statements corroborated by detailed police investigative reports, and (4) statements corroborated by the releasee's own statements."[145]

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132. *Martin*, 984 F.2d at 310.

133. *See supra* notes 117–24 and accompanying text.

134. *Martin*, 984 F.2d at 312–13 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 783 n.5 (1973)) (internal quotation marks omitted) (citing United States v. Simmons, 812 F.2d 561, 564 (9th Cir. 1987)).

135. *See* United States v. Minnitt, 617 F.3d 327, 334 (5th Cir. 2010) ("Reliability of the challenged hearsay is a 'critical consideration' in a district court's determination of whether good cause exists to disallow confrontation.").

136. *See supra* notes 117–24.

137. *See supra* notes 117–24.

138. United States v. Kirby, 418 F.3d 621, 628 (6th Cir. 2005). The Sixth Circuit has also applied the balancing test in the past. *See, e.g.*, United States v. Waters, 158 F.3d 933, 940 (6th Cir. 1998).

139. United States v. Kelley, 446 F.3d 688, 692 (7th Cir. 2006).

140. Curtis v. Chester, 626 F.3d 540, 545 (10th Cir. 2010).

141. Singletary v. Reilly, 452 F.3d 868, 872–73 (D.C. Cir. 2006).

142. *See supra* notes 138–41 and accompanying text.

143. *See supra* notes 138–41 and accompanying text.

144. Egerstaffer v. Israel, 726 F.2d 1231, 1234 (7th Cir. 1984).

145. *Curtis*, 626 F.3d at 545.

C. The Second Circuit's Mixed Test

The Second Circuit applies a unique two-part test to determine the admissibility of hearsay evidence in revocation proceedings.[146] When the evidence is inadmissible under an established exception to the hearsay rule, the court applies the standard federal balancing test and weighs a releasee's interest in confrontation against the government's showing of good cause.[147] However, if the evidence at issue is admissible under an established exception to the hearsay rule in criminal trials, then good cause does not need to be shown.[148]

D. The Federal Rule of Criminal Procedure 32.1(b)

In addition to the due process right, Federal Rule of Criminal Procedure 32.1 also directs federal courts to uphold a releasee's right to confrontation in revocation proceedings.[149] The most recent 2002 amendments to Rule 32.1 may signal that federal courts should only use the balancing test.[150]

After the Supreme Court decided *Gagnon* and *Morrissey*, the Federal Rules of Criminal Procedure were amended to include Rule 32.1, effective December 1, 1980.[151] The standards followed the minimum requirements set forth in *Gagnon* and *Morrissey*.[152] Revocation hearings were not formal trials, and the usual rules of evidence did not necessarily apply.[153]

When first issued, Rule 32.1(a)(2)(C) granted the probationer "an opportunity to appear and to present evidence in his own behalf."[154] The Committee clarified in its 1979 notes that "*upon request* by the probationer, adverse witnesses shall be made available for questioning unless the magistrate determines that the informant would be subjected to risk of harm if his identity were disclosed."[155] Rule 32.1(a)(2)(D) gave the probationer "the opportunity to question witnesses against him."[156] The Committee also explained that under this section, "the probationer d[id] not have to specifically request the right to confront adverse witnesses, and the court may not limit the opportunity to question the witnesses against him."[157]

Minor modifications were made to Rule 32.1, but most recently, in

146. *See* United States v. Williams, 443 F.3d 35, 45 (2d Cir. 2006).
147. *Id.*
148. *Id.*
149. *See* Fed. R. Crim. P. 32.1(b)(1)(B)(iii), (b)(2)(c).
150. *See id.* 32.1 advisory committee's note (2002 Amendments).
151. *See* Act of July 31, 1979, Pub. L. No. 96-42, 93 Stat. 326; Fed. R. Crim. P. 32.1 advisory committee's note (1979 Addition).
152. *See* Fed. R. Crim. P. 32.1 advisory committee's note (1979 Addition).
153. *Id.*
154. *Id.* 32.1(a)(2)(C) (1979).
155. *Id.* 32.1 advisory committee's note (1979 Addition).
156. Fed. R. Civ. P. 32.1 (a)(2)(D) (1979).
157. *Id.* 32.1 advisory committee's note (1979 Addition).

2002, it was changed significantly.[158] Now, the rule expressly provides that a releasee "*is entitled* to . . . question any adverse witness *unless the court determines that the interest of justice does not require the witness to appear.*"[159] Relying on *Morrissey* and decisions by the Eighth and Ninth Circuits, the Committee explained in its 2002 notes, that these "provisions recognize that the court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it."[160]

In light of this 2002 amendment, some courts have questioned the viability of the reliability test.[161] The Fourth Circuit, in *Doswell*, expressly overruled its earlier cases that applied the reliability test and formally adopted the balancing test to analyze a releasee's due process right to confrontation.[162] The Tenth Circuit, in *Curtis v. Chester*, also questioned whether the reliability test was still good law.[163]

However, even after this amendment, some courts still apply the reliability test, explaining that the test is very similar to the majority's balancing test.[164] For example, the Seventh Circuit held that it "treats a finding of 'substantial trustworthiness' as the equivalent of a good cause finding."[165] The Tenth Circuit also explained that the two tests overlap, especially in how important the reliability factor is in determining whether the opportunity to confront is required.[166]

E. The State Tests

Since *Gagnon*, state courts are also required to uphold a releasee's right to confrontation under the Due Process Clause.[167] State courts apply either one of the two federal tests to analyze a releasee's right to confrontation or apply their own tests, which share key similarities with

158. *Compare id.* 32.1 advisory committee's note (1987 Amendments), *id.* 32.1 advisory committee's note (1989 Amendments), *id.* 32.1 advisory committee's note (1991 Amendments), *and id.* 32.1 advisory committee's note (1993 Amendments), *with id.* 32.1 advisory committee's note (2002 Amendments).

159. *Id.* 32.1(b)(2)(C) (emphasis added).

160. *Id.* 32.1 advisory committee's note (2002 Amendments) (citing Morrissey v. Brewer, 408 U.S. 471, 489 (1972); United States v. Comito, 177 F.3d 1166 (9th Cir. 1999); United States v. Walker, 117 F.3d 417 (9th Cir. 1997); United States v. Zentgraf, 20 F.3d 906 (8th Cir. 1994)).

161. *See, e.g.*, United States v. Doswell, 670 F.3d 526, 530–31 (4th Cir. 2012); Curtis v. Chester, 626 F.3d 540, 545–46 (10th Cir. 2010).

162. *See Doswell*, 670 F.3d at 530–31.

163. *See Curtis*, 626 F.3d at 545–46.

164. *See, e.g., id.* at 546; United States v. Kelley, 446 F.3d 688, 692 (7th Cir. 2006).

165. *Kelley*, 446 F.3d at 692.

166. *Curtis*, 626 F.3d at 546.

167. *See* Gagnon v. Scarpelli, 411 U.S. 778, 785–86 (1973).

the federal tests.[168] For example, Indiana,[169] Oklahoma,[170] and Massachusetts[171] courts apply the reliability test, finding that once the reliability of hearsay evidence is established, a separate finding of good cause is not necessary. However, states such as Texas,[172] Washington,[173] South Dakota,[174] and Utah[175] have adopted the balancing test.

Some states have created their own standards.[176] For example, both New Mexico and California have tests that depend on the type of evidence.[177] New Mexico courts apply a "sliding scale" analysis such that certain types of evidence do not require the government's showing of good cause and other types of evidence do.[178] Hearsay evidence that is "uncontested, corroborated by other reliable evidence, and documented by a reliable source without a motive to fabricate, or possibly situations where the evidence is about an objective conclusion, a routine recording, or a negative fact, making the demeanor and credibility of the witness less relevant to the truth-finding process" does not require that the government show good cause for denying confrontation.[179] However, evidence that is "contested by the defendant, unsupported or contradicted, and its source has a motive to fabricate; it is about a subjective, judgment-based observation that is subject to inference and interpretation, and makes a conclusion that is central to the necessary proof that the defendant violated probation" requires that the government show good cause before denying confrontation.[180] Otherwise, confrontation is required for the evidence to be admissible.[181]

Similarly, California courts apply two different tests depending on whether the evidence is documentary or testimonial.[182] For documentary hearsay evidence, the evidence is viewed as trustworthy and admissible in probation revocation proceedings without confrontation "when there are 'sufficient indicia of reliability.'"[183] A separate finding of good cause for

168. *See, e.g.*, Hampton v. State, 2009 OK D4 4, ¶ 17, 203 P.3d 179, 184–85; *In re* M.P., 220 S.W.3d 99, 110 (Tex. App.—Waco 2007, pet. denied).

169. Reyes v. State, 868 N.E.2d 438, 441 (Ind. 2007) ("We find the substantial trustworthiness test the more effective means for determining the hearsay evidence that should be admitted at a probation revocation hearing.").

170. *Hampton*, 203 P.3d at 184–85.

171. Commonwealth v. Negron, 808 N.E.2d 294, 300 (Mass. 2004) ("In other words, if reliable hearsay is presented, the good cause requirement is satisfied.").

172. *M.P.*, 220 S.W.3d at 110.

173. State v. Abd-Rahmaan, 111 P.3d 1157, 1161–62 (Wash. 2005) (en banc).

174. State v. Beck, 2000 SD 141, ¶ 11, 619 N.W.2d 247, 250.

175. State v. Tate, 1999 UT App. 302, ¶ 11, 989 P.2d 73, 75.

176. *See, e.g.*, State v. Guthrie, 2011-NMSC-014, ¶ 40, 257 P.3d 904, 915; People v. Brown, 263 Cal. Rptr. 391, 392 (Ct. App. 1989).

177. *See, e.g.*, *Guthrie*, 2011-NMSC, ¶¶ 40–41; *Brown*, 263 Cal. Rptr. at 392.

178. *Guthrie*, 2011-NMSC, ¶¶ 40–41.

179. *Id.* ¶ 40.

180. *Id.* ¶ 41.

181. *Id.*

182. *See, e.g.*, People v. Arreola, 875 P.2d 736, 746 (Cal. 1994) (in bank); *Brown*, 263 Cal. Rptr. at 392.

183. *Brown*, 263 Cal. Rptr. at 392 (quoting United States v. Penn., 721 F.2d 762, 765 (11th Cir. 1983)).

the absence of the declarant is not required.[184] However, for hearsay evidence that is "testimonial," a showing of good cause is required before it is admitted.[185] Generally, good cause exists "(1) when the declarant is 'unavailable' under the traditional hearsay standard, (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm to the declarant."[186] Courts must also consider other relevant circumstances, including "the purpose for which the evidence is offered . . . ; the significance of the particular evidence to a factual determination relevant to a finding of violation of probation; and whether other admissible evidence," such as the probationer's admissions, corroborates the evidence.[187]

Then, there are states that refuse to take a clear stance.[188] For example, Virginia courts have expressly "decline[d] to determine whether either [federal] test, or both tests, or other methods of analysis are mandatory in evaluating good cause for the admission of hearsay in probation revocation hearings."[189]

As stated in the introduction to this part, these due process confrontation tests involve a judicial determination of reliability.[190] In the balancing test, a judicial determination of the hearsay evidence's reliability determines how much good cause the government must show to overcome a releasee's right to confrontation.[191] In the reliability test, the reliability of the hearsay evidence is the only question asked.[192] As for state courts that follow different tests depending on the type of evidence, their tests inherently examine how independently reliable the evidence is before deciding which standard to apply.[193]

The necessity and importance of a judicial determination of reliability shows the key difference between the Sixth Amendment right to confrontation in criminal trials versus the Fourteenth Amendment's right to confrontation in revocation proceedings. As for criminal trials, the *Crawford* Court held that the only way to determine reliability was to test the evidence "in the crucible of cross-examination."[194] But in revocation hearings, a backwards-*Crawford* rule is applied: judges determine the reliability of the hearsay evidence to determine whether the releasee should have the right to confront the declarant.[195] In this way, courts are

184. *See id.*
185. *Arreola*, 875 P.2d at 746.
186. *Id.* (citation omitted)
187. *Id.* at 746–47.
188. *See, e.g.*, Henderson v. Commonwealth, 722 S.E.2d 275, 281 (Va. Ct. App. 2012).
189. *Id.*
190. *See supra* note 109 and accompanying text.
191. *See* United States v. Doswell, 670 F.3d 526, 531 (4th Cir. 2012).
192. *See* Curtis v. Chester, 626 F.3d 540, 547–48 (10th Cir. 2010).
193. *See, e.g.*, Reyes v. State, 868 N.E.2d 438, 441–42 (Ind. 2007); *In re* M.P., 220 S.W.3d 99, 111–12 (Tex. App.—Waco 2007, pet. denied).
194. Crawford v. Washington, 541 U.S. 36, 61 (2004).
195. *See Reyes*, 868 N.E.2d at 441–42.

still embracing the now-overruled *Roberts* idea that hearsay evidence that is judicially determined to have sufficient indicia of reliability does not require confrontation.[196]

Based on Parts II and III of this Article, it appears that the two confrontation rights always existed and continue to exist in their own separate space, with no legal principle or analytical tool to join the two. In Part II, the survey of cases showed that the Supreme Court treats these two confrontation rights very separately.[197] The Court has yet to issue an in-depth analysis of the relationship, if any, between the Fourteenth Amendment confrontation right in revocation hearings and the Sixth Amendment confrontation right in criminal prosecution. Also, as explained in this part, the different tests for confrontation in revocation proceedings that are employed by federal and state courts are far from the comparatively simple rule set forth in *Crawford* for criminal prosecutions.[198]

However, to conclude that the Sixth and Fourteenth Amendment confrontation rights are, and always have been, two completely separate entities is inaccurate. As explained in Part IV, the relationship between the two rights is much more complicated and intertwined.

IV. THE PAST AND PRESENT RELATIONSHIP BETWEEN THE SIXTH AMENDMENT CONFRONTATION CLAUSE AND THE FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION IN REVOCATION HEARINGS AS SHOWN THROUGH THE ADMISSIBILITY OF FORENSIC LABORATORY REPORTS

Presently, the Sixth Amendment Confrontation Clause in criminal prosecutions and the Fourteenth Amendment right to confrontation in revocation hearings mandate very different tests to determine the admissibility of evidence made by out-of-court declarants. As discussed in Part II, in the Sixth Amendment context under Crawford, confrontation is necessary to determine reliability; but in the Fourteenth Amendment context, an initial judicial determination of reliability plays a critical role in determining whether confrontation is even necessary, similar to the rule in *Roberts*.[199]

Releasees have asked courts to apply the *Crawford* rule in revocation hearings so that hearsay evidence generally would not be admissible unless the releasee had a prior opportunity to cross-examine the out-of-court declarant.[200] Such requests have been answered with a clear and

196. *See supra* Part II.B.1.
197. *See supra* Part II.
198. *See supra* Part III A.–E.
199. *See supra* Part II.B.1–2.
200. *See, e.g.*, United States v. Carthen, 681 F.3d 94, 99–100 (2d Cir. 2012); Curtis v. Chester, 626 F.3d 540, 543 (10th Cir. 2010); United States v. Minnitt, 617 F.3d 327, 333 (5th Cir. 2010); United States v. Lloyd, 566 F.3d 341, 343 (3d Cir. 2009); United States v. Geathers, 297 F. App'x 885, 886–87 (11th Cir. 2008) (per curiam); United States v. Walker,

resounding no.[201]

Similar requests in the past to apply Sixth Amendment principles in revocation proceedings were answered differently than they are now.[202] After the Supreme Court decided *Ohio v. Roberts* in 1980, courts readily applied Sixth Amendment Confrontation Clause principles to the due process right to confrontation in revocation proceedings, even mistakenly equating the two rights.[203] After *Crawford*, the dependence on Sixth Amendment jurisprudence abruptly stopped.[204]

To illustrate this changing relationship, this Article examines how courts analyzed the admissibility of hearsay forensic laboratory reports in revocation hearings after key Sixth Amendment Confrontation Clause cases: *Roberts*, *Crawford*, *Melendez-Diaz*, and *Bullcoming*.[205]

For two reasons, forensic laboratory reports serve as a compelling lens through which to analyze the influence, or lack thereof, that the Sixth Amendment Confrontation Clause had on the Fourteenth Amendment confrontation right in revocation hearings. First, forensic laboratory reports are very specific types of hearsay evidence, and extraneous factors play less of a role in determining the admissibility of the evidence.[206] For example, if one were to examine the admissibility of an out-of-court declarant's statement to the police, then one may also have to examine the specific context of the statements to see if it had an influence on admissibility.[207] Second, the treatment of forensic laboratory reports for purposes of confrontation recently underwent a vast change.[208] The Supreme Court recently held in *Melendez-Diaz* and *Bullcoming* that certifications of forensic laboratory reports are testimonial[209] and, therefore, not admissible unless the defendant had a prior opportunity to examine the declarant under *Crawford*.[210] The clear shift in the character of forensic

263 F. App'x 316, 318 (4th Cir. 2008) (per curiam); United States v. Kelley, 446 F.3d 688, 691 (7th Cir. 2006); Ashley v. Reilly, 431 F.3d 826, 829 (D.C. Cir. 2005); United States v. Rondeau, 430 F.3d 44, 47–49 (1st Cir. 2005); United States v. Hall, 419 F.3d 980, 984–85 (9th Cir. 2005); United States v. Kirby, 418 F.3d 621, 627–28 (6th Cir. 2005); United States v. Martin, 382 F.3d 840, 841 (8th Cir. 2004).

201. *See* cases cited *supra* note 200.

202. *Compare* Flewallen v. Faulkner, 677 F.2d 610, 612 (7th Cir. 1982) (per curiam), *with Kelly*, 446 F.3d at 691.

203. *See, e.g.*, *Flewallen*, 677 F.2d at 612–13.

204. *See, e.g.*, *Rondeau*, 430 F.3d at 47.

205. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709–10 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009); Crawford v. Washington, 541 U.S. 36, 61 (2004); Ohio v. Roberts, 448 U.S. 56, 67 (1980), *abrogated by Crawford*, 541 U.S. 36.

206. *See* Williams v. Illinois, 132 S. Ct. 2221, 2240–41 (2012) (plurality opinion); *id.* at 2250 (Breyer, J., concurring); *Melendez-Diaz*, 557 U.S. at 318.

207. *See Bullcoming*, 131 S. Ct. at 2727; *Melendez-Diaz*, 557 U.S. at 318; *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring) (citing Idaho v. Wright, 497 U.S. 805, 820–24 (1990)).

208. *See Bullcoming*, 131 S. Ct. at 2709–10; *Melendez-Diaz*, 557 U.S. at 310.

209. In *Williams*, 132 S. Ct. 2221, 2232–33 (2012), a plurality of justices concluded that a defendant's Sixth Amendment confrontation rights were not violated when an expert testified about scientific reports if the reports themselves were not admitted into evidence. 132 S. Ct. at 2232–33 (plurality opinion).

210. *Bullcoming*, 131 S. Ct. at 2709–10; *Melendez-Diaz*, 557 U.S. at 310.

laboratory reports—from nontestimonial to testimonial[211] and from inherently reliable and neutral to sometimes flawed and biased[212]—makes it easier to see if these recent Sixth Amendment cases had any influence on the treatment of forensic laboratory reports in revocation hearings for purposes of confrontation.

This Article focuses on cases from the Fifth, Eighth, and Eleventh Circuits because these cases most clearly illustrate how courts in revocation hearings shifted in their reliance on Sixth Amendment Confrontation Clause cases. At the end, a summary of cases from other courts is also presented.

A. The Fifth Circuit

In the *Roberts* era, the Fifth Circuit welcomed Sixth Amendment Confrontation Clause jurisprudence into revocation proceedings to determine the admissibility of forensic laboratory reports.[213] However, once *Crawford* was decided, the Fifth Circuit kept Sixth Amendment confrontation cases out, even when principles from *Melendez-Diaz* and *Bullcoming* that were not tied exclusively to the Sixth Amendment had direct relevance over the admissibility of hearsay forensic laboratory reports.[214]

Less than six months after the Supreme Court decided *Roberts*, the Fifth Circuit examined the admissibility of a releasee's laboratory report, which tested positive for cocaine, in a probation revocation hearing in *United States v. Caldera*.[215] In *Caldera*, the probationer appealed the trial court's admission of the report, arguing that the trial court denied his right to confront and cross-examine the person who prepared it.[216] The Fifth Circuit agreed that the trial court denied the probationer his confrontation right.[217] The court relied exclusively on a Sixth Amendment case, *United States v. Cain*, and did not even mention the Fourteenth Amendment right to confrontation.[218]

Later, in *United States v. Kindred*,[219] the Fifth Circuit analyzed the admissibility of a hearsay urinalysis report in a revocation hearing and overruled *Caldera*, noting that after *Caldera*, most courts applied a balancing test that weighed a releasee's interest in confrontation with "the government's good cause for denying [confrontation], particularly focusing on the 'indicia of reliability' of a given hearsay statement."[220] The court found that the balancing test was supported by the Supreme Court's dicta

211. *Melendez-Diaz*, 557 U.S. at 310.
212. *Id.* at 317–21.
213. *See* United States v. Bentley, 875 F.2d 1114, 1117 (5th Cir. 1989).
214. *See* United States v. Fields, 483 F.3d 313, 332 (5th Cir. 2007); *see also Bullcoming*, 131 S. Ct. at 2709–10; *Melendez-Diaz*, 527 U.S. at 310.
215. 631 F.2d 1227, 1228 (5th Cir. 1980) (per curiam).
216. *Id.*
217. *Id.*
218. *See id.* (citing United States v. Cain, 615 F.2d 380 (5th Cir. 1980) (per curiam)).
219. 918 F.2d 485 (5th Cir. 1990).
220. *Id.* at 486 (quoting Farrish v. Miss. State Parole Bd., 836 F.2d 969, 978 (5th Cir. 1988)) (internal quotation mark omitted).

in *Scarpelli* and *Morrissey* and the Advisory Committee Notes for Federal Rule of Criminal Procedure 32.1.[221] While the Fifth Circuit cited to legal authority that stemmed from the Fourteenth Amendment due process confrontation right, the court still continued to invoke the Sixth Amendment Confrontation Clause.[222] It specifically ruled that the admission of the report did not violate the Sixth Amendment and cited to other revocation hearing cases that explicitly found no Sixth Amendment violation in admitting urinalysis reports through a probation officer.[223] The court appeared to equate the due process right to confrontation in revocation proceedings with the Sixth Amendment confrontation right.[224]

The influence of the Sixth Amendment Confrontation Clause in revocation proceedings was still evident five years later in another case that examined the admissibility of a hearsay urinalysis report in a supervised release revocation hearing.[225] While acknowledging that a releasee's right to confrontation stemmed from due process requirements as evidenced by *Morrissey* and Federal Rule of Criminal Procedure 32.1, the court nevertheless directly relied on Sixth Amendment Confrontation Clause jurisprudence to apply a harmless error analysis.[226] The court explained that "[a]lleged violations of the *Confrontation Clause* are reviewed de novo, but are subject to a harmless error analysis."[227]

However, after *Crawford* and its progeny created a stricter test for testimonial hearsay evidence— and forensic laboratory reports specifically—the Fifth Circuit changed its tune regarding the place of the Sixth Amendment Confrontation Clause in revocation hearings.[228] For example, after *Melendez-Diaz* held that certificates of forensic laboratory results are testimonial and therefore subject to *Crawford*'s standards, the Fifth Circuit clearly differentiated the Sixth Amendment and Fourteenth Amendment rights to confrontation.[229] In *Minnit*, the Fifth Circuit held that "*Melendez-Diaz* interprets a defendant's right to confrontation under the Sixth Amendment in a criminal prosecution, *not the limited* due process right to confrontation afforded a defendant in a revocation proceeding."[230] Even though the Fifth Circuit acknowledged that the influence of the Sixth Amendment Confrontation Clause in revocation proceedings was permissible, the court refused to actually *apply* any principles from the Sixth Amendment case *Melendez-Diaz*.[231] Even factual and legal principles in *Melendez-Diaz* that were not tied exclusively to

221. *Id.* at 486–87.
222. *See id.*
223. *Id.* at 487 (citing United States v. Bell, 785 F.2d 640, 644–45 (8th Cir.1986); United States v. Penn, 721 F.2d 762, 766 (11th Cir.1983)).
224. *See id.*
225. *See* United States v. McCormick, 54 F.3d 214, 219 (5th Cir. 1995).
226. *See id.* at 221.
227. *Id.* at 219 & n.6 (emphasis added) (citing United States v. Frazier, 26 F.3d 110, 113 (11th Cir. 1994); *Kindred*, 918 F.3d at 488).
228. *See, e.g.*, United States v. Minnitt, 617 F.3d 327, 329–30 (5th Cir. 2010).
229. *See, e.g., id.*; *see also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009).
230. *Minnitt*, 617 F.3d at 333 n.3 (emphasis added).
231. *See id.*

the Sixth Amendment, such as the usefulness of cross-examination in light of documented errors in the forensic reports and the fact that the reports were not traditional "business records," failed to cross the divide to influence confrontation-rights analysis in revocation proceedings.[232]

For example, in *Melendez-Diaz*, the Supreme Court expressly noted some benefits of cross-examining the analyst who prepared the forensic reports.[233] These benefits were not tied exclusively to the Sixth Amendment.[234] The Supreme Court stated that confrontation "assur[es] accurate forensic analysis," especially since the analyses may be fraudulent or incompetent, with a "lack of proper training or deficiency in judgment."[235] Confrontation also assures accurate forensic analysis in an environment where "[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution."[236] Furthermore, confrontation helps obtain accurate forensic analysis in an environment of "wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material."[237] The *Melendez-Diaz* Court learned of such benefits through factual studies that highlighted the unreliability of forensic tests.[238] In light of these factual studies, the Supreme Court concluded that "there is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology."[239]

After *Melendez-Diaz*, one would expect courts to acknowledge that there would be some benefit to allowing a releasee to confront the creator of a forensic laboratory report in *any* proceeding, especially in light of the independent research studies relied on by the Supreme Court.[240] But

232. *See Melendez-Diaz*, 557 U.S. at 320–21; *Minnitt*, 617 F.3d at 334–35.

233. *Melendez-Diaz*, 557 U.S. at 320–21.

234. *See id.*

235. *Id.* at 318–20.

236. *Id.* at 318.

237. *Id.* at 320–21 (quoting COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 6–7 [hereinafter NAT'L ACADEMY REPORT] (2009) (internal quotation marks omitted)).

238. *Id.* at 318–20. The Court referred to a recent study by the National Research Council of the National Academies, which "discuss[ed] problems of subjectivity, bias, and unreliability of common forensic tests" and conclud[ed] that "*[t]he forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country.*" *Id.* at 319, 321 (quoting NAT'L ACADEMY REPORT, *supra* note 237, at P-1) (internal quotation marks omitted). The Court also cited a study that concluded that in a "study of cases in which exonerating evidence resulted in the overturning of criminal convictions[,] . . . invalid forensic testimony contributed to the convictions in 60% of the cases." *Id.* at 319 (citing Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14 (2009)).

239. *Melendez-Diaz*, 557 U.S. at 321.

240. *See id.* at 318–21. Recently news reports have continued to show the need to test the reliability of forensic test results. *See, e.g.*, Sally Jacobs, *Annie Dookhan Pursued Renown Along a Path of Lies*, BOSTON GLOBE (Feb. 3, 2013), http://www.bostonglobe.com/metro/2013/02/03/chasing-renown-path-paved-with-lies/Axw3AxwmD331RwXatSvMCL/

the Fifth Circuit refused to allow *Melendez-Diaz* to have any such impact.[241] In analyzing the releasee's interest in confrontation, the Fifth Circuit in *Minnitt* held that the releasee's interest in cross-examination about a scientific fact was "*minimal* because the truth of the fact [could] best be '*verified through the methods of science*' rather than 'through the rigor of *cross-examination.*'"[242] In light of the factual findings in *Melendez-Diaz* about the unreliability of forensic tests and the clear benefits of cross-examination, the Fifth Circuit's statement that such forensic reports were best "'verified through the methods of science' rather than 'through the rigor of cross-examination'"[243] was outdated and unsupported.[244]

The Fifth Circuit also refused to allow *Melendez-Diaz* to exert any influence when analyzing whether the Government showed good cause for denying confrontation.[245] In evaluating whether the report had sufficient indicia of reliability (one of the factors in the good cause analysis), the Fifth Circuit stated that "[a]lthough urinalysis reports are 'not so inherently reliable as to be automatically admissible,' they are regular business records and therefore bear 'substantial indicia of reliability.'"[246] However, in *Melendez-Diaz*, the Supreme Court expressly held that such laboratory reports do not qualify as traditional business records because "the regularly conducted business activity is the production of evidence for use at trial."[247] This finding was based not only on Sixth Amendment jurisprudence but also on civil law.[248]

One would expect this reasoning that forensic reports are *not* business reports to trickle down to the analysis of all forensic laboratory reports, regardless of whether they are examined in the revocation proceeding context or criminal trials. However, the Fifth Circuit refused to allow *Melendez-Diaz*, a Sixth Amendment case, to exert any such influence in the revocation hearing context.[249] Again, in *United States v. Delbosque*, the Fifth Circuit explicitly stated that neither *Melendez Diaz* nor *Bullcoming*, both Sixth Amendment cases, applied in revocation

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story.html (discussing forensic analyst Annie Dookhan's close relationship with prosecutors, and her production of fraudulent test results, including intentionally contaminating samples); Joseph Goldstein, N.Y. TIMES, Jan. 11, 2013, at A1 (stating examples of lab technician's mishandling of DNA evidence in rape cases).

241. *See* United States v. Minnitt, 617 F.3d 327, 333 (5th Cir. 2010).

242. *Id.* (quoting United States v. McCormick, 54 F.3d 214, 222 (5th Cir. 1995)) (emphasis added).

243. *Id.* (quoting *McCormick*, 54 F.3d at 222).

244. *See Melendez-Diaz*, 557 U.S. at 318–21.

245. *See Minnitt*, 617 F.3d at 334.

246. *Id.* (quoting *McCormick*, 54 F.3d at 223–24; United States v. Kindred, 918 F.2d 485, 487 (5th Cir. 1990)).

247. *Melendez-Diaz*, 557 U.S. at 321–22.

248. *See id.* The Court relied in part on *Palmer v. Hoffman*, 318 U.S. 109 (1943), a *civil matter* in which the Court held that "an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was 'calculated for use essentially in the court, not in the business.'" *Id.* at 321 (quoting *Palmer*, 318 U.S. at 114). "The analysts' certificates—like police reports generated by law enforcement officials—[did] not qualify as business or public records for precisely the same reason." *Id.* at 321–22.

249. *See Minnitt*, 617 F.3d at 333 n.3.

hearings.[250]

The Fifth Circuit's present-day treatment of the Sixth Amendment Confrontation Clause when analyzing due process confrontation rights in revocation hearings contrasts sharply with its earlier treatment of the Sixth Amendment Confrontation Clause.[251] Now, even principles that are independent of the Sixth Amendment are excluded from revocation hearings.[252] However, in the past, the Fifth Circuit has mistakenly equated the due process confrontation right with the Sixth Amendment right.[253]

B. The Eighth Circuit

The Eighth Circuit also relied on Sixth Amendment Confrontation Clause principles to determine confrontation rights in revocation proceedings after *Roberts*, but it cut ties with the Sixth Amendment after *Crawford*.[254] In *United States v. Bell*, the Eighth Circuit held that the admission of urinalysis laboratory reports in a revocation hearing did not violate a probationer's due process right to confrontation, relying on *Morrissey*, *Gagnon*, and, erroneously, the Sixth Amendment.[255] The Eighth Circuit stated that the Sixth Amendment Confrontation Clause did apply in revocation hearings and that "it must be honored unless the findings necessary to avoid it are made."[256] This finding may have come from the Eighth Circuit's incorrect view that *Morrissey* interpreted the Sixth Amendment Confrontation Clause in revocation hearings, when in actuality, *Morrissey* interpreted the Fourteenth Amendment confrontation right.[257] Nevertheless, the Sixth Amendment Confrontation Clause raised no red flags for the Eighth Circuit in addressing a probationer's right to confrontation in a probation revocation hearing.[258]

Three years later, in *United States v. Burton*, the Eighth Circuit relied on its decision in *Bell* to find that a probationer's right to confrontation was not violated when hearsay urinalysis laboratory reports were admitted against him.[259] Although this time, the Eighth Circuit avoided stating that the Sixth Amendment directly applied, it borrowed language from Sixth Amendment Confrontation Clause cases.[260] For example, the court cited to *Bell*'s language that such laboratory reports bore "substantial indicia of reliability."[261] The *Bell* court in turn had relied on *United States v.*

250. United States v. Delbosque, 463 F. App'x 364, 366 (5th Cir. 2012) (per curiam).
251. *Compare Minnitt*, 617 F.3d at 333, *with McCormick*, 54 F.3d at 219.
252. *See Minnitt*, 617 F.3d at 333–35.
253. *See* United States v. Kindred, 918 F.2d 485, 488 (5th Cir. 1990).
254. *Compare* United States v. Redd, 318 F.3d 778, 784–85 (8th Cir. 2003), *with* United States v. Martin, 382 F.3d 840, 849 (8th Cir. 2004).
255. *See* United States v. Bell, 785 F.2d 640, 641–45 (8th Cir. 1986).
256. *Id.* at 643 n.3.
257. *See* United States v. Burton, 866 F.2d 1057, 1059–60 (8th Cir. 1989); *Bell*, 785 F.2d at 642.
258. *See Bell*, 785 F.2d at 645.
259. *Burton*, 866 F.2d at 1059–60 (8th Cir. 1989).
260. *See id.* at 1059.
261. *Id.* (quoting *Bell*, 785 F.2d at 643).

Penn,[262] which erroneously held that the Sixth Amendment Confrontation Clause directly applied to revocation hearings.[263]

In *United States v. Redd*, shortly before *Crawford* was decided, the Eighth Circuit again applied the Sixth Amendment Confrontation Clause in a revocation proceeding in which the releasee argued that the introduction of hearsay test results and chain-of-custody reports for six sweat patches that tested positive for drugs violated his right to confrontation.[264] The Eighth Circuit directly addressed the releasee's argument that he was deprived of his Sixth Amendment Confrontation Clause right and concluded that no such violation occurred.[265] The court also relied directly on Sixth Amendment cases, such as *United States v. Baker*, to find that such reports were "normally understood to be reliable" and had "greater indicia of reliability than oral hearsay."[266]

Once the Supreme Court decided *Crawford*, the Eighth Circuit finally distinguished the Sixth Amendment right to confrontation from the Fourteenth Amendment right to confrontation in revocation hearings.[267] In *United States v. Martin*, the court held that the Sixth Amendment confrontation right in criminal prosecutions did not apply to supervised release revocation proceedings because the revocation proceedings are not part of a criminal prosecution.[268] It expressly acknowledged the "limited due process right to confront and cross-examine adverse witnesses in a revocation hearing" and held that *Crawford*, which "involv[ed] the contours of the confrontation right in criminal prosecutions, "did not apply in revocation proceedings.[269] Although the *Martin* court addressed the admissibility of a rape victim's out-of-court statements and not forensic laboratory reports, it was only after *Crawford* that the Eighth Circuit finally and clearly separated the due process right to confrontation from the Sixth Amendment right to confrontation.[270]

C. The Eleventh Circuit

The Eleventh Circuit's treatment of the Sixth Amendment Confrontation Clause in revocation proceedings followed a similar trajectory as the Fifth and Eighth Circuits.[271] In the early 1980s, in *United States v. Penn*, the Eleventh Circuit analyzed whether a releasee's right to confrontation was denied in a revocation hearing when the trial court admitted a hear-

262. *Bell*, 785 F.2d at 642.
263. *See* United States v. Penn, 721 F.2d 762, 764 (11th Cir. 1983).
264. United States v. Redd, 318 F.3d 778, 784–85 (8th Cir. 2003).
265. *Id.* at 782, 785.
266. *Id.* at 784 (citing United States v. Baker, 855 F.2d 1353, 1359 (8th Cir. 1988)).
267. *See* United States v. Martin, 382 F.3d 840, 844 (8th Cir. 2004).
268. *Id.* at 844 n.4.
269. *Id.* at 844 & n.4.
270. *See id.* at 844. The Eighth Circuit has yet to decide a case determining the admissibility of hearsay forensic laboratory reports in revocation proceedings since *Crawford*.
271. *Compare* United States v. Minnitt, 617 F.3d 327, 329–30 (5th Cir. 2010), *and Martin*, 382 F.3d at 844, *with* United States v. Morris, 140 F. App'x 138, 143 (11th Cir. 2005) (per curiam).

say laboratory report that showed a positive test for drugs.[272] The Eleventh Circuit freely applied principles from Sixth Amendment Confrontation Clause cases, such as *Roberts*.[273] The court held that conventional substitutes for hearsay like affidavits, depositions, and documentary evidence "tend to bear the 'indicia of reliability' upon which the Court has focused in the related context of determining whether a given hearsay statement should be admissible in a criminal trial."[274]

The *Penn* court also mistakenly stated that the Sixth Amendment Confrontation Clause directly applied in revocation hearings.[275] Rather than finding that the Fourteenth Amendment Due Process Clause provided the right to confrontation in revocation proceedings, the court incorrectly stated that the Fourteenth Amendment *incorporated* the Sixth Amendment Confrontation Clause in revocation hearings.[276] Even though the Eleventh Circuit also cited to *Morrissey* and *Gagnon* and distinguished revocation proceedings from criminal trials, it nevertheless failed to recognize that the right to confrontation in revocation proceedings stems not from the Sixth Amendment but the Fourteenth Amendment.[277]

Like its sister courts, the Eleventh Circuit's view of the influence of the Sixth Amendment in revocation proceedings changed after *Crawford*.[278] Although the Eleventh Circuit has yet to decide a case directly involving forensic laboratory reports in a revocation hearing after *Crawford*, in a case involving the admissibility of forensic laboratory results at a sentencing hearing, the court discussed in dicta that the *Crawford* right to confrontation is only a criminal trial right and that in revocation hearings, the right to confrontation is determined by a balancing test.[279] Furthermore, in other cases analyzing the admissibility of hearsay evidence in revocation proceedings, the Eleventh Circuit expressly held that neither *Crawford* nor the Sixth Amendment applies.[280] For example, in *United States v. Morris*, the Eleventh Circuit held that "the Sixth Amendment right to confrontation is specifically limited to 'criminal prosecutions.' The Su-

272. United States v. Penn, 721 F.2d 762, 766 (11th Cir. 1983).

273. *Id.* at 765.

274. *Id.* (citing Ohio v. Roberts, 448 U.S. 56, 65–68 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004); Dutton v. Evans, 400 U.S. 74, 88–89 (1970) (plurality opinion)).

275. *See id.* at 764.

276. *Id.*

277. *See id.*; *see also* United States v. Taylor, 931 F.2d 842, 847–48 (11th Cir. 1991) (per curiam) (finding that trial court did not violate releasee's *Sixth Amendment* right to confrontation in revocation hearing when it admitted hearsay testimony of probation officer who received information form unnamed sources linking releasee to shootings and drug-related crimes).

278. *Compare Penn*, 721 F.2d at 766, *with* United States v. Morris, 140 F. App'x 138, 143 (11th Cir. 2005) (per curiam), *and* United States v. Geathers, 297 F. App'x 885, 886 (11th Cir. 2008) (per curiam); *compare* United States v. Redd, 318 F.3d 778, 784–85 (8th Cir. 2003), *with* United States v. Martin, 382 F.3d 840, 844 (8th Cir. 2004); *compare* United States v. Caldera, 631 F.2d 1227, 1228 (5th Cir. 1980), *with* United States v. Minnitt, 617 F.3d 327, 329–30 (5th Cir. 2010).

279. *See* United States v. Melvin, 241 F. App'x 692, 696–97 (11th Cir. 2007).

280. *See, e.g.*, *Morris*, 140 F. App'x at 143.

preme Court previously has held that the revocation of parole is not part of a criminal prosecution."[281] Again, in *United States v. Geathers*, the court emphatically stated, "No authority extends the Sixth Amendment right to confront adverse witnesses to supervised release revocation proceedings."[282]

Relying on *Geathers*, the Southern District of Florida in *United States v. Hathaway* held that the admission of laboratory test results in a supervised release revocation hearing did not deny a releasee's confrontation rights.[283] The court found that the Sixth Amendment cases, like *Crawford*, were simply inapplicable in revocation hearings.[284] It found that the releasee's "[r]eliance on *Crawford* [was] misplaced, because that holding interprets rights guaranteed by the Sixth Amendment, which has not been interpreted to apply to supervised release revocation proceedings."[285]

Thus, the Eleventh Circuit has made its position clear: there is no room for Sixth Amendment Confrontation Clause jurisprudence in revocation proceedings.

D. Other Courts

This changing relationship between the Sixth Amendment Confrontation Clause and the Fourteenth Amendment confrontation right in revocation hearings is also evident in other courts. For example, before *Crawford*, the Seventh Circuit had no qualms about relying on Sixth Amendment Confrontation Clause cases to analyze the due process right to confrontation in revocation proceedings.[286] In *United States v. Pierre*, the Seventh Circuit upheld the admission of laboratory reports in a revocation proceeding without the necessity of cross-examination by relying in part on a Sixth Amendment criminal case finding medical records reliable.[287]

Although the Seventh Circuit has not directly examined the admissibility of laboratory reports in revocation proceedings since *Crawford*, *Melendez-Diaz*, or *Bullcoming*, in analyzing other hearsay evidence after *Crawford*, the Seventh Circuit has clearly separated the two confrontation rights.[288] For example, in *United States v. Kelley*, the Seventh Circuit held that "*Crawford* changed nothing with respect to revocation hearings" because *Morrissey* "held unequivocally that revocation hearings are not 'criminal prosecutions' for purposes of the Sixth Amendment."[289]

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281. *Id.* (citing Crawford v. Washington, 541 U.S. 36, 38 (2004); Morrissey v. Brewer, 408 U.S. 471, 480 (1972)) (citations omitted).
282. *Geathers*, 297 F. App'x at 886.
283. United States v. Hathaway, No. 08-80077-CR-Hurley, 2011 WL 5320985, at *1–3 (S.D. Fla. Oct. 18, 2011), *adopted by* 2011 WL 5295318 (S.D. Fla. Nov. 3, 2011).
284. *Id.* at *2.
285. *Id.* (quoting *Geathers*, 297 F. App'x at 886) (internal quotation marks omitted).
286. *See, e.g.*, United States v. Pierre, 47 F.3d 241, 242–43 (7th Cir. 1995).
287. *Id.*
288. *See* United States v. Kelley, 446 F.3d 688, 691 (7th Cir. 2006).
289. *Id.* (citing Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

This is not to say that all courts made drastic changes after *Crawford* and its progeny. For example, the Fourth and Ninth Circuits have consistently relied exclusively on the Fourteenth Amendment due process right to confrontation, the Federal Rule of Criminal Procedure 32.1, or both to determine whether the admission of a hearsay forensic test denies a releasee's right to confrontation.[290]

The Fourth Circuit in *United States v. McCallum* (just two years after *Roberts* was decided) ruled that a releasee's right to confront a witness was not denied when a report showing a positive test for marijuana was used against him.[291] The Fourth Circuit relied exclusively on Federal Rule of Criminal Procedure 32.1 to conclude that the releasee's confrontation right was not denied.[292] Nearly two decades later, after *Melendez-Diaz* was issued, the Fourth Circuit again analyzed the admissibility of a positive drug report under Federal Rule of Criminal Procedure 32.1, but this time held that the releasee's confrontation rights were denied.[293]

Similarly, the Ninth Circuit has consistently looked to the due process right to confrontation and Federal Rule of Criminal Procedure 32.1 to determine the admissibility of hearsay forensic reports against releasees in revocation proceedings.[294]

Regardless of whether courts have wavered in their application of the Sixth Amendment Confrontation Clause to revocation hearings or they have consistently held that the Sixth Amendment Confrontation Clause does not apply, it is clear that after the Supreme Court announced its game-changing rule in *Crawford* regarding the admissibility of testimonial hearsay evidence, *all* federal circuit courts have taken a clear stance that neither *Crawford* nor the Sixth Amendment Confrontation Clause has any material bearing on the Fourteenth Amendment confrontation right in revocation proceedings.[295]

The next part of this Article questions the current approach. While there are good reasons to keep the two confrontation rights completely separate, there are stronger reasons for the Sixth Amendment Confrontation Clause to have more influence and impact in analyzing a releasee's due process right to confrontation in revocation proceedings.

290. *See, e.g.*, United States v. Doswell, 670 F.3d 526, 530–31 (4th Cir. 2012); United States v. Martin, 984 F.2d 308, 310–14 (9th Cir. 1993).

291. United States v. McCallum, 677 F.2d 1024, 1025–27 (4th Cir. 1982).

292. *Id.* at 1025–26.

293. *Doswell*, 670 F.3d at 531.

294. *See, e.g.*, United States v. Perez, 526 F.3d 543, 548–50 (9th Cir. 2008); *Martin*, 984 F.2d at 309–14.

295. *See supra* note 200 and accompanying text.

V. THE SIXTH AMENDMENT CONFRONTATION CLAUSE SHOULD HAVE MORE INFLUENCE OVER THE DUE PROCESS CONFRONTATION RIGHT IN REVOCATION PROCEEDINGS

In this part, the Article analyzes whether the Sixth Amendment Confrontation Clause should have greater influence over the Fourteenth Amendment due process confrontation right in revocation proceedings.

There are four general reasons that courts and advocates keep the two confrontation rights separate: (1) the rights stem from distinct constitutional amendments;[296] (2) revocation proceedings are different from criminal prosecutions;[297] (3) a majority of courts currently believe that the two rights should be kept distinct;[298] and (4) an undue burden on the government would result if Confrontation Clause principles were adopted in revocation proceedings.

While each of these reasons may have some validity, there are stronger counter-arguments to allow Sixth Amendment Confrontation Clause principles to directly apply—or, at the least, have a greater influence—in revocation proceedings.[299] As the Sixth and Fourteenth Amendment rights to confrontation share the same ancient roots, the main purpose of confrontation—to determine the reliability of testimonial statements—should be evident in revocation proceedings as it is in criminal prosecutions. Also, while in the past, revocation proceedings and criminal prosecutions may have been distinct, they now share such similar procedures and purpose that the Sixth Amendment should directly apply in revocation proceedings or, at a minimum, have more influence. Lastly, constitutional concerns trump majority rule or any potential hardship on the government.

A. Separate Amendments vs. Ancient Roots and Same Amendment

1. Separate Amendments

Lower courts keep the two confrontation rights separate because, according to the Supreme Court, they stem from different amendments—the Sixth and Fourteenth.[300] Courts have relied on the different language

296. *See* Morrissey v. Brewer, 408 U.S. 471, 480 (1972); Salinger v. United States, 272 U.S. 542, 548 (1926).

297. *See Morrissey*, 408 U.S. at 480.

298. *See* United States v. Rondeau, 430 F.3d 44, 47 (1st Cir. 2005).

299. *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 n.5 (1973).

300. *See, e.g.*, *Morrissey*, 408 U.S. at 480, 482; United States v. Minnitt, 617 F.3d 327, 333 n.3 (5th Cir. 2010) (finding that the Sixth Amendment Confrontation Clause does not apply in revocation proceedings because the Sixth Amendment applies to a defendant's right to confrontation in a criminal prosecution and a defendant has a "limited due process right to confrontation in revocation proceedings"); United States v. Martin, 382 F.3d 840, 844 & n.4 (8th Cir. 2004) (concluding that there is a "limited due process right to confront and cross-examine adverse witnesses in a revocation hearing" and that *Crawford*, which "involv[ed] the contours of the confrontation right in criminal prosecutions, [therefore did] not apply" in revocation proceedings).

and purposes of the two amendments to justify distinct standards for each right.[301]

The language of the Sixth Amendment provides that the Confrontation Clause applies to statements against the accused in all criminal prosecutions.[302] The Sixth Amendment proclaims that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor."[303] According to the Supreme Court, the right to confrontation in revocation proceedings, however, arises not from the Sixth Amendment but from the Fourteenth Amendment Due Process Clause, which prohibits the government from "depriv[ing] any person of life, liberty, or property, without due process of law."[304]

Assuming courts continue to view the right to confrontation in revocation proceedings as arising from the Fourteenth Amendment instead of the Sixth Amendment, the distinct purposes of each Amendment may justify a separate jurisprudence for each right. Courts have carved out a unique purpose for the Sixth Amendment.[305] Recently, there is an "increasingly common presumption" that the primary basis of the Sixth Amendment Confrontation Clause is to prevent prosecutors from using ex parte witness examinations in criminal trials, such as those presented against Sir Walter Raleigh in the 1600s.[306] Indeed, the Supreme Court cited to Sir Walter Raleigh's trial in *Crawford*.[307]Arguably, however, the Fourteenth Amendment right to confrontation does not have a similar purpose. Sir Walter Raleigh was not mentioned in *Morrissey* or *Gagnon*.[308] Nor did the Court state in *Morrissey* or *Gagnon* that the primary purpose of confrontation in revocation proceedings is to prevent the government from using civil ex parte witnesses in quasi-criminal revocation proceedings.[309]

However, this rationale regarding the different language and purposes of each amendment only holds if courts continue to ignore two very significant truths. First, these two amendments share the same historical roots of "confrontation,"[310] and second, the idea that revocations are not

301. *See, e.g.*, *Minnitt*, 617 F.3d at 333; *Martin*, 382 F.3d at 844; Greene v. McElroy, 360 U.S. 474, 497 (1959).

302. *See* U.S. CONST. amend. IV.

303. *Id.*

304. *See id.* amend. XIV, § 1; *Morrissey*, 408 U.S. at 482 ("By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment."). The Due Process Clause, however, does not necessarily involve the right to confrontation. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 567–68 (1974). For example, in *Wolff*, although the Supreme Court held that the Due Process Clause applied to prisoner disciplinary cases, the rights to confrontation and cross-examination were not included. *Id.* The Court observed that "[c]onfrontation and cross-examination present greater hazards to institutional interests." *Id.* at 567.

305. *See* Smith, *supra* note 57, at 1505–06.

306. *Id.*

307. Crawford v. Washington, 541 U.S. 36, 44–45 (2004).

308. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973); *Morrissey*, 408 U.S. 471.

309. *See Gagnon*, 411 U.S. 778; *Morrissey*, 408 U.S. 471.

310. *See* Greene v. McElroy, 360 U.S. 474, 497 (1959).

really a part of "criminal prosecutions" lacks support, especially in modern times.[311]

2. Same Ancient Roots

First, the right to confrontation under the Sixth Amendment and Fourteenth Amendment share the same "ancient roots," dating back more than two thousand years.[312] This fundamental right to confrontation is not limited solely to criminal trials and revocation proceedings but also applies to certain civil proceedings.[313]

In *Greene v. McElroy*, the Supreme Court explained why the right to confrontation is required in certain hearings, even civil ones.[314] The Court held:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases but also in all types of cases where administrative and regulatory actions were under scrutiny.[315]

The "ancient roots" of confrontation trace back to biblical times when Festus reported to King Agrippa that the priests and elders wanted the apostle Paul to face judgment.[316] Festus reminded the King: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."[317]

The ancient roots of confrontation were highlighted again in *Crawford*.[318] There, the Supreme Court noted that "[t]he right to confront one's accusers is a concept that dates back to Roman times."[319] And early Supreme Court cases also recognized that common law, rather than

311. *See* Richard W. Alexander, Note, *The Exclusionary Rule in Probation and Parole Revocation: A Policy Appraisal*, 54 TEX. L. REV. 1115, 1129 (1976).

312. *Greene*, 360 U.S. at 497 & n.25.

313. *Id.*

314. *Id.* This is not to imply that confrontation is required in all contexts. *See supra* note 304.

315. *Greene*, 360 U.S. at 496–97 (footnote omitted) (citations omitted).

316. *Id.* at 496 n.25.

317. *Id.* (quoting *Acts* 25:16) (internal quotation marks omitted).

318. Crawford v. Washington, 541 U.S. 36, 43 (2004).

319. *Id.* (citing Coy v. Iowa, 487 U.S. 1012, 1015 (1988); Frank R. Herrmann, S.J. & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994).

the Sixth Amendment, created the right to confrontation.[320]

Although the Court in *Morrissey* and *Gagnon* did not identify the historical roots and reasons for the right to confrontation under the Fourteenth Amendment in revocation proceedings,[321] it is clear from the Supreme Court's reasoning in other cases that the general concept of confrontation dates back to ancient times.[322] Given that the Sixth Amendment and Fourteenth Amendment rights to confrontation and cross-examination started from the same source, it is illogical that the modern definitions and tests for confrontation are so different.

In the Sixth Amendment context, except in limited circumstances, the *only* way for courts to determine the reliability of testimonial hearsay evidence is to test the evidence "in the crucible of cross-examination."[323] As Professor Amar observed, "The deep principles underlying the Sixth Amendment[ ] . . . are the protection of innocence and the pursuit of truth"; the "[m]odern Supreme Court case law has exuberantly echoed [William] Blackstone . . . , defining the 'Confrontation Clause's very mission' as promoting 'the accuracy of the truth-determining process in criminal trials'; and labeling cross-examination the 'greatest legal engine ever invented for the discovery of truth.'"[324] In other words, confrontation and cross-examination are necessary steps to finding hearsay evidence reliable. A judicial determination of reliability was rejected as loathsome by the Framers.[325] However, in the Fourteenth Amendment context, a judicial determination of reliability of hearsay evidence plays a pivotal role in determining whether confrontation or cross-examination is required in revocation proceedings.[326] Therefore, while the two rights to confrontation share the same ancient roots, the modern day definitions are mutually exclusive. Courts still hold fast to the overruled and rejected definition and principles of confrontation in revocation proceedings merely because *Crawford* is a Sixth Amendment case and they overlook the fact that these two rights share the same ancient roots.[327]

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320. *See, e.g.*, Salinger v. United States, 272 U.S. 542, 548 (1926) ("The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions.").

321. *See* Gragnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). Justice Douglas in his dissent in *Morrissey* did point to the "ancient roots" of confrontation and cross-examination and relied on the Court's language from *Greene v. McElroy* to support his proposition that confrontation with the informer may be necessary in some revocation hearings. *Morrissey*, 408 U.S. at 497 n.9, 498–99 (Douglas, J., dissenting) (citing Greene v. McElroy, 360 U.S. 474, 496–97 (1959)).

322. *See, e.g.*, *Greene*, 360 U.S. at 497 & n.25.

323. *Crawford*, 541 U.S. at 61.

324. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642, 689–90 (1996) (footnote omitted) (quoting Tennessee v. Street, 471 U.S. 409, 415 (1985); California v. Greene, 399 U.S. 149, 158 (1970)). *But see* Roger C. Park, *Is Confrontation the Bottom Line?*, 19 REGENT U. L. REV. 459, 467 (2007) ("I cannot demonstrate conclusively that it is better to identify underlying goals than merely to say that 'the purpose of confrontation is confrontation.'").

325. *Crawford*, 541 U.S. at 67.

326. *See supra* Part III.

327. *See Crawford*, 541 U.S. at 68; *see also, e.g.*, United States v. Kelley, 446 F.3d 688, 689 (7th Cir. 2006); United States v. Barraza, 318 F. Supp. 2d 1031, 1035 (S.D. Cal 2004).

In fact, until *Crawford*, the two Amendments actually had great influence over each other.[328] For example, Professor Westen observed that the "indicia of reliability" standard linked to the Confrontation Clause in the *Roberts* era derived not from the Confrontation Clause but from the Due Process Clause, which in general, "prohibits the state . . . from using any single item of evidence against a defendant which is inherently too unreliable for rational evaluation by the jury."[329] Part IV of this Article also gave examples of how before *Crawford*, courts were much more willing to rely on Sixth Amendment Confrontation Clause principles in revocation proceedings.[330]

Since the time that courts have rejected *Crawford*'s applicability in revocation hearings, odd outcomes have resulted from courts applying different tests in different contexts.[331] As the dissenting judges in the Ninth Circuit observed in *Valdivia v. Schwarzenegger*, the court may, in certain circumstances, give a more expansive confrontation right to releasees in revocation proceedings than a defendant in criminal trials for the same exact type of hearsay evidence.[332] The greater right to confrontation in revocation proceedings is contrary to the Supreme Court's guiding principle that criminal defendants enjoy more rights than releasees in revocation proceedings.[333]

In the example set forth in *Valdivia*, in a criminal trial, a defendant would have no right to confront a domestic abuse victim's statements to a 911 operator while an emergency is taking place because such statements would be considered nontestimonial.[334] The evidence would be admitted as an excited utterance under Federal Rule of Evidence 803(2).[335]

However, in a revocation proceeding, those same statements would only be admissible if the Ninth Circuit found that the government showed sufficient good cause to dispense with the releasee's right, under the Fourteenth Amendment, to confront the domestic abuse victim.[336] In other words, because the right to confrontation in revocation proceedings is available to all hearsay evidence, not just testimonial hearsay evidence, the government has a higher burden to dispense with the right to con-

328. *See* Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 598–600 (1978).

329. *Id.*

330. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56, 65–66 (1980), *abrogated by Crawford*, 541 U.S. 36; *supra* Part IV.

331. *See, e.g.*, Valdivia v. Schwarzenegger, 623 F.3d 849, 850–51 (9th Cir. 2010) (Bea, J., dissenting).

332. *Id.*

333. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 480 (1972) ("We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.").

334. *See Valdivia*, 623 F.3d at 851 (Bea, J., dissenting) (citing Davis v. Washington, 547 U.S. 813, 827–28 (2006)).

335. *Id.*

336. *Id.*

frontation.[337] Namely, the government's showing of good cause for denying confrontation must outweigh the releasee's right and interest in confrontation.[338]

In fact, anytime a court or hearing officer applies the reliability test or federal balancing test to nontestimonial hearsay evidence in a revocation hearing, the right to confrontation in a revocation proceeding would be more expansive than the Sixth Amendment right to confrontation because the Sixth Amendment Confrontation Clause does not apply to nontestimonial hearsay evidence in criminal trials.[339] In sum, the divide between the Sixth Amendment Confrontation Clause and Fourteenth Amendment right to confrontation in revocation proceedings may lead to circumstances where the releasees have a more expansive right to confrontation than criminal defendants.[340]

3. Same Amendment

Courts have failed to give convincing reasons why revocation proceedings are not a continuation of criminal prosecutions and why the Sixth Amendment Confrontation Clause should not directly apply in revocation proceedings.

In *Morrissey*, the Supreme Court announced that parole revocation hearings are not part of criminal prosecutions:

> Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.[341]

In *Gagnon*, the Court cited to this justification to find that probation revocation is "not a stage of a criminal prosecution."[342]

However, as discussed in more detail in the next section, revocation proceedings share many key similarities with traditional criminal prosecutions.[343] Revocation proceedings look like criminal trials, and the government actually has to prove a new violation for probation, parole, or supervised release to be revoked.[344] These proceedings differ from sentencing hearings, where the Sixth Amendment does not apply, because unlike a sentencing hearing where courts already know that the defendant is guilty, in revocation hearings a new violation must be found.[345] As

337. *See id.* at 851–52.
338. *See id.* at 851.
339. *See id.* at 852.
340. *Id.* at 850–51.
341. Morrissey v. Brewer, 408 U.S. 471, 480 (1972).
342. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (citing *Morrissey*, 408 U.S. at 480).
343. *See infra* Part V.B.2.
344. *See* Alexander, *supra* note 311, at 1129.
345. *See id.* at 1123 & n.57.

explained in the next section, a revocation hearing is arguably a continuation of a criminal prosecution, and, therefore, the Sixth Amendment should directly apply in revocation proceedings or, at the very least, have much more influence than it does now.[346]

B. Different Proceedings vs. Related Proceedings

1. Different Proceedings

Another common reason courts give for keeping the two confrontation rights separate is that a revocation proceeding is not a criminal prosecution, and, therefore, releasees are not entitled to the same rights as criminal defendants.[347] As the Supreme Court held in *Morrissey*, "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."[348] This principle was so important that it was the starting and ending point of the Court's analysis in *Morrissey*.[349]

On the basis of this principle, courts have held over and over again, especially after *Crawford*, that Sixth Amendment Confrontation Clause principles are not to be extended to releasees in revocation proceedings.[350] In *Gagnon*, the Supreme Court noted the main differences between the criminal prosecutions and revocation hearings.[351] According to the Court, a prosecutor represents the state in criminal trials, but in revocation proceedings, a parole officer with specific qualities represents the state.[352] Furthermore, in criminal trials, formal rules of evidence apply, and defendants' procedural rights are waived if not timely raised.[353] By contrast, in revocation hearings, formal procedures and rules of evidence are not used.[354] Additionally, in jury trials, defendants are required to make their case "understandable to untrained jurors."[355] In revocation hearings, though, "the members of the hearing body are familiar with the problems and practice of probation or parole."[356] In sum, the *Gagnon*

346. *See infra* Part V.B.2.

347. *See, e.g.*, United States v. Rondeau, 430 F.3d 44, 47 (1st Cir. 2005).

348. Morrissey v. Brewer, 480 U.S. 471, 408 (1972).

349. *Id.* ("We begin with the proposition . . . ."); *id.* at 489 ("We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense."); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) ("[R]evocation of parole is not a part of a criminal prosecution.").

350. *See, e.g.*, United States v. Carthen, 681 F.3d 94, 99 (2d Cir. 2012); United States v. Justice, 430 F. App'x 274, 227 (5th Cir. 2011); Valdivia v. Schwarzenegger, 599 F.3d 984, 989 (9th Cir. 2010); United States v. Kelley, 446 F.3d 688, 691 (7th Cir. 2006); *Rondeau*, 430 F.3d at 47 ("The Supreme Court has long recognized that a parole revocation hearing, which for present purposes is analogous to a supervised release hearing, is *not* equivalent to 'a criminal prosecution.' Therefore, 'the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.'") (citations omitted).

351. *Gagnon*, 411 U.S. at 788–89 (listing these differences in the context of determining whether the right to counsel existed in revocation proceedings).

352. *Id.* at 789.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

Court characterized a criminal trial as "an adversary proceeding with its own unique characteristics."[357]

2. Related Proceedings

In modern day, however, many revocation proceedings, particularly probation and supervised release revocation proceedings, no longer portray the key characteristics that the *Gagnon* Court observed.[358] For example, it is not uncommon in supervised release and probation revocation hearings for the prosecutor to represent the government.[359] While the formal rules of evidence still may not apply in revocation proceedings,[360] there are formal procedural rules contained in the Federal Rules of Criminal Procedure[361] and state law[362] that apply in revocation proceedings. Also, in revocation proceedings, it is not uncommon for the fact-finder and decision-maker to be a judge, as is the case in juvenile delinquency proceedings, where a jury is not present.[363] The defining characteristics that set a criminal prosecution apart from a revocation proceeding, according to *Gagnon*, are not as evident in the modern day.

As scholars have observed, the two proceedings are linked in purpose.[364] Many prosecutors have greater incentive to pursue a revocation proceeding in place of a criminal trial due to the lesser burden of proof, faster process, and, in some situations, a lengthier sentence.[365] Also, as

357. *Id.*

358. *See id.* at 788–89.

359. *See, e.g.*, United States v. Palmer, 463 F. Supp. 2d 551, 552 (E.D. Va. 2006) (probation revocation hearing); United States v. Barraza, 318 F. Supp. 2d 1031, 1031 (S.D. Cal. 2004) (supervised release revocation proceeding); United States v. Myers, 896 F. Supp. 1029, 1029 (D. Or. 1995).

360. *See, e.g.*, Curtis v. Chester, 626 F.3d 540, 544 (10th Cir. 2010) (finding that Federal Rules of Evidence do not apply in parole revocation hearings); United States v. Frazier, 26 F.3d 110, 111 (11th Cir. 1994) (concluding "that Federal Rules of Evidence do not apply in supervised release revocation hearings"); United States v. Torrez-Flores, 624 F.2d 776, 780 (7th Cir. 1980) (stating that "Federal Rules of Evidence do not apply [in probation revocation hearings] except for the rules of privilege").

361. FED. R. CRIM. P. 32.1.

362. *See, e.g.*, HAW. REV. STAT. § 353-66 (2012) (terms and conditions for suspending or revoking parole); 730 ILL. COMP. STAT. 5/3-3-9 (2012) (procedure for parole or supervised release revocation hearings); NEB. REV. STAT. § 29-2266 (2012) (procedure for probation violations); 234 PA. CODE § 708 (regulations for court revocation of probation or parole hearings).

363. *See, e.g.*, United States v. Barry, 616 F. Supp. 2d 102, 102 (D.D.C. 2009) (magistrate judge adjudicating probation revocation proceeding); United States v. Wolvin, 339 F. Supp. 2d 1062, 1063 (W.D. Wis. 2004) (district court judge adjudicating supervised release revocation hearing); United States v. Gravina, 906 F. Supp. 50, 51 (D. Mass. 1995) (district court judge adjudicating supervised release revocation hearing); United States v. Middleton, 815 F. Supp. 990, 991 (E.D. Tex. 1992) (district court judge adjudicating supervised release revocation hearing); Summerford v. State, 728 S.E.2d 829, 830 (Ga. Ct. App. 2012) (reviewing superior court's revocation of releasee's probation); Cottingham v. State, 971 N.E.2d 82, 83 (Ind. 2012) (reviewing superior court's revocation of releasee's probation); State v. Talbert, 727 S.E.2d 908, 909 (N.C. Ct. App. 2012) (reviewing superior court's revocation of releasee's probation).

364. *See, e.g.*, Alexander, *supra* note 311 at 1123, nn.57–58.

365. *See id.* Scott H. Ikeda, *Probation Revocations as Delayed Dispositional Departures: Why* Blakely v. Washington *Requires Jury Trials at Probation Violation Hearings*, 24 LAW

one scholar explained, "*Morrissey* rests on the assumption that parole is a fundamentally different stage in the correctional process than imprisonment. Where imprisonment is punitive in nature, parole in *Morrissey*'s view is oriented toward rehabilitation."[366] However, as early as twenty years after *Morrissey*, the scholar made a well-supported observation that parole no longer served the primary goal of rehabilitation but had become a "cost-effective means of extending the surveillance and discipline of the penitentiary."[367]

Lastly, another indication that revocation proceedings are more similar to criminal prosecutions than what the *Morrissey* and *Gagnon* Courts envisioned is that other criminal-prosecution rights and principles have crossed over to revocation proceedings after those two decisions were issued.[368] Two examples are the right to counsel and prosecutorial immunity.[369]

In *Gagnon*, the key differences between the two proceedings resulted in the Court ruling that there was no right to counsel in revocation hearings and that counsel should only be granted "on a case-by-case basis."[370] Notably, in 1972, the year *Morrissey* was decided, over twenty percent of parole boards refused to allow the presence of even retained counsel at parole revocation proceedings, and only twenty-six percent of the boards appointed lawyers for the poor.[371] Shortly after *Gagnon*, federal and many state rule-makers granted releasees the right to counsel in revocation proceedings.[372] Some courts have also erroneously held that the Sixth Amendment right to effective counsel applies in revocation proceedings.[373]

& INEQ. 157, 157–58 (2006) (advocating jury trials in probation revocation proceeding because revocation proceedings are, arguably, the equivalent to durational departures in sentencing proceedings where juries are required per *Blakely v. Washington*, 542 U.S. 296 (2004)); Sunny A. M. Koshy, Note, *The Right of [All] the People to Be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449, 450 n.7 (1988) (stating that the lighter burden of proof and the fewer required resources prompt prosecutors to pursue probation revocation over prosecution); Shockley, *supra* note 8, at 385–86 (observing that prosecutors are incentivized to pursue revocation of supervised release rather than criminal prosecution of child pornography violations for supervised releasees because the revocation can result in a heavier sentence before a judge, whose standard is a preponderance of evidence, than before a jury, whose standard is beyond a reasonable doubt).

366. Bamonte, *supra* note 17, at 128 (citing Morrissey v. Brewer, 408 U.S. 471, 477–80 (1972)).

367. *Id.* at 132.

368. *See infra* notes 371, 374 and accompanying text.

369. *See infra* notes 371, 374 and accompanying text.

370. Gagnon v. Scarpelli, 411 U.S. 778, 789–90 (1973).

371. Choper, *supra* note 17, at 133.

372. *See* FED. R. CRIM. P. 32.1(b); Choper, *supra* note 17, at 134 (footnote omitted) (observing that "*Gagnon* has led almost all jurisdictions to permit retained counsel as a matter of course and has prompted a majority—including California, New York, and the federal government—to provide appointed counsel without any showing of special need"). *But see* Alabama v. Shelton, 535 U.S. 654, 656 (2002) (noting that in Alabama, there is no right to counsel in probation revocation hearings).

373. *See, e.g.*, United States v. Coleman, 241 F. App'x 945, 946 (4th Cir. 2007) (per curiam) (declining to consider an ineffective assistance of counsel claim in a probation

Furthermore, courts have applied principles of prosecutorial immunity, available in criminal prosecutions, to prosecutors' involvement in revocation proceedings.[374] For example, Professor Zacharias cites cases where federal and state courts determined that prosecutors were immune from conspiring to improperly revoke a releasee's probation and for causing a defendant to be arrested for violating probation.[375]

Upon closer inspection, revocation proceedings share many similar traits and goals with criminal prosecutions. These similarities should prompt courts to re-examine whether a revocation proceeding is actually a continuation of criminal prosecution and whether the Sixth Amendment Confrontation Clause should, therefore, directly apply. At the very least, courts should allow the Sixth Amendment to have more influence over the due process right to confrontation in these proceedings.

C. Status Quo vs. Change

Courts have also kept the two confrontation rights separate because every other federal appellate court that hears appeals of revocation proceedings has found that *Crawford*'s interpretation of the Sixth Amendment right to confrontation does not apply in revocation proceedings.[376] Even though there are individual judges who disagree with this view,[377] it is more difficult to argue that a legal principle should change when *all* federal appellate courts agree on the principle.

But the mere fact that a majority of courts advocate one viewpoint should not prevent change when compelling reasons demand otherwise. It was only a few years ago that the *Crawford* Court recognized that the *Roberts* rule did not adequately protect a criminal defendant's Sixth Amendment right to confrontation regardless of whether all lower courts were applying the *Roberts* rule.[378] Similarly, courts should not hesitate to adopt Sixth Amendment confrontation principles in revocation hearings

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revocation hearing on the grounds that such claims are not addressed in direct appeals but in collateral proceedings); United States v. Lavanture, 74 F. App'x 221, 226 (3d Cir. 2003) (same); United States v. DeFusco, 949 F.2d 114, 120–21 (4th Cir. 1991) (same); United States v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987) (conducting *Strickland* analysis to determine whether counsel was ineffective for failing to explain the differences between Class A and Class B violations in supervised release revocation proceeding) (citing Strickland v. Washington, 446 U.S. 668 (1984)); Hambrick v. Brannen, 715 S.E.2d 89, 92 (Ga. 2011) (reversing district court's grant of habeas relief and finding that releasee did not receive ineffective assistance of counsel in probation revocation hearing under *Strickland*). *But see* United States v. Soto–Olivas, 44 F.3d 788, 792 (9th Cir. 1995) (stating that there is no *constitutional* right to assistance of counsel in supervised release revocation proceedings).

374. Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 204–05 (2005).

375. *Id.* at 204 n.123 (citing Mosier v. State Bd. of Pardons & Paroles, 445 S.E.2d 535, 537 (Ga. Ct. App. 1994); Harris v. Menendez, 817 F.2d 737, 741–42 (11th Cir. 1987); Hamilton v. Daley, 777 F.2d 1207, 1213 (7th Cir. 1985)).

376. *See supra* note 200.

377. *See, e.g.*, Valdivia v. Schwarzenegger, 623 F.3d 849, 850–54 (9th Cir. 2010) (Bea, J., dissenting) (dissent from denial of rehearing).

378. *See* Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

just because a majority of courts fail to do so. Constitutional concerns always trump majority rule.

D. Burden to Government vs. Tailored Solution

Separatists may also argue that the government would shoulder an undue burden if a standard closer to *Crawford* were required in revocation hearings.[379] In prior instances where courts considered expanding the right to confrontation to new situations, the government inevitably raised concerns about undue expense and difficulty.[380] For example, when the Supreme Court considered whether the due process right to confrontation should be granted in probation revocation hearings, in addition to parole revocation hearings, the Government argued that "serious practical problems" would arise in certain cases, especially with respect to "the difficulty and expense of procuring witnesses from perhaps thousands of miles away."[381]

Also, in the Sixth Amendment Confrontation Clause context, when the Supreme Court weighed whether a criminal defendant had the right to confront a technician who prepared certifications of forensic laboratory results, numerous states submitted a joint amici brief in opposition that highlighted the burden they would face if confrontation were required.[382] They forecasted their future burden by presenting "the burden [they] currently face[d] *without* such a requirement."[383] These states concluded that "[e]ven if only 5% of drug cases culminate[d] in trial, as long as the number of yearly drug arrests and analysis abides in the millions, the burden on the States [would be] oppressive."[384]

The National District Attorneys Association also stated that the appearance of the analysts who performed each test "would be physically impossible."[385] It predicted that "the current criminal justice system would effectively come to a standstill" and no defendant would plead guilty without the analyst present in the courtroom.[386] Due to "the current staffing levels and budgetary restrictions in states throughout the country," the Association surmised "it w[ould] be highly unlikely that an analyst w[ould] in fact be available to testify in every narcotics case."[387]

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379. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 782 n.5 (1973).

380. *See id.*

381. *Id.*

382. *See* Brief of Alabama et al. as Amici Curiae in Support of Respondent at 25–26, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (No. 07-591), 2008 WL 4185394.

383. *Id.* For example, in 2006, 1,889,810 persons were arrested for narcotics crimes, and 1,935,788 substances were analyzed. *Id.* at 25. The states argued that if they were required to produce technicians at trial, then their already-burdened system would become even more difficult to manage. *Id.* at 25–26.

384. *Id.* at 25.

385. Brief of Nat'l Dist. Attorneys Ass'n et al. as Amici Curiae in Support of Respondent at 10, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (No. 07-591), 2008 WL 4185393.

386. *Id.* at 19.

387. *Id.*

Similar concerns about the difficulties and expense of confrontation were again raised when the Supreme Court considered a new issue—whether surrogate analyst testimony was sufficient for purposes of the Sixth Amendment.[388] In its amici brief, the New Mexico Department of Health Scientific Laboratory Division pointed to the large numbers of blood analyses and samples it reviews each year.[389] State governments again pointed to the difficulty that would result if the technician who actually tested the sample were required to testify.[390]

The real-world difficulty, burden, and expense that the government spends in producing declarants at criminal trials would become even greater if the same or similar Confrontation Clause standards were required in revocation hearings.

Although the concerns about the government's difficulty and expense are valid, they again do not outweigh constitutional concerns. As the Supreme Court stated in *Gagnon*, "[s]ome amount of disruption inevitably attends any new constitutional ruling."[391] For this reason, courts should not shy away from finding that the Sixth Amendment directly applies in revocation proceedings.

However, even if courts were to continue to rely on the Fourteenth Amendment as the basis for a releasee's confrontation right in revocation proceedings, a new standard similar to the Sixth Amendment Confrontation Clause should be constructed. To prevent an undue burden on the government, courts can still allow the standards to maintain one of the most fundamental features of the due process confrontation right—flexibility.[392] Proposed modifications to the due process right to confrontation in revocation proceedings are discussed in Part VI, the final part of this Article.

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388. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709 (2011).

389. Brief of N.M. Dep't of Health Scientific Lab. Div. as Amicus Curiae in Support of Respondent at 27, Bullcoming v. New Mexico, 131 S. Ct. 2705 (No. 09-10876), 2011 WL 175869. For example, the Department tested over 2500 blood samples in 2008 and over 3000 samples in 2010. *Id.* The four analysts at the department that analyzed blood alcohol content for implied consent cases tested over 700 samples each year. *Id.*

390. Brief for California et. al. as Amici Curiae Supporting Respondent at 9, Bullcoming v. New Mexico, 131 S. Ct. 2705 (No. 09-10876), 2011 WL 175867. To illustrate the "unworkable alternative" of producing at trial every analyst who has tested a forensic sample, the states gave an example of a robbery prosecution in California where the prosecutor "call[ed] all twelve forensic analysts who had participated in the batch processing of DNA samples." *Id.* "One analyst spent more than twelve hours away from the laboratory for approximately thirty minutes of testimony." *Id.*

391. Gagnon v. Scarpelli, 411 U.S. 778, 785 n.5 (1973).

392. In *Gagnon*, the Supreme Court expressly allowed the introduction of alternatives to live testimony, such as affidavits, depositions, and documentary evidence, to abate the government's concerns about the difficulty and expense of "procuring witnesses from perhaps thousands of miles away." *Id.*

VI. PROPOSED CHANGES TO THE DUE PROCESS RIGHT TO CONFRONTATION IN REVOCATION PROCEEDINGS

First, as there is a strong argument that revocation proceedings are a continuation of criminal prosecutions, rather than separate from criminal prosecutions, the Sixth Amendment should apply directly to revocation proceedings. In other words, the exact same standards for confrontation in criminal trials should exist in revocation proceedings.

Second, even if revocation proceedings were not considered to be part of a criminal prosecution, the standards for the Fourteenth Amendment right to confrontation in revocation proceedings should change in three ways to more closely mirror the Sixth Amendment Confrontation Clause.

First, a releasee's due process right to confrontation in revocation hearings should only exist for testimonial hearsay evidence. Next, the current tests used to analyze a releasee's confrontation right in revocation proceedings should be modified so that judges and hearing officers no longer factor in the reliability of hearsay evidence in determining whether confrontation is necessary. Specifically, the federal reliability test should no longer be employed, and minor adjustments to the federal balancing test should be made so that the government's good-cause factor no longer takes into consideration the reliability of the evidence.

These adjustments would not only bring the due process right to confrontation more in line with the Sixth Amendment right to confrontation but would leave most of the balancing test intact so that the confrontation right can exhibit flexibility, a quintessential trait of the due process right.

A. THE DUE PROCESS RIGHT TO CONFRONTATION IN REVOCATION PROCEEDINGS: TESTIMONIAL–NONTESTIMONIAL FRAMEWORK AND FLEXIBILITY

First, both confrontation rights should share the same framework. Since under the current jurisprudence of the Sixth Amendment Confrontation Clause, only testimonial hearsay evidence implicates the right to confrontation.[393] Releasees likewise should only have a constitutional right to confront witnesses who make *testimonial* statements against them, unless the witness is unavailable and the releasee had a prior opportunity to examine the witness.[394]

One clear benefit of having the same framework across both confrontation rights is that if the Supreme Court were to change or clarify the definition of key terms or create completely new test for when a defendant has the right to confront out-of-court declarants, the principles would easily be transferable to revocation proceedings. As an example, if one of the many proposals to modify the definition of "testimonial" in the Con-

393. *See* Crawford v. Washington, 541 U.S. 36, 51–53 (2004).
394. *Id.* at 68.

frontation Clause context were adopted,[395] these principles would naturally trickle down to revocation proceedings and ensure the consistency of key legal principles between the two proceedings. Having the same framework would prevent the inconsistent and odd results detailed in Part V.A.2 of this Article.[396] There would no longer be situations where the government must satisfy a higher bar to present nontestimonial hearsay evidence in revocation proceedings than to present the same nontestimonial hearsay evidence in criminal prosecutions.[397]

In addition to sharing the same framework as the Confrontation Clause, the due process right to confrontation in revocation proceedings should exhibit due process's key distinguishing trait—flexibility.[398] As the *Morrissey* Court observed, "[i]t has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."[399]

While some have criticized the Due Process Clause as "amorphous,"[400] "vague[,] . . . unsound, . . . undemocratic,"[401] and leaving decisions to the "whim of men,"[402] flexibility should not mean standardless. In fact, the existing federal balancing test needs only slight modifications.

B. Standard for Testimonial Hearsay Evidence

Currently, the two main tests used to analyze a releasee's right to confrontation in a revocation proceeding are the federal balancing test and the reliability test.[403] To follow the main directives of the Sixth Amendment Confrontation Clause, slight modifications should be made to the federal balancing test, and the reliability test should be abolished.

As explained in Part III.A of this Article, the balancing test weighs a releasee's right or interest to confrontation against the government's good cause for denying the releasee's right to confrontation.[404] When the releasee's right to confrontation outweighs the government's good cause, then the hearsay evidence is not admissible.[405] However, if the govern-

395. *See, e.g.*, Fisher, *supra* note 88, at 590, 626–27 (advocating the res gestae approach to determine which statements are testimonial, meaning that statements in which "the person was narrating completed events to a person of authority" would be testimonial); Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 748–52 (2005); Scott G. Stewart, Note, *The Right of Confrontation, Ongoing Emergencies, and the Violent-Perpetrator-at-Large Problem*, 61 STAN. L. REV. 751, 778 (2008).

396. *See supra* Part V.A.2.

397. *See supra* Part V.A.2.

398. *See* Morrissey v. Brewer, 408 U.S. 471, 487 (1972).

399. *Id.*

400. Lininger, *supra* note 17, at 289–90.

401. Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 728 (1971).

402. *Id.*

403. *See, e.g.*, United States v. Minnitt, 617 F.3d 327, 332–33 (5th Cir. 2010); United States v. Kirby, 418 F.3d 621, 627–28 (6th Cir. 2005).

404. *See, e.g.*, Minnitt, 617 F.3d at 332–33.

405. *Id.*

ment's good cause outweighs the releasee's right to confrontation, then the hearsay evidence may be admitted in the revocation proceeding without offending the releasee's due process right to confrontation.[406]

Also, as described in Part III.B of this Article, the reliability test holds that the admission of hearsay evidence does not violate a releasee's due process right to confrontation as long as the hearsay evidence is sufficiently reliable.[407] There is no requirement that the government show good cause for denying confrontation.[408]

Since the Supreme Court in *Crawford* rejected any reliance on a judicial determination of reliability to determine a defendant's right to confrontation in criminal prosecutions,[409] the reliability test and similar state tests that follow the reliability test should be abolished. These reliability tests inherently depend on a judicial determination of whether the hearsay evidence is reliable before granting or denying a releasee's right to confrontation.[410]

Next, the federal balancing test should be modified slightly so that courts and hearing officers no longer look to the reliability of hearsay evidence when examining the government's good cause for denying confrontation. Instead, when weighing a releasee's interest in confrontation against the government's good cause, the only two factors considered should be: (1) the releasee's interest in confrontation, and (2) good cause evidence the government has shown to dispense with the releasee's right to confrontation.

Courts should also apply clear standards for each of these factors to avoid leaving decisions to "the whim of men."[411] As for the first factor—the releasee's interest in confrontation—the three prong test set forth by the Ninth Circuit in *United States v. Martin*[412] ensures that the releasee's interest in confrontation is not easily overlooked. Courts and hearing officers should examine "the importance of the evidence to the court's ultimate finding,"[413] whether there is a complete denial of any other right to confrontation,[414] and the consequences of finding a violation.[415]

The second factor—the government's good cause—should also have more definite standards. The "good cause" standard should be restricted to narrow situations, such that dispensing with a releasee's right to confrontation for testimonial hearsay evidence is difficult. For starters, the exceptions carved out in *Morrissey* and *Gagnon* should apply: risk of

406. *Id.*
407. *See, e.g.*, *Kirby*, 418 F.3d at 627–28.
408. *Id.*
409. Crawford v. Washington, 541 U.S. 36, 61 (2004).
410. *See id.*
411. Griswold, *supra* note 401, at 728.
412. 984 F.2d 308, 310–11 (9th Cir. 1993).
413. *Id.* at 311.
414. *Id.*
415. *Id.* at 312. This third factor is not always considered. *See, e.g.*, United States v. Comito, 177 F.3d 1166, 1171 (9th Cir. 1999).

harm to an informant[416] and great difficulty or expense to the government, such as when a witness is *thousands* of miles away.[417] Again, to prevent courts and hearing officers from easily dispensing with the right to confrontation, the government would be required to show actual proof of harm, difficulty, or expense. In some situations, the hearsay testimonial evidence may be so pivotal in the revocation hearing that no amount of good cause should overcome the releasee's right to confrontation.[418] In other words, courts must safeguard against any potential government abuse by actually requiring the government to show proof or evidence of good cause before dispensing with a releasee's right to confrontation.

One may argue this higher standard would be too burdensome to the government. While the burden will likely increase, three safeguards promote its workability. First, this new standard would only apply to testimonial hearsay evidence. As for all other, nontestimonial, hearsay evidence, under the current *Crawford* standards, the government would no longer have to show good cause for dispensing with the releasee's right to confrontation.[419] Second, statutory schemes like notice and demand statutes where the government gives notice to the defendant of its intent to submit specific hearsay evidence and the defendant then has a period of time to object to the evidence[420] could also be applied in revocation proceedings. Because the Supreme Court has upheld such statutory schemes in the Sixth Amendment Confrontation Clause context,[421] similar statutes should also be constitutional in the due process revocation proceeding context. These statutes may provide more structure and advance notice in upholding a releasee's confrontation right. Third, Supreme Court Confrontation Clause jurisprudence, which provides the government with alternative ways to produce evidence without denying a defendant's confrontation rights, could also trickle down to revocation proceedings.[422] For example, after the Supreme Court found in *Melendez-Diaz* and *Bullcoming* that forensic laboratory results were testimonial hearsay evidence, it then found in *Williams v. Illinois* that in limited circumstances, forensic results do not violate the Confrontation Clause if not presented for the truth of the matter asserted, if not made for the purpose of determining guilt, or if not "formal."[423] After *Williams*, forensic data can be introduced in limited circumstances without violating a releasee's due process right to confrontation. Future Supreme Court Confrontation

416. Morrissey v. Brewer, 408 U.S. 471, 487 (1972).

417. Gagnon v. Scarpelli, 411 U.S. 778, 782 n.5 (1773).

418. *Morrissey*, 408 U.S. at 499 (Douglas, J., dissenting in part) ("But confrontation with the informer may . . . be necessary for a fair hearing and the ascertainment of the truth.").

419. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004).

420. For more information on notice and demand statutes and other *ipse dixit* statutes see Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 481–84 (2006).

421. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 325–26 (2009).

422. *See* Williams v. Illinois, 132 S. Ct. 2221, 2235–41 (2012) (plurality opinion).

423. *Id.*; *see also* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2723 (2011); *Melendez-Diaz*, 557 U.S. at 310.

Clause cases clarifying how lower courts should manage a defendant's right to confrontation could also trickle down to revocation proceedings.

C. Standard for Nontestimonial Hearsay Evidence

As for nontestimonial hearsay evidence in revocation proceedings, releasees would no longer have the due process right to confront that evidence just as criminal defendants do not have the Sixth Amendment right to confrontation for nontestimonial hearsay evidence.[424] To guarantee some protection against unreliable nontestimonial statements being admitted in revocation proceedings, the same federal or state rules of evidence pertaining to hearsay evidence that apply in criminal trials should also apply in revocation proceedings.

This is not to say that the current Sixth Amendment-related rules for nontestimonial hearsay (or even testimonial hearsay) should remain static. Rather, there are strong arguments and proposals for allowing defendants in criminal prosecutions to have some right to confront nontestimonial hearsay statements.[425] Such proposals, if adopted in the Sixth Amendment context, would then apply in revocation proceedings.

VII. CONCLUSION

After *Crawford*, courts have treated the Sixth Amendment confrontation right more as a foe than as a friend of the due process right to confrontation in revocation proceedings. This must change. First, because the government must prove a new violation in order to revoke parole, probation, or supervised release, and revocation proceedings share important characteristics and goals with traditional criminal trials, it is arguable that revocation proceedings are a continuation of criminal prosecutions and, therefore, that the Sixth Amendment Confrontation Clause should directly apply in revocation proceedings.

Second, even if courts still were to hold onto the view that revocation proceedings are not part of criminal prosecutions, the Fourteenth Amendment due process confrontation right must assimilate to the post-*Crawford* definition of confrontation for three reasons. First, the Fourteenth Amendment confrontation right is derived from the same ancient roots as the Sixth Amendment Confrontation Clause. Second, revocation

424. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004).

425. *See, e.g.*, Laird C. Kirkpatrick, *Nontestimonial Hearsay After* Crawford, Davis *and* Bockting, 19 Regent U. L. Rev. 367, 370–72 (2007) (arguing that "[i]t was premature for the Court" to find that the Confrontation Clause does not apply to nontestimonial hearsay evidence and that nontestimonial statements still play an important role in convicting defendants); Tom Lininger, *Yes, Virginia, There Is a Confrontation Clause*, 71 Brook. L. Rev. 401, 406 (2005) (pointing to Oregon courts as an example of upholding confrontation rights for nontestimonial hearsay); Miguel A. Méndez, Essay, Crawford v. Washington: *A Critique*, 57 Stan. L. Rev. 569, 607–11 (2004); Smith, *supra* note 57, at 1524–28 (presenting four proposals for when defendants should have the right to confront declarants of nontestimonial hearsay statements, such as admitting nontestimonial statements if they fall under a firmly-rooted hearsay exception, unless the defendant shows that statement's untrustworthiness).

proceedings and criminal prosecutions share similar procedures and goals. Third, constitutional concerns trump any potential hardship on the government or majority vote.

As the Supreme Court continues to make changes to Sixth Amendment Confrontation Clause jurisprudence, these new principles should not be confined merely to defendants in criminal prosecutions. Before the jurisprudence for each right becomes too solidified and the relationship between the two amendments irreparably falls apart, courts should change course and invite the Sixth Amendment confrontation right to have more direct influence in revocation proceedings.