THE CONFRONTATION CLAUSE AND PRETRIAL HEARINGS: A DUE PROCESS SOLUTION

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Despite the recent crop of Supreme Court cases addressing the Confrontation Clause of the Sixth Amendment, many issues regarding the application of the Confrontation Clause remain unresolved. In this Note, the author articulates and analyzes one such lingering question: whether the Confrontation Clause applies to pretrial hearings, and if so, to what extent. After describing the relevant Supreme Court precedent—including the current state of Confrontation Clause jurisprudence—the author examines the various ways lower courts have interpreted and applied that precedent in determining whether the Confrontation Clause applies prior to trial. The author then articulates three potential approaches to applying the Confrontation Clause to pretrial hearings, yet ultimately concludes that the preferable means of reconciling Supreme Court precedent with the necessity of protecting criminal defendants' confrontation rights prior to trial is to analyze such questions under a due process—rather than a Confrontation Clause—framework.

I. INTRODUCTION

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[1]

The Confrontation Clause of the Sixth Amendment to the United States Constitution is only one short phrase and yet, like so many other constitutional issues, the meaning of these few words has been the subject of countless court opinions. For more than a century, the Supreme Court of the United States has struggled with the protections of the Confrontation Clause, particularly as they relate to the rules against hearsay, developing, revising, and abandoning doctrine in a patchwork of cases. In *Crawford v. Washington*, decided by the Court in 2004, the Court tried to reclaim the Confrontation Clause and develop a coherent theory for

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1. U.S. CONST. amend. VI.

its application.[2] Questions remain, however, about the Confrontation Clause's applicability in a number of situations.

This Note explores one of these situations: the role of the Confrontation Clause in protecting a defendant's right to confrontation at pretrial hearings.[3] The question of whether and to what extent Confrontation Clause doctrine should apply prior to trial is one issue about which the Court has been surprisingly silent. Particularly after the Court's ruling in *Crawford*, however, several state and lower federal courts have had to consider the issue, and, predictably, different courts have come to different conclusions.[4] This Note analyzes each of these approaches and ultimately concludes that none are satisfactory in reconciling the rights of defendants at pretrial hearings with the Supreme Court precedent. Instead, this Note argues that while defendants should have some confrontation rights prior to trial, these rights may be better governed by the principles of due process instead of Confrontation Clause doctrine.

Analysis of this issue begins in Part II, which outlines the relevant Supreme Court precedent. Part II first describes the current Supreme Court doctrine that governs the applicability of the Confrontation Clause at trial and then details the case law relevant to the application of the right to confrontation at pretrial hearings. Part III describes how state and lower federal courts have applied this precedent and analyzes why courts have come to different conclusions. It then details three possible solutions to the issue of how the Confrontation Clause should apply to pretrial hearings, ultimately concluding that none is satisfactory. Finally, Part IV introduces the idea of due process and proposes that a better way to reconcile Supreme Court precedent with the need to protect defendants' rights at pretrial hearings is to remove the analysis from the Confrontation Clause framework and instead to apply a due process balancing test.

II. BACKGROUND

The Confrontation Clause of the Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[5] This Section provides background on the Supreme Court cases that have interpreted this clause. It first details the history and current applicability of the Con-

2. *See generally* Crawford v. Washington, 541 U.S. 36 (2004).

3. It is not clear exactly which pretrial procedures courts are referring to when they discuss the Confrontation Clause's applicability to "pretrial hearings." Rule 17.1 of the Federal Rules of Criminal Procedure discusses "pretrial conferences," which seem to refer to any formal or informal meeting of the parties and the court prior to trial. *See* FED. R. CRIM. P. 17.1. But most of the state and lower federal courts who have considered the confrontation issue have done so in the context of formal adversarial hearings such as hearings on suppression motions. *See infra* notes 146–47. For the purposes of the discussion in this Note, "pretrial hearings" is assumed to refer to these formal adversarial hearings.

4. *See* cases cited *infra* notes 122–24 and accompanying text.

5. U.S. CONST. amend. VI.

frontation Clause at trial. Then it outlines Supreme Court precedent relevant to the question of whether the Confrontation Clause applies prior to trial.

A. Confrontation Clause Rights at Trial

The Confrontation Clause was included in the U.S. Constitution as part of the Bill of Rights in 1791.[6] This clause guarantees a criminal defendant the right to physically face witnesses who are giving testimony against him and to cross-examine those witnesses to test the truth of their statements and to attack their credibility.[7] In incorporating this right to the states in *Pointer v. Texas*, the Supreme Court stated that "the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[8]

The protections that the Confrontation Clause provides a criminal defendant at trial fall into roughly three categories. First, a defendant has the right to "a face-to-face meeting with witnesses appearing before the trier of fact,"[9] although this right has been limited in some situations involving abusers and child witnesses.[10] Second, the Confrontation Clause guarantees a defendant an opportunity for effective cross-examination,[11] which means limitations on the scope of witness questioning at trial must be justified and reasonable.[12] Finally, the Confrontation Clause limits the admission of out-of-court statements (hearsay) as evidence against the defendant.[13]

Most litigation concerning the Confrontation Clause involves this third category and the relationship between the right to confrontation and hearsay. Generally, evidence rules prohibit hearsay from being admitted as evidence,[14] but these rules allow many exceptions.[15] The Confrontation Clause provides an independent constitutional limit on the

6. *Crawford*, 541 U.S. at 46.

7. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987).

8. Pointer v. Texas, 380 U.S. 400, 405 (1965).

9. Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

10. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 857 (1990) ("[W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence . . . .").

11. Davis v. Alaska, 415 U.S. 308, 315–16 (1974); *see also* Delaware v. Fensterer, 474 U.S. 15, 20 (1985).

12. *See* Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) ("[T]rial judges retain wide latitudes . . . to impose reasonable limits on such cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.").

13. *See Fensterer*, 474 U.S. at 18.

14. *See, e.g.*, FED. R. EVID. 802.

15. *See, e.g.*, FED. R. EVID. 803, 804.

admission of hearsay.[16] A hearsay statement must both fit into a hearsay exception under the evidence rules and not violate the Confrontation Clause for it to be allowed in as evidence.[17]

Until the Court decided *Crawford v. Washington* in 2004, hearsay evidence was acceptable under the Confrontation Clause if it had some "indicia of reliability."[18] This rule was set out by the Court in *Ohio v. Roberts*, where the Court held

> [W]hen 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.[19]

Cases that followed attempted to define what qualified as "firmly rooted hearsay exceptions" and "particularized guarantees of trustworthiness."[20]

In 2004, however, the Court revisited this rule, setting out a new standard in *Crawford v. Washington* for when hearsay did not violate the Confrontation Clause.[21] In *Crawford*, the Court emphasized that the Confrontation Clause is a procedural guarantee, requiring cross-examination, and held that "amorphous notions of 'reliability'" are not enough for statements to be admissible under the Sixth Amendment.[22] The opinion contained a lengthy discussion of the history and rationale behind the Confrontation Clause.[23] The Court argued that in relation to evidentiary issues, the Confrontation Clause was mainly intended to prevent the admission of testimonial statements by absent witnesses, unless the defendant had a prior opportunity for cross-examination.[24] Therefore the Court concluded the Confrontation Clause required that "[t]estimonial statements of witnesses absent from trial [should be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[25]

16. *See* Daniel Huff, *Confronting* Crawford, 85 NEB. L. REV. 417, 418–19 (2006) ("The hearsay evidence rules are layered on top of whatever constitutional requirements the Confrontation Clause imposes. Both may protect the same interests, but the Confrontation Clause represents the minimum safeguards of fairness for the defendant.").

17. *See id.*

18. Ohio v. Roberts, 448 U.S. 56, 65–66 (1980) (citing Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).

19. *Id.* at 66.

20. *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 125–40 (1999); Idaho v. Wright, 497 U.S. 805, 815–25 (1990).

21. Crawford v. Washington, 541 U.S. 36, 61 (2004).

22. *Id.*

23. *See id.* at 42–68.

24. *Id.* at 53–54.

25. *Id.* at 59.

The decision in *Crawford* has been seen by many to be essentially resuscitating the Confrontation Clause, giving defendants a much better chance at keeping hearsay from being admitted against them at trial than under the old rule in *Roberts*.[26] *Crawford*, however, left open many questions concerning the Confrontation Clause,[27] particularly the issue of what statements qualify as "testimonial."[28] Another emerging issue is what effect the rule in *Crawford* has prior to trial. Several defendants have tried to argue that *Crawford* should apply to hearsay admitted at pretrial hearings as well as at trial.[29] But while the right to confrontation protected by the Confrontation Clause is clearly guaranteed at trial,[30] it is much less clear the effect the Confrontation Clause has prior to trial, particularly in the context of pretrial hearings. The next Section examines the patchwork of Supreme Court decisions that have considered Confrontation Clause issues in the context of pretrial hearings. These cases form the basis for the arguments by courts and defendants who claim the Confrontation Clause should apply to pretrial hearings and courts and prosecutors who claim it should not.

B. Confrontation Rights Prior to Trial

As noted above, one way defendants have tried to take advantage of the increased protections of the right to confrontation provided by *Crawford* is to argue that *Crawford* should apply to pretrial hearings just as it does at trial.[31] But for the rule in *Crawford* to apply to pretrial hearings, the Confrontation Clause itself must apply to pretrial hearings. The Supreme Court has never indicated that a defendant has no right to confrontation prior to trial, but it is not clear that the Confrontation Clause applies in full force to pretrial hearings either. The Sections below outline the Supreme Court precedent relevant to determining whether and to what extent the Confrontation Clause applies prior to trial.

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26. *See* Huff, *supra* note 16, at 452 ("With the requirements of confrontation now stricter, the burden of demanding it is greater. There is a real cost to prosecutors in complying with *Crawford*."); *see also* Curry v. State, 228 S.W.3d 292, 296 (Tex. App. 2007) ("In *Crawford v. Washington*, the Supreme Court of the United States essentially resuscitated the Confrontation Clause . . . .").

27. For analysis of several issues left open by *Crawford*, see generally Huff, *supra* note 16.

28. In 2006, the Court attempted to provide some guidance on what statements should be considered "testimonial." The Court's decision in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* set out a purpose test for statements made in the context of police interrogation:

> 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. They 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.

547 U.S. 813, 822 (2006).

29. *See infra* Part III.A.

30. *See* Pointer v. Texas, 380 U.S. 400, 404–05 (1965).

31. *See infra* Part III.A.

1. Early Cases

The Court's first brief analysis of the right to confrontation in the context of a pretrial hearing occurred in 1967 in a case called *McCray v. Illinois*.[32] The defendant in *McCray* claimed his right to confrontation was violated at a suppression hearing in which he challenged the probable cause of his arrest.[33] The trial court permitted the police officers testifying at the suppression hearing to refuse to answer questions about the identity of the informant who had led them to suspect McCray was selling drugs.[34] In response to the argument that McCray's Sixth Amendment rights were violated by not producing the informant to testify at the hearing, the Court said, without any further elaboration, "This contention we consider absolutely devoid of merit."[35]

This quick dismissal may imply that the Confrontation Clause has no role at all in pretrial hearings. In its holding, however, the Court relied in part on the fact that case law at the time did not require that an informer's identity always be disclosed at trial[36] when the Confrontation Clause applied with full force.[37] Thus, using this decision to support an argument that the Confrontation Clause does not apply at all at pretrial hearings seems to misinterpret the Court's reasoning.

Additionally, the Court in *McCray* did consider McCray's additional Confrontation Clause argument that his right to confrontation and cross-examination of the police officers themselves was infringed because they were permitted to refuse to reveal the identity of the informant.[38] The Court found this argument unpersuasive as well because it viewed the refusal to reveal an informant's identity as a testimonial privilege and the Sixth Amendment cannot prevent witnesses from asserting testimonial privileges.[39] The mere fact that the Court engaged in an analysis of the confrontation issue, however, implies that the Confrontation Clause applied, at least to some effect, at pretrial hearings, although the exact role of the Confrontation Clause prior to trial remained unclear.

Some guidance on this question may be found in *Gerstein v. Pugh*, decided by the Court only a few years later in 1975.[40] This case analyzed a Florida law that allowed suspects arrested without warrants to be held for trial without providing them an opportunity to challenge the probable cause for their arrest at a judicial hearing.[41] The Court held that a judi-

32. 386 U.S. 300 (1967).
33. *Id.* at 312–13.
34. *Id.* at 305.
35. *Id.* at 314 (quoting Cooper v. California, 386 U.S. 58, 62 n.2 (1967)).
36. *Id.* at 312.
37. *See, e.g.*, California v. Green, 399 U.S. 149, 157 (1970) ("Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause . . . .").
38. *McCray*, 386 U.S. at 314.
39. *Id.*
40. 420 U.S. 103 (1975).
41. *Id.* at 105–06.

cial determination of probable cause was constitutionally required,[42] but it reversed the lower court decisions that required this determination to be through a full adversarial hearing accompanied by the right to counsel, confrontation, cross-examination, and compulsory process.[43] Thus, a judge needed to decide whether there was probable cause for a suspect's arrest before the suspect could be held for trial, but this decision did not have to occur at a formal hearing, with formal procedural requirements, to be constitutional.[44]

Like *McCray*, this case on its face may seem to imply that the right to confrontation does not apply to pretrial hearings, because the Court said that confrontation and cross-examination are not required for the determination of probable cause.[45] But the Court's conclusion in *Gerstein* was not that these rights are not constitutionally required but rather the *hearing itself* is not constitutionally required, or at least an adversarial hearing similar to other pretrial hearings.[46] Instead, the Court said that a judge must determine if there was probable cause to hold the person until trial and that at a minimum this requires a nonadversarial, informal proceeding in front of a magistrate, similar to what would be required for police to get a warrant for arrest.[47] *Gerstein* suggests, then, that cross-examination and confrontation of witnesses is not constitutionally necessary at informal, nonadversarial hearings, but it left open the larger issue of what role the right to confrontation plays at an actual adversarial pretrial hearing.

2. "The Right to Confrontation Is a Trial Right"

In between *McCray* and *Gerstein*, the Court decided a pair of cases that addressed the Confrontation Clause right in the context of trial, *Barber v. Page* in 1968[48] and *California v. Green* in 1970.[49] Neither case directly addressed the effect of the Confrontation Clause prior to trial, but both included language that later courts would use to support decisions that the Confrontation Clause did not apply to pretrial hearings.[50]

In *Barber*, the Court asserted that "[t]he right to confrontation is basically a trial right."[51] This quote, with nothing more, certainly implies that the right to confrontation applies only to trial and not to pretrial hearings. In *Barber*, however, the defendant was given an opportunity to

42. *Id.* at 114.
43. *Id.* at 119–20.
44. *Id.*
45. *Id.* at 120.
46. *Id.*
47. *Id.*
48. 390 U.S. 719 (1968).
49. 399 U.S. 149 (1970).
50. *See infra* Part III.A.2.
51. *Barber*, 390 U.S. at 725.

cross-examine a witness at a preliminary hearing.[52] The issue on appeal was not whether he had a confrontation right at the preliminary hearing, but instead whether the preliminary hearing testimony of the witness could come in at trial when the witness himself did not appear.[53] In holding that the admission of this evidence at trial violated the Confrontation Clause, the Court emphasized that the Confrontation Clause is a trial right and that cross-examination at a preliminary hearing may not be enough to satisfy the right to confrontation at trial.[54] When considered in context, this quote is far from declaring that a defendant has no confrontation rights prior to trial.

Similarly, in *Green*, the Court's opinion included this statement: "Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause . . . ."[55] The Court used this reasoning to find that prior inconsistent statements of a witness at a preliminary hearing could be admitted when the witness also testified and was cross-examined at trial.[56] Because the defendant was able to literally confront this witness at trial, the admission of prior inconsistent statements of the witness did not violate the Confrontation Clause.[57] While this opinion confirms that the right to confront witnesses at trial is the main purpose of the Confrontation Clause, it does not follow that this right does not apply at all outside of the trial setting. In fact, the defendant in *Green* was able to extensively cross-examine the witness in question at a preliminary hearing.[58] At the core of the Confrontation Clause may be a protection of rights at trial, but it is overreaching to suggest that this means that this constitutional protection has no effect beyond the context of trial.

The emphasis on the right to confrontation as a trial right culminated in *Pennsylvania v. Ritchie*, decided by the Court in 1987.[59] In *Ritchie*, the Court stated, "The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination."[60] Unlike *Barber* and *Green*, which focused on trial, *Ritchie* confronted the issue of applying the Confrontation Clause to pretrial

52. *Id.* at 722. Barber did not exercise his right to cross-examine when given the opportunity at the preliminary hearing but was considered to have waived his right to cross-examination for the purposes of the Court's analysis. *Id.*

53. *Id.* at 720.

54. *Id.* at 725.

55. California v. Green, 399 U.S. 149, 157 (1970).

56. *Id.* at 164.

57. *Id.* at 158 ("[T]here is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.").

58. *Id.* at 151.

59. 480 U.S. 39 (1987).

60. *Id.* at 52.

procedure directly.[61] During discovery, Ritchie was denied access to the reports of a state agency that had investigated claims by Ritchie's daughter that he had sexually abused her.[62] He argued that this information was necessary for effective cross-examination of the victim at trial and that denying him access to the agency material violated his confrontation rights.[63] A plurality of the Court disagreed, emphasizing that as long as defendants get the opportunity to cross-examine witnesses at trial, the confrontation right is satisfied and the Confrontation Clause does not require "the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony."[64]

Some would say that *Ritchie* settled the issue: the Confrontation Clause applies only to trial. Once again, however, this seems to be reading the Court's opinion too broadly. The first flaw in this reading of the Court's opinion is that the key passage about the Confrontation Clause (Part III-A of the opinion) was signed by only four justices, making this section a plurality opinion and not part of the majority opinion.[65] Justice Harry Blackmun, who joined the Court on the rest of the opinion, wrote a concurring opinion where he stated that he refused to join Part III-A because he disagreed with the plurality's conclusion "that the Confrontation Clause protects only a defendant's trial rights and has no relevance to pretrial discovery."[66] Instead, Justice Blackmun argued that "there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness."[67] Because Justice Blackmun disagreed with this portion of the Court's opinion, the conclusion that the right to confrontation is a trial right and only a trial right is not one endorsed by the Court.

Additionally, it can be argued that even the plurality of the Court who agreed that the right to confrontation is a trial right did not intend this to mean that the Confrontation Clause has no effect at pretrial hearings. These justices were concerned that the Confrontation Clause would be used as "a constitutionally compelled rule of pretrial discovery," and they believed that this was beyond its scope.[68] The argument that defendants have some right to confront witnesses who testify at pretrial hearings, however, does not necessarily engage the Confrontation Clause in the way the plurality in *Ritchie* was worried about. Ritchie argued his confrontation rights *at trial* were violated because prior to trial he was not allowed access to information necessary for effective cross-

61. *Id.* at 51–53.
62. *Id.* at 44–45.
63. *Id.* at 51.
64. *Id.* at 53.
65. *Id.* at 42.
66. *Id.* at 61 (Blackmun, J., concurring in part and in the judgment).
67. *Id.* at 61–62.
68. *Id.* at 52 (plurality opinion).

examination.[69] And a plurality of the Court disagreed.[70] This argument differs from an argument that a defendant's confrontation rights were violated *at a pretrial hearing*, because he was denied cross-examination or the ability to confront a witness at that hearing.

Of course, it may be argued that the plurality in *Ritchie* (and possibly the rest of the Court as well) would see the application of the right to confrontation to a pretrial hearing as even further beyond the scope of the Confrontation Clause. But it remained unclear after *Ritchie* to what extent, if at all, the Confrontation Clause applies to pretrial hearings.

Later that year, Justice Blackmun, writing for the majority in *Kentucky v. Stincer*, reaffirmed his view of the Confrontation Clause.[71] In *Stincer*, the Court addressed whether a defendant's right to confrontation was violated when he was excluded from an in-chambers hearing to determine the competency of two child witnesses.[72] In a footnote of the opinion, Justice Blackmun restated his disagreement with the plurality in *Ritchie*, noting that the difference of opinion was not implicated in the current case because Stincer's exclusion from the competency hearing did not affect his ability to fully cross-examine the witnesses at trial.[73]

The Court's holding that excluding Stincer from the hearing did not violate the Confrontation Clause is relevant to the question of whether the Confrontation Clause applies to pretrial hearings.[74] The fact that the Court found this procedure to be acceptable may seem to imply that the Confrontation Clause does not apply to pretrial hearings. But the Court refused to make this distinction in the opinion, specifically stating that a competency hearing of this sort may not be a pretrial proceeding at all, but instead part of the trial.[75] Rather than analyzing how the right to confrontation applies to pretrial proceedings, the Court instead decided "it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination,"[76] and they found that it did not.[77]

Thus, after *Stincer*, the issue of whether the Confrontation Clause applied to pretrial hearings remained unclear. The Court had said that the right to confrontation is a trial right, but none of its opinions specifically limited the right to the trial setting. A plurality of the Court in *Ritchie* felt that the Confrontation Clause should not be used in the context of pretrial discovery.[78] And a majority in *Stincer* chose to analyze the issue in the context of a competency hearing without making a distinction

69. *Id.* at 51.
70. *Id.* at 52.
71. 482 U.S. 730, 738–39 (1987).
72. *Id.* at 732–33.
73. *Id.* at 738–39 n.9.
74. *See id.* at 744.
75. *Id.* at 739–40.
76. *Id.* at 740.
77. *Id.* at 744.
78. Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987).

between trial and pretrial procedure.[79] Yet, to extrapolate from these decisions that the Confrontation Clause does not apply at all to pretrial hearings seems to be overreaching.

3. The "Critical Stage" Analysis

During the same time period the Court was considering the early Confrontation Clause cases detailed above, it also decided several cases relating to other procedural constitutional guarantees. One of the doctrines that developed during this time was the application of the Sixth Amendment right to counsel[80] to proceedings prior to trial using the "critical stage" test.[81] Although the Court did not apply the test in the context of the Sixth Amendment right to confrontation, some state courts and lower federal courts would later apply it as part of an analysis of whether the Confrontation Clause applies prior to trial.[82]

In *United States v. Wade*, the Court held that a defendant has a right to the presence of his attorney at a post-indictment lineup because it was a "critical stage" during which the presence of counsel was necessary to protect the accused's interests.[83] The Court recognized that law enforcement processes had changed since the Bill of Rights was passed and that in modern criminal proceedings the fate of a defendant could be affected long before the official trial.[84] It is these "pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality" that are critical stages of the criminal prosecution, and a defendant is entitled to representation by counsel at these stages to ensure a fair trial.[85]

While some initial proceedings involving criminal defendants may not be "critical" in the sense that their outcomes may limit an accused's defense,[86] other pretrial hearings are clearly "critical stages" that require the presence of counsel. These include some preliminary hearings,[87] entrapment hearings,[88] and suppression hearings.[89] The outcomes of these types of hearings "[hold] significant consequences for the accused"[90] and

79. *Stincer*, 482 U.S. at 740.

80. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence." U.S. CONST. amend. VI.

81. *See* United States v. Wade, 388 U.S. 218, 224–25 (1967).

82. *See infra* Part III.A.1.

83. *Wade*, 388 U.S. at 224–27.

84. *Id.* at 224.

85. *Id.*

86. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 122 (1975) (stating that counsel is not necessary at a preliminary probable cause determination).

87. *Compare* White v. Maryland, 373 U.S. 59, 59–60 (1963) (holding a preliminary hearing in which a plea of guilt was made in the absence of counsel to be a "critical stage"), *with* Rothgery v. Gillespie County, 128 S. Ct. 2578, 2600 (2008) (holding that an initial appearance did not constitute a critical stage because it did not involve entry of a plea and it was nonadversarial).

88. *See, e.g.*, People v. Sammons, 478 N.W.2d 901, 907 (Mich. Ct. App. 1991).

89. *See, e.g.*, Olney v. United States, 433 F.2d 161, 163 (9th Cir. 1970).

90. Bell v. Cone, 535 U.S. 685, 696 (2002).

are stages of the criminal process "where rights are preserved or lost."[91] The assistance of counsel in these hearings is therefore constitutionally required to ensure that a defendant has the ability to present a full defense.[92]

The Court has recognized the effect the decisions in these critical stages of the prosecution can have on the ultimate determination of whether an accused is found guilty.[93] Some state and lower federal courts have expanded on this reasoning and required that an accused be granted the protection of other constitutional procedural guarantees at pretrial hearings, including the right to confrontation.[94] Although the line of Court cases applying the critical stage test is not directly related to the Confrontation Clause, it is still relevant to the overall issue of whether and to what extent the Confrontation Clause applies prior to trial when its application by some state and lower federal courts is considered.

4. Hearsay at Pretrial Hearings

Another dimension of the analysis of whether and to what extent the Confrontation Clause applies prior to trial involves the admission of hearsay at pretrial hearings. The central concern of both the rules of evidence against hearsay and the Confrontation Clause is to ensure the reliability of evidence against a party by preserving the ability to confront witnesses in open court through cross-examination.[95] The evidence rules against hearsay, however, have numerous exceptions and often allow in testimony that has not been subject to cross-examination.[96] But taken literally, the Confrontation Clause's requirement that an accused has the right to "be confronted with the witnesses against him" seems to require that all hearsay be excluded in criminal proceedings unless the declarant is present at trial, eliminating almost every hearsay exception.[97]

The Court, however, has not been willing to interpret the Confrontation Clause this broadly and has found that some hearsay statements can still be admitted at trial.[98] It is clear, though, that at least some hearsay that would be admissible at trial under a hearsay exception is barred by the Confrontation Clause in criminal trials.[99] The exact relationship between the Confrontation Clause and the evidence rules against hear-

91. *White*, 373 U.S. at 60 (citing Hamilton v. Alabama, 368 U.S. 52, 53–54 (1961)).

92. United States v. Wade, 388 U.S. 218, 224–25 (1967).

93. *Id.* at 224.

94. *See infra* Part III.A.1.

95. *See* Maryland v. Craig, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."); s*ee also* MCCORMICK ON EVIDENCE § 252 (Kenneth S. Broun ed., 6th ed. 2006).

96. The Federal Rules of Evidence list twenty-eight exceptions to the hearsay rule in Rules 803 and 804 alone. FED. R. EVID. 803, 804.

97. U.S. CONST. amend. VI; *see* Ohio v. Roberts, 448 U.S. 56, 62–63 (1980).

98. *See* Crawford v. Washington, 541 U.S. 36, 50–51 (2004); *Roberts*, 448 U.S. at 62–65.

99. *Roberts*, 448 U.S. at 63.

say has not been completely defined,[100] but because these concepts are integrally linked, the Court's approach toward hearsay at pretrial hearings gives some insight into how the Confrontation Clause should be applied in this context.

In *United States v. Matlock*, the Court considered the admission of hearsay in the context of a suppression hearing.[101] The Court held that "certainly there should be no automatic rule against the reception of hearsay evidence in [proceedings where the judge is considering the admissibility of evidence]."[102] The Court found it proper for the trial judge to consider at a suppression hearing the statements of a witness to police[103] that arguably would have been excluded as hearsay under the Federal Rules of Evidence.[104] To support this decision, the Court cited the 1949 case *Brinegar v. United States*,[105] which allowed hearsay evidence that was excluded from trial to be admitted at a preliminary hearing.[106] Both of these cases suggest that the standards for admitting evidence should be different than those at trial when a defendant is trying to prove not guilt but probable cause at a suppression hearing and it is the judge and not the jury deciding.[107]

The Federal Rules of Evidence support this view, specifically Rule 104(a) and Rule 1101.[108] Rule 104(a) concerns preliminary questions of admissibility and provides in part that "[i]n making its determination [the court] is not bound by the rules of evidence except those with respect to privileges."[109] Rule 1101 governs the applicability of the rules of evidence, stating in section (d) that the rules (except for those with respect to privileges) do not apply to the determination of preliminary questions of fact, grand jury proceedings, preliminary examinations in criminal cases, sentencing, the issuance of warrants, and bail hearings.[110] Under these provisions, the rule against hearsay and its exceptions would not apply in these situations, many of which are pretrial hearings in criminal cases.

But the Court in *Matlock* does not explicitly say that hearsay is always admissible in pretrial hearings, although some of the Court's later

100. As noted *supra* Part II.A, the Court's decision in *Crawford v. Washington* set out a completely different approach to the Confrontation Clause, and as a result, courts are wrestling with a number of new issues. *See generally* Huff, *supra* note 16.

101. 415 U.S. 164, 172–78 (1974).

102. *Id.* at 175.

103. *See id.* at 172, 175.

104. The Federal Rules of Evidence had not yet been enacted by Congress when the Court was considering *Matlock* but had already been approved by the Supreme Court. *See id.* at 172 n.8.

105. 338 U.S. 160 (1949).

106. *Id.* at 173–74; *see also Matlock*, 415 U.S. at 173.

107. *See Matlock*, 415 U.S. at 175 ("There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable . . . ."); *Brinegar*, 338 U.S. at 173–74.

108. FED. R. EVID. 104(a), 1101.

109. FED. R. EVID. 104(a).

110. FED. R. EVID. 1101(d).

opinions suggest this.[111] Instead, the Court only holds that there is no automatic rule against the reception of hearsay evidence in pretrial hearings and, if read even more narrowly, only in "proceedings where the judge himself is considering the admissibility of evidence."[112] When applying *Matlock*, however, several circuit courts have suggested that hearsay evidence is always admissible, at least in the context of suppression hearings.[113]

If the Confrontation Clause was intended to limit at least some hearsay testimony, then it seems that a rule that dismisses the rules of evidence concerning hearsay and allows all hearsay to be admissible at pretrial hearings implies that the Confrontation Clause should have no effect at pretrial hearings either. But if *Matlock* is read to mean what it says, that there should be no automatic rule against hearsay at pretrial hearings,[114] then it is unclear whether the Confrontation Clause applies in this context. The Court has interpreted the Confrontation Clause to prevent only some hearsay from being admitted at trial,[115] so a rule that does not automatically bar hearsay is not inconsistent with this interpretation of the Confrontation Clause, as both would allow some hearsay to be considered.

This argument is difficult to make when the facts of *Matlock* are taken into account, however. In *Matlock*, the Court reviewed the lower courts' rulings that statements by another occupant of the defendant's home made to police officers during and after a search of their home were inadmissible hearsay as against the defendant.[116] These statements would be considered hearsay under the Federal Rules of Evidence and not admitted at trial.[117] Additionally, if the current Confrontation Clause doctrine as defined by the Court in *Crawford* was applied to these statements, their admission would still violate the Confrontation Clause because they are testimonial hearsay and the defendant did not have a prior

111. *See, e.g.*, United States v. Raddatz, 447 U.S. 667, 679 (1980) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial.").

112. *Matlock*, 415 U.S. at 175.

113. *See, e.g.*, United States v. Miramonted, 365 F.3d 902, 904 (10th Cir. 2004) ("[H]earsay testimony is admissible at suppression hearings . . . ."); United States v. Lee, 541 F.2d 1145, 1146 (5th Cir. 1976) ("[T]he exclusionary law of evidence . . . need not be applied in limine where hearing is before a judge, not a jury. The judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."); United States v. Bolin, 514 F.2d 554, 557 (7th Cir. 1975) ("[I]t is clear that hearsay evidence is admissible in a hearing on a motion to suppress."). *But see* United States v. Brewer, 947 F.2d 404, 408 (9th Cir. 1991) ("[T]he Federal Rules of Evidence are applicable to motion to suppress evidence proceedings.").

114. *Matlock*, 415 U.S. at 175.

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

116. *Matlock*, 415 U.S. at 168.

117. The Court in *Matlock* notes that the witness's statements may fit into the hearsay exception for statements against penal interest, but this exception only allows statements to come in if the witness is unavailable, and since the witness testified at the suppression hearing, her statements would not fall under this exception. *Id.* at 176–77; *see* FED. R. EVID. 804(b)(3).

opportunity to cross-examine the witness.[118] But the Court in *Matlock* found that the statements should have been considered at the suppression hearing.[119] So, under the reasoning in this case, either the Confrontation Clause, like the Federal Rules of Evidence, does not apply at all at pretrial hearings, or it applies differently than it does at trial.

As this Part has outlined, the applicability of the Confrontation Clause prior to trial is not clear. Section A of the Analysis below will detail the attempts of state and lower federal courts to interpret and apply the precedent discussed above in determining to what extent the Confrontation Clause should apply prior to trial. Section B then considers several ways to resolve the conflicting Supreme Court precedent and discusses why none of these approaches prove satisfactory.

III. ANALYSIS

The issue of the applicability of the Confrontation Clause prior to trial is not raised often, although it has been considered in some form by a few state courts and lower federal courts.[120] This Part begins by outlining the two general approaches taken by these courts when analyzing this issue and the differing conclusions that result. It then lays out three possible ways to resolve the issue of how the Confrontation Clause should apply to pretrial hearings. It details the problems of each approach and ultimately concludes that none provides a satisfactory solution.

A. Interpretation by State and Lower Federal Courts

Although the Supreme Court has not directly addressed whether the Confrontation Clause applies to pretrial hearings, several state and lower federal courts have considered the issue directly. Particularly after the Court's ruling in *Crawford*, which substantially shifted the approach courts take in considering Confrontation Clause issues,[121] many state and lower federal courts had to consider whether *Crawford*'s new Confrontation Clause doctrine applied to pretrial proceedings as well as at trial.[122]

118. *See Crawford*, 541 U.S. at 59. *Crawford* specifically defines testimonial as including "police interrogations," and the witness's statements in *Matlock* likely fall into this category. *Id.* at 68; *see also* Davis v. Washington, 547 U.S. 813, 813 (2006). Additionally, the witness was present at the suppression hearing so this statement fails the unavailability requirement of *Crawford* as well. *See Crawford*, 541 U.S. at 59.

119. *Matlock*, 415 U.S. at 172.

120. *See infra* Part III.A.

121. *See generally* MCCORMICK ON EVIDENCE, *supra* note 95, § 252; Huff, *supra* note 16.

122. *See, e.g.*, People v. Felder, 129 P.3d 1072, 1073 (Colo. Ct. App. 2005); Gresham v. Edwards, 644 S.E.2d 122, 124 (Ga. 2007); State v. Daly, 775 N.W.2d 47, 66 (Neb. 2009); Sheriff v. Witzenburg, 145 P.3d 1002, 1003 (Nev. 2006); State v. Rivera, 192 P.3d 1213, 1216 (N.M. 2008); People v. Brink, 818 N.Y.S.2d 374, 374–75 (App. Div. 2006); State v. Woinarowicz, 720 N.W.2d 635, 641 (N.D. 2006); Village of Granville v. Graziano, 858 N.E.2d 879, 883 (Ohio Mun. Ct. 2006), *aff'd*, 2007 WL 764765 (Ohio App. Mar. 14, 2007); Graves v. State, 307 S.W.3d 483, 489 (Tex. App. 2010); Curry v. State, 228 S.W.3d 292, 296 (Tex. App. 2007); Vanmeter v. State, 165 S.W.3d 68, 71 (Tex. App. 2005); State v. Timmerman, 218 P.3d 590, 593–95 (Utah 2009); State v. Rhinehart, 153 P.3d 830, 834 (Utah Ct. App. 2006); *see*

Predictably, in navigating the muddled Supreme Court precedent laid out above, courts came to different conclusions about the applicability of the Confrontation Clause prior to trial. The analysis of these courts roughly falls into two categories: those that applied the Confrontation Clause to a pretrial hearing because it was a "critical stage" of the criminal prosecution process,[123] and those that held the Confrontation Clause is only a trial right and does not apply to pretrial hearings.[124]

1. The Confrontation Clause Applies to Pretrial Hearings

A handful of state and lower federal courts that have considered the issue have found that the protections of the Confrontation Clause apply to hearings prior to trial just as they would apply to the trial itself.[125] Others seem to have just assumed the Confrontation Clause applies and have analyzed the confrontation arguments in the context of pretrial hearings without considering first whether the right to confrontation applies in these settings.[126]

The courts that have considered the issue use the "critical stage" language in *United States v. Wade* and other similar Supreme Court cases to support their arguments.[127] Although the Court has not applied this

also State v. Randolph, 933 A.2d 1158, 1188–92 (Conn. 2007) (noting the split in authorities on the applicability of *Crawford* to preliminary hearings but refusing to decide the issue).

123. *See, e.g.*, United States v. Hodge, 19 F.3d 51, 53 (D.C. Cir. 1994); United States v. Green, 670 F.2d 1148, 1154 (D.C. Cir 1981); State v. Sigerson, 282 So. 2d 649, 651 (Fla. Dist. Ct. App. 1973); People v. Sammons, 478 N.W.2d 901, 907 (Mich. Ct. App. 1991); *Granville*, 858 N.E.2d at 883; *Curry*, 228 S.W.3d at 297; *see also* People v. Levine, 585 N.W.2d 770, 773–74 (Mich. Ct. App. 1998), *vacated*, 600 N.W.2d 622 (Mich. 1999).

124. *See, e.g.*, *Felder*, 129 P.3d at 1073–74; *Gresham*, 644 S.E.2d at 124; State v. Sherry, 667 P.2d 367, 376 (Kan. 1983); State v. Harris, 998 So. 2d 55, 56 (La. 2008); *Daly*, 775 N.W.2d at 66; *Witzenburg*, 145 P.3d at 1006; *Rivera*, 192 P.3d at 1216; *Brink*, 818 N.Y.S.2d at 374–75; *Woinarowicz*, 720 N.W.2d at 641; *Graves*, 307 S.W.3d at 489; *Vanmeter*, 165 S.W.3d at 74; *Timmerman*, 218 P.3d at 594–95; *Rhinehart*, 153 P.3d at 834–35. Additionally, at least one court post-*Crawford* has found no confrontation violation in a pretrial hearing setting, but its analysis does not fall as neatly into the "Confrontation Clause only applies to trial" category. *See* United States v. Morgan, 505 F.3d 332, 338–39 (5th Cir. 2007) ("The issue centers on whether the Confrontation Clause provides the same protections to defendants at preliminary proceedings as it does at trial under *Crawford.*"). The court limited its analysis to the business records authentication matter at issue in the case, however, holding only that "*Crawford* does not apply to the foundational evidence authenticating business records in preliminary determinations of the admissibility of evidence." *Id.* at 339.

125. *See Green*, 670 F.2d at 1154 ("[W]e have no doubt of the applicability of the right [of cross-examination at the suppression hearing] or of its importance."); *Sammons*, 478 N.W.2d at 907 ("[W]e conclude that the protections afforded by the Confrontation Clause were available to defendant at the entrapment hearing as a means of ensuring the reliability of evidence submitted against him."); *Granville*, 858 N.E.2d at 883 ("[I]n the context of an [operating a vehicle under the influence (OVI)] case, the court finds that the Confrontation Clause[] . . . appl[ies] at suppression hearings."); *Curry*, 228 S.W.3d at 298 ("[W]e . . . hold that the protections of the Confrontation Clause extend to a pretrial suppression hearing.").

126. *See, e.g.*, Mackey v. United States, Nos. 06-22244-CIV, 03-20715-CR, 2008 WL 2782819, at *5–6 (S.D. Fla. July 16, 2008); United States v. Lopez, 328 F. Supp. 1077, 1088 (E.D.N.Y. 1971).

127. United States v. Wade, 388 U.S. 218, 224–25 (1967) ("[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment

test in the context of the Confrontation Clause, these courts note that the Court has emphasized the interests at stake at these pretrial hearings and the importance of the assistance of counsel in protecting these interests.[128] The courts that have considered this issue then apply the Court's reasoning to the Confrontation Clause, arguing that the protections of the Confrontation Clause are just as important to protecting a defendant's interests at a pretrial hearing as the presence of counsel.[129] These courts often cite the importance of cross-examination in the adversarial system and note that it seems fundamentally unfair to prohibit a defendant from confronting witnesses at these hearings, considering the interests at stake.[130]

Courts have been most favorable to the argument that the Confrontation Clause applies to pretrial hearings when the defendant's ability to cross-examine a witness at a pretrial hearing was significantly limited[131] or when the defendant himself was not even present at the hearing.[132] Fewer have been willing to apply the Confrontation Clause when evidentiary issues are raised.[133] Additionally, several of the cases that applied the Confrontation Clause to pretrial hearings were decided before some of the Supreme Court cases cited in the discussion above, so their analyses do not account for any newer changes in the scope or application of the Confrontation Clause, including the recent landmark changes made in *Crawford v. Washington* in 2004.[134]

However, at least two courts have applied the Confrontation Clause to pretrial hearings post-*Crawford* and held that the rule for testimonial evidence set out in *Crawford* should apply in the context of pretrial hearings as well.[135] The most recent of these was *Curry v. State*, decided by the Texas Court of Appeals in Waco in 2007.[136] In *Curry*, the court considered the defendant's claim that the trial court erred by admitting statements from a video surveillance tape during a suppression hearing.[137] The court affirmed the admission of the statements, but only after applying the Confrontation Clause doctrine set out in *Crawford* and finding

guarantee [of the right to the assistance of counsel] to apply to 'critical' stages of the proceedings."); *see also* discussion *supra* Part II.B.3.

128. *See Wade*, 388 U.S. at 224–25.

129. *See, e.g.*, *Green*, 670 F.2d at 1154; *Sammons*, 478 N.W.2d at 907; *Granville*, 858 N.E.2d at 882–83; *Curry*, 228 S.W.3d at 296–97.

130. *See, e.g.*, *Green*, 670 F.2d at 1154; *Sammons*, 478 N.W.2d at 907; *Curry*, 228 S.W.3d at 296–97.

131. *See, e.g.*, United States v. Hodge, 19 F.3d 51, 52 (D.C. Cir. 1994); *Green*, 670 F.2d at 1153–54; *Sammons*, 478 N.W.2d at 906–07.

132. *See, e.g.*, State v. Sigerson, 282 So. 2d 649, 650 (Fla. Dist. Ct. App. 1973).

133. *See, e.g.*, *Granville*, 858 N.E.2d at 881 (challenging the admission of documents relating to a blood alcohol test); *Curry*, 228 S.W.3d at 296 (challenging the admission of statements on a video surveillance tape).

134. *Hodge, Green, Sigerson,* and *Sammons* were all decided prior to the Supreme Court's decision in *Crawford*. *Hodge*, 19 F.3d 51; *Green*, 670 F.2d 1148; *Sigerson*, 282 So. 2d 649; *Sammons*, 478 N.W.2d 901.

135. *See Granville*, 858 N.E.2d at 883; *Curry*, 228 S.W.3d at 298–99.

136. *Curry*, 228 S.W.3d at 292.

137. *Id.* at 296.

that the statements were not testimonial and therefore admitting them did not violate Curry's right to confrontation.[138] In its analysis, the court acknowledged that other courts have found the Confrontation Clause to be inapplicable to pretrial hearings, but it argued that because the suppression hearing was a critical stage of the proceeding, the interests at stake were "just as pressing as those in the actual trial."[139] The court ultimately decided that the only way to protect the defendant's interests at this stage was to grant him the protections of the Confrontation Clause at the suppression hearing.[140]

The courts that have applied the Confrontation Clause to pretrial hearings emphasize the Supreme Court decisions finding that these hearings are "critical stages" of the prosecution, but downplay other Court language claiming the right to confrontation is a "trial right."[141] But, as the next Section illustrates, many other courts have interpreted the case law differently.

2. The Confrontation Clause Does Not Apply to Pretrial Hearings

Several courts have interpreted Supreme Court precedent and found that either the Confrontation Clause does not apply at all to pretrial hearings[142] or it does not apply to the same extent as it does at trial.[143]

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138. *Id.* at 296–99.

139. *Id.* at 297.

140. *See id.* at 297–98.

141. *Compare* United States v. Wade, 388 U.S. 218, 224–25 (1967), *with* Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987).

142. *See, e.g.*, People v. Felder, 129 P.3d 1072, 1073 (Colo. Ct. App. 2005) ("*Crawford* addressed a defendant's rights of confrontation at *trial*. Nothing in *Crawford* suggests that the Supreme Court intended to alter its prior rulings allowing hearsay at *pretrial* proceedings . . . ."); Gresham v. Edwards, 644 S.E.2d 122, 124 (Ga. 2007) ("There [is] no indication in *Crawford* of a change from the Court's previous statements that the right of confrontation is a trial right . . . ."); State v. Sherry, 667 P.2d 367, 376 (Kan. 1983) ("There is no constitutional right to allow the accused to confront witnesses against him at the preliminary hearing."); State v. Harris, 998 So. 2d 55, 56 (La. 2008) ("The right to confrontation contained in the United States and the Louisiana Constitutions is not implicated in this pre-trial matter."); State v. Daly, 775 N.W.2d 47, 66 (Neb. 2009) ("[I]t is well established that Confrontation Clause rights are trial rights that do not extend to pretrial hearings in state proceedings."); Sheriff v. Witzenburg, 145 P.3d 1002, 1006 (Nev. 2006) ("We conclude that the Sixth Amendment Confrontation Clause and *Crawford* do not apply to a preliminary examination."); State v. Rivera, 192 P.3d 1213, 1216 (N.M. 2008) ("[T]he Confrontation Clause does not apply to preliminary questions of fact elicited at a suppression hearing."); People v. Brink, 818 N.Y.S.2d 374, 374 (App. Div. 2006) ("We reject the contention of defendant that [*Crawford*] applies to his pretrial suppression hearing . . . ."); State v. Woinarowicz, 720 N.W.2d 635, 641 (N.D. 2006) ("In *Crawford*, the United States Supreme Court did not indicate it intended to change the law and apply the Confrontation Clause to pretrial hearings."); Graves v. State, 307 S.W.3d 483, 489 (Tex. App. 2010) ("[T]he right of confrontation does not attach until trial."); Vanmeter v. State, 165 S.W.3d 68, 74–75 (Tex. App. 2005) ("[W]e conclude that *Crawford* did not change prior law that the constitutional right of confrontation is a trial right, not a pretrial right . . . ."); State v. Timmerman, 218 P.3d 590, 594 (Utah 2009) ("[W]e hold that the federal Confrontation Clause does not apply to preliminary hearings."); State v. Rhinehart, 153 P.3d 830, 834 (Utah Ct. App. 2006) ("Although the Supreme Court in *Crawford* provided an exhaustive discussion of the Confrontation Clause, in contrast to Defendant's argument, it never indicated that it applies at preliminary hearings.").

143. *See, e.g.*, United States v. Boyce, 797 F.2d 691, 693 (8th Cir. 1986) ("[T]he right of confrontation does not apply to the same extent at pretrial suppression hearings as it does at trial."); *see also*

The analysis generally starts with the language in *Pennsylvania v. Ritchie*, *Barber v. Page*, and *California v. Green* stating that the right to confrontation is a trial right.[144] Courts then support this assertion by pointing to the holdings in *United States v. Matlock* and *McCray v. Illinois*, both of which allow hearsay that would be barred by the Confrontation Clause at trial to be considered at a pretrial hearing.[145]

This analysis happens most commonly in the context of challenges to the admission of hearsay at suppression hearings[146] or preliminary hearings to determine probable cause.[147] In these cases, many courts also cite *United States v. Raddatz*, which states that "the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself,"[148] and *Gerstein v. Pugh*, which says that adversarial safeguards including the rights to confrontation and cross-examination "are not essential for the probable cause determination."[149]

Courts then have to account for *Crawford v. Washington*, which included a detailed description of the history and purpose of the Confrontation Clause[150] and changed the way the right to confrontation is applied at trial.[151] *Crawford* does not explicitly state that it applies to pretrial hearings, nor does it explicitly overrule any prior Supreme Court precedent except the reliability test in *Ohio v. Roberts*,[152] so most courts that have interpreted prior case law to limit the Confrontation Clause to trial have found *Crawford* not to have changed this.[153] Courts then interpret the case law together to conclude that Supreme Court precedent supports the conclusion that the Confrontation Clause is applicable only at trial.[154]

United States v. Morgan, 505 F.3d 332, 338–39 (5th Cir. 2007) (applying similar reasoning to the Eighth Circuit's reasoning in *Boyce*).

144. *Ritchie*, 480 U.S. at 52; California v. Green, 399 U.S. 149, 157 (1970); Barber v. Page, 390 U.S. 719, 725 (1968); *see supra* Part II.B.2.

145. *See* United States v. Matlock, 415 U.S. 164, 175 (1974); McCray v. Illinois, 386 U.S. 300, 313–14 (1967).

146. *See, e.g.*, *Felder*, 129 P.3d at 1073; *Harris*, 998 So. 2d at 56; *Rivera*, 192 P.3d at 1215; *Brink*, 818 N.Y.S.2d at 374–75; *Woinarowicz*, 720 N.W.2d at 640; *Graves*, 307 S.W.3d at 489; *Vanmeter*, 165 S.W.3d at 70.

147. *See, e.g.*, *Gresham*, 644 S.E.2d at 123; *Witzenburg*, 145 P.3d at 1003; *Timmerman*, 218 P.3d at 592–94; *Rhinehart*, 153 P.3d at 833–34.

148. United States v. Raddatz, 447 U.S. 667, 679 (1980).

149. Gerstein v. Pugh, 420 U.S. 103, 120 (1975).

150. Crawford v. Washington, 541 U.S. 36, 42–65 (2004).

151. For a detailed analysis of the Court's decision in *Crawford* and the confrontation questions that remain undecided, see generally Huff, *supra* note 16.

152. *Crawford*, 541 U.S. at 68–69.

153. *See, e.g.*, People v. Felder, 129 P.3d 1072, 1073 (Colo. Ct. App. 2005); Gresham v. Edwards, 644 S.E.2d 122, 124 (Ga. 2007); Sheriff v. Witzenburg, 145 P.3d 1002, 1003 (Nev. 2006); State v. Rivera, 192 P.3d 1213, 1216 (N.M. 2008); State v. Woinarowicz, 720 N.W.2d 635, 641 (N.D. 2006); Graves v. State, 307 S.W.3d 483, 489 (Tex. App. 2010); Vanmeter v. State, 165 S.W.3d 68, 73–74 (Tex. App. 2005); State v. Timmerman, 218 P.3d 590, 593–94 (Utah 2009); State v. Rhinehart, 153 P.3d 830, 834–35 (Utah Ct. App. 2006).

154. *See, e.g.*, *Felder*, 129 P.3d at 1074; *Gresham*, 644 S.E.2d at 124; State v. Sherry, 667 P.2d 367, 375–76 (Kan. 1983); State v. Harris, 998 So. 2d 55, 56 (La. 2008); *Witzenburg*, 145 P.3d at 1006; *Rivera*,

For example, the Texas Court of Appeals of Dallas in *Vanmeter v. State* found that a trial judge's reliance on testimony and videotape evidence at a suppression hearing, which arguably would have been considered hearsay and excluded from trial, did not violate the rights of the defendant protected by the Confrontation Clause.[155] The court noted that courts have been permitted to rely on hearsay at pretrial hearings, citing *Matlock*,[156] and that the Supreme Court has said the right to confrontation is basically a trial right, citing *Ritchie*, *Green*, and *Barber*.[157] After also examining state law and determining that "a trial judge may decide preliminary questions concerning the admissibility of evidence on affidavits alone, without hearing any live testimony,"[158] the court considered *Crawford* and decided "*Crawford* did not change prior law that the constitutional right of confrontation is a trial right."[159]

This case is an illustrative example because, as noted above, the Texas Court of Appeals of Waco looked at the same Supreme Court precedent and Texas law in deciding *Curry v. State* and found that "the protections of the Confrontation Clause extend to a pretrial suppression hearing," even after its sister court had found otherwise.[160] The fact that two courts in the same jurisdiction, applying the same law to substantially similar facts can come to different conclusions illustrates that the Supreme Court precedent is not as clear as either of these approaches interpret.

B. Possible Solutions

Logic would dictate three general ways Confrontation Clause doctrine could be applied to pretrial hearings: The Confrontation Clause could not apply at all to pretrial hearings, it could apply to pretrial hearings the same as it does at trial, or it could apply to pretrial hearings but differently than it does at trial. As the case discussions above illustrate, courts generally take one of the two "all or nothing" approaches, either finding that the protections of the Confrontation Clause do not apply at all to pretrial hearings[161] or finding that the Confrontation Clause applies to pretrial hearings just as it does to trial.[162] The first two Sections of this Part detail these two "all or nothing" solutions and the problems associated with each. The third Section then examines one possible "middle ground" approach, where the Confrontation Clause applies to pretrial

192 P.3d at 1216; *Woinarowicz*, 720 N.W.2d at 641; *Graves*, 307 S.W.3d at 489; *Vanmeter*, 165 S.W.3d at 74; *Timmerman*, 218 P.3d at 592–95; *Rhinehart*, 153 P.3d at 834.

155. *Vanmeter*, 165 S.W.3d at 69, 73–75.

156. *Id.* at 71 (citing United States v. Matlock, 415 U.S. 164, 172 (1974)).

157. *Id.* at 72 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987); California v. Green, 399 U.S. 149, 157 (1970); Barber v. Page, 390 U.S. 719, 725 (1968)).

158. *Id.* at 74.

159. *Id.*

160. Curry v. State, 228 S.W.3d 292, 298 (Tex. App. 2007).

161. *See supra* Part III.A.2.

162. *See supra* Part III.A.1.

hearings, but differently than it does at trial. This approach would find a Confrontation Clause violation when a limitation prior to trial would cause effective cross-examination to be impossible at trial, and it is based on the concurrence of Supreme Court Justice Harry Blackmun in *Pennsylvania v. Ritchie*.[163]

1. The Confrontation Clause Is Only Applicable to Trial

One possible solution to the question of how the Confrontation Clause applies prior to trial is to argue that it does not apply at all. Courts could interpret the Confrontation Clause to be only applicable to trial and interpret it to grant defendants no protection in the context of pretrial hearings. As illustrated above, this approach seems consistent with much of the Supreme Court precedent.[164] Hearsay evidence is not barred from pretrial hearings.[165] The Court has said repeatedly that the right to confrontation is a trial right.[166] And nothing in the Court's recent opinion in *Crawford v. Washington* states that its rule applies to pretrial hearings.[167]

The argument that a defendant has no right to confrontation in any form at a pretrial hearing may be too broad, however. Part of the right to confrontation guaranteed in the Confrontation Clause is the right to cross-examine witnesses and to be present in the courtroom during testimony.[168] It is generally understood that criminal defendants have some right to cross-examine witnesses at pretrial hearings,[169] and the Court has said that "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."[170]

Additionally, the Court placed great weight on the importance of cross-examination in determining the reliability of evidence, both in its recent *Crawford* opinion and in previous opinions.[171] Although the Court

163. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 61–62 (1987) (Blackmun, J., concurring in part and in the judgment); *see also* discussion *supra* Part II.B.2.

164. *See supra* Part II.B.

165. United States v. Matlock, 415 U.S. 164, 175 (1974).

166. *See Ritchie*, 480 U.S. at 52; California v. Green, 399 U.S. 149, 157 (1970); Barber v. Page, 390 U.S. 719, 725 (1968).

167. *See, e.g.*, State v. Rhinehart, 153 P.3d 830, 834 (Utah Ct. App. 2006) ("Although the Supreme Court in *Crawford* provided an exhaustive discussion of the Confrontation Clause, in contrast to Defendant's argument, it never indicated that it applies at preliminary hearings.").

168. The Court in *Ritchie* stated "The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Ritchie*, 480 U.S. at 51.

169. *See* Ohio v. Parsons, 580 N.E.2d 800, 803 (Ohio Ct. App. 1989) ("It is clear that a defendant has a right to cross-examine government witnesses at a suppression hearing."); s*ee also* 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2(d) (4th ed. 2004).

170. Illinois v. Allen, 397 U.S. 337, 338 (1970).

171. Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[The Confrontation Clause] commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."); Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

in *Matlock* allowed the admission of hearsay evidence in the context of pretrial hearings,[172] the Court's emphasis on the importance of cross-examination in these other cases suggests that a defendant should have some right to confront witnesses through cross-examination at all stages of the prosecution. In light of these cases, it seems the argument that the Confrontation Clause should have no application prior to trial is not as consistent with Supreme Court case law as some lower federal and state courts have argued.[173]

2. The Protections of the Confrontation Clause Apply to Pretrial Hearings the Same as to Trial

In light of the problems noted above in refusing to apply the Confrontation Clause at all to pretrial hearings, courts could take the opposite approach and apply Confrontation Clause doctrine to pretrial hearings just the same as it would be applied to trial. This is the solution a few state courts have chosen to take[174] and it seems consistent with the Court's recognition that pretrial hearings are critical stages of the prosecution process where the defendant has important interests at stake.[175]

This approach is also problematic, however. While pretrial hearings have been described by the Court as "critical stages" of the prosecution,[176] the Court has also noted elsewhere that "the interests at stake [in pretrial hearings] are of a lesser magnitude than those in the criminal trial itself."[177] It is true that pretrial hearings are part of the adversarial process of prosecution, but they still differ in some ways from trial. The Court has allowed hearsay that would not be admissible at trial to be considered by judges in deciding issues at pretrial hearings.[178] Most issues in pretrial hearings are decided by a judge instead of a jury, and while the interests at stake are important, the judge is not deciding the ultimate question of guilt or innocence in these situations. All of these factors support a finding that the protections given to the defendant at these stages should not be the same as those provided at trial.

Additionally, current Confrontation Clause doctrine includes the rule in *Crawford* that says testimonial statements of witnesses absent from trial can only be admitted where the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[179] It is difficult to see how this doctrine would be applied in a pretrial set-

172. United States v. Matlock, 415 U.S. 164, 175 (1974).
173. *See supra* Part III.A.2.
174. *See, e.g.*, Village of Granville v. Graziano, 858 N.E.2d 879, 883 (Ohio Mun. Ct. 2006); Curry v. State, 228 S.W.3d 292, 298 (Tex. App. 2007).
175. *See* United States v. Wade, 388 U.S. 218, 224–25 (1967).
176. *Id.*
177. United States v. Raddatz, 447 U.S. 667, 679 (1980).
178. United States v. Matlock, 415 U.S. 164, 175 (1974).
179. Crawford v. Washington, 541 U.S. 36, 59, 68 (2004).

ting, considering its language directly refers to its applicability at trial.[180] This rule allows testimony to be admitted if the defendant had a prior opportunity to cross-examine the absent witness, presumably at a pretrial hearing.[181] It seems odd, therefore, to apply it to a pretrial hearing in which a defendant likely would not have had the same prior opportunity to cross-examine any of the witnesses. Applied in this way to pretrial hearings, the *Crawford* rule would likely bar most testimonial hearsay from pretrial hearings because testimony would seldom fit into the prior cross-examination exception. Although the Court intended in *Crawford* to put more emphasis on the right to confrontation,[182] it is unlikely the Court intended to create this sort of absolute bar on testimonial hearsay at pretrial hearings.

Considering the above, the approach of applying the protections of the Confrontation Clause in full to pretrial hearings also seems to be somewhat inconsistent with Supreme Court case law. A better approach may be one that finds some middle ground between not applying the Confrontation Clause at all and applying it in full.

3. Justice Blackmun's Approach: A Restriction Prior to Trial Is a Confrontation Clause Violation if It Makes Effective Cross-Examination Impossible at Trial

One possible "middle ground" approach may be found in Justice Harry Blackmun's concurring opinion in *Pennsylvania v. Ritchie*.[183] As noted in Part II.B.2 above, *Ritchie* involved a defendant's attempt during discovery to obtain records from a state agency concerning his daughter's claims that he sexually abused her.[184] A plurality of the Court disagreed that his confrontation rights had been violated when the trial court denied him full access to these records.[185]

Justice Blackmun refused to join the section of the Court's opinion on the confrontation issue because he disagreed with the plurality that had concluded "the right to confrontation is a *trial* right" and is not applicable to pretrial discovery.[186] Instead, Justice Blackmun argued "there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness."[187] Justice Blackmun argued that the Confrontation Clause protects *effective* cross-examination

180. Although some courts have tried, see the discussion of *Curry v. State* in Part III.A.1 above.

181. *See Crawford*, 541 U.S. at 59.

182. *See id.*

183. Pennsylvania v. Ritchie, 480 U.S. 39, 61–66 (1987) (Blackmun, J., concurring in part and in the judgment). For a full discussion of the confrontation issues in *Ritchie*, see Part II.B.2 above.

184. *Id.* at 44 (majority opinion).

185. *Id.* at 54 ("[T]he Confrontation Clause was not violated by the withholding of the [records] . . . .").

186. *Id.* at 52; *see id.* at 61 (Blackmun, J., concurring in part and in the judgment).

187. *Id.* at 61–62 (Blackmun, J., concurring in part and in the judgment).

of witnesses at trial, not just the opportunity to question a witness.[188] Anything else, he said, would turn the confrontation right into "an empty formality."[189]

For Justice Blackmun, then, the test for whether a restriction prior to trial violated the defendant's right to confrontation seems to be whether that restriction would limit a defendant's ability to effectively cross-examine a witness at trial.[190] This approach still focuses on the protection of a defendant's right to confrontation at trial, but recognizes that some actions must be allowed prior to trial for this right to be protected at trial. This may include allowing a defendant access to certain information during discovery, which Justice Blackmun argued was necessary in *Ritchie* to avoid a confrontation violation.[191] It also arguably includes placing few restrictions on the ability of a defendant to cross-examine a witness at a pretrial hearing.

But this approach does not apply the Confrontation Clause protections directly to pretrial hearings, thus it would likely not help a defendant who was trying to prevent hearsay from being admitted at a pretrial hearing or who was unable to fully cross-examine a witness whose testimony would not be relevant to trial.[192] Additionally, this approach may be hard to apply because it may not be clear prior to trial what will be relevant at trial and what limitations during discovery and at pretrial hearings will prevent a defendant from effectively cross-examining witnesses at trial. Nevertheless, this approach does allow a defendant to have some protections of the Confrontation Clause at pretrial hearings while still complying with Supreme Court precedent that declares the right to confrontation a "trial right"[193] and allows hearsay to be admitted at pretrial hearings.[194]

As this Section has illustrated, it seems inconsistent with Supreme Court precedent to apply Confrontation Clause doctrine to pretrial hearings just as it is applied at trial. But claiming that the Confrontation Clause should have no effect prior to trial also seems inconsistent. Additionally, Justice Blackmun's "middle ground" approach in *Pennsylvania v. Ritchie* solves some of the problems of the "all or nothing" approaches by allowing some confrontation rights prior to trial, but it still does not fully address the question of how the Confrontation Clause should be applied when the limits placed on confrontation at a pretrial hearing

188. *Id.* at 62.

189. *Id.*

190. *See id.* at 61–62.

191. *Id.*

192. For example, the questions asked of a police officer at a suppression hearing may not be relevant to the overall issue of guilt at trial. It would be hard for a defendant to argue his confrontation rights at trial would be violated by not allowing him liberty to fully cross-examine the police officer at the suppression hearing.

193. *Ritchie*, 480 U.S. at 52; California v. Green, 399 U.S. 149, 157 (1970); Barber v. Page, 390 U.S. 719, 725 (1968).

194. United States v. Matlock, 415 U.S. 164, 175 (1974).

would not have a direct effect on confrontation rights at trial. The following Section suggests an alternative approach for protecting confrontation rights at pretrial hearings based not on the Confrontation Clause, but rather on procedural due process.

IV. RESOLUTION AND RECOMMENDATION

The previous Section has illustrated the problems inherent in attempts to develop a coherent approach to the application of the Confrontation Clause to pretrial hearings that is consistent with Supreme Court precedent. Applying Confrontation Clause doctrine to pretrial hearings the same way it is applied at trial seems inconsistent with Supreme Court precedent, but so does a finding that there is no right to confrontation at all prior to trial. This Part suggests an approach to this problem that moves away from the Confrontation Clause and instead considers the issue from a procedural due process analytical framework. It first presents a basic overview of procedural due process and then outlines a due process test for confrontation rights at pretrial hearings, noting the benefits of the approach and addressing potential problems.

A. An Overview of Procedural Due Process

The Due Process Clause of the Fourteenth Amendment[195] provides an independent limit on the procedural actions of state governments in criminal cases based on the idea of "fundamental fairness."[196] Although the Due Process Clause has been used to incorporate specific provisions of the Bill of Rights to the states,[197] it also guarantees fair procedure for a criminal defendant, regardless of whether the process challenged is specifically prohibited by a guarantee in the Bill of Rights.[198] The concept of due process has been used by the Court in a wide variety of cases to impose procedural limitations at all stages of the criminal prosecution process, independent of any particular guarantees of the Bill of Rights.[199]

The Court often applies a "totality of the circumstances" test to determine whether a procedural restriction is fundamentally unfair and violates due process.[200] Though not specifically stated, an example of this

195. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

196. *See* Dowling v. United States, 493 U.S. 342, 352 (1990); *see also* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.7(a) (3d ed. 2007).

197. *See, e.g.*, Pointer v. Texas 380 U.S. 400, 403 (1965) (applying the Due Process Clause of the Fourteenth Amendment to incorporate the Sixth Amendment right to confrontation to the states).

198. *See* Daniels v. Williams, 474 U.S. 327, 337 (1986) (Stevens, J., concurring) ("[The Due Process Clause] is a guarantee of fair procedure, sometimes referred to as 'procedural due process' . . . .").

199. For an exhaustive listing of the Court's procedural due process cases in the context of criminal procedure, see 1 LAFAVE ET AL., *supra* note 196, § 2.7(a).

200. *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 302 (1967).

test can be found in *Chambers v. Mississippi*.[201] In *Chambers*, the Court held that the combined impact of Mississippi's hearsay and party witness evidentiary rules violated the defendant's right to due process when these rules restricted his cross-examination of hostile defense witnesses and prohibited him from calling other witnesses to aid in his defense.[202] The Court did not consider whether these evidentiary rules violated the specific provisions of the Sixth Amendment, in particular the Confrontation and Compulsory Process Clauses,[203] but instead rested its finding of unconstitutionality on due process grounds.[204] Considering all the circumstances and the combined impact of these two evidentiary rules on Chambers' ability to present his defense, the Court found that Chambers had been denied his right to a fundamentally fair trial in accordance with the Fourteenth Amendment right of due process.[205]

B. A Procedural Due Process Test for the Right to Confrontation at Pretrial Hearings

An analysis similar to that in *Chambers* could be applied to the right to confrontation at pretrial hearings. Instead of asking whether the Confrontation Clause was violated by a restriction on cross-examination or the admittance of hearsay evidence at a pretrial hearing, courts could bypass the Confrontation Clause question and apply a due process analysis instead. A restriction on confrontation at a pretrial hearing would then be unconstitutional if it denied the defendant his or her right to fundamentally fair procedure in the criminal prosecution process. Courts should take into consideration the totality of the circumstances in making this determination, including the importance of cross-examination in determining reliability of evidence,[206] the "critical" nature of the proceeding and the defendant's interests at stake,[207] whether a judge or jury is deciding the issue,[208] the overall importance of the evidence or testimony to the issue at hand, and any other relevant factors.

This test is in some ways an adoption of the approach of courts that have decided the Confrontation Clause does not apply to pretrial hearings because it removes the analysis from the Confrontation Clause

201. 410 U.S. 284 (1973).
202. *Id.* at 294, 302.
203. *See* U.S. CONST. amend. VI.
204. *Chambers*, 410 U.S. at 302–03.
205. *Id.*
206. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) (identifying cross-examination as the procedural way to determine reliability).
207. *See* United States v. Wade, 388 U.S. 218, 224–25 (1967) (recognizing the critical nature of pretrial proceedings and noting that the results of pretrial proceedings may determine the accused's fate).
208. *See* United States v. Matlock, 415 U.S. 164, 175 (1974) ("[W]here the judge himself is considering the admissibility of evidence, the exclusionary rules . . . should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel.").

framework.[209] But while this approach may suggest that the *Confrontation Clause* does not apply prior to trial, it affirms that the *right to confrontation* does have some application at pretrial hearings. It is clear that the right to confrontation is essential to due process,[210] and by focusing on due process, courts can avoid wading through the inconsistencies in the Supreme Court precedent regarding the Confrontation Clause and pretrial hearings laid out above.[211] Instead courts can consider the totality of the circumstances in each situation, taking into account, for example, the fact that some pretrial hearings are "critical stages" of the prosecution[212] and that hearsay evidence is not barred from pretrial hearings.[213] This approach allows courts to balance these competing interests instead of applying an "all or nothing" test that would either grant defendants the full protections of the Confrontation Clause or none at all.

The due process approach in the context of the right to confrontation is not new. The Court conducted a due process analysis when considering a restriction on cross-examination in *Chambers*, detailed above.[214] And several courts have mentioned due process when deciding whether or not to apply the protections of the Confrontation Clause to pretrial hearings.[215] The proposed due process approach would simply shift the focus away from whether specific Confrontation Clause doctrine should apply to pretrial hearings and instead allow courts to consider all the surrounding circumstances when deciding whether a defendant's confrontation rights have been violated at a pretrial hearing.

C. Potential Problems with the Procedural Due Process Approach

It should be acknowledged that this procedural due process approach to confrontation issues in the context of pretrial hearings is not without potential problems. In particular, this approach must contend with Supreme Court precedent that narrowly applies the Due Process Clause in criminal procedure matters.[216] Additionally, because this approach does not incorporate Confrontation Clause doctrine, it may not provide the protections defendants desire at pretrial hearings.

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209. *See supra* Part III.A.2.

210. *See Chambers*, 410 U.S. at 294 ("The right[] to confront and cross-examine witnesses . . . ha[s] long been recognized as essential to due process.").

211. *See supra* Part II.B.

212. *See Wade*, 388 U.S. at 224–25.

213. *See Matlock*, 415 U.S. at 175.

214. *Chambers*, 410 U.S. at 294–303.

215. *See, e.g.*, United States v. Green, 670 F.2d 1148, 1154 (D.C. Cir. 1981) ("[W]hether we describe the right of cross-examination as deriving from the fundamental concepts embedded in the Due Process Clause or as implicit in the rules governing federal criminal proceedings, . . . we have no doubt of the applicability of the right [at the defendant's suppression hearing] or of its importance."); People v. Sammons, 478 N.W.2d 901, 907 (Mich. Ct. App. 1991) ("[I]t would be fundamentally unfair, and contrary to principles of due process, to allow the state to [limit the defendant's confrontation rights at the entrapment hearing] . . . .").

216. *See* Medina v. California, 505 U.S. 437, 443 (1992); Dowling v. United States, 493 U.S. 342, 352 (1990).

The Court has specifically limited the application of the Due Process Clause in some criminal cases. In *Dowling v. United States*, the Court said that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly."[217] And in *Medina v. California*, the Court explained that "the expansion of those constitutional guarantees [of the Bill of Rights] under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order."[218]

This view of the Due Process Clause as applying narrowly beyond the guarantees of the Bill of Rights may seem to imply that the approach outlined above is an improper expansion of due process. But this due process approach is not expanding the constitutional guarantees of the Confrontation Clause; rather, it is simply acknowledging that the right to confrontation is essential to due process (something the Court has done as well)[219] and utilizing Due Process instead of Confrontation Clause doctrine to apply this right to pretrial hearings. This is something the Court itself did in the *Chambers* case.[220] In fact, applying the Due Process Clause and its totality of the circumstances balancing test to the right to confrontation at pretrial hearings is more consistent with Supreme Court precedent than applying Confrontation Clause doctrine, which would protect the right to confrontation either completely or not at all.

The due process approach may not satisfy defendants who want Confrontation Clause doctrine (particularly the test for hearsay in *Crawford v. Washington*[221]) applied at pretrial hearings, however, because due process is likely a lower standard than most Confrontation Clause tests set out by the Court. It is unlikely, for example, that many defendants will be successful in challenging hearsay testimony at pretrial hearings under the due process approach unless it is so unreliable that its admission is considered fundamentally unfair.[222] But if the Court's test in *Crawford* were applied, a defendant would have a much better chance of preventing hearsay evidence from being considered at a pretrial hearing. Additionally, the totality of the circumstances test requires each situation to be considered individually and might make it hard for defendants to determine whether their situation would fall under the protections of due process.

217. *Dowling*, 493 U.S. at 352.

218. *Medina*, 505 U.S. at 443.

219. *See Chambers*, 410 U.S. at 294 ("The right[] to confront and cross-examine witnesses . . . ha[s] long been recognized as essential to due process.").

220. *See id.*

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

222. For one example of a court that found the admissibility of hearsay evidence at a pretrial hearing to violate due process, see People v. Sammons, 478 N.W.2d 901, 907 (Mich. Ct. App. 1991).

Nevertheless, the due process approach at least gives defendants the chance to challenge limitations on their ability to confront witnesses at pretrial hearings, which is more than the courts that have found the Confrontation Clause not to apply at all to pretrial hearings have been willing to allow.[223] And because cross-examination is fundamental to due process,[224] this approach may allow defendants to successfully challenge even limitations that would not violate traditional Confrontation Clause doctrine. Therefore, the due process approach seems to be the best way to reconcile the need to protect a defendant's rights prior to trial with conflicting Supreme Court precedent regarding the applicability of the Confrontation Clause at pretrial hearings.

V. CONCLUSION

Supreme Court precedent makes it clear that cross-examination and confrontation are important rights necessary to ensure fair criminal prosecutions. But courts have struggled with how to apply this right prior to trial. Supreme Court precedent on the Confrontation Clause that has focused on the right at trial is not easily applicable to the context of pretrial hearings, as the inconsistent approaches of some state and lower federal courts illustrate. To avoid this problem, but still grant defendants their necessary rights at pretrial hearings, a better solution may be to abandon Confrontation Clause doctrine altogether in the context of pretrial hearings and instead analyze the issue under procedural due process principles. This approach would allow for the development of a coherent theory on the right to confrontation prior to trial and consistency in applying the right to confrontation at pretrial hearings—consistency, as judged by the court decisions on this issue, that is clearly needed.

223. *See supra* Part III.A.2.
224. *See Chambers*, 410 U.S. at 294.