"It Was Impossible to Get a Conversation Going, Everybody Was Talking Too Much":[1] Synthesizing New Developments in the Sixth Amendment's Confrontation Clause

Major Michael R. Holley
Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School
Charlottesville, Virginia

The U.S. Constitution accords the accused the fundamental right of confrontation.[2] How this right is properly satisfied is the subject of extensive debate, a fair measure of which has occurred during the past year. This article attempts to synthesize this varied debate into one understandable conversation—a conversation that will hopefully assist the military justice practitioner with the application of this keenly important constitutional demand.

Part I: The Demands of the Constitution

The language of the Confrontation Clause is straightforward. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[3] The Supreme Court gave this sparse phrase significant exposition in a series of carefully considered opinions culminating with *Crawford v. Washington*.[4] *Crawford*, however, does not address all that needs to be said regarding the Confrontation Clause. Practitioners must take care because contradictory and overlapping statements regarding the demands of the Sixth Amendment can operate to confuse rather than to clarify. This article provides a simplified analysis that may serve as the basic framework for considering questions involving the Confrontation Clause and begins with the situation in which the right of confrontation may be waived or forfeited.

Part II: Producing the Witness or Demonstrating Waiver or Forfeiture

Forfeiture and Waiver

The right of confrontation is not absolute,[5] and the criminal accused may forfeit his right to confront a witness.[6] Alternatively, the accused may waive his right.[7]

Waiver of the right to confront witnesses is fairly commonplace and is an established exception to the demands of confrontation. Accused servicemembers routinely waive their right to confront a specific witness or witnesses during the course of a guilty plea.[8] An accused may also waive the right to confront witnesses during the trial on the merits.[9] For example, in *United States v. Bridges*, the accused was charged with assaulting his children.[10] The accused's wife refused to answer any questions after the government called her as a witness.[11] The accused declined the opportunity to cross-examine his wife and declined an invitation by the military judge to recall her at a later point in the proceedings.[12] The government

---

[1] Quote DB, Quotes of Yogi Berra, http://www.quotedb.com/quotes/1314 (last visited June 21, 2006) [hereinafter Quotes of Yogi Berra].

[2] U.S. CONST. amend. VI.

[3] *Id.*

[4] 541 U.S. 36 (2004).

[5] *See* Wright v. Idaho, 497 U.S. 805, 813 (1990) (conceding that the Sixth Amendment does not prohibit all hearsay statements although confrontation has not occurred at trial).

[6] *Crawford*, 541 U.S. at 62.

[7] Brookhart v. Janis, 384 U.S. 1 (1966).

[8] *See* Boykin v. Alabama, 395 U.S. 238 (1969); *see also* United States v. Hansen, 59 M.J. 410 (2004).

[9] *See* Brookhart v. Janis, 384 U.S. 1, 4 (1966) (holding that although the accused may waive his right to confront witnesses, he had not affirmatively done so in this case).

[10] 55 M.J. 60 (2001).

[11] *Id.* at 61.

[12] *Id.*

later admitted certain hearsay statements of the wife.[13] The accused objected to the admission of the hearsay statements as a denial of his right to confront the witness, but the Court of Appeals for the Armed Forces (CAAF) held that the accused waived his right to confront the witness.[14]

Although waiver is common, a special variant of waiver deserves additional consideration—the invocation of the doctrine of forfeiture. Forfeiture is an equitable doctrine,[15] which lends itself to wide interpretation and uneven application.[16] A brief examination of forfeiture is warranted because the Supreme Court has clearly stated that forfeiture can extinguish the right to confront a witness[17] and because forfeiture is being used with increasing frequency. Two cases are particularly instructive in sounding out this principle.

United States v. Mayhew[18] is representative of the typical forfeiture case. The defendant killed his ex-girlfriend and kidnapped their daughter, Kristina.[19] After fleeing across several states, the police stopped Mayhew but not before he shot himself and fatally wounded Kristina.[20] Before Kristina died, she made several statements that the government admitted as evidence against the defendant during his trial.[21] Principally relying on the Sixth Circuit's opinion in *United States v. Garcia-Meza*,[22] the *Mayhew* court found that the defendant forfeited his right to confront his daughter.[23] The *Mayhew* court reasoned that the fact that the defendant was charged with the underlying murder was not a bar to the government proving by a preponderance of evidence that the defendant's wrongdoing was responsible for the witness's absence.[24] Furthermore, the court found that the motivation for the murder of the daughter was not dispositive.[25] The *Mayhew* court found it unnecessary that the government prove the defendant intended to procure the unavailability of the witness.[26] Rather, the court maintained that the doctrine of forfeiture was an equitable doctrine such that the defendant should not benefit in any way from his wrongdoing.[27]

In stark contrast to *Mayhew*, the court in *United States v. Jordan* found no forfeiture under somewhat similar facts.[28] At the time of the offense, defendant Mark Jordan was an inmate of a federal prison.[29] Jordan stabbed another inmate in the

---

[13] *Id.*

[14] *Id.* at 64. Judge Sullivan, joined by Judge Baker, concurred but found that waiver was not as clear as the majority opined. Judge Sullivan pointed to other cases where waiver had been affirmative and clear.

[15] *Id.* at 62.

[16]

> "Equity" in its broadest and most general signification, . . . denotes the spirit and heart of fairness, justness, and right dealing which would regulate the intercourse of men with men. . . . In this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law. . . . In a restricted sense, the word denotes equal and impartial justice . . . ; justice, that is, as ascertained by natural reason or ethical insight, but independent of the formulated body of law.

Gilles v. Dep't of Human Res. Dev., 521 P.2d 110, 116 n.10 (Cal. 1974). This case, and the doctrine of forfeiture, are very expertly and thoughtfully discussed by Judge Comparet-Cassani in her article on the subject. *See* Joane Comparet-Cassani, *Crawford and the Forfeiture by Wrongdoing Exception*, 42 SAN DIEGO L. REV. 1185 (2005).

[17] Crawford v. Washington, 541 U.S. 36, 62 (2004).

[18] 380 F. Supp. 2d 961 (D. Ohio 2005).

[19] *Id*. at 963.

[20] *Id.*

[21] *Id.*

[22] 403 F.3d 364, 370-71 (6th Cir. 2005).

[23] *Mayhew*, 380 F. Supp. 2d at 968. The Sixth Circuit reasoned in *Garcia-Meza* that the requirements of the federal hearsay rules, as captured by FRE 804(b)(6), were not controlling as to the constitutional analysis. The doctrine, said the Sixth Circuit, was an equitable one and there was no requirement that the government prove that the defendant specifically intended to procure the unavailability of the witness, regardless of what the evidentiary rule may require. *Garcia-Meza*, 403 F.3d at 370.

[24] *Mayhew*, 380 F. Supp. 2d at 968.

[25] *Id.* at 966.

[26] *Id.*

[27] *Id.*

[28] 2005 U.S. Dist. LEXIS 3289 (D. Colo. 2005).

back with a sharpened piece of steel, apparently in connection with a drug debt.[30] The inmate died from the injury seven hours later, but not before making several statements implicating the defendant.[31] At the time of the defendant's trial, the government sought to introduce the inmate's incriminating statements as either dying declarations or excited utterances.[32] The court rejected both theories.[33] Additionally, the government argued that the defendant forfeited his right to confront the witness.[34] The court rejected this argument, as well.[35] With respect to forfeiture, the court pointed to the language of Federal Rule of Evidence (FRE) 804(b)(6).[36] This rule, the court said, requires that the wrongdoing be intended to procure the witness's absence.[37] Further, the court found that the government simply had not proven that the defendant's intent at the time of the stabbing was to procure the witness's absence.[38] The *Jordan* court identified the following as an "archetypical" illustration of the doctrine of forfeiture:

> [A] defendant's murder of a witness who was scheduled to testify against the defendant in an upcoming case *unrelated* to the case in which the defendant is charged with the witness' murder. The defendant sets out to kill the witness to prevent her from testifying against him about something she witnessed in the past related to a crime other than her own murder.[39]

In essence, the court found the doctrine of forfeiture inapplicable to a case where the by-product of the alleged murder is the unavailability of the witness.[40]

The *Mayhew* and *Jordan* cases highlight the great differences in approaches to the equitable doctrine of forfeiture which are the subject of some debate. A recent law review article, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*,[41] captures this debate. The article states that prior to the *Crawford* case, forfeiture was primarily limited to circumstances where a witness was intentionally killed to prevent the witness from testifying about a prior crime.[42] This limitation was, as noted above, the essence of the analysis of *Jordan*.[43] After *Crawford*, courts are increasingly using forfeiture to fit situations such as the one in *Mayhew* where the murder of the victim establishes forfeiture as a by-product.[44] For the practitioner, caution is appropriate. The doctrine of forfeiture by wrongdoing is a long held, well-established, and recently reaffirmed principle that can be an exception to the normal demands of the Confrontation Clause.[45] There are, however, few relative certainties that attend this doctrine, but arguably there are at least three. First, the majority of jurisdictions require the government to prove the accused's wrongdoing by a preponderance of the evidence.[46] Second, any conduct, not simply illegal conduct, which causes the witness to absent himself from trial, may be sufficient under the

---

[29] *Id.* at *1.

[30] *Id.* at *2.

[31] *Id.*

[32] *Id.*

[33] *Id.* at *16.

[34] *Id.* at *11.

[35] *Id.* at *15.

[36] FED. R. EVID. 804(b)(6).

[37] *Jordan*, at *13.

[38] *Id.* at *15.

[39] *Id.* at *14.

[40] *Id.* at *15.

[41] Joshua Deahl, *Expanding Forfeiture Without Sacrificing Confrontation After Crawford*, 104 MICH. L. REV. 599 (2005).

[42] *Id.*

[43] *Jordan*, 2005 U.S. Dist. LEXIS 3289, at *14; Deahl, *supra* note 41, at 601.

[44] *Mayhew*, 380 F. Supp. 2d at 968; Deahl, *supra* note 41, at 601.

[45] Crawford v. Washington, 541 U.S. 36, 62 (2004).

[46] *See* United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001) (requiring proof by a preponderance of the evidence); *see also* United States v. Rivera, 292 F. Supp. 2d 827 (E.D. Va. 2003); United States v. Scott, 284 F.3d 758 (7th Cir. 2002); United States v. Price, 265 F.3d 1097 (10th Cir. 2001); United States. v. Zlatogur, 271 F.3d 1025 (11th Cir. 2001); United States v. Cherry, 217 F.3d 811 (10th Cir. 2000); United States v. Emery, 186 F.3d 921 (8th Cir. 1999). *But see* United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982) (requiring a "clear and convincing" standard).

forfeiture doctrine.[47] Third, when the government can prove that the accused undertook the wrongdoing with the specific intent of procuring the absence of the witness, the doctrine of forfeiture is clearly invoked.[48] Beyond these principles, it is somewhat unclear how far and how safely the doctrine may be extended. Courts, confronted with the sometimes seemingly harsh bar of *Crawford*, may be tempted to extend the forfeiture doctrine somewhat aggressively,[49] particularly in cases involving domestic violence and child abuse.[50] Other courts have established clear limits to the doctrine.[51] The careful practitioner must closely study the issue and factual circumstances before making his argument to support or attack the doctrine of forfeiture.[52]

Producing the Witness for Cross Examination

Waiver and forfeiture are exceptions; production is the rule. The best and most direct way to satisfy the Confrontation Clause is to simply produce the witness and allow the defense counsel to adequately cross-examine.

Satisfying Confrontation When the Witness Is Present

Witness production, or witness availability, is a concept more complex that it initially appears. Take, for example, the case of the witness who is physically present at trial. A witness who refuses to testify is generally considered unavailable for hearsay and confrontation purposes.[53] This is true whether the witness decides before he reaches the courtroom that he will not answer questions or whether the witness makes this decision on the witness stand.[54] Thus, a witness who "freezes" on the witness stand should be considered unavailable for hearsay and confrontation purposes.[55] Sometimes, however, a witness may be unavailable under the hearsay rules, but available for confrontation purposes. Consider the witness who invokes his privilege against self-incrimination. Under Military Rule of Evidence (MRE) 804(a)(1), this witness would be considered unavailable for hearsay purposes.[56] Assuming this witness could be given testimonial immunity, however, the witness would *not* be unavailable for confrontation purposes because the government can make the witness available through a grant of

---

[47] *See* People v. Hampton, 2005 Ill. App. LEXIS 1188 (Ill. App. Ct. 2005) ("We conclude that any conduct by an accused intended to render a witness against him unavailable to testify is wrongful and may result in forfeiture of the accused's privilege to be confronted by that witness."); *see also* Steele v. Taylor, 684 F.2d 1193, 1201-02 (6th Cir. 1982) (finding that defendant's coercive control over intimate partner who would be a witness against him is deemed forfeiture).

[48] United States v. Houlihan, 92 F.3d 1271, 1279-80 (1st Cir. 1996) (finding that murder of a man who had the potential to be a witness against the defendant in a drug trial clearly established the defendant's forfeiture of the right to confront the witness).

[49] *See* United States v. Montague, 421 F.3d 1099 (10th Cir. 2005). In *Montague*, the government showed that the defendant, after his arrest, repeatedly communicated with his wife in violation of a no-contact court order. *Id.* at 1101. She subsequently invoked her marital privilege. *Id.* Notably, the defendant should have been able to abide by the no-contact order since he was confined during the relevant time period. *Id.* Nevertheless the court concluded that when the defendant's wife visited him in jail, he could have opted not to speak to her. *Id.* at 1103. This option, combined with other evidence of intimidation, satisfied the Tenth Circuit that the decision of the trial court to apply the doctrine of forfeiture by wrongdoing was not clearly erroneous. *Id.* at 1104.

[50] *See* Laurie E. Martin, *Child Abuse Witness Protections Confront* Crawford v. Washington, 39 IND. L. REV. 113 (2005); *see also* Myrna Raeder, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children Too:* Crawford*'s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOKLYN L. REV. 311 (2005).

[51] *See* People v. Melchor, 841 N.E.2d 420 (Ill. App. Ct. 2005). After shooting a man to death, the defendant became a fugitive for over ten years. *Id.* at 422. During this time the only eye witness died of a drug overdose, but did so only after a co-defendant had been tried and acquitted in a trial in which the eye witness testified. *Id.* Upon Melchor's re-arrest and subsequent trial, the court admitted the statements of the now deceased eye-witness. The Illinois appellate court held that this admission of the hearsay statements of the eye-witness violated the defendant's right to confrontation. *Id.* at 436. The appellate court further held that the doctrine of forfeiture by wrongdoing was inapplicable since the defendant's misconduct of fleeing trial had no causal connection to the eye-witness' death. *Id.*

[52] For further discussion as to why the current extension of the forfeiture doctrine is inconsistent with precedent, see James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459 (2003). For a contrary view on the subject, see Paul Grimm & Jerome Deise, *Hearsay, Confrontation, and Forfeiture by Wrongdoing:* Crawford v. Washington*, a Reassessment of the Confrontation Clause*, 35 U. BALT. L.F. 5 (2004).

[53] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 804(a)(1) (2005) [hereinafter MCM]; *see also In re T.T.*, 815 N.E.2d 789, 797 (Ill. App. Ct. 2004).

[54] *In re T.T.*, 815 N.E.2d at 797; *see also In re Rolandis G.*, 817 N.E.2d 183 (Ill. App. Ct. 2004).

[55] *In re T.T.*, 815 N.E.2d at 797.

[56] MCM, *supra* note 53, MIL R. EVID. 804(a)(1).

testimonial immunity.[57] Consider, too, the fairly common situation where the witness agrees to testify but then claims a loss of memory regarding the events at issue. Military Rule of Evidence 804(a)(3) defines this witness as "unavailable" when he "testifies to a lack of memory of the subject matter of the declarant's statement."[58] Does it follow then that the "forgetful" witness is also unavailable for confrontation purposes?

The CAAF clearly answered this question in *United States v. Rhodes*.[59] Staff Sergeant (SSgt) Rhodes was charged with a variety of drug offenses.[60] The case against SSgt Rhodes heavily relied upon the testimony of an accomplice, Senior Airman (SrA) Daughtery.[61] Senior Airman Daughtery previously made a confession that implicated both himself and SSgt Rhodes.[62] After meeting with SSgt Rhodes and his defense counsel, SrA Daughtery subsequently recanted and signed an affidavit claiming that he no longer remembered SSgt Rhodes's involvement in the drug offenses.[63]

At trial, SrA Daughtery persisted in his claim of lack of memory.[64] After making "extensive findings of fact and conclusions of law," the military judge admitted the previous confession of SrA Daughtery as a statement against interest and provided several conditions for its use.[65] The defense cross-examined SrA Daughtery "at length."[66]

On appeal, SSgt Rhodes argued that the court denied his right to confrontation.[67] Staff Sergeant Rhodes pointed to a footnote in the *Crawford* opinion that stated that the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."[68] The CAAF rejected this innovative argument by referring back to an earlier Supreme Court case, *United States v. Owens*.[69] The CAAF found that *Crawford* had not overruled *Owens* by using the phrase "to defend or explain it."[70] The CAAF stated, "[A]s *Owens* makes clear, the declarant's explanation may be that he or she has no recollection of the underlying event, and the defense can meaningfully confront a witness who claims such a lack of memory."[71] The CAAF determined SrA Daughtery was available for confrontation purposes, but, because of his claim of lack of memory, was unavailable for purposes of hearsay.[72] The statements against interest, which required a finding of unavailability for hearsay purposes,[73] did not violate the accused's confrontation rights since, for confrontation purposes, the witness was in fact available.[74]

Rhodes reminds the practitioner that rules of hearsay and the Confrontation Clause, though related in many ways, are distinct legal requirements. A witness may be available for confrontation purposes and unavailable for hearsay purposes. Additionally, *Rhodes* indicates that questions of availability and unavailability for confrontation purposes may be more complicated than they initially appear—the focus of the next section of this article.

---

[57] *See* United States v. Simpson, 60 M.J. 674, 678 (2004).

[58] MCM, *supra* note 53, MIL. R. EVID. 804(a)(3).

[59] 61 M.J. 445 (2005). The *Rhodes* case is further discussed in Major Christopher W. Behan's article, *"The Future Ain't What It Used to Be": New Developments in Evidence for the 2005 Term of Court*, ARMY LAW., Apr. 2006, at 65-66.

[60] *Rhodes*, 61 M.J. at 446.

[61] *Id*. at 447.

[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *Id*. at 448.

[67] *Id.* at 449.

[68] *Id*. at 450 (citing Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)).

[69] *Id.* (citing United States v. Owens, 484 U.S. 554 (1988)).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] MCM, *supra* note 53, MIL. R. EVID. 804(b)(3).

[74] *Rhodes*, 61 M.J at 450.

Satisfying Confrontation When the Witness Is Not Physically Present

While *Rhodes* provides an interesting evaluation of the issues surrounding *legal availability*, the more common Confrontation Clause question for practitioners involves *physical availability*. For defense witnesses, the question of physical availability is one of compulsory process and beyond the scope of this article. For government witnesses, however, the issue of the physical production of witnesses falls squarely within the boundaries of the Confrontation Clause. What is to be made of the witness who does not testify because he is not physically available at trial? A safe assumption can be made that a *truly unavailable* witness is unavailable for both hearsay and confrontation purposes. The ultimate question, then, is when is a witness who is not physically present at trial truly unavailable?

The question of true unavailability is, at times, difficult to answer because the test for witness availability is fairly nebulous. The Supreme Court provides a foundation for witness unavailability in *Barber v. Page*: "In short, a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[75] The Army Court of Criminal Appeals (ACCA) has gone further by stating that "the Government must exhaust every reasonable means to secure the witness' live testimony."[76] Unfortunately, what may be considered "good-faith" and "reasonable" is in the eye of the beholder. As a result, determining when a witness is physically unavailable may vary from courtroom to courtroom. For this reason, *United States v. Campbell*,[77] although it is an unpublished service court opinion, is worth considering.

Staff Sergeant (SSG) Campbell was charged with several offenses, including disobeying a lawful command from a senior commissioned officer.[78] The government relied upon two witnesses to prove the disobedience charge.[79] The two witnesses were members of a Special Forces unit and were deployed with their unit on separate missions to Columbia and Honduras.[80] The deployment had been planned several months in advance.[81] Initially, the witnesses would have been present for the trial, but a defense delay moved the trial date into the time frame of the deployment.[82]

Prior to trial, the government sought and obtained approval from the military judge to depose the two witnesses.[83] The trial began on 17 February 2002 and ended on 22 February 2002.[84] The witnesses deployed on 27 January 2002 with a scheduled return date of 29 March 2002. After hearing testimony from another member of the witnesses' unit, the military judge determined that the two witnesses were unavailable at the time of trial due to "the location of the witnesses, the nature of the military operations, the degree of difficulty in obtaining these witnesses[']personal appearance prior to April [2002], the length of time the accused has already spent in pretrial confinement, and that the accused is entitled to have his day in court."[85] The military judge subsequently admitted the depositions over defense objection, and the accused was convicted of a variety of offenses.[86]

Upon review, the Army court first looked to the language of Article 49(d)(2) of the Uniform Code of Military Justice (UCMJ),[87] which was incorporated into MRE 804(a)(6), to determine when a deposition may be admissible.[88] Article 49

---

[75] 390 U.S. 719, 724 (1968).

[76] United States v. Dieter, 42 M.J. 697 (Army Ct. Crim. App. 1995).

[77] No. 200020190 (Army Ct. Crim. App. 28 June 2005) (unpublished).

[78] *Id.* at *1.

[79] *Id.* at *2, *4. There were actually three witnesses at issue, but one of the witnesses testified concerning an aggravated assault. The use of this witness's deposition, though erroneous, did not prejudice the accused and so will not be discussed here.

[80] *Id.* at *3.

[81] *Id.* at n.3.

[82] *Id.* at *3.

[83] *Id.*

[84] *Id.*

[85] *Id.* at *2.

[86] *Id.*

[87] UCMJ art. 49 (2005).

[88] *Campbell*, No. 200020190, at *5.

states that a deposition may be used if the witness "by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing."[89] The court then analyzed the specific facts of the case. After first concluding that the witnesses could have traveled back to Fort Bragg for the trial, the court found that it was incapable of taking judicial notice of the difficulties of travel.[90] Given the court's inability to take judicial notice of these difficulties combined with the government's failure to establish these facts at trial, the Army court was forced to conclude that the government failed to meet their burden of demonstrating unavailability.[91]

The court, however, went further. Looking back to a case from the Vietnam era, the court quoted *United States v. Davis*[92] in finding that with developments in transportation, depositions would not be admitted under the rubric of military necessity "short of war or an armed conflict."[93] Additionally, the Army court referenced previous decisions by the Court of Military Appeals in *United States v. Vanderwier*[94] and *United States v. Cokeley*[95] that counseled strongly for delay rather than a finding of unavailability in most cases.[96] Examining the specific facts of the case, the court found that the military judge erred by not delaying the trial for two days to permit the witnesses to fly to Fort Bragg or by not delaying the trial for six weeks to allow the witnesses to complete their deployment.[97] This failure, said the court, was an abuse of discretion.

Campbell, like most availability cases, is very fact specific. Although the precedential value of *Campbell* may be slight, the ultimate message of the case is certain: strong facts made clear and distinct by the military judge on the record are essential prior to a finding of unavailability. Counsel would be unwise to assume that basic efforts to demonstrate physical unavailability will be sufficient. Instead, counsel should ensure that such efforts are exhaustive, imminently reasonable, and on the record. Military judges, likewise, must be very careful in making findings of fact and conclusions of law with regard to availability and must strongly consider delaying the case if such a delay will make an unavailable witness available. Finally, defense counsel should press the government very hard to demonstrate that a witness is truly physically unavailable for trial and, when appropriate, demand a continuance if doing so will rectify the problem or, at a minimum, preserve the issue for appeal.

The physical production of witnesses at trial represents the confluence of strong, competing currents. The Confrontation Clause demands that witnesses be physically present at trial.[98] Against this demand are the difficulties inherent in the physical production of witnesses—remote location, illness, military operations, refusal of the witness to travel, etc. The military prosecutor may find himself with a trial at Fort Lewis, Washington, a civilian victim in an Iraqi village, and a military witness in the jungles of Columbia. It is at such a confluence that the possibility of using remote testimony may present itself.[99] A trial counsel who can produce a witness by remote means, such as video-teleconference, would apparently satisfy all demands. Nevertheless, the likelihood of using remote testimony is itself remote in the aftermath of *United States v. Yates*.[100]

Before considering *Yates*, however, a quick review of the law on remote testimony may be helpful. The starting point is *Maryland v. Craig*,[101] a case involving child abuse in which the child victim testified by one-way closed circuit television

---

[89] *Id*. (citing UCMJ art. 49).

[90] *Id.* at *5.

[91] *Id*. at *9.

[92] 41 C.M.R. 217, 223 (C.M.A. 1970).

[93] *Campbell*, No. 200020190, at *8.

[94] 25 M.J. 263 (C.M.A. 1987).

[95] 22 M.J. 225 (C.M.A. 1986).

[96] *Campbell*, No. 200020190, at *8.

[97] *Id.* at *9.

[98] U.S. CONST. amend. VI.

[99] As stated above, defense counsel also have an interest in procuring witnesses, but this interest would find itself within the context of the Compulsory Process of the Sixth Amendment and not the Confrontation Clause.

[100] 438 F.3d 1307, 1310 (11th Cir. 2006).

[101] 497 U.S. 836 (1990).

with a defense counsel and a prosecutor present.[102] The accused, jury, judge, and other counsel viewed the testimony in the courtroom. In upholding the Maryland statute prescribing this particular method of remote testimony, the Court held that the "Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and necessities of the case."[103] The Court also stated that the "preference" for "face-to-face confrontation" may give way if it is necessary to further an important public policy but only where the reliability of the testimony can otherwise be assured.[104] Even with this case-specific finding, courts must attempt to preserve as many of the elements of confrontation—physical presence, oath, cross-examination, and observation of the witness's demeanor by the trier of fact—as possible.[105]

Rule for Court-Martial (RCM) 914a and MRE 611d followed the *Craig* decision and were largely validated in *United States v. McCollum*.[106] But even prior to *McCollum*, and in circumstances not involving a child witness, various federal courts tested the outer boundaries of *Craig* when utilizing video-teleconferences for witnesses who were unwilling or unable to be physically present at trial. Perhaps the most significant of these cases was *United States v. Gigante*.[107] In this case, the government asserted that Mr. Vincent Gigante was the boss of the Genovese crime family and supervised its criminal activity.[108] Gigante was subsequently convicted of racketeering; criminal conspiracy, under the Racketeer Influenced and Corrupt Organization statute; conspiracy to commit murder; and a labor payoff conspiracy.[109] The government proved its case using six former members of the Mafia, including Peter Savino.[110] Savino was allowed to testify via closed circuit television because he was in the Federal Witness Protection Program and because he was in the final stages of an inoperable, fatal cancer.[111] Finding "exceptional circumstances," the Second Circuit held the trial judge did not violate Gigante's right to confront Savino.[112] As a result, *Gigante* is considered an early and important step in extending the use of remote testimony beyond the child witness.

The military took an additional step toward extending the use of remote testimony in *United States v. Shabazz*[113] when the Navy-Marine Corps Court of Criminal Appeals (NMCCA) examined the issue of remote testimony of an adult witness. In *Shabazz*, the adult witness to an assault and maiming refused to travel from the United States to a court-martial in Okinawa.[114] After considering and rejecting several options, the military judge permitted the use of remote testimony stating that such a method of taking the witness's testimony was "far better than a deposition."[115] The NMCCA, in analyzing the confrontation issue, looked to *Craig* and *Gigante* finding that the age of the witness was not dispositive but simply a factor in deciding "whether denial of face-to-face confrontation at trial is necessary to further an important public policy."[116] The NMCCA found the accused's confrontation rights were violated but only because the trial judge did not do enough to control the reliability of testimony from the remote location.[117]

---

[102] *Id*.

[103] *Id*. at 849.

[104] *Id*. at 850.

[105] *Id*. at 846.

[106] 58 M.J. 323 (2003). For a thorough examination of *McCollum*, see Major Robert Wm. Best, *2003 Developments in the Sixth Amendment: Black Cats on Strolls*, ARMY LAW., July 2004, at 55.

[107] 166 F.3d 75 (2d Cir. 1999).

[108] *Id*. at 78.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* at 81; *see also* State v. Sewell, 595 N.W.2d 207, 211 (Minn. Ct. App. 1999) (holding that the use of remote testimony for critically injured witness who could not travel did not violate the defendant's confrontation rights).

[113] 52 M.J. 585, 590 (N-M. Ct. Crim. App. 1999).

[114] *Id*. at 591.

[115] *Id*.

[116] *Id.* at 594.

[117] *Id.* Apparently neither the military judge nor the trial counsel took any steps to ensure that the witness in the United States was able to answer the questions posed without any additional assistance from an off-camera source.

Gigante, *Shabazz*, and other similar cases suggested a movement toward increased use of remote testimony in situations involving adults. That movement ran into a brick wall in *United States v. Yates*.[118]

In *Yates*, the trial judge, over defense objection, permitted two key government witnesses in Australia to testify via two-way video teleconferencing.[119] The two witnesses were unwilling to travel to the United States for trial.[120] Both witnesses were sworn in and then questioned and cross-examined by counsel.[121] The defendants, the jury, and the judge could see the testifying witnesses on monitors and the witnesses could see the temporary courtroom.[122] The Eleventh Circuit originally held that the procedure violated the defendants' right to confront witnesses against them.[123] The opinion, however, was subsequently vacated and heard in an en banc hearing.[124]

Upon rehearing, the Eleventh Circuit again found that the use of two-way video teleconferencing violated the defendant's right of confrontation.[125] The court applied the *Craig* standard—"a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[126] The court considered and rejected the government's arguments that *Craig* was inapplicable. First, the government argued that the two-way video conference was superior to the one-way procedure.[127] Second, the government contended that since the two-way video-conference was superior to testimony taken by deposition under the federal rules, the two-way video method should be utilized whenever a deposition would be otherwise allowed.[128]

The Eleventh Circuit quickly dismissed the government's first argument by stating that two-way video conferencing is not distinguishable from one-way video conferencing.[129] The Eleventh Circuit found that the Second Circuit in *Gigante* erred in holding that it was distinguishable.[130] The court identified four other circuits that agreed that confrontation via a two-way video conference is not the constitutional equivalent of face-to-face confrontation.[131] "The simple truth," the court stated, "is that confrontation through a video monitor is not the same as physical face-to-face confrontation."[132]

The *Yates* court also criticized the government's second argument—the superiority of the video conference to a deposition.[133] The court pointed out that during a deposition the accused has the opportunity for a physical face-to-face confrontation.[134] The court also emphasized that the Supreme Court rejected a proposed amendment to the Federal Rules of Criminal Procedure that would have allowed two-way video conferencing.[135] The Eleventh Circuit stated that Justice Antonin Scalia commented that the proposed rule would be "contrary to the rule enunciated in *Craig*" in that such a

---

[118] 438 F.3d 1307 (11th Cir. 2006).

[119] *Id.* at 1310.

[120] *Id*.

[121] *Id.* The original courtroom did not have video teleconferencing capabilities, so the trial was moved to the U.S. Attorney's Office.

[122] *Id*.

[123] 391 F.3d 1182 (11th Cir. 2004).

[124] 404 F.3d 1291 (11th Cir. 2005).

[125] *Yates*, 438 F.3d at 1318.

[126] *Id.* at 1312 (quoting Maryland v. Craig, 497 U.S. 836, 850).

[127] *Id*.

[128] *Id.*

[129] *Id*. at 1313.

[130] *Id*.

[131] *Id.* The Sixth, Eighth, Ninth, and Tenth Circuits concurred. Only the Second Circuit (in *Gigante*) does not.

[132] *Id*. at 1315.

[133] *Id*. at 1315-17.

[134] *Id.* at 1317.

[135] *Id*. at 1314.

technique would not limit remote testimony to "instances where there has been a 'case-specific finding' that is 'necessary to further an important public policy.'"[136]

The Eleventh Circuit, in finding that the *Craig* standard had not been satisfied, stressed the importance of necessity, stating that "*Craig* requires that furtherance of the important public policy make it *necessary* to deny the defendant his right to a physical face-to-face confrontation."[137] The court had serious concerns that the government's "important public policy" was limited to "expeditiously and justly resolving the case"[138] Such policies are important, said the court, but these policies will always be present to some degree in any criminal prosecution.[139] The court found that necessity under these circumstances simply did not exist, particularly when another alternative, the deposition, was available to the government.[140]

The Eleventh Circuit and Second Circuit justices seem to have differing viewpoints regarding the use of remote testimony. The Eleventh Circuit's reasoning, however, may be the better of the two since it flows directly from and is more faithful to the *Craig* standard. Assuming military courts follow *Yates* vice *Gigante*, four lessons can be drawn regarding the use of remote testimony for adult witnesses.

First, absent extraordinary circumstances, remote testimony involving adult witnesses will likely violate the Confrontation Clause. *Yates* seems to foreclose remote testimony, but only upon a cursory reading. Notably, the Eleventh Circuit suggests that had the trial court in *Gigante* held the necessary evidentiary hearings and applied the *Craig* standard, remote testimony would have likely satisfied the Confrontation Clause.[141] *Gigante*, said the Eleventh Circuit, had a very unusual set of circumstances that would have demonstrated the necessity of remote testimony because the witness in question was "a former mobster participating in the Federal Witness Protection Program . . . at an undisclosed location, and . . . was in the final stages of inoperable, fatal cancer."[142] Absent such unique circumstances, Confrontation Clause demands are not likely to be met. Although such extraordinary circumstances may arise in a future military case, they must be viewed in light of the second lesson.

The second lesson concerns depositions. Government counsel who are faced with a witness who is unwilling or unable to travel to the court-martial should use depositions if at all possible. Defense counsel who are faced with remote testimony at trial should mention the availability of depositions to the government in an effort to deprive the prosecution of its ability to establish necessity. (Notably, the defendant in *Gigante* refused to attend a previously ordered deposition).[143] *Yates* makes it very clear that since the deposition is a recognized means of satisfying the Confrontation Clause, depositions should be used if the witness will be otherwise unavailable at the time of trial.[144] When a deposition can be used, remote testimony is essentially prohibited.

The third lesson is perhaps more subtle. Given the fundamental definition of physical confrontation, counsel should carefully consider the use **of** telephonic or video conference testimony at Article 32 hearings. A fair inference from the *Yates* opinion and others is that reliance upon either one of these techniques at the Article 32 hearing will often fail to satisfy the Confrontation Clause if later introduced as evidence at trial. This is not to say that video conference testimony or even telephonic testimony is inappropriate at an Article 32 hearing. Rather, the trial counsel who later tries to rely upon this testimony because the witness is unavailable at trial may be prevented from arguing that the Confrontation Clause has been previously satisfied.[145] Additional issues are also raised at this point, such as whether the absence of an objection at the

---

[136] *Id.*

[137] *Id*. at 1316 (emphasis added).

[138] *Id*.

[139] *Id.* ("All criminal prosecutions include at least some evidence crucial to the Government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial.").

[140] *Id*. at 1316.

[141] *Id.* at 1313.

[142] *Id.*

[143] *Gigante*, 166 F.3d 75, 79 (2d Cir. 1999).

[144] *Yates*, 438 F.3d at 1316.

[145] There is yet further nuance to this issue. In military trials, the prior opportunity for cross-examination is most likely to occur at the Article 32 hearing, or, in some cases, during a deposition conducted pursuant to RCM 702. One interesting technique currently in vogue at Article 32 hearings in some jurisdictions of Army practice is for counsel to announce that it is their intention to question a witness simply for discovery purposes and not for impeachment purposes. If the witness is later unavailable for trial, then the defense counsel objects not on confrontation grounds but on hearsay grounds.

Article 32 hearing would waive the physical presence component of confrontation at a later trial. Presumably, it would not.[146] This issue of prior opportunity to cross-examine the witness has gained new importance in light of *Crawford* since such an opportunity, combined with a finding of unavailability, may be the only means to admit testimonial hearsay.[147]

The fourth lesson is one of remote testimony generally and not necessarily of *Yates.* *Yates* involved the physical production of adult witnesses on the merits. Questions remain concerning *Yates* applicability at other stages of trial. The pre-sentencing case, around which so much of the military practitioner's world revolves, does not implicate the Confrontation Clause.[148] Thus, for the majority of military guilty pleas, remote testimony may be a useful tool because it allows the production of government aggravation witnesses through a reasonably responsive media without the associated financial costs required by travel or the impediment to mission caused by the witness's absence from his unit. Likewise, recent changes in Article 39, UCMJ, have opened up new avenues for using remote testimony during pre-trial sessions.[149] As a result, remote testimony may be permissible for pre-trial sessions not bearing on guilt.

Judicial analysis for using remote testimony is not uniform. These four lessons, however, should aid military counsel in negotiating witness availability issues.

Limiting Cross Examination

Producing the witness does not satisfy the Confrontation Clause if a full opportunity for cross-examination is limited.[150] During the last term, the CAAF explored this important concept in *United States v. Israel*[151] and *United States v. James.*[152]

Airman First Class (A1C) Israel was charged with the wrongful use of cocaine.[153] The government's case relied upon the normal urinalysis process.[154] The defense aimed at attacking this process.[155] On 19 May 2001, A1C Israel submitted a urine sample at MacDill Air Force Base (MacDill).[156] The MacDill Drug Testing Program Manager, Mr. Mahala, sent the sample to the Brooks Air Force Drug Testing Laboratory (Brooks) where it was tested on 30 May 2001.[157]

Through Mr. Mahala the government established how the sample was taken and shipped to Brooks.[158] Mr. Mahala could not remember the specific sample, but he testified about his standard procedures for collecting and shipping urine samples.[159]

The specific objection is that the hearsay exception under MRE 804(b)(1), former testimony, is inapplicable because the rule requires that the questioner at trial have a "similar motive" as on the prior occasion. Defense counsel then argue that since the motive at the Article 32 hearing—discovery—and the motive at the trial impeachment differ, the hearsay exception is inapplicable. Counsel would be well advised to read *United States v. Connor*, prior to undertaking such an advanced and risky tact. *See* United States v. Connor, 27 M.J. 378 (C.M.A. 1989).

[146] *See* Johnson v. Zerbst, 304 U.S. 458, 464 (U.S. 1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.").

[147] Crawford v. Washington, 541 M.J. 36, 69 (2004).

[148] United States. v. McDonald, 55 M.J. 173 (2001).

[149] 18 U.S.C.S. § 839 (LEXIS 2006). The corresponding National Defense Authorization Act provides further guidance on when remote testimony may be used for Article 39(a) sessions. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006). An executive order changing the appropriate RCM is now required. Additionally, *Army Regulation 27-10* must be changed to fulfill the Secretarial authorization requirement. These changes contemplate arraignments and other sessions without members to be conducted even in the physical absence of the parties. Additionally, the provisions make allowances for witness who may appear via video teleconference on issues "not bearing on guilt" as well as rare allowances for witnesses whose testimony does "bear on guilt." These changes will be discussed in greater detail once AR 27-10 has been appropriately modified.

[150] Davis v. Alaska, 415 U.S. 308 (1974).

[151] 60 M.J. 485 (2005).

[152] 61 M.J. 132 (2005).

[153] *Israel*, 60 M.J. at 486.

[154] *Id.*

[155] *Id.*

[156] *Id*. at 487.

[157] *Id*.

[158] *Id.*

[159] *Id.*

Prior to cross-examination, the government made a motion in limine to preclude the defense counsel "from presenting evidence on cross of Mr. Mahala, as well as be precluded from any mention at all of the Drug Demand Urinalysis' untestable rates . . . from MacDill Air Force Base."[160] The defense argued that the presence of certain untestable samples raised a fair inference in procedural irregularities since an untestable rate indicated that something had gone wrong with the procedure involved in collecting and shipping urine samples.[161] The military judge granted the government motion and precluded the defense from cross examining Mr. Mahala about the untestable samples.[162]

Next, the government focused on the procedures at Brooks. Dr. Haley, an expert witness, testified about the various tests the Brooks laboratory used to ascertain the presence of cocaine. Dr. Haley stated that the gas chromatography/mass spectrometry testing process was considered the "gold standard in drug testing. "[163] Dr. Haley also testified about the various control systems used to prevent testing errors.[164]

Prior to the cross-examination of Dr. Haley, the military judge held an Article 39(a), UCMJ, session to address evidence the defense sought to introduce in its cross-examination of Dr. Haley.[165] This evidence included a May 2001 calibration error, a 1997 incident where a laboratory employee erroneously annotated a specimen sample, a 1999 incident where an employee falsified documents to cover up an error, an August 2000 false-positive blind quality control sample, and log book errors made in April 2001.[166] The military judge determined that this evidence was "totally irrelevant . . . none of that stuff has anything to do with this particular testing in this particular case."[167]

The CAAF disagreed, in part, with both of the trial court's rulings. With regard to MacDill's untestable rates, the CAAF found that questions of irregularity in the process of collecting samples were relevant, particularly when the witness's testimony relied upon a presumption of regularity.[168] The CAAF found that the military judge abused his discretion in prohibiting the defense from using this evidence in cross-examination.[169]

With regard to the errors at Brooks, the CAAF first found that the calibration error in May 2001 was erroneously excluded.[170] The calibration errors, of which there were two during the relevant time period, indicated procedural irregularities in the testing process.[171] As a result, the CAAF held that the military judge abused his discretion by excluding this evidence.[172] In making this finding, the CAAF stated the following:

> [I]n those cases where the Government relies on the general reliability of testing procedures, evidence related to the testing process that is closely related in time and subject matter to the test at issue may be relevant and admissible to attack the general presumption of regularity in the testing process.[173]

Next, the CAAF found that the judge committed error by prohibiting the defense counsel from cross-examining Dr. Haley regarding the false-positive blind quality control sample in August 2000.[174] This evidence, too, went to the regularity

---

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.* at 488.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 488, 489.

[169] *Id.* at 489.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 489-90.

and accuracy of the testing process.[175] Simply because this evidence concerned an event that occurred nine months earlier did not diminish its relevance in the court's assessment.[176] This was particularly true when the government characterized the laboratory's testing procedures as "the gold standard" and the "Mercedes" of drug testing processes.[177] This heightened characterization of the testing procedures opened the door to a broader time frame during which laboratory errors would be relevant to challenge the testing process.[178]

With regard to the remaining evidence, the CAAF found that the military judge had not abused his discretion.[179] The May 1997 erroneous annotation of a drug sample was irrelevant to the reliability of the test results.[180] Although the employee who made the erroneous annotation in 1997 was involved with Israel's test, his involvement was limited to only reviewing the data.[181] This incident was simply too far removed "in both subject matter and time" to be relevant to the reliability of the tests.[182] The 1999 incident of falsifying a sample was also found irrelevant.[183] The employee in question had not been employed at the time of Israel's test.[184] The CAAF found that this incident was related to the accused's test only in that both occurred at Brooks.[185] Finally, the CAAF found that log book errors in April 2001 were irrelevant because the individuals involved in that incident did not access any areas where Israel's sample was tested or stored.[186]

The CAAF made these rulings with an eye toward guaranteeing the confrontation rights of the accused. The wholesale denial of the evidence in question was error that constituted a violation of the accused's constitutional rights.[187] Such a violation requires reversal unless the error was harmless beyond a reasonable doubt.[188] Because the government relied so heavily upon the regularity of the drug testing process, and particularly so where the government characterizes the process as the "gold standard," the CAAF held the error was not harmless beyond a reasonable doubt when the defense was prevented from appropriately contesting the "gold standard."[189] The CAAF reversed the decision and set aside the findings and sentence.[190]

The CAAF also addressed the limits of cross-examination in *United States v. James*.[191] In this case, Airman (AMN) James pleaded guilty to wrongful use and distribution of ecstasy.[192] In pre-sentencing proceedings before a panel, the government called Airman Basic (AB) Rose, the accused's "best friend," as an aggravation witness.[193] Previously, AB Rose had been tried by a general court-martial in which he pleaded guilty pursuant to a pre-trial agreement.[194] Rose testified that

---

[175] *Id.* at 489.

[176] *Id.* at 490.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.* at 491.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] 61 M.J. 132 (2005).

[192] *Id.* at 133.

[193] *Id.* at 134.

[194] *Id.*

the accused introduced him to ecstasy.[195] Rose also testified that AMN James had used and distributed ecstasy on a number of occasions.[196]

Airman Basic Rose's pretrial agreement limited his punishment to eighteen months from a maximum possible punishment of fifty-two years.[197] Airman Basic Rose in fact received eighteen months from the military judge.[198] At the time of AMN James's trial, AB Rose was still pending a clemency hearing.[199]

After testifying for the government, the defense sought to cross-examine AB Rose.[200] The military judge precluded the defense from cross-examining AB Rose concerning the specific terms in his pretrial agreement.[201] On appeal, AMN James contended that this preclusion violated his Sixth Amendment right to confront the witnesses against him.[202]

The CAAF held that the military judge did not violate AMN James's confrontation rights,[203] citing to the Supreme Court in *Delaware v. Van Arsdall* concerning the following limits of cross-examination:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.[204]

The CAAF found that the military judge permitted an otherwise full opportunity to cross-examine AB Rose.[205] The CAAF found it important that the members knew that AB Rose entered into a pretrial agreement in his own trial where he pleaded guilty and entered into a stipulation of fact, that he received immunity for his testimony in AMN James's court-martial, that his agreement required him to cooperate with the government against his best friend, and that his clemency hearing was still pending.[206] This last point, that his clemency hearing was still pending, was important to the CAAF[207] because "Rose's only 'continuing incentive' identified in this case was that his clemency appeal was pending before the convening authority and if he testified favorably he would be able to inform the convening authority that he cooperated with the Government in James's trial."[208] The CAAF seems to have left open the possibility that preventing the defense from exploring the specifics of Rose's agreement might have violated AMN James's core constitutional rights had AB Rose not already been sentenced. Taken with *Israel*, the CAAF in *James* assisted counsel in clarifying both the guarantee and the limits of cross-examination.

Having considered various statements this article now examines the common situation of hearsay in the context of the Confrontation Clause.

---

[195] *Id.*

[196] *Id.*

[197] *Id.* This raises the tactical issue for trial counsel of "overcharging" when dealing with a co-accused. It seems unlikely that this much of a sentencing cap was ever needed, but might the subsequent disparity between the maximum punishment and the benefit of the pre-trial agreement have the effect of disproportionately influencing some panel-members?

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.* Interestingly and as stated above, the CAAF had previously held that the Confrontation Clause does not apply to presentencing, though the Due Process Clause does. United States. v. McDonald, 55 M.J. 173 (2001). Nevertheless, the reasoning of *James* occurs within the context of the Confrontation Clause.

[203] *James*, 61 M.J. at 136.

[204] *Id*. at 134 (citing United States v. Bahr, 33 M.J. 228 (C.M.A. 1991)) (citing to Delaware v. Van Arsdall, 475 U.S. 673, 678-679 (1986)).

[205] *Id.* at 136.

[206] *Id*.

[207] *Id.*

[208] *Id.*

Part III: Hearsay and the Sixth Amendment

Background

> *"The law is a sort of hocus-pocus science, that smiles in yer face while it picks yer pocket: and the glorious uncertainty of it is of more use to the professors than the justice of it."*[209]

Statements made by out-of-court declarants are common in courts-martial. Such statements first raise the issue of confrontation and second the issue of hearsay. Whether the particular statement satisfies the Confrontation Clause has become somewhat of a guessing game in the aftermath of *Crawford v. Washington*.[210] Fortunately during its 2006 term, the Supreme Court further defined "testimonial" in *United States v. Davis* and *United States v. Hammon*, two cases that will no doubt be discussed in next year's symposium.[211] Whether these cases will answer all the necessary questions posed by the *Crawford* decision or will simply create additional issues remains to be seen. This article will not dwell on the deep issues of *Crawford* nor will it hazard to predict the impact of *Davis* and *Hammon*. Rather, it will simply review the principal military cases dealing with *Crawford* from the 2005 term. First, however, a cursory review of *Crawford* may be helpful.[212]

Review of Crawford v. Washington

In *Crawford*, the Supreme Court held that when "testimonial" statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.[213] This confrontation must take place at trial, or the court must find the witness unavailable at the time of trial and demonstrate counsel's prior opportunity to cross-examine the witness.[214] And, as previously mentioned and discussed above, the Supreme Court left open the possibility of forfeiture.[215] The critical term for triggering this rule is, of course, "testimonial."

The Supreme Court partially answered the question of what statements might be classified as "testimonial" by first suggesting various definitions that might fully explain the nature of a testimonial statement.[216] From these proposed, but not fully adopted, definitions, the Supreme Court recognized several concrete examples of testimonial statements and several examples of nontestimonial statements.[217] Statements that should be considered nontestimonial, said the Court, include business records and statements made in furtherance of a conspiracy.[218] Additionally, the Court suggested that dying declarations may be treated as nontestimonial statements as an exception to the general rule.[219] Interestingly, the Court seemed to strongly suggest that nontestimonial statements are altogether exempted from Confrontation Clause scrutiny.[220]

---

[209] Charles Macklin (1690–1797), Irish actor, dramatist. CHARLES MACKLIN, SIR ARCHY MACSARCASM, LOVE À LA MODE act 2, sc. 1 (1759), *available at* http://www.bartleby.com/66/25/37225.html.

[210] 541 U.S. 36 (2004).

[211] 2006 U.S. LEXIS 4886 (2006) (declaring that statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency; also providing that statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution).

[212] For an excellent discussion of *Crawford* and its legal and logical underpinnings, see Major Robert Wm. Best, *To Be or Not To Be Testimonial? That Is the Question: 2004 Developments in the Sixth Amendment*, ARMY. LAW., Apr. 2005, at 65 and Best, *supra* note 106, at 55.

[213] *Crawford*, 541 U.S. at 68-69.

[214] *Id*. at 68.

[215] *Id*. at 62.

[216] *Id.* at 51-52 (These definitions include "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.").

[217] *Id.* at 52.

[218] *Id.* at 56.

[219] *Id*. at 52 n.6.

[220] *Id.* at 68. ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

Few courts, however, have been willing to embrace this suggestion[221] and the old paradigm of *Ohio v. Roberts* has been consistently maintained.[222]

With regard to clearly testimonial statements, the Supreme Court offered examples such as ex parte testimony at a preliminary hearing,[223] a plea allocution showing the existence of a conspiracy,[224] grand jury testimony,[225] prior trial testimony,[226] and "statements taken by police officers in the course of interrogations."[227] What "in course of interrogations" means is a subject of intense debate and not a small amount of confusion. Similarly, the character of statements that do not fall neatly within the specified examples is also a subject of great speculation and argument. The practitioner is left with the following difficult question: if the statement does not fall within any of the enumerated examples, when does it become "testimonial?" This article considers several approaches to that question in the context of military courts-martial.

Review of Military Cases Analyzing Crawford v. Washington

The CAAF courageously took up the challenge of defining "testimonial" in *United States v. Scheurer*.[228] Before a military judge, SrA Schuerer pleaded guilty to two specifications of wrongful use of methamphetamine and not guilty to a number of other drug related offenses.[229] Evidence was elicited that at various times SrA Schuerer used drugs by himself, with his wife, and with other individuals.[230] Additionally, SrA Scheurer and his wife, AMN Anne Scheurer, purchased drugs and supplied them to others, including a high school student.[231] Over a period of approximately eight months, Anne discussed her own drug use as well as that of her husband with SrA Sherry Sullivan, an acquaintance.[232] Anne described the Scheurer's efforts to purge their systems of drugs and told SrA Sullivan of her fears that investigators from the Air Force Office of Special Investigations (AFOSI) were monitoring the Scheurer's conduct.[233] Eventually, SrA Sullivan contacted AFOSI and agreed to wear a monitoring device in order to record Anne's admissions.[234] Senior Airman Sullivan ultimately recorded two conversations with Anne regarding the Scheurer's drug use.[235]

---

[221] *See* United States v. Scheurer, 62 M.J. 100, 106 (2005) ("We agree with the conclusion of every published appellate court decision that has considered this issue since *Crawford*: *Ohio v. Robert*s requirement for particularized guarantees of trustworthiness continues to govern confrontation analysis for nontestimonial statements.").

[222] Ohio v. Roberts, 448 U.S. 56, 66 (1980).

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id.

Unavailability is not always required, however, for nontestimonial hearsay. *See* White v. Illinois**,** 502 U.S. 346, 348-49 (1992) (stating that there is no requirement of a finding of unavailability for admittance of a witness' statement as a spontaneous declaration or medical examination exception); *see also* United States v. Inadi, 475 U.S. 387, 395-96 (1986) (stating that there is no requirement for unavailability to admit co-conspirator's statement in furtherance of a conspiracy).

[223] *Crawford*, 541 U.S. at 52.

[224] *Id*. at 64.

[225] *Id*.

[226] *Id.* at 65.

[227] *Id*. at 52.

[228] 62 M.J. 100, 106 (2005).

[229] *Id.* at 103.

[230] *Id.* at 102.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

Based on these recordings, the government preferred charges against SrA Schuerer. The defense counsel moved to suppress Anne's statements to SrA Sullivan.[236] In response, the government called Anne as a witness.[237] Anne invoked the spousal incapacity rule and refused to testify against her husband.[238] The government next called SrA Sullivan who described her conversations with Anne.[239] The military judge made "detailed findings of fact" and "extensive conclusions of law" in determining that Anne was unavailable as a witness, that her statements were statements against her own interest within the meaning of MRE 804(b)(3), and that the circumstances surrounding the making of the statements overcame any presumption of unreliability.[240] After applying the MRE 403 balancing test,[241] the military judge ruled that the statements were admissible against SrA Schuerer provided that they were to be accompanied by instructions to the members explaining how the evidence could be considered.[242] After the military judge determined that the statements were admissible, SrA Schuerer changed his choice of forum to military judge alone. After SrA Scheuer pleaded guilty to two specifications of wrongful use, the military judge convicted him of the remaining contested specifications with the exception of one specification of wrongful use of cocaine and one specification of wrongful distribution of lysergic acid diethylamide.[243]

The issue before the CAAF was whether the military judge violated SrA Schuerer's Sixth Amendment right to confrontation by admitting an accomplice statement against him without requiring that all references to SrA Schuerer be redacted.[244] The court held that the military judge did not violate SrA Schuerer's Sixth Amendment right to confrontation by admitting Anne's statements.[245] The CAAF drew a comparison between *Crawford* and the instant case because both cases involved incriminating statements made by the defendant's spouse who subsequently did not testify because of a spousal privilege.[246] Just as in *Crawford*, Anne's unavailability at trial forced the issue of whether or not her statements could be characterized as testimonial or nontestimonial.[247]

In determining the character of Anne's statements, the CAAF relied upon the reasoning of the Third Circuit in *United States v. Hendricks*.[248] The CAAF first stated that Anne's statements "'neither fall within nor are analogous to any of the specific examples of testimonial statements mentioned by *Crawford*.'"[249] Next, the CAAF, quoting *Hendricks*, reasoned that Anne's statements did not qualify as testimonial based upon any of the definitions suggested by *Crawford*.[250] Anne's statements were not an "'ex parte in-court testimony or its functional equivalent,' nor are they 'extrajudicial statements . . . contained in formalized . . . materials."'[251] Finally, the CAAF pointed to the *Hendricks* rationale that statements unknowingly made to a government informer lack a formality present in the *Crawford* contemplation of testimonial.[252]

---

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.* at 102-03.

[241] *See* MCM, *supra* note 53, MIL. R. EVID. 403.

[242] *Scheurer*, 62 M.J. at 103.

[243] *Id.*

[244] *Id.* at 104.

[245] *Id.* at 108.

[246] *Id.* The spousal privilege rule under Washington state law and the military's spousal incapacity rule differ in operation. In Washington, the defendant can invoke the privilege. Military Rule of Evidence 504(a), however, provides that it is the witness spouse, not the accused, who decides whether or not to testify. MCM, *supra* note 53, MIL. R. EVID. 504(a). Significantly, *Scheurer* overrules a previous case, *United States v. Hughes*, where the court held that a spouse who invoked spousal incapacity to benefit the accused wife or husband was still available for confrontation purposes. United States v. Hughes, 28 M.J. 391 (C.M.A. 1989). Following *Scheurer*, a spouse who invokes his spousal capacity is now *unavailable* for confrontation purposes.

[247] *Crawford* applies only to testimonial statements. Crawford v. Washington, 541 U.S. 36, 43-54 (2004).

[248] *Scheurer*, 62 M.J. at 105 (citing United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005)).

[249] *Id.* at 105.

[250] *Id.* (citing *Hendricks*, 395 F.3d at 181).

[251] *Id.*

[252] *Id*.

"Statements 'cannot be deemed testimonial' if the declarants 'did not make the statements thinking that they would be available for use at a later trial.'"[253]

Finally, the CAAF addressed the involvement of government officers in the production of testimony.[254] To resolve this issue, the CAAF juxtaposed two critical ideas captured from the *Crawford* opinion. The first warned about the involvement of government officials in the production of a statement: "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."[255] The second focused exclusively on the declarant: "[A]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[256] Without any real discussion about the relationship between these two ideas, the CAAF concluded that Anne's statements fell within the second idea and were nontestimonial in nature.[257]

In addressing the issue of the character of Anne's statement, the CAAF raised an interesting question. In dicta, the court allowed for a future situation in which government involvement in the production of a statement could, irrespective of the declarant's expectations, render a statement testimonial.[258] In the instant case, the CAAF found that since the government's role in obtaining Anne's statements "amounted only to facilitation, not direction or suggestion," the role of government and the attendant issues of formality of the statement were essentially rendered moot.[259]

Having determined that the statement was nontestimonial, the CAAF applied the *Ohio v. Roberts* reliability analysis.[260] Anne's statements were admitted as statements against interest, a hearsay exception that is not firmly rooted and must therefore bear particularized guarantees of trustworthiness.[261] Statements against interest bear the additional constitutional burden of being presumptively unreliable.[262] Based on the circumstances surrounding the making of these statements, however, the CAAF found that the military judge correctly concluded that the statements bore the requisite particularized guarantees of trustworthiness.[263] Specifically, the CAAF pointed to the following circumstances as bearing sufficient particularized guarantees of trustworthiness to overcome the presumption of unreliability: the statements were truly self-incriminating, the statements were made almost daily over an eight-month period, the statements indicated a consciousness of the possibility of prosecution, and there was no animosity between Anne and SrA Sullivan.[264]

The practitioner should pay particular attention to the CAAF's analysis in arriving at its determination that the statements at issue were nontestimonial. The court first surveyed the enumerated examples in *Crawford* for clearly testimonial statements. The court then considered the underlying definitions considered by the *Crawford* Court. Finally, the court blended the form, or formality of the statement, with the expectations of the declarant in making the statements. The court readily concluded that statements made unknowingly to a government informant would be non-testimonial, provided that the government simply "facilitated" the statements.

---

[253] *Id.*

[254] Though never fully defined, "government officers" would likely include anyone operating in an official, rather than private, capacity to investigate an alleged crime.

[255] Crawford v. Washington, 541 U.S. 36, 56 (2004).

[256] *Id*. at 51.

[257] *Scheurer*, 62 M.J. at 106.

[258] *Id.* at 105. For an application of this principle, see State v. Siler, 843 N.E.2d 863 (Ohio Ct. App. 2005). In *Siler*, a three-year-old child witness to his mother's murder had no expectation that his statements would be used at trial. Nevertheless, the detective's formal questioning of the child caused the statement to be testimonial in nature.

[259] *Id.* at 106.

[260] *Id.*

[261] *Id.* at 107.

[262] *Id*. (citing Lilly v. Virginia, 527 U.S. 116 (1999)).

[263] *Id.* at 107-08.

[264] *Id.*

The facts of *Schuerer* are intriguing. However, statements made to an unknown informant are certainly the exception, and not the rule, with regard to most criminal prosecutions. A much more common circumstance was addressed by the NMCCA in *United States v. Coulter*.[265]

In *Coulter*, a military judge convicted the accused, Electrician's Mate Second Class (EM2) Coulter, of committing an indecent act upon a child under the age of 16.[266] The court found that EM2 Coulter was left alone in a bedroom with KL, a two-year old girl.[267] When KL's father, Hull Technician Second Class (HT2) L, re-entered the bedroom he noticed KL positioned on a bed in an unusual manner with EM2 Coulter sitting nearby.[268] Coulter immediately leapt to his feet and began acting in a nervous manner, crossing his arms one moment and then shoving his hands into his pockets the next.[269] Coulter then left the home in a somewhat abrupt manner.[270] Hull Technician Second Class L asked KL why she had been sitting on the bed in such an odd manner.[271] KL did not respond.[272] Hull Technician Second Class L took KL downstairs where, in response to the same question, KL pulled her underwear down, pointed to her vaginal area, and said, "He touched me here."[273] Hull Technician Second Class L located his wife and relayed KL's comments to her.[274] The wife then asked the little girl if EM2 Coulter had touched her.[275] KL again pulled down her underwear and, while pointing to her vaginal area, said, "He touched me here."[276] Subsequent medical examinations corroborated KL's claim by revealing injuries consistent her statement.[277] At EM2 Coulter's trial, KL was ruled incompetent to testify pursuant to MRE 601 because of her age and thus unavailable.[278] The military judge admitted KL's statements to her mother and father under the residual hearsay exception.[279]

On appeal, the NMCCA considered whether the military judge violated EM2 Coulter's Sixth Amendment right to confrontation by admitting the statements of an unavailable child witness through her mother and father against EM2 Coulter. The court held that there was no violation.[280] The court analyzed the Confrontation Clause in a somewhat unusual manner, beginning with the hearsay exception, moving to an analysis of the requirements of *Ohio v. Roberts*, and finishing with a look at *Crawford*.[281]

The court first analyzed the hearsay exception at issue—residual hearsay.[282] The court correctly found that by offering the statement under the residual hearsay exception, the government was required to demonstrate that the statement possessed "equivalent circumstantial guarantees commensurate with the other exceptions to the hearsay rule."[283] This language, taken from the text of the MRE 807[284] and *United States v. Giambra*,[285] is somewhat confusing because it is the same language

---

[265] 62 M.J. 520 (N-M. Ct. Crim. App. 2005).

[266] *Id.* at 522.

[267] *Id.*

[268] *Id.*

[269] *Id.* at 523.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.* at 525.

[279] *Id.*

[280] *Id.* at 528.

[281] *Id.* at 525-28.

[282] *Id.* at 525.

[283] *Id.*

[284] MCM, *supra* note 53, MIL. R. EVID. 807.

used for testing some statements under the Confrontation Clause.[286] The confusion was compounded by the NMCCA's reliance on *United States v. Donaldson*.[287] *Donaldson* considered a similar statement made by a child victim under a purely hearsay analysis.[288] In doing so, *Donaldson* suggested the following reliability factors that the *Coulter* court adopted: (1) the mental state and age of the declarant, (2) the spontaneity of the statement, (3) the use of suggestive questioning, and (4) whether the statement can be corroborated.[289]

Considering these factors, including the corroborating medical examination, the service court concluded that the statements of KL met the circumstantial guarantees of trustworthiness for admission as hearsay under MRE 807.[290] The court even went further adding that "[f]or the same reasons, we are also satisfied that the evidence carries the particularized guarantees of trustworthiness required to meet the *Roberts* standard."[291] This is unfortunate because the Supreme Court previously limited the estimation of whether a statement contains the requisite guarantees of trustworthiness to the taking of the statement itself, foreclosing the option of considering extrinsic evidence.[292] Arguably, then, the *Coulter* court erred in conflating the standards for MRE 807 with the constitutional demands of confrontation as presented in *Roberts*.[293] Interestingly, the *Coulter* court added in a footnote that the statement might also be considered admissible as a present sense impression.[294]

The NMCCA next considered the implications of *Crawford* in admitting KL's statements.[295] In a somewhat less nuanced analysis than the CAAF's reasoning in *Scheurer*, the *Coulter* court found that the statements fell outside the definition of a testimonial statement.[296] First, the court concluded that KL's statements did not "fall within, or were analogous to" the specific examples of testimonial statements found in any of *Crawford's* definitions of testimonial.[297] The court then reasoned that an objective witness would not reasonably believe that such statements would be used later at trial.[298] Additionally, the court pointed out that "the motivation behind HT2 L and Mrs L's questioning" was not to procure and preserve a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."[299] Finally, the court found that KL's statements were not the product of a situation that bore a "kinship to the abuses at which the Confrontation Clause was directed," but was instead a product of "the normal and expected parental instinct to protect their cherished offspring."[300] The statements, then, were nontestimonial. Having found the statement to be nontestimonial in nature, the court properly applied *Roberts* to the hearsay statement.[301] Accordingly, the NMCCA found that the trial court did not err in admitting the statements against the accused.[302]

---

[285] 33 M.J. 331 (C.M.A. 1991).

[286] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[287] *Coulter*, 62 M.J. at 525 (citing United States v. Donaldson, 58 M.J. 477 (2003)).

[288] *Donaldson*, 58 M.J. at 488.

[289] *Coulter*, 62 M.J. at 525 (citing *Donaldson*, 58 M.J. at 488).

[290] *Id.*

[291] *Id.*

[292] Idaho v. Wright, 497 U.S. 805, 823 (1990).

[293] The determination of whether the statement can be corroborated by extrinsic evidence may be relevant to whether the statement satisfies the requirements of the hearsay exception. With regard to the Confrontation Clause, however, the court is limited to the circumstances surrounding the taking of the statement and cannot rely upon extrinsic evidence. *See* Lilly v. Virginia, 527 U.S. 116, 137-38 (1999); *Wright*, 497 U.S. at 820, 823.

[294] *Coulter*, 62 M.J. at 526, n.3. Whether the hearsay exception of "present sense impression" is firmly rooted is a subject of some debate. *See* Gutierrez v. McGinnis, 389 F.3d 300, 303 (2d Cir. 2004) ("[t]he question of whether the present sense impression is a "firmly rooted" hearsay exception remains open."); *see also* United States v. Murillo, 288 F.3d 1126, 1137 (9th Cir. 2002) (stating that the government concedes and the court agrees that no caselaw supports classifying the present sense impression as "firmly rooted").

[295] *Coulter*, 62 M.J. at 526.

[296] *Id.* at 528.

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

Coulter, like *Scheurer*, assists the practitioner in providing a slightly different analytical framework for confrontation questions. The NMCCA began with a purely hearsay analysis. This technique has a distinct advantage—if a statement fails to satisfy the hearsay requirements, the practitioner has no need to enter the wilderness of a confrontation analysis. If, on the other hand, the hearsay requirements are satisfied, one of two broad confrontation tests will be applied—*Roberts* or *Crawford*. The question as to which test applies comes back to the original question—what does testimonial mean? The *Coulter* court made fairly quick work of this issue. The facts of *Coulter* strongly favor a nontestimonial characterization. Very simply, there was no government involvement in the production of the statement. Without governmental involvement, there is no real issue of the "unique potential for prosecutorial abuse" dangers contemplated by the framers. The absence of government involvement also addresses concerns regarding the form of the statement. Clearly KL's statement did not fall within either of the specific examples of testimonial statements nor did it fit within the broad definitions of a testimonial statement provided by *Crawford*. Finally, the issue of the declarant's expectations was also a fairly easy question to resolve. The statements at issue resulted from a spontaneous, traumatic conversation between the young, naïve girl and her sincerely and intensely interested parents. These statements, the court readily determined, were not of such a nature that the declarant would expect the statements to be used prosecutorially at a later date. As a result, the *Coulter* court appears to have rightly concluded that KL's statements were nontestimonial.

Coulter provides one additional lesson to the practitioner, or at least a reminder of an old lesson. This case again suggests that multiple theories of admissibility should be offered by trial counsel when hearsay is at issue. For example, and as was the case in *Coulter*, a present sense impression might be considered a firmly rooted hearsay exception and, as such, would satisfy the Confrontation Clause, assuming the statement is characterized as nontestimonial. Other firmly rooted hearsay exceptions, most notably excited utterances and statements made for medical diagnosis and treatment, would almost certainly satisfy the Confrontation Clause analysis.[303] Similarly, an opponent to the statement might find it useful to articulate exactly why the statement does not satisfy the requirements of any particular hearsay exception. With regard to statements that are not firmly rooted, such as residual hearsay as in *Coulte*r, or statements against interest as in *Scheurer*, the defense counsel can rightfully force the government to remain within the bounds of the making of the statement itself and forbid treading into the territory of extrinsic evidence.

From the perspective of determining whether a statement is testimonial or not, *Coulter* is a straightforward case. Perhaps equally straightforward are cases involving business records. *Crawford* clearly lists business records under the category of nontestimonial statements.[304] Applying this guidance, the NMCCA held in *United States v. Rankin*[305] that the underlying documents used to prove an unauthorized absence charge were non-testimonial. Similarly, in another unpublished opinion, the service court in *United States v. Ryan*[306] held that urinalysis results in a wrongful use case were not testimonial in nature. More significantly is *United States v. Maygari*, a CAAF case that also held that the results of a urinalysis were not testimonial in nature.[307] For the practitioner today, business records are generally nontestimonial in nature. Though not without exception,[308] this rule is the closest sure a thing in Confrontation Clause jurisprudence as can be found.

Conclusion

Many statements were made this term regarding the Confrontation Clause. Those statements lend themselves to an intelligent, understandable conversation to the careful listener. In reverse order of presentation in this article, consider once again the following seemingly disparate comments.

First, when the declarant is not present at trial and hearsay is not at issue, the fundamental question is one of categorization. Whether a statement is testimonial or nontestimonial in nature is a matter of careful legal analysis, a pattern of which is provided in the *Scheurer* opinion. For hearsay that is testimonial in nature, only production of the witness or a

---

[303] Idaho v. Wright, 497 U.S. 805, 827 (1990).

[304] Crawford v. Washington, 541 U.S. 36, 56 (2004).

[305] No. 200101441, 2005 CCA LEXIS 354 (N-M. Ct. Crim. App. Nov. 10, 2005) (unpublished).

[306] No. 9900374, 2005 CCA LEXIS 407 (N-M. Ct. Crim. App. Dec. 30, 2005) (unpublished).

[307] 62 M.J. 123 (2006).

[308] *See* People v. Rogers, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (blood test generated in anticipation of trial by prosecution testimonial in nature); *see also* People v. Hernandez, 794 N.Y.S.2d 788, 789 (N.Y. Sup. Ct. 2005) (fingerprint records testimonial in nature); Commonwealth v. Carter, 861 A.2d 957 (Pa. Super. Ct. 2004) (lab report identifying substance as cocaine testimonial in nature).

demonstration of unavailability coupled with a prior opportunity to cross-examine will satisfy constitutional demands. If the hearsay is nontestimonial in nature, the critical question becomes one of classifying the hearsay as firmly rooted or bearing particularized guarantees of trustworthiness. If the hearsay is of the latter classification, then care should be taken to look only at the circumstances of the taking of the statement and not at extrinsic evidence. If the hearsay is of the former classification, firmly rooted, then generally the constitutional demands will be satisfied. Second, if the witness is not produced at trial, the court must determine whether the witness is truly unavailable. Practitioners should take care in discerning the difference between legal availability, physical availability, availability for the purpose of the Confrontation Clause, and availability for the purpose of hearsay. *Rhodes* and *Campbell* are instructive in this regard. Practitioners should take care when the witness testifies in some way other than in-person, in-court testimony. Here, *Yates* and the question of remote testimony is instructive. Third, for the witness who does testify, proper latitude must be given for cross-examination in order to satisfy the Confrontation Clause, a point emphasized by both *Israel* and *James*. Fourth and finally, in rare cases, the Confrontation Clause may be satisfied even in the absence of the witness if waiver or forfeiture may be established, a proposition perhaps best considered in light of the *Mayhew* and *Jordan* opinions. Together these varied statements really do lend themselves to a conversation—a conversation of key importance to the military justice practitioner.