NOTES & COMMENTS

YOU DON'T (HEAR)SAY?: CONFRONTING THE TYRANNY OF OPINION ON THE BAIL REFORM ACT AND PRETRIAL LIBERTY

ASHLEY JOINES*

"There are two sorts of tyranny: a real one, which consists of the violence of the government, and one of opinion, which is felt when those who govern establish things that run counter to a nation's way of thinking."[1]

By providing guidelines on pretrial detention hearings, the Bail Reform Act contemplates pretrial liberty because one consequence is detention pending trial. While the United States Constitution does not differentiate between pretrial liberty and the liberty at stake with trial, some courts find that a difference does exist. Specifically, these courts reason that pretrial liberty is less significant—in that its absence imposes less grievous consequences on the defendant's life—and consequently necessitates fewer procedural protections. These courts, therefore, conclude that a vital procedural safeguard prescribed by the Constitution, the right to confront adversary witnesses under the Sixth Amendment's Confrontation Clause, is not available to defendants during pretrial detention hearings.

But these courts are incorrect, due in large part to their misinterpretation of binding precedent set by the United States Supreme Court and disregard

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[1] MONTESQUIEU, The Spirit of the Laws 309 (1989).

of the congressional intent behind the Bail Reform Act. Most significantly, these courts ignore the fears fueling the Framers of the Constitution, who went so far as to enscribe protections in our nation's foundational law that must be afforded to citizens when the government takes away their liberty, regardless of the government's reason for doing so—whether the loss of liberty be from temporary pretrial detention, or long-term detention post-conviction.

The impact of this mistaken conclusion does much more than set bad precedent. The result of such a conclusion is dangerous—for it represents the quiet, and many times unnoticed, deprivation of liberty without due process.

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INTRODUCTION

"Ma, I can't take it anymore."[2] Those are the words Kalief Browder shared with his mother the night before he committed suicide; words that resulted from the deprivation of his pretrial liberty.[3]

At age sixteen, Kalief was accused of stealing a backpack and sent to the notorious Rikers Island Prison to await trial.[4] After more than one thousand days in confinement, which included routine abuse from officers and other inmates, Kalief was released when the charges against him were dropped for insufficient evidence.[5] The harm from pretrial detention, however, did not end with Kalief's release.[6] Shortly after his release, Kalief stated

> I'm not all right. I'm messed up. I know that I might see some money from this case, but that's not going to help me mentally. I'm mentally scarred right now. That's how I feel. Because there are certain things that changed about me and they might not go back.[7]

Just two years later, Kalief committed suicide at twenty-two years old.[8]

Kalief demonstrated that pretrial detention is partnered with destructive psychological consequences.[9] Primarily, the consequences result from a detainee's transition from life in society to life in a cell, which

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[2] Jennifer Gonnerman, *Kalief Browder, 1993–2015*, THE NEW YORKER (June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

[3] *See id.*

[4] *Id.*; Colleen Shalby, *Kalief Browder, Teen Who Awaited Trial for 3 years at Rikers, Kills Himself*, PBS (June 8, 2015, 1:37 PM), https://www.pbs.org/newshour/nation/new-yorker-profiled-kaleif-browder-kills-3-years-awaiting-trial-rikers-island; Rosie Blunt, *Rikers Island: Tales from inside New York's Notorious Jail*, BBC (Oct. 20, 2019), https://www.bbc.com/news/world-us-canada-50114468.

[5] Gonnerman, *supra* note 2; *Pre-trial Incarceration and the Case of Kalief Browder Examined at Next Conversations on Race and Policing*, CSUSB (Nov. 5, 2021), https://www.csusb.edu/inside/article/550339/pre-trial-incarceration-and-case-kalief-browder-examined-next-conversations.

[6] *See* Gonnerman, *supra* note 2*; see generally* Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, THE MARSHALL PROJECT (July 9, 2015, 6:04 PM), https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder?gad_source=1&gclid=Cj0KCQjwrKu2BhDkARIsAD7GBot-b0h4adJsZws8YoZSaRclbIgutK2gQ59f5RrYB94WKqE6XbCMTmUaArF_EALw_wcB.

[7] Jennifer Gonnerman, *BEFORE THE LAW*, THE NEW YORKER (Sept. 14, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law.

[8] Shalby, *supra* note 4.

[9] *See id.*; Gonnerman, *supra* note 2; *see also* Diana D'Arbruzzo, *The Harmful Ripples of Pretrial Detention*, ARNOLD VENTURES (Mar. 24, 2022), https://www.arnoldventures.org/stories/the-harmful-ripples-of-pretrial-detention; Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1351–57 (2014).

is often accompanied with shock.[10] Such effects are especially prevalent among underage and first-time offenders, like Kalief,[11] and can be long-lasting and partnered with self-destructiveness.[12] As for Kalief, the trauma from pretrial detention brought an end to his life.[13]

While the world was devastated by Kalief's death, the harms associated with pretrial detention were not a new discovery in 2010.[14] In 1965, for example, Congress aimed to address the known problems and inequities of the federal bail system through new legislation.[15] Reform was the goal, as the previous bail system "inevitably disadvantage[ed] [a] person of limited means" and caused many defendants to be "severely handicap[ped]...in preparing [their] defense."[16] In addition, it was noted that defendants detained pretrial were more likely to be convicted and receive a lengthier sentence compared to similarly situated individuals on pretrial release.[17] Congress further recognized that pretrial detention often causes defendants to lose their jobs, lose the ability to support their families, and, in the event of wrongful convictions and acquittals, "to needlessly suffer the public stigma of incarceration."[18]

If it was widely known in 1965 that pretrial detention can be so harmful to detainees as to move Congress to prescribe protections through the Bail Reform Act, how have courts determined that pretrial liberty interests are less significant than the liberty interests at stake with trial?[19] After all, Kalief lost his life not as a result of going to trial, but as a result of losing his pretrial liberty.[20]

This Note considers the importance of pretrial liberty and the denial of a vital constitutional right at federal pretrial detention hearings—the right

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[10] Wiseman, *supra* note 9; *see* Elisa L. Toman et al., *Jailhouse Blues? The Adverse Effects of Pretrial Detention for Prison Social Order*, 45 CRIM. JUST. & BEHAV. 316 (2018).

[11] Wiseman, *supra* note 9; Toman et al., *supra* note 10; *see* Gonnerman, *supra* note 2.

[12] Wiseman, *supra* note 9; Toman et al., *supra* note 10.

[13] Santo, *supra* note 6.

[14] *See generally* STAFF OF S. COMM. ON THE JUDICIARY, 88TH CONG., REP. ON CONSTITUTIONAL RIGHTS AND FEDERAL BAIL PROCEDURES 17 (Comm. Print 1964) (describing "[t]he Federal bail system" as "repugnant to the spirit of the Constitution and in direct conflict with the basic tenets that a person is presumed innocent until proven guilty by a court of law, and that justice should be equal and accessible to all . . .").

[15] *Id.* at 1–4.

[16] *Id.* at 17.

[17] *See id.* at 1–2, 11.

[18] *Id.* at Parts VI–VII.

[19] *Id.* at 17–18; *see* United States v. Hernandez, 778 F. Supp. 2d 1211, 1125 (D.N.M. 2011) (reasoning that "the Sixth Amendment is a trial right and does not apply to pretrial proceedings").

[20] Gonnerman, *supra* note 7.

to confront adversary witnesses under the Sixth Amendment's Confrontation Clause. Part I details the Bail Reform Act and the congressional intent behind the legislation, which lays the foundation to understand how courts have interpreted the Bail Reform Act in a manner contrary to its objective. Part II introduces the Confrontation Clause and the development of its role within the criminal justice system, outlining the reasons why the Supreme Court has overturned past precedent and created new law with respect to hearsay and witness examinations. Finally, Part III explains how one court, the United States District Court for the District of New Mexico, incorrectly analyzed jurisprudence on the Confrontation Clause and the Bail Reform Act, leading to its alarming conclusion that there is no right to confrontation at pretrial detention hearings. Overall, this Note demonstrates how there is no difference between the liberty involved with pretrial detention hearings and the liberty involved with a trial and, as a result, how the Confrontation Clause should apply to federal pretrial detention hearings.

I. AN OVERVIEW OF FEDERAL PRETRIAL DETENTION

Dating back to medieval England, bail originated as a system to ensure a defendant's presence for their criminal prosecution.[21] Generally, those accused of committing a crime could post financial security, known as bail, in place of their detention pending trial.[22] The issue with the bail system, however, was the discretionary nature of the judicial officer's decision to grant or deny bail.[23] The discretionary process resulted in an inconsistent imposition of bail, with some defendants held on high amounts of bail for minor crimes and others held on low amounts, or none at all, for heinous crimes.[24]

To address the issue of excessive bail in the newly formed United States, the Framers of the Constitution created the Eighth Amendment.[25] The Framers' concern nonetheless persisted as, centuries later, Congress identified the issue of a still present inconsistent and inequitable bail system and attempted to resolve the issue by creating the Bail Reform Act.[26]

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[21] Shima B. Baughman, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System - Introduction*, S.J. QUINNEY COLL. L., Spring 2017, at 1–3.

[22] *Id.*; *see generally* CHARLES DOYLE, BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW, CONG. RSCH. SERV., R40221, 1–5 (2017), https://crsreports.congress.gov/product/pdf/R/R40221.

[23] *See* Baughman, *supra* note 21; Doyle, *supra* note 22.

[24] *See* Baughman, *supra* note 21; Doyle, *supra* note 22; Wiseman, *supra* note 9.

[25] *See* Doyle, *supra* note 22.

[26] *Id.*; *see generally* STAFF OF S. COMM. ON THE JUDICIARY, supra note 14.

A. Congressional Intent of the Bail Reform Act

Testifying in support of legislative bail reform in 1964, United States Attorney General Robert Kennedy explained that "the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail."[27] Similarly, it was noted that pretrial detention "handicapped" a defendant's ability to formulate a defense because, a detained defendant

> cannot locate witnesses; he cannot consult his lawyer in the privacy of his law office; he enters the courtroom—not in the company of an attorney—but from a cell block in the company of a marshal; being in detention, he is often unable to retain his job and is unable to support his family.[28]

Moreover, in the event of an acquittal, the detained defendant "needlessly suffer[ed] the public stigma of incarceration."[29] Based on this information presented to Congress, the Bail Reform Act of 1966 was created to address the harms and inequity associated with bail in the United States.[30]

The initial Bail Reform Act of 1966 was later repealed and replaced by the passage of the Bail Reform Act of 1984 in order to address a new issue: "the alarming problem of crimes committed by persons on release."[31] While bringing new focus to the safety of the community, the new Bail Reform Act possessed the same goal of protecting a defendant's pretrial liberty and creating a uniform bail system.[32] The Supreme Court highlighted this objective while analyzing the Bail Reform Act in 1987 and clarified that "[i]n our society *liberty is the norm*, and detention prior to trial or without trial is the *carefully limited exception*."[33]

Interestingly, despite the clear intent of Congress and the Supreme Court to treat pretrial detention as the limited exception, statistics indicate that it instead became the standard.[34] Since 1984, for example, pretrial detention rates have tripled from less than twenty-four percent of defendants detained pretrial in 1983 to seventy-five percent in 2019.[35] On

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[27] CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY 1 (2019).

[28] STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 14.

[29] *Id.* at Part VII.

[30] *See id.*

[31] S. REP. No. 98–225, at 3 (1983).

[32] *See id.*; *see* STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 14.

[33] United States v. Salerno, 481 U.S. 739, 755 (1987) (emphasis added).

[34] *Id.*; *see* STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 14; *see* Alison Siegler, *Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis*, U. CHI. L. (Oct. 2022).

[35] Siegler, *supra* note 34, at 20, 22.

top of that, the average length of time spent in pretrial detention today is nearly a year, whereas in 1985, the average length of time was less than two months.[36]

B. The Bail Reform Act's Procedure

The Bail Reform Act prescribes the standards a judicial officer must follow in determining whether to detain a defendant pending trial.[37] This determination is made at a pretrial detention hearing, where the government must demonstrate, by clear and convincing evidence, that no release condition[38] can "reasonably assure" the safety of the community or the defendant's appearance in court–i.e., the defendant's risk of danger or risk of flight.[39] To rein in discretion, Congress outlined specific factors to guide a judicial officer in making these findings.[40] In analyzing a defendant's risk of danger and risk of flight upon release, a judicial officer must consider

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including–
>
> > (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
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> > (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State or local law; and

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[36] *Id.* at 23.

[37] *See* 18 U.S.C. § 3142.

[38] Examples of release conditions may include, but are not limited to, compliance with a curfew, reporting to a probation officer, undergoing medical treatment or therapy, completing a rehabilitation program, maintaining employment or participating in an educational program, and refraining from possessing a firearm. *See* 18 U.S.C. § 3142(c).

[39] 18 U.S.C. § 3142(e)–(f).

[40] 18 U.S.C. § 3142(g).

> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.[41]

When considering these factors, a judicial officer must rely on evidence provided by the prosecution at the pretrial detention hearing.[42] The Federal Rules of Evidence, however, do not apply to the introduction of such evidence.[43] Therefore, the prosecution is not required to produce the witnesses or physical evidence they offer to meet their burden of proof and establish a defendant's risk of danger and flight.[44]

As for defendants, the Bail Reform Act does provide for various procedural safeguards at pretrial detention hearings.[45] In particular, a defendant may request counsel, testify and present witnesses on their own behalf, proffer evidence, and "cross-examine witnesses who appear at the hearing."[46] However, because the Bail Reform Act only gives defendants the opportunity to cross-examine the prosecution's witnesses *already present* at the detention hearing,[47] and the Federal Rules of Evidence do not apply, hearsay[48] testimony may be introduced by the prosecution as evidence of a defendant's risk of danger and flight.[49]

Thus, as one example, prosecutors regularly provide evidence by asking a law enforcement officer, who was not involved in the investigation or arrest of the defendant in any capacity, to testify as to the contents of a report documenting the investigation and arrest conducted by another officer—what this Note refers to as the declarant officer.[50] In other words, the testifying officer provides information of which they have no personal knowledge to support a finding that the defendant poses a risk of danger or flight.[51]

When a prosecutor's case largely relies on hearsay provided by a testifying officer in the scenario described above, how may a defendant

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[41] 18 U.S.C. § 3142(g).

[42] *Id.*

[43] 18 U.S.C. § 3142(f)(2)(B).

[44] David Haas, *What to Expect at a Federal Detention Hearing*, HAAS LAW (Apr. 23, 2020), https://haaslawpllc.com/2020/04/23/what-to-expect-at-a-federal-detention-hearing.

[45] 18 U.S.C. § 3142(f).

[46] 18 U.S.C. § 3142(f)(2)(B).

[47] *Id.*

[48] Hearsay is an out of court statement made by a party not present in court when the statement is provided as proof of the veracity and truth of the statement. *Hearsay*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[49] 18 U.S.C. § 3142(d)(1)(B); *see generally* Haas, *supra* note 44.

[50] *See generally* United States v. Hernandez, 778 F. Supp. 2d 1211, 1216–18, 1230 (D.N.M. 2011).

[51] *See generally id.*

test the credibility of the information provided? The information cannot be tested by cross-examining the testifying officer because they have no firsthand knowledge. The presence of the declarant officer cannot be compelled at the hearing through the authority of the Bail Reform Act because it only provides for the right to cross-examine witnesses already present at the hearing.[52] The defendant is seemingly left with no recourse for the hearsay evidence, and must rely on the judicial officer presiding over the pretrial detention hearing to determine whether the evidence is credible.

As a last resort, however, a defendant may attempt to compel the declarant officer's presence through the Sixth Amendment's Confrontation Clause.[53] This issue arose in the District of New Mexico with *United States v. Hernandez*.[54]

C. The District of New Mexico's Decision

Hernandez began with the defendant's pretrial detention hearing, where an officer testified (the testifying officer) on behalf of the defendant's probation officer (the declarant officer), who was not present for the hearing.[55] The testifying officer testified to out of court conversations between the declarant officer and the defendant, which were subsequently documented in the declarant officer's report.[56] Given the content of the conversations, the prosecution provided the officer's testimony as proof of the defendant's lack of ties to the community.[57] At face value, this evidence weighed strongly in favor of risk of flight, and therefore, pretrial detention.[58] Because the testifying officer had no personal knowledge as to the conversations involving and statements by the declarant officer to which they testified, the defendant objected to the testimony and argued that he had the constitutional right to confront the declarant officer as an adversary witness.[59] Ultimately, the *Hernandez* court disagreed.[60]

Because there is "scant" authority addressing the Confrontation Clause's role at pretrial detention hearings, the *Hernandez* court evaluated

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[52] *See* 18 U.S.C. § 3142(f).
[53] *See Hernandez*, 778 F. Supp. 2d at 1217–18.
[54] *Id.* at 1219–20.
[55] *Id.* at 1212, 1217–18.
[56] *Id.* at 1215–18, 1228–29.
[57] *Id.*
[58] *See id.*; *see generally* 18 U.S.C. § 3142(g).
[59] *See Hernandez*, 778 F. Supp. 2d at 1219.
[60] *Id.* at 1219–27.

the Confrontation Clause in context of pretrial proceedings in general.[61] The court determined that the Confrontation Clause addresses "the protections afforded [to] defendants at trial...not...the protections at pretrial proceedings."[62] A prominent issue with this conclusion, however, is that the court relied on case law decided before the Supreme Court overturned longstanding precedent with respect to the Confrontation Clause.[63]

II. THE DEVELOPMENT OF THE CONFRONTATION CLAUSE JURISPRUDENCE

The Sixth Amendment's Confrontation Clause instructs that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."[64] Yet, other than "criminal prosecutions" and "witnesses against," the Confrontation Clause is silent as to the scope of its application.[65] Accordingly, the judicial system has been left to determine when, and to what extent, the Confrontation Clause applies.[66]

A. Before Crawford

The Confrontation Clause was established in 1791 through the Sixth Amendment of the United States Constitution, guaranteeing defendants the right to physically face and cross-examine adversary witnesses in all criminal prosecutions.[67] In 1895, the Supreme Court explained that the Confrontation Clause's purpose was to

> prevent depositions or ex parte affidavits...being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon

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[61] *Id.*

[62] *Id.* at 1223.

[63] *See id.* at 1212, 1219–27; *see* Crawford v. Washington, 541 U.S. 36 (2004).

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

[65] *See id.*

[66] *See* Mattox v. United States, 156 U.S. 237, 243 (1895); Pointer v. Texas, 380 U.S. 400, 406 (1965); Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); California v. Green, 399 U.S. 149, 165–68 (1970); Coy v. Iowa, 487 U.S. 1012, 1015 (1988); *Crawford*, 541 U.S. at 62.

[67] *See The Bill of Rights: How Did it Happen?*, NATIONAL ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen#:~:text=A (last visited Nov. 6, 2024); *Mattox*, 156 U.S. at 242–43.

> the stand and the manner in which he gives his testimony whether he is worthy of belief.[68]

In other words, the Supreme Court found that the Confrontation Clause required adversary witnesses to testify under oath in the presence of the factfinder and defendant, so their credibility may be tested.[69]

While the right to confrontation was continuously reaffirmed as "[o]ne of the fundamental guaranties of life and liberty,"[70] what changed was the extent to which it was found to apply.[71] For instance, until 1965, the right to confrontation was considered only a right in context of the federal criminal justice system.[72] Later, the primary focus with the Confrontation Clause became the admissibility of hearsay against the accused.[73]

In *Bruton v. United States*, the Supreme Court reasoned that hearsay triggered the Confrontation Clause when it provided "substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination."[74] While the Supreme Court indicated there was a relationship between hearsay and the Confrontation Clause with *Bruton*, their relationship was not directly examined until *California v. Green*.[75]

In 1970, *Green* established that, while evidence rules on hearsay and the Confrontation Clause "are generally designed to protect similar values," the "overlap" of their protections is not complete.[76] With this language, the Supreme Court implied that there are instances where hearsay meets the admissibility requirements of the Federal Rules of Evidence but not the requirements of the Confrontation Clause, and vice versa.[77] In the same year, the Supreme Court clarified that the "limited contours" of evidence rules were not mandated by the Confrontation Clause.[78] Rather, evidence rules were merely a product of judicial "rule-

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[68] *Mattox*, 156 U.S. at 242–44.

[69] *Id.*

[70] Kirby v. United States, 174 U.S. 47, 55 (1899); *see also* Greene v. McElroy, 360 U.S. 474, 496–97 (1959); *Pointer*, 380 U.S. at 404; *Dutton*, 400 U.S at 79.

[71] *Pointer*, 380 U.S. at 404; Douglas v. Alabama, 380 U.S 415 (1965); Bruton v. United States, 391 U.S. 123 (1968); California v. Green, 399 U.S. 149, 155 (1970); Ohio v. Roberts, 448 U.S. 56, 65–66 (1980).

[72] *Pointer*, 380 U.S. at 403.

[73] *Roberts*, 448 U.S. at 65–66; White v. Illinois, 502 U.S. 346 (1992); Lilly v. Virginia, 527 U.S. 116 (1999).

[74] 391 U.S. at 128.

[75] *See id.*; *Green*, 399 U.S. at 155–56; *Dutton*, 400 U.S. at 82.

[76] *Green*, 399 U.S. at 155–56.

[77] *See id.*

[78] *Dutton*, 400 U.S. at 82.

making power in the area of the federal law of evidence."[79] Therefore, the Federal Rules of Evidence and the Confrontation Clause were expressly distinguished as two separate powers governing the admissibility of hearsay.[80] This idea was developed further in *Ohio v. Roberts*.[81]

According to *Roberts*, when an adversary witness is "not present for cross-examination at trial, the Confrontation Clause normally requires a showing that [they are] unavailable" and that their testimony "bears adequate indicia of reliability."[82] The *Roberts* standard was much broader than the Federal Rules of Evidence because hearsay that did not survive the evidence rules could nonetheless meet the requirements of the Confrontation Clause so long as there was "a showing of particularized guarantees of trustworthiness."[83] Essentially, *Roberts* subordinated the Confrontation Clause to the Federal Rules of Evidence.[84] For over two decades, the Supreme Court adhered to the *Roberts* standard until change came with *Crawford v. Washington*.[85]

B. Crawford

Michael Crawford's assault conviction was primarily based on his wife's tape-recorded statement taken during a police interrogation.[86] The wife's statement was hearsay because, due to marital privilege, she was unavailable to testify as a witness during Crawford's trial.[87] For that reason, Crawford had no opportunity to test the credibility of his wife's statement when it was offered by the prosecution to meet their burden of proof and establish his guilt at trial.[88] Crawford appealed his conviction on the grounds that the admission of his wife's statement violated the Confrontation Clause.[89]

The lower appellate courts disagreed as to whether the statement by Crawford's wife was sufficiently reliable, and therefore admissible, under *Roberts*.[90] In particular, the Washington Court of Appeals found the

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[79] *Id.*

[80] *Id.*; *see also Green*, 399 U.S. at 155–56.

[81] 448 U.S. 56, 65–66 (1980).

[82] *Id.* at 66 (citation omitted).

[83] *See id.*

[84] *See generally id.*

[85] *See* Crawford v. Washington, 541 U.S. 36 (2004).

[86] *Id.* at 38–41.

[87] *Id.* at 40.

[88] *See id.*

[89] *See id.* at 41.

[90] *Id.* at 40–42.

statement to be unreliable because it contradicted another statement provided by Crawford's wife.[91] The Washington Supreme Court, on the other hand, unanimously concluded the statement had sufficient "guarantees of trustworthiness" because it was "virtually identical" to a statement made by Crawford himself.[92] Crawford petitioned the United States Supreme Court to determine whether the admission of his wife's statement violated the Confrontation Clause.[93]

To find its answer, the Court analyzed the history behind the Confrontation Clause and hearsay.[94] Looking to pretrial examinations during the reign of Queen Mary and *ex parte* examination practices of the Colonies in the early eighteenth century, the Court reasoned that "the principle evil at which the Confrontation Clause was directed was the...use of *ex parte* examinations as evidence against the accused."[95] As such, the Court found that the Confrontation Clause must be interpreted with a consideration of witness statements offered by the government to meet their burden of proof during a criminal prosecution.[96] Moreover, the Confrontation Clause is especially relevant with respect to the "involvement of government officers in the production of testimonial evidence."[97]

The Court did not believe "the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."[98] Notably, the Court thought *Roberts* was flawed because it treated the Confrontation Clause as a *substantive* guarantee for reliability, as opposed to a *procedural* guarantee.[99] Rather than use "amorphous notions" of reliability, which involve inconsistent judicial interpretations as evidenced by the lower courts in Crawford's case, the Court reasoned that reliability is best determined by testing evidence "in the crucible of cross-examination."[100] The Court therefore concluded that *Roberts* erroneously replaced "the constitutionally prescribed method of assessing reliability," cross-examination, with the judicial determination of reliability.[101] Ultimately, *Crawford* demonstrates that it is the process for how reliability

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[91] *Id.* at 41.
[92] *Id.*
[93] *Id.* at 38, 40–42.
[94] *Id.* at 42–56.
[95] *Id.* at 50.
[96] *See id.* at 50–52.
[97] *Id.* at 53.
[98] *Id.* at 61.
[99] *Id.* at 61–62.
[100] *Id.* at 61.
[101] *Id.* at 40–42, 62–65.

is determined, rather than the existence of reliability, that is mandated by the Confrontation Clause.[102]

So, as the Court details in *Crawford*, it is "not enough...when the single safeguard missing is the one the Confrontation Clause demands."[103] Thus, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[104] Again, the Court clearly specified with *Crawford* that what the Confrontation Clause requires as a procedural protection is the method by which reliability is determined, not the mere determination of reliability subject to the discretion of a judicial officer.[105]

Crawford also made a crucial distinction between evidentiary hearsay rules and the Confrontation Clause.[106] According to *Crawford*, the Confrontation Clause is no longer inferior to evidence rules because even if a hearsay exception is met, the Confrontation Clause may still be violated.[107] That being said, the Confrontation Clause applies regardless of the application of the Federal Rules of Evidence.

While the relationship between hearsay and the Confrontation Clause was directly addressed by the Court, *Crawford* deepened the conversation as to another Confrontation Clause issue: at what stage of the criminal prosecution does the Confrontation Clause apply?[108]

III. THE CONFRONTATION CLAUSE AT PRETRIAL DETENTION HEARINGS

In *Hernandez*, the court uses *Crawford* to reason that the Confrontation Clause is only a "trial right."[109] The Supreme Court's history of referring to the right of confrontation as a "trial right" seemingly supports *Hernandez*'s analysis.[110] From this reasoning, *Hernandez*

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[102] *See id.*

[103] *Id.* at 65.

[104] *Id.* at 68–69.

[105] *See id.*

[106] *See id.*

[107] *See id.*

[108] *See id.*; United States v. Cantellano, 430 F.3d 1142, 1146 (11th Cir. 2005); *see* United States v. Hernandez, 778 F. Supp. 2d 1211 (D.N.M. 2011) (explaining that *Crawford* only applies at trial, not pretrial).

[109] *See Hernandez*, 778 F. Supp. 2d at 1225.

[110] *See id.*; Barber v. Page, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."); Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987) ("[T]he right to confrontation is a *trial* right."); California v. Green, 399 U.S. 149, 157 (1970) (The "right to 'confront' the witness

ultimately concludes that the Confrontation Clause does not apply to pretrial detention hearings.[111]

Hernandez's conclusion, however, is erroneous for three reasons. First, *Hernandez* ignored the nature of pretrial detention hearings and purpose of the Bail Reform Act as described by the Supreme Court in *United States v. Salerno*.[112] Second, *Hernandez* analyzed jurisprudence pertaining to the Confrontation Clause and pretrial liberty in a narrow manner that overlooked key language contradicting its conclusions.[113] Finally, *Hernandez* mistakenly found that *Crawford* only applies to trial and as a result, the Confrontation Clause does not apply to pretrial detention hearings.[114] To understand how *Hernandez* got it wrong, we must turn to the court's method of analysis.

A. The Path of Hernandez*'s Analysis*

To start its analysis, *Hernandez* looks to *United States v. Smith*.[115] In *Smith*, the D.C. Circuit asserted that there is no right of confrontation at a pretrial detention hearing due to the hearing's distinguishable purpose from trial.[116] Specifically,

> [a] pretrial detention hearing...is neither a discovery device for the defense nor a trial on the merits. The process that is due is only that which is required by and proportionate to the purpose of the proceeding. That purpose includes neither a reprise of all the evidence presented before the grand jury...nor the right to confront non-testifying government witnesses.[117]

According to *Smith*, pretrial detention hearings are associated with a type of liberty that is not proportionate "to the liberty interest at stake-*viz.* the interest in remaining free until trial."[118] On its face, *Smith* appears to support *Hernandez*'s proposition that the Confrontation Clause only

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at the time of trial . . . forms the core values furthered by the Confrontation Clause.") (citation omitted).

[111] *Hernandez*, 778 F. Supp. 2d at 1219–27.

[112] *See id.* (citing United States v. Salerno, 481 U.S. 739, 746–52 (1987) (holding that the Bail Reform Act was constitutional, as the Sixth Amendment does not apply to detention hearings because they are not criminal prosecutions)).

[113] *See id.*

[114] *See id.*

[115] *Id.* at 1220 (citing United States v. Smith, 79 F.2d 1208 (D.C. Cir. 1996)).

[116] *Smith*, 79 F.3d at 1210.

[117] *Id.* (internal citations omitted).

[118] *Id.*

applies to the most important liberty interests, which are those at risk with trial.[119]

Next, *Hernandez* looks to the Third Circuit's similar expression in *United States v. Delker*.[120] *Delker* explains that while pretrial detention does involve a liberty interest, "not every potential loss of liberty requires the full panoply of procedural guarantees available at trial."[121] Using *Delker*'s reasoning, *Hernandez* argues that the liberty interests at stake with pretrial detention are less important than those impacted by a trial, so the Confrontation Clause is inapplicable pretrial.[122] Notably, the crux of *Delker*'s analysis, and therefore *Hernandez*'s analysis, is the rationale of *Gerstein v. Pugh*.[123]

In *Gerstein*, the Supreme Court analyzed the liberty interests associated with pretrial probable cause determinations.[124] According to *Gerstein*, pretrial probable cause determinations are not adversarial in nature and, as a result, involve a different liberty interest compared to trial.[125] *Gerstein* therefore implies that where there is an adversarial process, strong liberty interests similar to those involved with trial follow.

Gerstein further explains that the result of a pretrial probable cause determination, pretrial detention, "may affect to some extent the defendant's ability to assist in preparation of his defense" but "does not present the high probability of substantial harm" that requires certain constitutional safeguards.[126]

To extend *Gerstein*'s analysis of pretrial probable cause determinations to pretrial detention hearings, *Hernandez* utilizes *United States v. Edwards*.[127] *Edwards* explains that because a pretrial detention hearing and *Gerstein* probable cause determination both potentially result in pretrial detention, the "liberty interest affected by each proceeding is accordingly the same."[128]

Yet, *Hernandez* recognized, with the Supreme Court's decision in *Morrissey v. Brewer*, that "[i]n some respects...[preliminary revocation hearings] required greater procedural protections than those dictated in

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[119] *See id.*; *Hernandez*, 778 F. Supp. 2d at 1220.
[120] *Hernandez*, 778 F. Supp. 2d at 1220–22.
[121] United States v. Delker, 757 F.2d 1390, 1397 (3d Cir. 1985).
[122] *Hernandez*, 778 F. Supp. 2d at 1220–22.
[123] *Id.*
[124] Gerstein v. Pugh, 420 U.S. 103, 111–24 (1975).
[125] *Id.*
[126] *Id.* at 123.
[127] *Hernandez*, 778 F. Supp. 2d at 1221.
[128] United States v. Edwards, 430 A.2d 1321, 1336 (D.C. 1981).

Gerstein."[129] Preliminary revocation hearings are treated similarly to pretrial detention hearings under the Bail Reform Act, as they involve the temporary loss of freedom until the final disposition of the accusation against the defendant—the accusation in pretrial detention hearings being a criminal charge and the accusation in preliminary revocation hearings being a probation violation.[130]

Nonetheless, *Hernandez* ignored the language in *Morrissey* indicating that preliminary revocation hearings, and thus pretrial detention hearings, may not be comparable to *Gerstein* pretrial probable cause determinations and instead found *Morrissey* to merely stand for the proposition that "not every potential loss of liberty requires the full panoply of procedural guarantees available at trial."[131] Ultimately, *Hernandez* still decided that pretrial detention hearings, due to the less significant liberty interests at stake, do not mandate the same constitutional safeguards as a trial.[132]

Hernandez's use of *Morrissey* and *Gerstein*, however, leads to several erroneous conclusions as it misinterprets their analyses, ignores binding case law established by the Supreme Court, and overlooks the congressional intent behind the Bail Reform Act.

B. Pretrial Detention Hearings are Adversary Proceedings

Hernandez's first mistake is not treating pretrial detention hearings as adversary proceedings.[133] To conclude to the contrary, as introduced above, *Hernandez* likened pretrial detention hearings to *Gerstein* pretrial probable cause determinations.[134]

In *Gerstein*, a prosecutor's information was used as evidence to establish probable cause for detaining a defendant pending trial.[135] The defendant challenged the use of the prosecutor's information on the grounds that they had a constitutional right for the probable cause determination to occur through a judicial hearing.[136] The Supreme Court, however, disagreed because the probable cause determination "can be

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[129] *Hernandez*, 778 F. Supp. 2d at 1221.

[130] *See* NEIL P. COHEN, NATURE AND FUNCTIONS, LAW OF PROBATION & PAROLE § 25:1 (2d ed. 2024).

[131] *Hernandez*, 778 F. Supp. 2d at 1221 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[132] *See id.* at 1219–27.

[133] *Id.* at 1221–22.

[134] *Id.*

[135] *Gerstein*, 420 U.S. at 105–06.

[136] *Id.* at 106–07.

determined reliably *without an adversary hearing*" as there are "*lesser consequences* [with] a probable cause determination."[137] In other words, the *Gerstein* pretrial probable cause determinations are not adversarial in nature.[138] By equating pretrial detention hearings to the *Gerstein* hearings, *Hernandez* treats pretrial detention hearings as nonadversary proceedings.

The Supreme Court, in contrast to *Hernandez*'s indication that pretrial detention hearings are not adversary proceedings, explicitly defined pretrial detention hearings as adversary proceedings in 1987 with *Salerno*.[139]

In *Salerno*, the Supreme Court reviewed the legislative intent behind the Bail Reform Act and determined that a pretrial detention hearing is a "full-blown adversary hearing" for which a defendant retains a "strong [liberty] interest."[140] *Salerno* concludes with its most crucial language: "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[141] Therefore, according to the Supreme Court, pretrial detention hearings are adversary proceedings and involve a strong liberty interest—making no differentiation between liberty before, during, or after trial.[142]

In addition to the Supreme Court's precedent as to the nature of pretrial detention hearings and pretrial liberty, Congress was clear about the importance of pretrial liberty when it created the Bail Reform Acts of 1966 and 1984.[143] Congress recognized that the loss of pretrial liberty posed significant consequences, including the loss of employment and the ability to support one's family, the inability to effectively aid in one's defense, and significant psychological harm.[144] These evident concerns of Congress support *Salerno*'s description of pretrial detention hearings as adversarial proceedings involving "strong" liberty interests, and thus requiring procedural safeguards.[145]

Along those same lines, looking back to the Supreme Court's discussion in *Gerstein*, the expressly identified strong liberty interests involved with pretrial detention hearings are an indication that the hearings

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[137] *Id.* at 120–21 (emphasis added).
[138] *See id.* at 121–22.
[139] 481 U.S. 739, 741 (1987).
[140] *Id.* at 746–51.
[141] *Id.* at 755.
[142] *Id.*
[143] *See supra* Parts I, II.
[144] *See id.*
[145] *See id.*; *Salerno*, 481 U.S. at 742–52.

should be adversarial, and therefore receive constitutional protections similar to a trial.[146]

While *Salerno* referenced the cross-examination of adversary witnesses as a procedural safeguard available at pretrial detention hearings, it did not detail the scope of cross-examinations or the issue of hearsay evidence.[147] For example, *Salerno* does not specify whether a defendant can only cross-examine adversary witnesses already present at their hearing, or whether they have the constitutional right, through the Confrontation Clause, to compel the presence of an adversary witness during the hearing.[148]

Courts, however, must not use the absence of such an explanation as proof that the Supreme Court would conclude otherwise. We can also not assume that the Confrontation Clause does not apply just because the Federal Rules of Evidence are inapplicable at pretrial detention hearings. The absence of this explanation, rather, is likely a result of the fact that *Salerno* was decided in 1984, when *Roberts* governed the relationship between hearsay and the Confrontation Clause.[149]

But recall that a few years before *Hernandez* was decided in 2011, the law regarding the admissibility of hearsay and the role of the Confrontation Clause was revolutionized with *Crawford*.[150] When harmonizing the Supreme Court's analysis in *Crawford* and its analysis in *Salerno*, it logically follows that pretrial detention hearings were designed to be more than a nonadversarial, informal hearing like the probable cause determination discussed in *Gerstein*.[151] So, the Confrontation Clause should apply to pretrial detention hearings, regardless of the applicability of the Federal Rules of Evidence, in order to allow for the cross-examination of adversary witnesses.

The *Hernandez* court's next critical mistake is finding that the loss of pretria liberty is less grievous than the loss of the liberty at stake with trial.[152]

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[146] Gerstein v. Pugh, 420 U.S. 103, 111–24 (1975).

[147] *See Salerno*, 481 U.S. at 742, 751–52.

[148] *See id.* at 742–55.

[149] *See id.*; *see supra* Part II.

[150] *See Salerno*, 481 U.S. at 742–55; Crawford v. Washington, 541 U.S. 36 (2004).

[151] Gerstein v. Pugh, 420 U.S. 103, 111–24 (1975); *see* STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 14; *see Salerno*, 481 U.S. at 742–55.

[152] United States v. Hernandez, 778 F. Supp. 2d 1211, 1219–27 (D.N.M. 2011).

C. Liberty is Liberty, No Matter the Occasion

Hernandez uses *Morrissey* to establish that the Confrontation Clause does not apply to every potential loss of liberty.[153] Despite relying on *Morrissey* for this language, the *Hernandez* court ignored the remainder of *Morrissey* that contradicts its finding that the liberty involved with pretrial detention hearings is different from the liberty involved with trial.[154] Specifically, *Morrissey* demonstrates that liberty is unqualified.[155]

In *Morrissey*, the Supreme Court considered the procedural safeguards available to parolees at preliminary revocation hearings.[156] As explained earlier, the type of hearings at issue in *Morrissey* are similar to pretrial detention hearings in that the result of both is detention pending the final disposition of the charge against the defendant or parolee, whether the final disposition be for a criminal charge or a charge of parole violation.[157]

With the hearing in *Morrissey*, the Supreme Court noted that a parolee's liberty interest includes "values of *unqualified* liberty" such that, its termination will "inflict[] a grievous loss on the parolee and often on others."[158] To that end, it is evident that the weight, or significance, of a defendant's liberty interest is not determined by the mere stage of the criminal prosecution of which they happen to be in. If the loss of liberty could result in devastating effects and grievous loss in the defendant's life, then it is a loss of liberty requiring constitutional protections regardless of when, and for how long, the loss occurs. This line of reasoning ties back to the Supreme court's similar analysis in *Gerstein*, where the Court indicated that adversarial processes are involved with the loss of strong liberty interests. Accordingly, the only consideration as to the applicability of the Confrontation Clause, per the Supreme Court, must be "whether the nature of the interest is one within the contemplation of the liberty" regarding the Constitution.[159]

Similarly, *Hernandez* failed to notice *Morrissey*'s discussion of the "grievous" loss of liberty that can occur outside of a trial.[160] This loss of liberty is exactly what the Supreme Court discussed in *Salerno* with respect to pretrial detention and what Congress considered when creating the Bail

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[153] *Id.* at 1220–22.
[154] *See id.*; *see generally* Morrissey v. Brewer, 408 U.S. 471 (1972).
[155] *Morrissey*, 408 U.S. at 472–82.
[156] *Id.* at 472–74.
[157] *Id.* at 477–79.
[158] *Id.* at 482 (emphasis added) (internal quotations omitted).
[159] *Id.* at 481.
[160] *Id.* at 481–82.

Reform Act nearly sixty years ago.[161] Nonetheless, *Hernandez* ignored this binding precedent and long history of legislative intent.

Most significantly, *Hernandez* was decided in 2011, just one year after Kalief Browder's death in 2010: a death that resulted from what no one would disagree as a "grievous" loss of pretrial liberty.[162] Still, despite all of this evidence, the *Hernandez* court supported its conclusion by using *Crawford*'s language as proof that the Confrontation Clause only applies at trial.[163] *Crawford*, however, does not stand for that proposition.

D. Crawford *Applies to Adversary Proceedings*

Even though *Crawford* discussed the Confrontation Clause in the surroundings of Michael Crawford's trial, the Supreme Court's analysis is not limited to the context of trial as *Hernandez* asserts.[164] In *Crawford*, rather, the Supreme Court consistently referred to procedural safeguards and constitutional rights in the context of the adversary process, not solely in context of trial.[165] *Crawford*'s focus on the adversarial nature of a proceeding, as opposed to the mere connection to a trial and conviction, was also not the first of its kind from the Supreme Court.[166]

In *Maryland v. Craig*, for example, the Supreme Court reasoned that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an *adversary* proceeding."[167] It logically follows that because *Salerno* finds pretrial detention hearings to be adversarial in nature, and *Crawford* and *Craig* establish that the Confrontation Clause is a procedural guarantee available at adversary proceedings, the Confrontation Clause should apply to pretrial detention hearings.

Furthermore, *Craig* demonstrates that the Supreme Court understands the Confrontation Clause's purpose to be the process for how reliability is determined, not the mere consideration of reliability.[168] This reasoning is precisely what the Supreme Court explained in *Crawford*

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[161] *See supra* Parts I, II.

[162] Gonnerman, *supra* note 2.

[163] *See* United States v. Hernandez, 778 F. Supp. 2d 1211, 1219–27 (D.N.M. 2011).

[164] *See* Crawford v. Washington, 541 U.S. 36, 38, 42–43, 62–65 (2004).

[165] *Id.* at 42–43, 62–65.

[166] *See* Maryland v. Craig, 497 U.S. 836 (1990).

[167] *Id.* at 845 (emphasis added).

[168] *See id.*

when it rejected the "amorphous notions" of judicial determinations of reliability regarding hearsay described in *Roberts*.[169]

Yet, if we allow courts to proceed under *Hernandez*'s flawed conclusion, judicial officers presiding over pretrial detention hearings will be left to determine, in their discretion and with the use of amorphous notions of reliability just like the lower courts used in *Crawford*, whether hearsay is reliable.

This kind of determination goes against the purpose of the Confrontation Clause, which is to require the process of confrontation to protect a defendant's liberty interests against the prosecution's use of ex parte evidence to meet their burden of proof–whether it be for a showing that the defendant was guilty of a crime to warrant time in prison, or for a showing that the defendant posed a risk of flight or danger to the community to warrant pretrial detention.[170] In each instance, the defendant faces the same type of grievous loss of liberty the Framers contemplated when they intentionally included procedural safeguards within the Constitution.

We should find *Hernandez*'s conclusion alarming, as it is a stark contrast to the congressional intent of the Bail Reform Act, to the Supreme Court's reasons in overturning longstanding precedent with respect to the Confrontation Clause, and to the Framers' motivation in creating the Confrontation Clause in the first place. *Hernandez* is but a quiet tyranny of judicial opinion that has enabled the deprivation of pretrial liberty without a vital procedural safeguard mandated by the Constitution.

CONCLUSION

As Benjamin Franklin once wrote, "[f]reedom is not a gift bestowed upon us by other men, but a right that belongs to us by the laws of God and nature."[171] To protect this fundamental right, the Bill of Rights mandates that liberty, without distinction between pretrial liberty and the liberty at stake with a trial, cannot be deprived without due process. Yet, *Hernandez* and its progeny erroneously distinguish between varying stages of liberty and find that the Constitution does not protect pretrial liberty interests in the same manner as it does the liberty interests at stake with trial. In doing so, these judicial opinions personify the fear of the Framers–that their government would deprive its citizens of liberty without due process of law. Kalief Browder is, unfortunately, a modern-day depiction

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[169] *Crawford*, 541 U.S. at 42–43, 62–65; *see supra* Part II.

[170] *See supra* Parts I, II.

[171] BENJAMIN FRANKLIN, THE FRANKLIN YEAR BOOK: MAXIMS AND MORALS FROM THE GREAT PHILOSOPHER 45 (compiled by Wallace Rice 1907).

of this fear and demonstrates that the ideas behind *Hernandez* are but a quiet tyranny that must be overturned. Liberty is liberty, no matter the occasion.