VANISHING POINT: ALZHEIMER'S DISEASE AND ITS CHALLENGES TO THE FEDERAL RULES OF EVIDENCE

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INTRODUCTION

German psychiatrist and neuropathologist Dr. Alois Alzheimer delivered a lecture in 1906 to fellow psychiatrists summarizing the case of Frau Auguste Deter, who first consulted him in 1901 when she was 51 years old.[1]

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1. ALZHEIMER'S DISEASE EDUC. & REFERRAL (ADEAR) CTR., NAT'L INSTS. OF HEALTH, ALZHEIMER'S DISEASE FACT SHEET 1 (2011), *available at* http://www.nia.nih.gov/sites/default/files/alzheimers_disease_fact_sheet.pdf; *see also* Konrad Maurer, Stephan Volk & Hector Gerbaldo, *Auguste D and Alzheimer's Disease*, 349 LANCET 1546, 1546 (1997), *available at* http://alzheimer.neurology.ucla.edu/pubs/alzheimerLancet.pdf.

She told him, "I have lost myself."[2] He studied Deter's brain after she died at age 55 and found "there were plaques, neurofibrillary tangles, and arteriosclerotic changes."[3] This complex of signs and symptoms came to be known as Alzheimer's disease (AD).[4] As of 2012, an estimated 5.4 million Americans suffer from the disease.[5] By the year 2030, "the segment of the U.S. population age 65 and older is expected to double, and the estimated 71 million older Americans will make up approximately 20 percent of the total population."[6] According to studies, the incidence of AD "doubles for every 5-year interval past age 65."[7] Because an estimated one in eight Americans over the age of 65 currently have symptoms of AD,[8] courts will increasingly need to resolve evidentiary issues involving parties, defendants, witnesses, and victims in various stages of the disease. This is particularly important because "in January 2011, America reached a significant milepost when the oldest 'baby boomers' turned 65."[9] Obviously, testimony at trial often includes descriptions of events that happened in the past and thus frequently involves memory.

This Article explores three specific areas of evidence that will be affected by the changing demographic of our population and the consequent increase in the number of individuals with AD: first, the Rule 601 competence rule of the Federal Rules of Evidence; second, the 804 unavailability requirement; and third, the Confrontation Clause contained within the Sixth Amendment. Part I of this Article describes the disease and how it specifically differs from other mental and physical illnesses that may impact memory.[10] Part II addresses the general rule of competency and AD.[11] Part III examines the requirement of "unavailability" for the second set of excep-

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2. *See* Maurer, Volk & Gerbaldo, *supra* note 1, at 1548.

3. *Id.* at 1546.

4. Alzheimer's disease is only definitively diagnosed after death by a physical examination of the individual's brain. ALZHEIMER'S DISEASE EDUC. & REFERRAL (ADEAR) CTR., *supra* note 1, at 5. Physicians diagnose AD based upon symptoms, but only a brain examination proves actual AD. *See id.*

5. ALZHEIMER'S ASS'N, 2012 ALZHEIMER'S DISEASE FACTS AND FIGURES 14 (2012), *available at* http://www.alz.org/downloads/facts_figures_2012.pdf.

6. *Id.* at 18; *see also* Sharon B. Gardner, Catharine Coble Armstrong & Denise Rashti, *Dementia and Legal Capacity: What Lawyers Should Know When Dealing with Expert Witnesses*, 6 NAT'L ACAD. ELDER L. ATTORNEYS J. 131, 132 (2010).

7. U.S. DEP'T OF HEALTH & HUMAN SERVS., 2010 PROGRESS REPORT ON ALZHEIMER'S DISEASE 5 (2010), *available at* http://www.nia.nih.gov/sites/default/files/2010_alzheimers_disease_progress_report_.pdf.

8. *See* ALZHEIMER'S ASS'N, *supra* note 5, at 14.

9. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 7, at 5. The term "Baby Boomers" refers to those born between the years 1946 and 1964. *See* Josephine Gittler, Colloquium at the University of Iowa College of Law (Jan. 12, 2012), *available at* http://blogs.law.uiowa.edu/nhlp/?page_id=190.

10. *See infra* Part I.

11. *See infra* Part II.

tions to the hearsay rule with a view toward this disease.[12] Part IV sets forth how AD may affect the right of a defendant to confront witnesses.[13] Part V presents possible solutions and advice for facing the future onslaught of cases involving individuals who are diagnosed with or suffering from the disease.[14] Finally, the Article concludes with thoughts for the future.[15]

I. ALZHEIMER'S DISEASE AND MEMORY

Alzheimer's disease is the most common type of dementia, accounting for 60 to 80% of cases.[16] According to the National Institutes of Health, dementia is not a particular disease, but is rather the name for a collection of symptoms.[17] Those who have dementia suffer from "significantly impaired intellectual functioning."[18] Alzheimer's disease is one of the main factors leading to dementia and its most frequent cause.[19]

The hallmark of AD is "deposits of the protein fragment beta-amyloid (plaques) and twisted strands of the protein tau (tangles) as well as evidence of nerve cell damage and death in the brain."[20] Alzheimer's disease is "a progressive, degenerative brain disease that slowly erodes memory and thinking skills, and eventually even the ability to carry out simple tasks."[21] One significant fact about AD is that the impaired memory first affects "recent events or newly learned information."[22] According to the University of California San Francisco's Memory and Aging Center, "[a]s AD progresses, details or even the occurrence of recent events may be forgotten. Implicit (or memory for overlearned activities like riding a bike) and semantic memory (fact memory), as well as long-term memory, remain relatively

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12. *See infra* Part III.
13. *See infra* Part IV.
14. *See infra* Part V.
15. *See infra* CONCLUSION.
16. ALZHEIMER'S ASS'N, *supra* note 5, at 5.
17. *NINDS Dementia Information Page*, NAT'L INST. NEUROLOGICAL DISORDERS & STROKE, http://www.ninds.nih.gov/disorders/dementias/dementia.htm (last updated May 16, 2012).
18. *Id.*
19. *See The Difference Between Dementia and Alzheimer's*, DEMENTIAGUIDE (Oct. 11, 2011), http://www.dementiaguide.com/community/dementia-articles/Difference_Alzheimer's_and_Dementia.
20. ALZHEIMER'S ASS'N, *supra* note 5, at 5.
21. *Alzheimer's Disease*, UCSF MEMORY & AGING CENTER, http://memory.ucsf.edu/education/diseases/alzheimer (last visited Feb. 2, 2013).
22. *Id.*; *see also* Guy M. McKhann, *Changing Concepts of Alzheimer Disease*, 305 JAMA 2458, 2458 (2011) ("[M]ost common form . . . involves impairment of episodic memory such as the ability to learn and retain new information.").

intact early, but decline in these forms of memory eventually develops."[23] As the disease continues to progress, distant memory worsens and language and visuospatial difficulties become prominent.[24] For the purposes of the Rules of Evidence, it is also significant that symptoms in those with AD fluctuate, so that people have "good days" and "bad days."[25] It is a progressive disease, so "a person with early-stage AD may not show any symptoms one day; the next he or she may have trouble remembering your name or finding the milk in the refrigerator."[26]

No studies have been conducted on the specific topic of AD and testimony.[27] However, there are seven stages of AD,[28] which are instructive in determining whether testifying in a court of law will or may be problematic. The Alzheimer's Association specifies the following stages:

I. "No impairment (normal function)"

II. "Very mild cognitive decline (may be normal age-related changes or earliest signs of Alzheimer's disease)"

III. "Mild cognitive decline (early-stage Alzheimer's can be diagnosed in some, but not all, individuals with these symptoms)"

IV. "Moderate cognitive decline (Mild or early-stage Alzheimer's disease)"

V. "Moderately severe cognitive decline (Moderate or mid-stage Alzheimer's disease)"

VI. "Severe cognitive decline (Moderately severe or mid-stage Alzheimer's disease)"

VII. "Very severe cognitive decline (Severe or late-stage Alzheimer's disease)"[29]

As will be shown below, it is likely that witnesses in only stages five, six, and seven will cause evidentiary issues for courts. Stage seven, which is described as an individual losing the ability to respond to his or her envi-

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23. *Alzheimer's Disease*, *supra* note 21 (footnotes omitted); *see also* Ludovico Minati et al., *Current Concepts in Alzheimer's Disease: A Multidisciplinary Review*, 24 AM. J. ALZHEIMER'S DISEASE & OTHER DEMENTIAS 95, 100 (2009).

24. Gardner, Coble Armstrong & Rashti, *supra* note 6, at 133, 141. Visuospatial is defined as "[o]f or relating to visual perception of spatial relationships among objects." THE AMERICAN HERITAGE MEDICAL DICTIONARY 879 (2d ed. 2007).

25. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 7, at 41; UNIV. OF S. CAL. L.A. CAREGIVER RES. CTR., FACT SHEET: ALZHEIMER'S DISEASE 2 (2002), *available at* http://lacrc.usc.edu/forms/alzheimers%20disease.pdf.

26. UNIV. OF S. CAL. L.A. CAREGIVER RES. CTR., *supra* note 25, at 2.

27. Sal A. Soraci et al., *Psychological Impairment, Eyewitness Testimony, and False Memories: Individual Differences*, *in* 1 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR EVENTS 261, 267-68 (Michael P. Toglia et al. eds., 2007).

28. *Seven Stages of Alzheimer's*, ALZHEIMER'S ASS'N, https://www.alz.org/alzheimers_disease_stages_of_alzheimers.asp (last visited Feb. 2, 2013).

29. *Id.*

ronment, carry on a conversation, and control movement,[30] should ordinarily preclude the individual's ability to testify, although he or she may still be able to say words and phrases. Alzheimer's disease has no known cure or treatment, although the Food and Drug Administration has approved some medications that may temporarily alleviate symptoms.[31]

II. COMPETENCY AS A WITNESS AND ALZHEIMER'S DISEASE

Live witness testimony is one type of evidence that is offered at trial. Trial evidence may be categorized into the following six areas: (1) oral testimony, (2) real evidence, (3) documents, (4) demonstrative evidence, (5) stipulations, and (6) judicial notice.[32] Oral testimony, which is most likely to be most affected by AD, may be further divided into (1) fact witnesses; (2) expert witnesses; and (3) character witnesses.[33] This Article focuses on fact witnesses who suffer from AD.

Many years ago, senility was used as a basis for completely disqualifying a witness from testifying.[34] This and many other witness disqualifications eventually disappeared in favor of allowing witnesses to testify, with the jury weighing the credibility of that testimony.[35] The Advisory Committee to the Rules of Evidence proposed changes to the Rules of Evidence in 1972 and noted that "[n]o mental or moral qualifications for testifying as a witness are specified."[36] When the Rules were adopted in 1975, a very broad provision on the competency of witnesses was passed, and the Rule now provides the following: "Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision."[37]

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30. *Id.*

31. Sandra Day O'Connor, Stanley Prusiner & Ken Dychtwald, *The Age of Alzheimer's*, N.Y. TIMES (Oct. 27, 2010), http://www.nytimes.com/2010/10/28/opinion/28oconnor.html?_r=0; *see also* ALZHEIMER'S ASS'N, *supra* note 5, at 12.

32. DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 7-10 (2d ed. 2012).

33. *Id.*

34. Thomas J. Feeney, *Expert Psychological Testimony on Credibility Issues*, 115 MIL. L. REV. 121, 123 (1987).

35. *Id.*; *see also* FED. R. EVID. 601 advisory committee's note.

36. FED. R. EVID. 601 advisory committee's note.

37. FED. R. EVID. 601; Pub. L. No. 93-595, § 1, 88 Stat. 1934 (1975). The second sentence was added primarily to account for particular states' Dead Man's Acts. FED. R. EVID. 601 advisory committee's note. Note the Rules provided throughout this Article are the Restyled Rules of Evidence, which became effective on December 1, 2011. *See id.* The restyled changes to the Federal Rules "are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility." FED. R. EVID. 601 (including the 2011 amendment).

The Committee determined that courts had generally moved toward exercising discretion in favor of generally allowing testimony and leaving it to the jury to weigh the credibility of the witnesses.[38] In fact, the Advisory Committee went so far as to state that it is "difficult to imagine" a witness "wholly without capacity."[39]

Prior to the modern-day rules, as early as 1882, the U.S. Supreme Court indicated the following as the "general rule":

> [A] lunatic or a person affected with insanity is admissible as a witness if he have [sic] sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have [sic] that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity.[40]

Because capacity to testify is a question of law, judges decide whether a particular witness is competent, with a presumption that witnesses are competent.[41] The question about believability is then left to the jury, which weighs the credibility of testimony.[42]

According to the Supreme Court, judges should consider the following two criteria: "(1) whether the proposed witness is capable of comprehending the nature of the oath, and (2) whether the witness is capable of giving an accurate account of what he or she has seen and heard."[43] "The days are long past when any mental illness was presumed to undermine a witness's competence to testify."[44] In a case involving the question of whether rest home residents (described as "persons of advanced years, feeble both physically and mentally") were competent to testify at a trial for election fraud, the Court quoted a "leading commentator" on evidence, stating the following:

> "[T]he culmination of the modern trend which has converted questions of competency into questions of credibility while 'steadily moving towards a realization that

38. FED. R. EVID. 601 advisory committee's note.

39. *Id.*

40. District of Columbia v. Armes, 107 U.S. 519, 521-22 (1883) (citing Regina v. Hill, (1851) 5 Cox 259).

41. United States v. Victor Teicher & Co., No. 88 Cr. 796 (CSH), 1989 U.S. Dist. LEXIS 13894, at *3, *6-7 (S.D.N.Y. Nov. 21, 1989); Kevin M. Cremin et al., *Ensuring a Fair Hearing for Litigants with Mental Illnesses: The Law and Psychology of Capacity, Admissibility, and Credibility Assessments in Civil Proceedings*, 17 J.L. & POL'Y 455, 460 (2009).

42. Keren Shapira-Ettinger, *The Conundrum of Mental States: Substantive Rules and Evidence Combined*, 28 CARDOZO L. REV. 2577, 2584 (2007).

43. Cremin et al., *supra* note 41, at 462 (citing *Armes*, 107 U.S. at 521-22).

44. United States v. George, 532 F.3d 933, 937 (D.C. Cir. 2008).

> judicial determination of the question of whether a witness should be heard at all should be abrogated in favor of hearing the testimony for what it is worth."[45]

The Court went on to limit those disqualified to persons who are without personal knowledge, without the capacity to recall, or without the ability to understand the duty to testify truthfully.[46]

Nevertheless, courts have in some instances precluded the testimony of a witness with AD or another form of dementia. The Superior Court of Delaware in *In re Asbestos Litigation Carter Trial Group* disallowed the deposition testimony of "an elderly gentleman whose memory [was] fuzzy and who, though clearly striving to recall details of his work over a forty-year period . . . [was] simply unable to do so with any degree of certainty."[47] Oddly enough, the court still found that "Mr. Thomas knew right from wrong and that he understood his obligation to testify truthfully."[48] In *Averill v. Gleaner Life Insurance Society*, District Court Judge Carr, when speaking about a potential witness, seemingly imposed a blanket rule and stated, "According to the defendant, he is elderly and afflicted with dementia or Alzheimer's disease. If so, he is not competent to testify, even if he has relevant testimony to offer."[49] In a case involving not a witness with AD, but the testimony of a child, Ninth Circuit Justice Noonan wrote in his dissenting opinion, "You cannot cross-examine an idiot, a victim of Alzheimer's, a baby—they cannot understand what they are supposed to do."[50] He further stated that "[t]he 'necessities of the case' do not create competency. If your chief witness is incompetent, you do not have a case."[51] Judge Noonan's words were adopted by the Sixth Circuit Court of Appeals in a case in which the court perhaps incorrectly fused the differing concepts of competency and the constitutional right of confrontation.[52]

Conversely, other courts have allowed witnesses with AD to testify, or have held against a claim of ineffective assistance of counsel when experts were not retained at the trial level to attempt to block testimony. In *Monteverde v. Mitchell*, District Court Judge Ware determined that a witness with AD had diminished abilities that were "obvious to the jury," and that there

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45. United States v. Odom, 736 F.2d 104, 112 (4th Cir. 1984) (quoting 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES § 601 (1975)).

46. *Id.*

47. *In re* Asbestos Litig., No. 91C-07-61, 1992 Del. Super. LEXIS 488, at *3 (Del. Super. Ct. Oct. 26, 1992).

48. *Id.* at *5.

49. Averill v. Gleaner Life Ins. Soc'y, No. 3:06CV2867, 2009 U.S. Dist. LEXIS 105121, at *4 (N.D. Ohio Oct. 21, 2009).

50. Walters v. McCormick, 122 F.3d 1172, 1182 (9th Cir. 1997) (Noonan, J., dissenting).

51. *Id.*

52. Haliym v. Mitchell, 492 F.3d 680, 702 (6th Cir. 2007).

was thus no need for the petitioner's attorney to secure the services of an expert in an attempt to exclude her testimony.[53] In *Banez v. Banez*, the Court found that the trial court did not abuse its discretion in allowing a witness with "moderate severity" AD to testify, despite the fact that she "at times seemed confused."[54] That court found that the trial court did not abuse its discretion because the witness "demonstrated she was able to communicate and recollect her living apart from her husband due to her fear of him."[55] In a Michigan Court of Appeals case, the court stated that though the witness (plaintiff) had not been officially diagnosed with AD, a diagnosis to that effect would not necessarily mean the plaintiff was incompetent to testify.[56] Finally, the Superior Court of Pennsylvania decided that a trial judge did not abuse his discretion in allowing a plaintiff–appellant to testify despite her AD.[57] In that case, the physician who treated the plaintiff–appellant testified that she "could typically recall remote things better than more recent events."[58]

In an evidentiary hearing concerning an AD-diagnosed victim–witness's competence to testify, Judge Stokes of the Superior Court of the State of Delaware noted instances of "substantial confusion" but ruled the witness was competent to testify.[59] The judge cited to the Federal Rules of Evidence Advisory Committee Notes as well as to the "majority of states"[60] and stated that "[t]he jury will be able to assess whether or not they find Ms. Kilroy credible after hearing her testimony at trial."[61] Judge Stokes cited to a Texas Court of Civil Appeals case in which the court affirmed a conviction where the prosecution relied upon testimony from a witness–victim who was diagnosed with AD.[62] In that case, the victim–witness testified initially that she was injured by "'a pistol sticking right in [her] face,'" although the

53. Monteverde v. Mitchell, No. C 09-407 JW (PR), 2010 U.S. Dist. LEXIS 124957, at *6 (N.D. Cal. Oct. 27, 2010).

54. Banez v. Banez, 2007-Ohio-4584, ¶¶ 15, 178.

55. *Id.* ¶ 178.

56. Romig v. Norfolk S. Ry., No. 297040, 2011 Mich. App. LEXIS 1257, at *5 (Mich. Ct. App. July 7, 2011) (exemplifying where there was testimony from another witness that the plaintiff suffered from AD).

57. Fugent v. Whitehall Inn, Inc., No. 703 Pittsburgh 1986, 1987 Pa. Super. LEXIS 9922, at *6-7 (Pa. Super. Ct. Mar. 31, 1987).

58. *Id.* at *6.

59. State v. Baker, No. 0302013230, 2003 WL 21999596, at *1, *4 (Del. Super. Ct. Aug. 7, 2003), *available at* http://statecasefiles.justia.com/documents/delaware/superior-court/38130-0.pdf (exemplifying where the victim/witness was unable to remember the year she was born, her religion, the number of siblings she had, and the current day of the week, month, or season, among other things).

60. *Id.* at *2-3. The cases cited were not all AD cases. *See id.*

61. *Id.*

62. *Id.* (citing Rodriguez v. State, 772 S.W.2d 167, 171 (Tex. App. 1989)).

attack had in fact been made with a knife.[63] Although the court acknowledged that parts of her testimony "taken out of . . . context . . . raise[d] troubling questions," it also determined that she was "sufficiently coherent and intelligible."[64]

Given the information on the progressive nature of AD and the requirements of Rule 601 (particularly considering the Advisory Committee Notes to the Rule), most individuals with AD should be allowed to testify in court. If the issue concerns newly acquired information[65] or the potential witness is having a particularly difficult day, the court may wish to reconsider allowing the witness to testify.[66] These issues will be addressed below.

III. HEARSAY, UNAVAILABILITY, AND A WITNESS WITH ALZHEIMER'S DISEASE

The next area in the Rules of Evidence that may be affected when an individual has AD is the second set of exceptions to the hearsay rule, Rule 804, specifically the following provisions of the rule:

> Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness
>
> (a) CRITERIA FOR BEING UNAVAILABLE. A declarant is considered to be unavailable as a witness if the declarant:
>
> . . . .
>
> (3) testifies to *not remembering the subject matter*;
>
> (4) cannot be present or testify at the trial or hearing because of death or a *then-existing infirmity, physical illness, or mental illness*[67]

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63. *Rodriguez*, 772 S.W.2d at 171.

64. *Id.* at 170. Interestingly, the Court cited to the earlier Texas case of *Watson v. State*, a case that seems to have a rather high bar for competency. 596 S.W.2d 867, 870-71 (Tex. Crim. App. 1980) ("If a person afflicted with a physical or mental disability possesses sufficient intelligence to receive correct impressions of events he sees, *retains clear recollection of them* and *is able to communicate them through some means*, there is no reason for rejecting his testimony." (first emphasis added)).

65. This phenomenon is referred to as "first in, last out and last in, first out." *See* Carole B. Larkin, *How the Loss of Memory Works in Alzheimer's Disease, and How Understanding This Could Help You*, ALZHEIMER'S READING ROOM (Apr. 1, 2012), http://www.alzheimersreadingroom.com/2011/01/how-loss-of-memory-works-in-alzheimers.html.

66. *What Is Alzheimer's Disease?*, BBC, http://www.bbc.co.uk/radio4/memory/understand/alzheimers.shtml (last visited Feb. 2, 2013) ("Memory loss for recently acquired information is common but older information remains perfectly intact. In the later stages, sufferers can retreat into their childhood, replacing the people and context of the present, with those of the past.").

67. FED. R. EVID. 804 (emphasis added); Pub. L. No. 93-595, § 1, 88 Stat. 1934 (1975).

The unavailability provisions are of course a prerequisite to using the actual hearsay exception rules of Rule 804(b). Prior to passage of the rule, the lack of memory was generally recognized by courts as unavailability, although there was some concern within the Advisory Committee about a particular witness's feigned lack of memory.[68] The witness need not actually be "unavailable"—the issue is whether the *testimony* is unavailable.[69] Under Federal Rule of Evidence Rule 804, "unavailability" includes situations in which the declarant testifies to a lack of memory of the subject matter of his statement. "The crucial factor is not the unavailability of the witness but rather the unavailability of his [or her] testimony."[70] As discussed more fully below, courts have found that "there is a critical distinction between unavailability for *confrontation clause* purposes and unavailability for evidentiary purposes."[71]

A party need not establish a total memory loss for a finding of "unavailability" of a witness's testimony under the hearsay rule.[72] Accordingly, full cognitive decline is not necessary for this provision to apply. Patients with mild AD "generally show a short-term memory deficit," followed by a "worsening of the memory impairment as atrophic changes progress in the hippocampal structures."[73] The progression rate for those with AD varies widely.[74] One study found that "[c]linical experience with this population indicates that significant emotional experiences may be salient to people with dementia, and that certain behaviors and characteristics enhance their credibility as historians."[75]

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68. FED. R. EVID. 804(a)(3) advisory committee's note. When enacted, the Committee rejected any change to existing federal law on the lack of memory and indicated that a court could simply choose to disbelieve a declarant's testimony about his or her loss of memory. *Id.*; *see also* State v. Amos, 658 N.W.2d 201, 204-05 (Minn. 2003).

69. Walden v. Sears, Roebuck & Co., 654 F.2d 443, 446 (5th Cir. 1981).

70. *Id.* (citing 5 WEINSTEIN & BERGER, *supra* note 45, § 804(a)).

71. *See, e.g.*, State v. Beadle, 265 P.3d 863, 872 (Wash. 2011) (emphasis added).

72. State v. Schiappa, 728 A.2d 466, 474 (Conn. 1999) ("[P]artial memory loss reasonably may provide the basis for a finding of unavailability." (citing 2 MCCORMICK ON EVIDENCE § 253, at 133 (Kenneth S. Brown ed., 5th ed. 1999))).

73. Roberta Perri et al., *Amnestic Mild Cognitive Impairment: Difference of Memory Profile in Subjects Who Converted or Did Not Convert to Alzheimer's Disease*, 21 NEUROPSYCHOLOGY 549, 556 (2007) (citing Arturo Orsini et al., *Immediate Memory Spans in Dimentia*, 67 PERCEPTUAL & MOTOR SKILLS 267 (1988); N.C. Fox et al., *Presymptomatic Hippocampal Atrophy in Alzheimer's Disease: A Longitudinal MRI Study*, 119 BRAIN 2001 (1996)).

74. *Alzheimer's Stages: How the Disease Progresses*, MAYO CLINIC (Jan. 4, 2013), http://www.mayoclinic.com/health/alzheimers-stages/AZ00041.

75. AILEEN WIGLESWORTH & LAURA MOSQUEDA, PEOPLE WITH DEMENTIA AS WITNESSES TO EMOTIONAL EVENTS (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/234132.pdf.

There is a lack of research on elderly eyewitnesses and testimony from elderly persons in general.[76] There are currently disagreements amongst experts about the reliability of elderly witnesses.[77] According to one study conducted in 1994, "Patients with probable Alzheimer's disease (AD) not only fail to retrieve desired information but also suffer from distortions of memory."[78] On the other hand, in a study published in 2002 that compared prior findings, the authors stated, "The literature to date has been mixed with regard to whether AD patients show impaired or preserved emotional-memory enhancement effects."[79] In one study, elderly witnesses were perceived by mock jurors as being more trustworthy, yet less reliable.[80] Conversely, in another study, the authors found that although there was a "negative age bias against elderly witnesses," the data suggested an actual bias in favor of the testimony of elderly witnesses.[81] Experiments have even shown that elderly believability by the jury depends upon multiple factors, such as the actual age of the elderly person, whether they are male or female, and the amount of time the mock jurors spent with the elderly persons.[82] Undoubtedly, given the aging of society, there will be an increasing number of elderly witnesses, including those with AD. In fact, because of the "slow-motion train wreck" that is AD,[83] courts will have increasing opportunities to deal with this subject in the years ahead.[84] By the age of eighty-five, those

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76. Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 499 n.309 (2009); Rowena Jones & Tony Elliott, *Capacity to Give Evidence in Court: Issues That May Arise When a Client with Dementia Is a Victim of Crime*, 29 PSYCHIATRIST 324, 324-26 (2005) (surveying Great Britain, Australia, and the United States); *see also* Brian H. Bornstein, *Memory Processes in Elderly Eyewitnesses: What We Know and What We Don't Know*, 13 BEHAV. SCI. & L. 337, 345 (1995).

77. L. Beth Gaydon & Monica K. Miller, *Elders in the Justice System: How the System Treats Elders in Trials, During Imprisonment, and on Death Row*, 25 BEHAV. SCI. & L. 677, 679-80 (2007).

78. Andrew E. Budson et al., *Semantic Versus Phonological False Recognition in Aging and Alzheimer's Disease*, 51 BRAIN & COGNITION 251, 251 (2003).

79. Elizabeth A. Kensinger et al., *Effects of Normal Aging and Alzheimer's Disease on Emotional Memory*, 2 EMOTION 118, 130 (2002) (citations omitted).

80. Bornstein, *supra* note 76, at 338.

81. Narina Nunez et al., *The Testimony of Elderly Victim/Witnesses and Their Impact on Juror Decisions: The Importance of Examining Multiple Stereotypes*, 23 LAW & HUM. BEHAV. 413, 414 (1999).

82. Katrin Mueller-Johnson et al., *The Perceived Credibility of Older Adults as Witnesses and Its Relation to Ageism*, 25 BEHAV. SCI. & L. 355, 372 (2007).

83. George Bartzokis, *Baby Boomers and Alzheimer's Disease*, ABC NEWS (July 18, 2011), http://abcnews.go.com/Health/Alzheimers/baby-boomers-alzheimers-disease/story?id=14084404.

84. Mueller-Johnson et al., *supra* note 82, at 373 ("Given the pervasiveness of ageist attitudes in society, this finding, if replicated, can have important implications for legal proceedings: with the ratio of older persons in the population steadily growing and projected to

The *New York Times* refers to as the "old-old," one-half of Americans will have AD,[85] and courts will consequently need to determine unavailability not only under the hearsay rule, but under the Confrontation Clause of the Sixth Amendment as well.

IV. THE CONFRONTATION CLAUSE IN THE AGE OF ALZHEIMER'S DISEASE

A. The Confrontation Clause—In General

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[86] Between the years 1980 and 2004, the interpretation of the Confrontation Clause was rather static.[87] In 1980, the U.S. Supreme Court decided *Ohio v. Roberts* and held that the admission of an out-of-court statement made by an unavailable witness did not violate the Sixth Amendment, provided it had "adequate 'indicia of reliability.'"[88] There were two ways to establish these indicia of reliability, according to the Court: if the out-of-court statement either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness," then the admission of the statement met the requirements of the Confrontation Clause.[89] In 2004, the defendant in *Crawford v. Washington* asked the Supreme Court to reconsider the *Roberts* interpretation and argued that the "test strays from the original meaning of the Confrontation Clause."[90] Justice Scalia, writing for the majority, agreed.[91] In *Crawford*, the Court performed a lengthy review of the history of the right to confront one's accusers, beginning with Roman times.[92] Two "inferences" were drawn from an examination of this history.[93] The first was that the "principal evil at which the Confrontation Clause was directed" was the "use of *ex parte* examinations as evidence against the accused."[94] The second was that not all out-of-court statements fall under the Sixth Amendment's "core concerns."[95]

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reach 1:5 in the USA by 2050, more older persons will be involved in legal cases." (citations omitted)).

85. *See* Thomas L. Friedman, *Coming Soon: The Big Trade-Off*, N.Y. TIMES, July 28, 2012, at 1SR; Bartzokis, *supra* note 83.

86. U.S. CONST. amend. VI.

87. *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 756 (2005).

88. 448 U.S. 56, 66 (1980).

89. *Id.*

90. 541 U.S. 36, 42 (2004).

91. *Id.* at 68.

92. *Id.* at 43.

93. *Id.* at 50.

94. *Id.*

95. *Id.* at 51.

With *Crawford*, the Supreme Court radically transformed the interpretation of the Confrontation Clause.[96] This led to a "steady stream" of U.S. Supreme Court decisions since 2004 applying its holding in *Crawford*.[97] This "fundamentally new interpretation of the confrontation right" is the following: "'Testimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'"[98]

The steady stream of cases was brought because the Supreme Court decided against specifically defining the term "testimonial statements."[99] However, the Court did hint at the meaning of the term, stating that "at a minimum," prior testimony at a preliminary hearing and grand jury testimony, as well as testimony at a former trial, were considered testimonial.[100] Also included in the term were "pretrial statements that declarants would reasonably expect to be used prosecutorially" and extrajudicial statements, including "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[101] On the other hand, an "off-hand, overheard remark" would not be testimonial, nor would business records, public records, or statements made in furtherance of a conspiracy.[102]

In the *Davis v. Washington*[103] and *Michigan v. Bryant*[104] cases, the Court considered out-of-court statements made to the police. In *Davis*, Michelle McCottry called 911, but the call abruptly ended.[105] The 911 operator called back, spoke with her, and asked, "What's going on?"[106] McCottry answered, "He's here jumpin' on me again," "He's usin' his fists," and "He's runnin' now."[107] McCottry failed to appear at trial, and the State of Washington introduced the 911 tape, over Davis's objection.[108] In the companion case, *Hammon*, the police responded to a reported domestic

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96. Dylan O. Keenan, Note, *Bullcoming and Cold Cases: Reconciling the Confrontation Clause with DNA Evidence*, 30 YALE L. & POL'Y REV. INTER ALIA 13, 13 (2012).

97. Williams v. Illinois, 132 S. Ct. 2221, 2232 (2012) (referencing *Davis v. Washington*, 547 U.S. 813 (2006), which was decided with *Hammon v. Indiana*; *Indiana v. Edwards*, 554 U.S. 164 (2008); *Giles v. California*, 554 U.S. 353 (2008); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011)).

98. *Id.* (alterations in original) (quoting *Crawford*, 541 U.S. at 59).

99. *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

100. *Id.*

101. *Id.* at 51-52.

102. *Id.* at 51, 56; *Melendez-Diaz*, 557 U.S. at 324.

103. 547 U.S. 813, 817 (2006) (including *Hammon v. Indiana* as a companion case).

104. 131 S. Ct. 1143, 1150 (2011).

105. *Davis*, 547 U.S. at 817.

106. *Id.*

107. *Id.* at 817-18.

108. *Id.* at 819.

incident and found Amy Hammon alone, outside the house on her front porch.[109] She indicated that nothing was wrong, and her husband Hershel, who was in the kitchen, told the officers that there had been an argument, but no violence occurred.[110] The officers eventually spoke again with Amy and, based upon her account of the incident, had her fill out and sign an affidavit.[111] As McCottry had done, Amy did not appear at trial and the officer authenticated and testified about the affidavit, over Hershel's objection.[112] Justice Scalia, again writing for the majority, stated the following:

> 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.[113]

The Court revisited this "ongoing emergency" situation in *Michigan v. Bryant*.[114] In that case, Anthony Covington had been shot in the abdomen and was bleeding extensively and in great pain when approached by the responding police officers.[115] He was questioned by police for five to ten minutes and made numerous statements before the emergency medical services arrived.[116] The Supreme Court, with Justice Sotomayor writing for the majority, decided that the statements Covington made were not testimonial because the primary purpose of the police questions and his answers, viewed objectively, was to respond to an ongoing emergency.[117] The Court indicated that this is a "highly context-dependent inquiry."[118] Although Justice Scalia, in his dissent, disagreed vehemently, the majority found there was a potential threat to the public at large.[119]

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109. *Id.*
110. *Id.*
111. *Id.* at 820.
112. *Id.*
113. *Id.* at 822.
114. 131 S. Ct. 1143 (2011).
115. *Id.* at 1150.
116. *Id.*
117. *Id.* Covington subsequently died from the gunshot wound. *Id.*
118. *Id.* at 1158.
119. *Id.* at 1156. Justice Scalia wrote the following in his dissenting opinion:

> Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. . . . [T]oday's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles.

Id. at 1168 (Scalia, J., dissenting).

In three post-*Crawford* cases, the Supreme Court addressed the issue of lab reports and whether and under what circumstances these are testimonial. The first case was *Melendez-Diaz v. Massachusetts*, which involved three forensic "certificates of analysis" indicating that the substance found in a police cruiser was in fact cocaine.[120] The Court found the certificates to be indistinguishable from affidavits, which were clearly testimonial, according to *Crawford*.[121] The evidence, submitted without a witness, was "functionally identical to live, in-court testimony."[122] Cross-examination is necessary because "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials."[123] Justice Thomas cast the deciding vote, as he voted with the majority, but wrote a short concurring opinion.[124] He wrote the following: "'[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,'" and he agreed these were "'quite plainly'" affidavits.[125] His view, reiterating his stance in *Giles v. California*,[126] becomes important for Confrontation Clause jurisprudence, as will be shown below.

Bullcoming v. New Mexico was the next forensic report case decided by the Supreme Court involving the Confrontation Clause.[127] The Court answered a question that had been looming since *Melendez-Diaz*.[128] In *Bullcoming*, a New Mexico Department of Health Scientific Laboratory Division analyst, Gerasimos Razatos, testified about Donald Bullcoming's "Report of Blood Alcohol Analysis" that had been written by another analyst, Curtis Caylor.[129] Razatos had neither participated in nor reviewed Caylor's work.[130] In a 5-4 ruling, the Court held that the "surrogate testimony" did not meet constitutional requirements, and that the actual author of the report was necessary.[131] The Court did not answer several lingering questions that

120. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 308 (2009).
121. *Id.* at 310.
122. *Id.* at 310-11.
123. *Id.* at 319.
124. *Id.* at 329 (Thomas, J., concurring).
125. *Id.* at 329-30 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).
126. 554 U.S. 353, 378 (2008) (Thomas, J., concurring).
127. 131 S. Ct. 2705, 2712-13 (2011).
128. *Id.*
129. *Id.* at 2709-10. Interestingly, for reasons not disclosed, Caylor had been put on unpaid leave just prior to the trial. *Id.* at 2711-12.
130. *Id.* at 2712.
131. *Id.* at 2710.

were not relevant to its decision.[132] One issue, of course, was how prosecutors would handle cases in which the author of the report was not available (such as in "cold case" DNA cases).[133] Commentators saw calling an expert to testify about the results of the forensic reports as a possible solution.[134]

The *Bullcoming* case set the stage for the next and most recent Supreme Court case on the Confrontation Clause, *Williams v. Illinois*.[135] In February 2000, a young woman (L.J.) was abducted and raped in Chicago.[136] She was treated at a hospital, where the personnel took a vaginal swab from her using a sexual-assault kit.[137] The Illinois State Police sent the swab to a Cellmark Diagnostics Laboratory for DNA testing.[138] Cellmark sent back a report "signed by two 'reviewers'" stating that the swab contained DNA from a male "donor."[139] At the time of the testing, there were no rape suspects in the case.[140] The defendant, Sandy Williams, was arrested later for an unrelated crime, his DNA was tested, and the results were entered into the Illinois State Police (ISP) database.[141] An ISP forensic specialist, Sandra Lambatos, "conducted a computer search to see if the Cellmark [DNA] profile matched any" profiles within the ISP database, and a match to the defendant was discovered.[142] Lambatos was the person who testified at trial to link the defendant to the Cellmark finding.[143]

The earlier *Bullcoming* decision left the question open as to whether an expert could serve as this forensic "link."[144] On June 18, 2012, the U.S. Supreme Court issued a fractured decision, holding that there was in fact no violation of the Sixth Amendment Confrontation Clause.[145] Unfortunately, "no single rationale for the decision in *Williams* commanded a majority of

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132. Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used* Bullcoming v. New Mexico *to Clarify Confrontation Clause Requirements for CSI-Type Reports*, 90 NEB. L. REV. 502, 558 (2011).

133. Keenan, *supra* note 96, at 19-21.

134. *Id.* at 21-23.

135. 132 S. Ct. 2221 (2012).

136. *Id.* at 2229.

137. *Id.*

138. *Id.*

139. *Id.* at 2229; *Id.* at 2260 (Thomas, J., concurring).

140. *Id.* at 2228 (majority opinion).

141. *Id.* at 2229.

142. *Id.*

143. *Id.* at 2229-30.

144. *See* Jeffrey Fisher, *The Holdings and Implications of* Williams v. Illinois, SCOTUSBLOG (June 20, 2012, 2:20 PM), http://www.scotusblog.com/2012/06/the-holdings-and-implications-of-williams-v-illinois.

145. *See* John Castellano, *Castellano on* Williams v. Illinois*: Fractured Supreme Court Approves Introduction Under Confrontation Clause of Expert Testimony Relying on Others' DNA Reports*, 2012 LEXISNEXIS EMERGING ISSUES 6559.

the Court."[146] Four Justices (Alito, Roberts, Kennedy, and Breyer) believed that there was no Confrontation Clause violation for the following reasons:

> 1. The Cellmark DNA test report (lodged, but never offered in evidence), relied upon by the expert from the State of Illinois was not offered for the truth of the matter asserted and thus did not fit within the *Crawford* analysis and consequently did not violate the 6th Amendment; and
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> 2. "Even if the Cellmark report had been introduced for its truth . . . . [it] was not prepared for the primary purpose of accusing a targeted individual" and thus did not violate the 6th Amendment.[147]

Justice Thomas concurred in result only.[148] He did not agree with either of the above rationales, but rather found that the Cellmark report was not testimonial and the *Crawford* analysis was not triggered at all.[149] He believed that the report "lack[ed] the solemnity of an affidavit or deposition, for it [was] neither a sworn nor a certified declaration of fact."[150]

Four justices dissented, and Justice Kagan wrote a lengthy dissenting opinion (joined by Justices Scalia, Ginsburg, and Sotomayor).[151] She believed that under Confrontation Clause precedent (most notably the *Melendez-Diaz* and *Bullcoming* cases), *Williams* was "an open-and-shut case."[152] Justice Kagan began her dissent in an interesting way—with a reference to a State of California case in which a Cellmark analyst, when undergoing cross examination, realized that she had "made a mortifying error."[153] The dissent went on to point out that "[f]ive Justices specifically reject every aspect of [the plurality's] reasoning and every paragraph of its explication."[154] Justice Kagan indicated that the State of Illinois used Lambatos as a mere conduit for the Cellmark report and that in the future, states will "sneak in" the evidence through the back door.[155] She specifically stated that "Lambatos's testimony is functionally identical to the 'surrogate testimony' that New Mexico proffered in *Bullcoming*, which did nothing to cure the problem identified in *Melendez-Diaz*."[156] In fact, she stated that the first rationale relied upon by the plurality opinion "endorses a prosecutorial dodge," and

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146. *Id.*
147. *Williams*, 132 S. Ct. at 2227-28, 2242-44.
148. *Id.* at 2255 (Thomas, J., concurring).
149. *Id.* at 2255-56, 2259-60.
150. *Id.* at 2260. Justice Breyer filed a concurring opinion as well. *Id.* at 2244 (Breyer, J., concurring). He would have had the case reargued, as he would like an answer to the question, "What, if any, are the outer limits of the 'testimonial statements' rule set forth in *Crawford*." *Id.* at 2244-45.
151. *Id.* at 2264 (Kagan, J., dissenting).
152. *Id.* at 2265-67.
153. *Id.* at 2264.
154. *Id.* at 2265.
155. *Id.* at 2272.
156. *Id.* at 2267 (quoting Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011)).

the second rationale "relies on distinguishing indistinguishable forensic reports."[157] The dissenting Justices' analysis certainly appears to be correct, as "[t]he incriminating trial testimony came . . . from a 'state-employed scientist' who had no relationship whatsoever with the contents of the report."[158]

On the other hand, an expert in this area believes that due to Justice Thomas's concurrence in the result only, the fracturing is really along the lines of the *type* of forensic report.[159] He theorizes that reports on the analysis of drugs, blood, alcohol, fingerprints, ballistics, and autopsies will continue to be governed by the *Melendez-Diaz/Bullcoming* analysis.[160] On the other hand, "statements made as part of a lab's internal work product or in a subsidiary report used to generate a final incriminating report will generally not be testimonial."[161]

It is clear that there are no longer any clear demarcations in certain areas that may or may not implicate the Confrontation Clause. One commentator describes the four separate opinions in the *Williams* case as displaying the dysfunctional nature of the Justices in this particular constitutional area.[162] Another posits that there is "much uncertainty in terms of the proper application of the Confrontation Clause now and in the future."[163]

One remaining important area in post-*Crawford* Confrontation Clause jurisprudence is the applicability of "forfeiture by wrongdoing."[164] There were two exceptions to the Confrontation Clause under common law: first, if the individual made the statements while on the "brink of death," and second, if the speaker was prevented from appearing because he or she "was 'detained' or 'kept away' by the 'means or procurement' of the defendant."[165] This second exception became known as forfeiture by wrongdoing. In *Giles v. California*, the Supreme Court addressed this issue for the first time after their *Crawford* decision.[166] Brenda Avie was shot and killed by Dwayne Giles, and the State sought to admit statements made by Avie to

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157. *Id.* at 2265.

158. Andrew Cohen, *The Supreme Court Splinters Apart over the Confrontation Clause*, ATLANTIC (June 19, 2012), http://www.theatlantic.com/national/archive/2012/06/the-supreme-court-splinters-apart-over-the-confrontation-clause/258634 (quoting *Williams*, 132 S. Ct. at 2267).

159. Fisher, *supra* note 144. Professor Fisher was the lead counsel for the petitioners in *Crawford*, *Davis*, *Melendez-Diaz*, and *Bullcoming*. *See* Crawford v. Washington, 541 U.S. 36, 37 (2004); Davis v. Washington, 547 U.S. 813, 816 (2006); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 306 (2009); *Bullcoming*, 131 S. Ct. at 2709.

160. Fisher, *supra* note 144.

161. *Id.*

162. Cohen, *supra* note 158.

163. Castellano, *supra* note 145.

164. Giles v. California, 554 U.S. 353, 358 (2008).

165. *Id.* at 358-59.

166. *See id.* at 358.

police officers three weeks before the shooting.[167] The State conceded that the statements were testimonial, but argued that Giles waived his right to confrontation because he killed Avie.[168] Justice Scalia, once again looking back in history for the answer, wrote the majority opinion and held that in order for the forfeiture by wrongdoing doctrine to apply, the defendant must have made the witness unavailable for the purpose of preventing testimony.[169] The Court stated the following:

> The manner in which the rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declaration exception.[170]

Interestingly, Justice Thomas believed that even in this situation, the answers Avie provided to the officers were not testimonial, as the police questioning was not "'a formalized dialogue.'"[171] Nevertheless, because the State did not make any argument that the statements were non-testimonial, he concurred in the judgment.[172]

In the eight years since the *Crawford* decision, the Court has provided a significant amount of guidance. For example, it is now clear that statements in reply to police questions will be considered "testimonial" unless there is an ongoing emergency, although the Justices disagree as to what exactly constitutes an ongoing emergency.[173] Additionally, for forfeiture by wrongdoing, the prosecution must show that the defendant made the declarant unavailable for the narrow purpose of testifying and not for any other purpose.[174] Other areas are not clear, particularly in the area of forensic reports.[175] It remains to be decided under what circumstances expert witnesses will be allowed to testify about the findings of non-testifying analysts.

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167. *Id.* at 356.
168. *Id.* at 358.
169. *Id.* at 355, 361.
170. *Id.* at 361-62.
171. *Id.* at 378 (Thomas, J., concurring) (quoting Davis v. Washington, 547 U.S. 813, 840 (2006) (Thomas, J., concurring)).
172. *Id.* at 377-78.
173. *See supra* note 119 and accompanying text.
174. *Giles*, 554 U.S. at 359-62.
175. Castellano, *supra* note 145; Fisher, *supra* note 144.

B. The Meaning of "Unavailable"—Hearsay Versus the Confrontation Clause

Is it possible for a patient with Alzheimer's disease to be considered unavailable for purposes of the hearsay exceptions under Rule 804 and nevertheless be considered available for cross-examination purposes under the Confrontation Clause? Certain courts have answered that question affirmatively, relying upon both case law decided prior to *Crawford* and the *Crawford* case itself.[176]

The U.S. Supreme Court considered this issue, but did not answer the question squarely, in *United States v. Owens*, decided in 1988.[177] In *Owens*, Foster, an employee of a correctional institution, was attacked in a federal prison by a person wielding a metal pipe.[178] He suffered a fractured skull, and his memory was "severely impaired."[179] Mansfield, an FBI investigator, visited Foster in the hospital, and despite Foster's inability to remember his attacker's name on Mansfield's first visit, Foster named Owens on a subsequent visit and also identified him from a photo array.[180] Foster was called as a witness at trial, and he remembered his activities just prior to the attack, feeling the blows to his skull and seeing blood.[181] He did not, however, recall seeing Owens, although he testified that he did recall identifying him while he was in the hospital speaking with Mansfield.[182]

In the lower courts and before the Supreme Court, Owens objected to Foster's identification under both hearsay Rule 802 and the Confrontation Clause.[183] Justice Scalia corrected Owens' objection in footnote 1 of the opinion, and indicated that he should have raised his objection under Rule 801(d)(1)(C), not 802.[184] Justice Scalia continued the analysis on that basis. He indicated that the precise question ("a Confrontation Clause violation . . . [based] upon a witness' loss of memory") had not yet been before the Court, but he cited *California v. Green*[185] and *Delaware v. Fensterer*[186] as leaving

176. *See, e.g.*, State v. Beadle, 265 P.3d 863, 872-73 (Wash. 2011); *In re* M.H.V.-P., 341 S.W.3d 553, 557-58 (Tex. App. 2011); State v. Delos Santos, 238 P.3d 162, 164, 177-81 (Haw. 2010).

177. 484 U.S. 554 (1988).

178. *Id.* at 556; *id.* at 565 (Brennan, J., dissenting).

179. *Id.* at 556 (majority opinion).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 556-57 & n.1.

184. *Id.* at 557 n.1.

185. 399 U.S. 149, 168-69 (1970) ("Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture." (footnote omitted)).

the possibility open.[187] The Court, upon considering the question, stated the following:

> "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" . . . It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination . . . the very fact that he has a bad memory.[188]

Owens was decided using the old *Roberts* test.[189] The majority stated that "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he [or she] is placed on the stand, under oath, and responds willingly to questions."[190] Whether this remains the standard after *Crawford* is considered below.

One of the significant findings in *Owens* is that there was no "internal inconsistency" between a witness being deemed unavailable for purposes of one hearsay rule yet available under another hearsay rule.[191] The first hearsay rule discussed was 801(d)(1)(C), prior statements by a witness, and the second was 804(a)(3), definition of unavailability—lack of memory.[192] It was necessary for Foster to be "'subject to cross-examination'" for the United States to be able to use his prior identification of Owens.[193] On the other hand, based upon his memory loss, Owens claimed that Foster would be deemed "unavailable" under Rule 804 and the United States could not have it both ways.[194] The Court disagreed.[195] The majority stated the following with respect to the two hearsay rules:

> [Defendant] argues that this reading is impermissible because it creates an internal inconsistency in the Rules, since the forgetful witness who is deemed "subject to cross-examination" under 801(d)(1)(C) is simultaneously deemed "unavailable" under 804(a)(3). . . . It seems to us, however, that this is not a substantive inconsistency, but only a semantic oddity resulting from the fact that Rule 804(a) has for convenience of reference in Rule 804(b) chosen to describe the circumstances nec-

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186. At least two commentators believe the majority's reliance on the *Fensterer* case was misplaced. *See* David Greenwald, *The Forgetful Witness*, 60 U. CHI. L. REV. 167, 178-79 (1993); Claire L. Seltz, *Sixth Amendment—The Confrontation Clause, Witness Memory Loss and Hearsay Exceptions: What Are the Defendant's Constitutional and Evidentiary Guarantees—Procedure or Substance?*, 79 J. CRIM. L. & CRIMINOLOGY 866, 885-90 (1988).

187. *Owens*, 484 U.S. at 557-58.

188. *Id.* at 559 (alteration in original) (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)).

189. *See id.* at 560.

190. *Id.* at 561.

191. *Id.* at 563-64.

192. *See id.*

193. *Id.* at 561-62 (quoting FED. R. EVID. 801(d)(1)).

194. *Id.* at 563.

195. *Id.* at 564.

essary in order to admit certain categories of hearsay testimony under the rubric "Unavailability as a witness."[196]

The majority also determined in a different part of its opinion that Foster was indeed available for cross-examination under the Confrontation Clause, despite his memory loss.[197] Although the Court did not squarely address Rule 804 versus the Confrontation Clause, it appears the Court would have reached a similar finding as it had when it analyzed Rule 801(d)(1)(C) and the Confrontation Clause. It determined that the "unavailable" language in Rule 804 was merely a "semantic inconsistency" when compared with the language in 801(d)(1)(C), and it also found that Foster's testimony was admissible under both Rule 801(d)(1)(C) and the Confrontation Clause.[198]

The dissenting justices, Brennan and Marshall, believed former Supreme Court jurisprudence required the opportunity for *effective* cross-examination, not simply a hollow procedural formalism as was proposed by the majority.[199] They viewed the opportunity for effective cross-examination with an emphasis on the word *effective*, rather than the majority view, which put the emphasis on the word *opportunity*.[200] Justices Brennan and Marshall cited *Weinstein's Evidence* treatise and agreed with Weinstein and Berger that endorsing the construction of Hearsay Rule 801(d)(1)(C) as the majority had done "render[ed] it unconstitutional under the Confrontation Clause."[201] In their opinion, the mere presence of a witness in the courtroom was not enough.[202]

C. Does *Owens* Survive *Crawford*?

The sea change in Confrontation Clause analysis caused by *Crawford* raises the issue of whether the Supreme Court would now view a witness suffering from memory loss any differently than it did in the *Owens* case. It must be noted that the *Owens* case did not involve a witness with complete memory loss, as Foster testified that he remembered telling FBI Agent Mansfield that Owens was his attacker; in fact, he described his memory of the day in the hospital when he made the identification as "vivid."[203] He recollected making the *identification* but did not remember the actual at-

196. *Id.* at 563 (quoting FED. R. EVID. 801(d)(1), 804). For a critical view of this analysis, see Seltz, *supra* note 186, at 894-95 ("However, the Court did not give any support for this interpretation.").

197. *Owens*, 484 U.S. at 559-60.

198. *See id.* at 557 n.1, 563-64.

199. *Id.* at 567, 572 (Brennan, J., dissenting).

200. *Id.* at 567-69, 571.

201. *Id.* at 571 n.2.

202. *Id.* at 572.

203. *Id.* at 556 (majority opinion); *id.* at 565 (Brennan, J., dissenting).

tack.[204] That is, of course, markedly different from a situation when a witness has no recollection of any of the events at issue. Nevertheless, some courts have interpreted *Owens* in a way that allows prior out-of-court statements, even when the witness has no memory of making the previous out-of-court statement.

The Colorado Supreme Court "held that prior statements made to a police investigator could be admitted even if the witness did not remember making them. . . . These principles have been followed in subsequent decisions as well."[205] This case, although decided prior to *Crawford*, was subsequently relied upon in a case decided after *Crawford*.[206] In *Mercer v. United States*, the District of Columbia Court of Appeals determined that nothing in the *Crawford* case indicated a change in reasoning from the *Owens* case.[207] However, the Court misread *Owens*. The Court stated, "In *Owens*, a witness who had given a prior identification of an individual was not able to recall making that prior identification when called at trial due to memory loss."[208] As has been stated above, Foster remembered making the prior identification to Agent Mansfield; it was the actual assault he did not recall.[209]

The Supreme Court of Hawaii also misinterpreted the Supreme Court cases in stating the following without citing to any authority: "The Supreme Court's construction of the federal confrontation clause indicates that a witness who forgets both the underlying events and her prior statements nonetheless appears for cross-examination at trial."[210] One wonders how such a witness would be allowed to testify at all, because according to this statement, the witness could not possibly meet the personal knowledge requirement that is required of all witnesses. The Hawaii Supreme Court, in another part of its opinion, cited to other state cases "applying *Crawford* [that] have held that a testifying witness appears for cross-examination at trial despite a nearly total lapse in memory."[211]

The Court of Appeals of Texas has held similarly. In *In re M.H.V.-P.*, the court stated that "memory loss does not render a witness 'absent' for

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204. *See id.* at 556 (majority opinion); *id.* at 566 (Brennan, J., dissenting).

205. People v. Argomaniz-Ramirez, 102 P.3d 1015, 1017 (Colo. 2004) (citing People v. Pepper, 568 P.2d 446, 447-48 (Colo. 1977); *Owens*, 484 U.S. at 560).

206. *Id.*

207. 864 A.2d 110, 114 n.4 (D.C. 2004).

208. *Id.*

209. *Owens*, 484 U.S. at 556 ("He testified that he clearly remembered identifying respondent as his assailant during his May 5th interview with Mansfield. On cross-examination, he admitted that he could not remember seeing his assailant."); *id.* at 566 (Brennan, J., dissenting).

210. State v. Delos Santos, 238 P.3d 162, 177 (Haw. 2010).

211. *Id.* at 179-80 (citing State v. Holliday, 745 N.W.2d 556, 566-68 (Minn. 2008); Bush v. State, 193 P.3d 203, 210-12 (Wyo. 2008); *Mercer*, 864 A.2d at 113, 114 n.4; People v. Perez, 98 Cal. Rptr. 2d 522, 526 (Ct. App. 2000); United States v. Keeter, 130 F.3d 297, 302 (7th Cir. 1997); State v. Legere, 958 A.2d 969, 978 (N.H. 2008)).

Confrontation Clause purposes post-*Crawford* so long as the witness was present and testifying at the time the prior statement is admitted."[212] In the same manner, the U.S. Court of Appeals for the Armed Forces took the same route, and stated the following: "The Supreme Court's later decision in *Crawford v. Washington* is consistent with the *Owens* holding. In *Crawford*, the Supreme Court reiterated that 'when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraint[s] at all on the use of his prior testimonial statements.'"[213] These courts appear to take the view that provided there is a living breathing human on the stand, the requirements of the Confrontation Clause are met. It is difficult to square this position with the *Crawford* case when read in its entirety.

Certainly, as one commentator has observed, "'[c]onfront' means something more, or at least something other, than 'look at.'"[214] As pointed out by the Seventh Circuit in *Cookson v. Schwartz*, the wording "'appears for cross-examination'" is not dispositive.[215] In *Cookson*, the Seventh Circuit relied upon Justice Scalia's words that the "'Clause does not bar admission of a statement so long as the declarant is present at trial *to defend or explain it.*'"[216] The court cited to an earlier case it decided in which it determined that total amnesia with respect to a prior statement will often make a witness "'not subject to cross-examination' for Confrontation Clause purposes."[217] The court additionally cited to an Eighth Circuit case in which that court held that a "child's mere physical presence on the witness stand will not satisfy the Confrontation Clause's availability requirement."[218]

If one reads *Crawford* thoroughly, there is no doubt that cross-examination was uppermost in Justice Scalia's mind. In three areas of the opinion, he cites to or offers his own commentary about how exceptionally important it is.[219] First, he cites to Wigmore, who stated (when speaking about *Fenwick's Case*) that "Fenwick was condemned, but the proceedings

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212. *In re* M.H.V.-P., 341 S.W.3d 553, 558 (Tex. App. 2011).

213. United States v. Rhodes, 61 M.J. 445, 450 (C.A.A.F. 2005) (footnote omitted) (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)). The Court also stated, "Several courts have held that Justice Scalia's opinion for the Court in *Crawford* did not overrule Justice Scalia's opinion for the Court in *Owens*. We agree." *Id.* (footnote omitted).

214. Greenwald, *supra* note 186, at 170.

215. 556 F.3d 647, 651 (7th Cir. 2009) (quoting *Crawford*, 541 U.S. at 59 n.9).

216. *Id.* (quoting *Crawford*, 541 U.S. at 59 n.9).

217. *Id.* (quoting United States v. DiCaro, 772 F.2d 1314, 1323 (7th Cir. 1985)).

218. *Id.* (citing United States v. Spotted War Bonnet, 933 F.2d 1471, 1474 (8th Cir. 1991)).

219. *Crawford*, 541 U.S. at 46, 49, 61-62. Interestingly, two scholars believe Justice Scalia took liberties with his legal history in *Crawford*. *See* Robert M. Pitler, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1, 15-19 (2005). One commentator describes Justice Scalia's historical description of the Confrontation Clause as the equivalent of a Hollywood screenplay. Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 209 (2005).

'must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination.'"[220] Second, he quoted an Anti-federalist writing that stated, "'Nothing can be more essential than the cross examining [of] witnesses.'"[221] Finally, Justice Scalia himself declared that the Confrontation Clause not only required that evidence be reliable, but that it be tested by "the crucible of cross-examination."[222] It is difficult to believe he meant cross-examination as an empty gesture. Indeed, "[l]ack of memory makes it impossible to achieve the 'thorough exploration' the drafters of the Federal Rules contemplated."[223] It is more likely that *Owens* has been interpreted too broadly by lower courts, and that during the sixteen years between *Owens* and *Crawford*, Justice Scalia became increasingly convinced of the importance of this constitutional guarantee.

Justice Scalia authored the majority opinions in *Crawford*, *Davis*, *Giles*, and *Melendez-Diaz*.[224] His dissenting opinion in *Bryant* is written in a passionate tone[225] because he believed that the majority strayed too far from *Crawford* and returned to the *Owens* "reliability" test for Confrontation.[226] He accused the majority of creating a far too "expansive exception to the Confrontation Clause for violent crimes," and stated that "a defendant will have no constitutionally protected right to exclude the uncross-examined testimony of such [a] witness[]. . . . The Framers could not have envisioned such a hollow constitutional guarantee," again stressing the importance of cross-examination.[227] One wonders if Justice Scalia, judging from his *Crawford* and post-*Crawford* views, might adopt an analysis more aligned with Justices Brennan and Marshall in their *Owens* dissent, who

> objected to the Court's reasoning and result primarily on the ground that the Court's historic emphasis on the right to an opportunity for *effective* cross-

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220. *Crawford*, 541 U.S. at 46 (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA § 1364, at 22 (2d ed. 1923)).

221. *Id.* at 49 (second alteration in original) (quoting RICHARD HENRY LEE, OBSERVATION LEADING TO A FAIR EXAMINATION OF THE SYSTEM OF GOVERNMENT, 1787, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 466, 473 (1971)).

222. *Id.* at 61.

223. Greenwald, *supra* note 186, at 190 (quoting FED. R. EVID. 801(d)(1)(A) advisory committee's note).

224. *See Crawford*, 541 U.S. at 37; Davis v. Washington, 547 U.S. 813, 816 (2006); Giles v. California, 554 U.S. 353, 354 (2008); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 306 (2009).

225. One commentator stated that the majority opinion "enraged Justice Scalia" and that the anger in his dissent was "palpable." *See* Linda Greenhouse, *Justice Scalia Objects*, N.Y. TIMES OPINIONATOR (Mar. 9, 2011, 8:40 PM), http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects.

226. Michigan v. Bryant, 131 S. Ct. 1143, 1174 (2011) (Scalia, J., dissenting).

227. *Id.* at 1173.

> examination required more than the "futile" and "formalis[tic]" opportunity "to ask questions of a live witness, no matter how dead that witness' memory proves to be."[228]

How might the Supreme Court rule on a case involving witness testimony from a person suffering from AD? The *Owens* case does not necessarily answer that inquiry. Certainly there could be a situation with the same scenario as *Owens*, for example if an AD patient appears on the stand and demonstrates current memory loss, yet the prior out-of-court statement is stored in his or her long-term memory and he or she is able to testify about that prior statement. If the Supreme Court follows *Owens* in a post-*Crawford* world, there would be no Confrontation Clause violation, as the witness would be available for cross-examination. As detailed above, however, it depends entirely upon the stage of the disease at the time of this cross-examination.[229] If the lower courts have correctly interpreted *Owens* post-*Crawford*, then having the AD patient on the stand is enough, and little else (if anything) is necessary. Provided the witness is on the stand and is able to respond to questions, even with the response, "What are you talking about?" the standard has been met, as *Owens* stresses the *opportunity* for cross-examination rather than the opportunity for *effective* cross-examination.[230] As indicated above, perhaps the current members of the Supreme Court will require more than a mere appearance by the witness on the stand. Indeed, in the *Fensterer* case, the Supreme Court relied upon Justice Scalia in *Owens*, stating that when a witness provides "'testimony that is marred by forgetfulness, confusion, or evasion . . . . the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to *probe and expose these infirmities* through cross-examination.'"[231]

D. *Owens*, *Crawford*, and Alzheimer's Disease

The *Owens* facts are unique. Foster remembered only the statement made to Agent Mansfield in the hospital and the very general activities both before and after the blows.[232] He testified that he did not remember the attack or whether he had seen Owens or anyone else.[233] He "could recall vir-

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228. Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323, 1328 n.27 (1991) (alteration in original) (quoting United States v. Owens, 484 U.S. 554, 567, 572 (1988) (Brennan, J., dissenting)).

229. *See supra* Part I.

230. *Owens*, 484 U.S. at 559.

231. Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997) (emphasis added) (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985)).

232. *Owens*, 484 U.S. at 556.

233. *Id.*; *id.* at 565-66 (Brennan, J., dissenting).

tually nothing of the events of April 12, 1982," the day of the attack.[234] He did not recall any of the visitors he had at the hospital, except for Agent Mansfield.[235] It was a rather odd set of circumstances. With Alzheimer's disease patients, as reflected above, their testimony will depend entirely upon their stage of the disease, as well as their personal circumstances on the date of testimony.

There are four following possibilities with the AD witness:

1	2	3	4
No memory while on the stand of out of court statement	No memory while on the stand of out of court statement	Memory while on the stand of out of court statement	Memory while on the stand of out of court statement
Memory while on the stand of underlying issue	No memory while on the stand of underlying issue	Memory while on the stand of underlying issue	No memory while on the stand of underlying issue

The *Owens* situation is reflected in possibility number four above. In the event that the *Owens* decision is still viable post-*Crawford*, admission of the out-of-court statement is not a violation of the Confrontation Clause. With respect to possibility number three above, there would be no Confrontation Clause violation, even if the earlier out-of-court statement was testimonial, because the witness would be available for cross-examination. Oddly enough, some courts have interpreted *Owens* as allowing possibility number two without having a Confrontation Clause violation.[236] As discussed above, it is difficult to imagine under current Confrontation Clause jurisprudence that this possibility would pass muster in the event the earlier out-of-court statement was testimonial.[237] Because the witness is on the

234. *Id.*

235. *Id.* at 565.

236. *See, e.g.*, Vaska v. State, 74 P.3d 225, 228-29 (Alaska Ct. App. 2003), *rev'd on other grounds*, 135 P.3d 1011 (Alaska 2006). In the Court of Appeals decision, the Court stated the following:

> "The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available."

Id. at 229 (quoting California v. Green, 399 U.S. 149, 188 (1970) (Harlan, J., concurring)). The Court cites to many other states' opinions in footnote twenty-nine of the opinion. *Id.* at 229 n.29.

237. *See supra* notes 219-23 and accompanying text.

stand and available for cross-examination under possibility number one, that out-of-court statement should be allowed under the Confrontation Clause. Of course if any of these statements is non-testimonial, there would be no Confrontation Clause issue.

Possibility number two has never been an issue before the Supreme Court, despite lower court rulings claiming this was the factual situation in the *Owens* case.[238] It was not. If this possibility were allowed, then the right to confront is certainly an empty promise, as all that is necessary is a live body on the stand. Given *Crawford* and post-*Crawford* cases, it is difficult to imagine the Supreme Court would find adequate constitutional guarantees in that situation. "Although it is possible that mere physical presence on the stand is all that the Confrontation Clause requires, the Supreme Court has never taken such a view, which is inconsistent with the importance the Court has placed, in addition to physical presence, on the opportunity for cross-examination."[239] There are a number of lower court cases involving children and limited cross-examination, due either to court-ordered limitations or the result of the questioning itself reaching similar results.[240]

In a recent Supreme Court of Mississippi opinion, the Court stated the following: "In the wake of *Owens* and *Crawford*, many courts have found that a declarant's appearance and subjection to cross-examination at trial are all that is necessary to satisfy the Confrontation Clause, even if his or her memory is faulty."[241] The Court decided otherwise, however, in a case that presented the facts of possibility two above.[242] Amanda Goforth, a former high school teacher, was charged with sexual battery of a minor.[243] Chase Rigdon, a friend of the victim, gave a testimonial written out-of-court statement to the police and this provided possibly the "most damaging evidence against Goforth."[244] Rigdon did appear at trial, but between the time of the written statement and the trial, he was severely injured in an automobile accident and at trial had no memory of the written statement, or of ever having met or known Goforth or the victim.[245] The Court indicated that if the only requirement of the Confrontation Clause was the physical presence

238. *See infra* text accompanying note 241; *see also* State v. Delos Santos, 238 P.3d 162, 179 (Haw. 2010); People v. Argomaniz-Ramirez, 102 P.3d 1015, 1016-18 (Colo. 2004); Mercer v. United States, 864 A.2d 110, 113-15 (D.C. 2004).

239. Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 596 (2005).

240. Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1021-22 (2007).

241. Goforth v. State, 2010-KA-01341-SCT (¶ 48) (Miss. 2011).

242. *Id.* (¶¶ 25, 55).

243. *Id.* (¶ 1).

244. *Id.* (¶¶ 24-25, 58).

245. *Id.* (¶ 25).

of the declarant, that requirement had been met.[246] The Court instead followed the lead of the Seventh Circuit in *Cookson v. Schwartz* and decided the Sixth Amendment demanded more.[247] The Court stated, "This total lack of memory deprived Goforth any opportunity to inquire about potential bias or the circumstances surrounding Rigdon's statement. In sum, Goforth simply had no opportunity to cross-examine Rigdon about his statement."[248]

A witness suffering from Alzheimer's disease could present any of the possibilities above, because the disease is progressive and affects the memory of newly learned material before it affects long-term memory. Below is a discussion of what courts may do in the future to meet the challenges presented by a witness with AD.

V. POSSIBLE SOLUTIONS AND ADVICE FOR A FUTURE WITH ALZHEIMER'S DISEASE

Of course, the best solution for the "gray tsunami" and the consequent increase in the number of cases of AD is a cure, or barring that, a way to prevent or delay the symptoms of the disease.[249] Unfortunately, some of the most highly anticipated medicines thought to slow or halt AD have failed in the latter stages of testing.[250] Nevertheless, there is some hope for the future, as the Eli Lilly drug that failed did show some promise for patients with mild AD.[251] While continuing to hope for a cure or a method to delay or decrease the symptoms of AD, below are some ideas for assisting AD patients while maintaining justice for parties, defendants, and victims.

First, as indicated above, the symptoms of AD differ depending upon the particular patient and the progression of the disease.[252] If patients are in the early stages of the disease, they may have clear memories on certain topics.[253] Neuroscientist James McGaugh of the University of California at Irvine has indicated that "[t]he ability to consolidate and store new memo-

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246. *Id.* (¶ 50).

247. *Id.* (¶¶ 34, 50-52).

248. *Id.* (¶ 53).

249. *See* David Brooks, *The Fertility Implosion*, N.Y. TIMES, March 13, 2012, at A25; Phillip Longman, *Think Again: Global Aging*, FOREIGN POL'Y, Nov. 2010, at 52; *see supra* text accompanying notes 7, 31.

250. *See* Scott Hensley, *Failure of Lilly Drug Is Latest Alzheimer's Setback*, NPR SHOTS (Aug. 24, 2012, 2:30 PM), http://www.npr.org/blogs/health/2012/08/24/159997459/failure-of-lilly-drug-is-latest-alzheimers-setback; Shirley S. Wang & Jonathan D. Rockoff, *Setback for Alzheimer's Drug*, WALL ST. J. (July 24, 2012), http://online.wsj.com/article/SB10000872396390443295404577545470724479292.html.

251. Andrew Pollack, *Alzheimer's Drug Misses Goal, but Offers Hint of Potential*, N.Y. TIMES (Aug. 24, 2012), http://www.nytimes.com/2012/08/25/business/mixed-results-in-lilly-test-of-alzheimers-drug.html?_r=0.

252. *See supra* notes 24-25 and accompanying text.

253. *See supra* text accompanying note 29.

ries is the first thing to go . . . . Established memories hang out for a long time."[254] In fact, "[i]n the early stage of Alzheimer's long term memory is not impaired. People with early Alzheimer's disease can easily remember many details about their childhood and other earlier phases of their life."[255] One study revealed that Alzheimer's patients lose skills in the very same order they developed them as a child.[256] Accordingly, if the subject matter of their testimony is something stored in the patient's long-term memory, he or she should have no difficulty remembering the circumstances and issues.

It has been acknowledged that all witnesses have problems with their memories when testifying about eyewitness identifications.[257] This issue has recently been addressed by the Supreme Court in *Perry v. New Hampshire*, with the Court stating: "We do not doubt either the importance or the fallibility of eyewitness identifications."[258] Justice Sotomayor went even further in her dissent: "This Court has long recognized that eyewitness identifications' unique confluence of features—their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial."[259] Although memory is thought to be a fixed entity, this is not the case: "Hundreds of studies have cataloged a long list of circumstances that can affect how memories are recorded and replayed, including the emotion at the time of the event, the social pressures that taint its reconstruction, even flourishes unknowingly added after the fact."[260] Numerous studies have been published about the "mechanics and psychology" of witness identifications.[261] These studies include the effect of a number of variables, such as "the presence of a weapon, consumption of alcohol or drugs, how long a witness watched,"

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254. Melissa Healy, *Is It Dementia, or Just Aging?*, L.A. TIMES, Nov. 17, 2008, at F3.

255. EMORY UNIV. ALZHEIMER'S DISEASE RESEARCH CTR., ALZHEIMER'S DISEASE 1 (2010), *available at* http://med.emory.edu/ADRC/documents/fact_sheets/What%20is%20Alzheimers%20Disease%202010%2012%2015.pdf.

256. *Alzheimer's 'A Second Childhood,'* BBC NEWS (Aug. 18, 1999), http://news.bbc.co.uk/2/hi/health/423657.stm (citing a study led by Dr. Barry Reisberg and conducted by researchers at New York University).

257. *See* ELIZABETH LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL 15-30 (1991), *reprinted in How Can Eyewitness Identification Go Wrong?*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/dna/photos/eye/text_06.html (last visited Feb. 2, 2013).

258. 132 S. Ct. 716, 728 (2012).

259. *Id.* at 730-31 (Sotomayor, J., dissenting).

260. Laura Beil, *The Certainty of Memory Has Its Day in Court*, N.Y. TIMES, Nov. 29, 2011, at D1.

261. *Supreme Court Needs to Know Seeing Is Not Believing*, ST. LOUIS POST DISPATCH (Jan. 19, 2012), http://www.stltoday.com/news/opinion/columns/the-platform/editorial-supreme-court-needs-to-know-seeing-is-not-believing/article_6e699cfe-ebc0-5c05-8004-7f4c5030a645.html.

and more, on eyewitness memory.[262] In *Perry*, the Supreme Court indicated that some states allow expert testimony on "the hazards of eyewitness identification evidence."[263] One solution to the issues with a witness suffering from AD may be to allow expert witness evidence about the stages in which the memory is lost due to AD, in much the same way as it is presented in eyewitness memory situations.

As noted above, a witness with AD may have good days and bad days.[264] The AD sufferer also may have times during the day when he or she is better able to access memories.[265] A judge, prosecutor, or defense lawyer should be aware of these fluctuations in the abilities of the witness and make allowances for the testimony. For example, if a witness with AD is consistently better with her memory in the morning, steps could be taken to allow that witness to testify in the morning. There will be an increasing need for attorneys to advocate on behalf of a witness with AD. Judges will be unaware of potential issues due to AD, and it is therefore essential that the attorneys inform and educate judges and suggest ways to accommodate witnesses.

When faced with issues involving AD, judges could be liberal in their allowance of depositions to perpetuate testimony under both Rule of Civil Procedure 27 and Rule of Criminal Procedure 15. Ordinarily, these depositions are considered an extraordinary discovery device, particularly in the criminal arena.[266] In fact, the wording of Criminal Rule 15 requires "exceptional circumstances and . . . the interest of justice."[267] The purpose of both rules is to perpetuate testimony for trial because there is a risk that the testimony will be lost if not preserved.[268] The age and/or health of a witness may constitute such extraordinary circumstances.[269] It is within a judge's discretion to allow depositions to perpetuate testimony.[270] Given the very nature of AD, which is characterized by gradual loss of memory beginning with matters just learned and ending with long-term memories, judges should use this tool to preserve what memory the witness with AD still retains before there is further loss. In the criminal context, this may of course

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262. *Id.*

263. *Perry*, 132 S. Ct. at 729.

264. *See supra* note 25 and accompanying text.

265. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 7, at 41-42.

266. *See* United States v. O'Sullivan, 553 F. Supp. 2d 1349, 1350-51 (M.D. Fla. 2008); *In re* Exstein, 3 F.R.D. 242, 242-43 (S.D.N.Y. 1942).

267. Fed. R. Crim. P. 15(a)(1).

268. *See In re* Andrews, No. 1:11-mc-45, 2011 U.S. Dist. LEXIS 153013, at *2 (S.D. Ohio Dec. 2, 2011); *In re* Grand Jury Proceedings, 697 F. Supp. 2d 262, 263, 272-74 (D.R.I. 2010).

269. *Andrews*, 2011 U.S. Dist. LEXIS 153013, at *3, *5; *Grand Jury Proceedings*, 697 F. Supp. 2d at 273.

270. W.H. Elliott & Sons, Inc. v. E. & F. King & Co., 22 F.R.D. 280, 281-82 (D.N.H. 1957).

bring up Confrontation Clause issues.[271] In a case that considered this issue, the judge ruled that the Confrontation Clause did not apply because there was no "prosecution" or an "accused" at the time of the deposition.[272] Even if the Confrontation Clause applied, the judge determined that there was no violation, as the defendants had had an opportunity to cross-examine the elderly witnesses at the depositions.[273]

Courts and attorneys would be wise to consider changes and advancements in technology and medicine in order to assist a witness suffering from AD. For example, psychologists and psychiatrists have suggested the "Cognitive Interview" (CI) method to improve the interview process.[274] In addition, studies have been conducted on how to enhance memory, for example by implanting a memory-enhancing chip into rats.[275] Undoubtedly there will be more medical and technological advances in this area to assist those who suffer from AD, their families, and the justice system. In early 2011, President Barack Obama signed into law the National Alzheimer's Project Act (NAPA).[276] The Act is effective until 2025, and the Obama Administration has invested $50 million into Alzheimer's disease research in fiscal year 2012 and $80 million into research in fiscal year 2013.[277]

CONCLUSION

It is beyond question that there will be a dramatic increase in the number of people within the justice system who suffer from AD in the years ahead.[278] This increase will affect trial testimony, and consequently, courts and attorneys will frequently have to come to grips with this trend. Whether a person suffering from AD is considered competent to testify or is consid-

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271. *See Grand Jury Proceedings*, 697 F. Supp. 2d at 267-68.

272. United States v. Caramadre, No. 11-186 S, at 2, 8 (D.R.I. May 15, 2012) (order denying defendant's motion to suppress), *available at* www.gpo.gov/fdsys/pkg/USCOURTS-rid-1_11-cr-00186/pdf/USCOURTS-rid-1_11-cr-00186-0.pdf.

273. *Id.* at 9-12.

274. *See* Ronald P. Fisher & R. Edward Geiselman, *The Cognitive Interview Method of Conducting Police Interviews: Eliciting Extensive Information and Promoting Therapeutic Jurisprudence*, 33 INT'L J.L. & PSYCHIATRY 321 (2010); *see also* Laura Klaming & Anton H. Vedder, *Brushing Up Our Memories: Can We Use Neurotechnologies to Improve Eyewitness Memory?*, 2 LAW, INNOVATION & TECH. 203 (2009).

275. John Niman, *Memory Enhancing Technology and Witness Testimony*, H+ MAG. (July 15, 2011), http://hplusmagazine.com/2011/07/15/memory-enhancing-technology-and-witness-testimony.

276. National Alzheimer's Project Act, S. 3036, 111th Cong. (2010), *available at* http://www.kintera.org/atf/cf/%7BB96E2E84-AF7D-4656-9C86-285306F00E19%7D/NAPA%20FINAL%20JAN%204,%202011.pdf; U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL PLAN TO ADDRESS ALZHEIMER'S DISEASE 3 (2012), http://aspe.hhs.gov/daltcp/napa/NatlPlan.pdf.

277. S. 3036; U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 276, at 3.

278. *See supra* text accompanying notes 5-9.

ered available or unavailable for purposes of hearsay, and whether the constraints of the Confrontation Clause are met are issues which must necessarily be addressed. Each AD patient is unique, but there are stages to this progressive disease.

In all but the final stage of the disease, the witness who suffers from AD will likely be deemed a competent witness under Federal Rule of Evidence 601.[279] For hearsay purposes under Rule 804, courts determine whether the witness's testimony is unavailable, rather than whether the witness herself is unavailable.[280] Whether a witness's testimony is considered unavailable is dependent upon the stage of AD. A witness, according to the reasoning in *Owens*, may be on the witness stand and nevertheless be deemed unavailable for purposes of the hearsay rules. Given the fast-paced changes in the interpretation of the Confrontation Clause,[281] judges and attorneys need to remain vigilant in following changes in jurisprudence in this area. Even experts are unsure how to interpret recent Supreme Court cases. Defendants are guaranteed the right to confront their accusers, even if their accuser is suffering from diminished memory due to AD. Attorneys will need to advocate for the needs of those who suffer from AD, and courts should be willing to accommodate the needs of the sufferer while also balancing the needs of the parties and the constitutional rights of defendants.

There is an urgent need to study the effect of AD on witness testimony, as there has been virtually no research on this subject to date.[282] It is essential for the courts and attorneys to capture memories of the witness with AD before they are gone. The Federal Rules of Evidence were designed to allow for necessary flexibility when our society and culture change. In the absence of a cure for AD or a significant medical breakthrough to stem the tide of AD cases, flexibility for this cultural change is absolutely essential in the years ahead.

279. *See supra* text accompanying notes 39, 53-64.
280. *See supra* text accompanying notes 67-71.
281. *See supra* note 97 and accompanying text.
282. *See supra* text accompanying note 27.