STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ALVIN C. WALKER, JR., Defendant-Appellant.	FOR PUBLICATION November 21, 2006 9:05 a.m. No. 250006 Oakland Circuit Court LC No. 2002-187306-FH ON REMAND Official Reported Version

Before: Neff, P.J., and Owens and Cooper, JJ.

COOPER, J. (*concurring*).

I agree with the majority's conclusion and scholarly analysis under *Davis* and *Hammon*.[1] However, because I disagree as to the application in part IV of *Carines* to this matter, I write separately to address that issue.

The majority concludes that "[b]ecause defendant failed to preserve his Confrontation Clause claim, we review the error under the standard for unpreserved constitutional error." *Ante* at ___, citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). I would read *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), to automatically preserve Confrontation Clause claims. In *Crawford*, the defendant properly objected at trial to the admission of certain statements as hearsay. Justice Scalia, writing for the majority, turned the analysis to the Confrontation Clause, although the defendant had not preserved any such constitutional claim. I would find that *Crawford* sets the value of the Confrontation Clause guarantee high enough that violations of it cannot be unpreserved error.

Given the importance placed on the Confrontation Clause by Justice Scalia in *Crawford*, I am concerned that harmless error review is inappropriate. However, the Court did not directly speak to the applicable standard of review in *Crawford* or *Davis*, and we must therefore rely on existing Supreme Court precedent addressing the varied standards of review for constitutional errors. Here, because this error is not structural, but rather is "trial error," in that it "occurred

[1] *Davis v Washington*, ___ US ___; 126 S Ct 2266; 165 L Ed 2d 224 (2006), which includes the companion case of *Hammon v Indiana.*

during presentation of the case to the jury," we are bound to review it following the harmless error standard. *Arizona v Fulminante*, 499 US 279, 306-307; 111 S Ct 1246; 113 L Ed 2d 302 (1991). See also *Washington v Recuenco*, ___ US ___; 126 S Ct 2546, 2551; 165 L Ed 2d 466 (2006); *United States v Gonzalez-Lopez*, ___ US ___; 126 S Ct 2557, 2564; 165 L Ed 2d 409 (2006). I believe this is an issue the Supreme Court ought to address further; there is an apparent gap between the importance of the Confrontation Clause in *Crawford* and its consignment to harmless error review by the division between structural error and trial error.

However, in the instant case I agree with the majority; under any analysis, this error was not harmless.

/s/ Jessica R. Cooper