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Why the Sky Didn't Fall: Using Judicial Creativity to Circumvent Crawford v. Washington

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WHY THE SKY DIDN'T FALL: USING JUDICIAL CREATIVITY TO CIRCUMVENT *CRAWFORD V. WASHINGTON* *

I. INTRODUCTION

A woman's voice, frightened and full of panic, calls out across a 911 switchboard. Trembling, the woman pleads for help. Her boyfriend, she tells the operator, just attacked her. At trial, the boyfriend faces charges of domestic assault, but the victim is too afraid to testify; the boyfriend moves to exclude as evidence the recorded 911 call. The call, he argues, is hearsay. Accordingly, its admission violates his Sixth Amendment right to confront witnesses against him.

Prior to the United States Supreme Court's recent decision in *Crawford v. Washington*,[1] the 911 call would ordinarily be admitted into evidence as an "excited utterance,"[2] provided that the evidence established all the necessary elements of that hearsay exception.[3] Moreover, prior to *Crawford*, the admission of such a call did not violate the Sixth Amendment's Confrontation Clause.[4]

The Court's ruling in *Crawford* threw the admissibility of numerous hearsay statements into considerable doubt. Although the facts of *Crawford* did not involve domestic violence, the decision fundamentally altered the structure of hearsay analysis in criminal trials.[5] Accordingly, the decision bears directly on all areas of criminal litigation involving the admissibility of hearsay evidence.[6]

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1. 541 U.S. 36 (2004).
2. FED. R. EVID. 803(2).
3. *See, e.g.*, People v. Simpson, 656 N.Y.S.2d 765, 767 (App. Div. 1997) (affirming the trial court's holding to admit the recording of a 911 call as an excited utterance).
4. People v. Moscat, 777 N.Y.S.2d 875, 879 (Crim. Ct. 2004).
5. *See id.* at 876.
6. *See id.* at 877.

As a result, many commentators argue that the impact of *Crawford* on the criminal justice system will be monumental.[7] A trend in the lower courts that have actually applied *Crawford*, however, reveals that in practice the breadth and applicability of the decision may not be as far-reaching as initially anticipated.[8]

In *People v. Moscat*,[9] a case that involved facts similar to those presented above, the court held that a 911 call was not "testimonial" in nature and was thus admissible under the excited utterance exception to the hearsay rule.[10] The court concluded that the 911 call for help was "essentially different in nature" from the testimonial statements that, post-*Crawford*, are excluded by the Confrontation Clause.[11] *Moscat* represents just one of the hundreds of courts around the country grappling with the meaning and concrete application of the new principles in the Sixth Amendment analysis set forth in *Crawford*.

The Court in *Crawford* held that the Confrontation Clause prohibits the admission of testimonial statements made by a witness who fails to appear at trial unless (1) the witness is unavailable to testify and (2) the defendant has had a prior opportunity to cross-examine the witness.[12] *Crawford* partially overruled the Court's "well-settled"[13] decision in *Ohio v. Roberts*,[14] which allowed out-of-court statements to be introduced at a criminal trial if the court deemed the statements sufficiently reliable.[15] *Crawford* substituted a

7. Both legal commentators and appellate courts have noted the significance of the *Crawford* decision. *See, e.g.*, Ira Mickenberg, 'Blakely' *and* 'Crawford', NAT'L L.J., Aug. 2, 2004, at S8 (noting that *Crawford* "will cause a sea of change in the way tens of thousands of cases are litigated"); *see also* United States v. Manfre, 368 F.3d 832, 838 n.1 (8th Cir. 2004) (describing *Crawford* as "a case of great importance").

8. *See infra* Part IV.B.

9. 777 N.Y.S. 2d 875 (Crim. Ct. 2004).

10. *Id.* at 879–80.

11. *Id.* at 879.

12. Crawford v. Washington, 541 U.S. 36, 68 (2004).

13. State v. Forrest, 596 S.E.2d 22, 26 (N.C. Ct. App. 2004).

14. 448 U.S. 56 (1980).

15. *Id.* at 66. Under *Roberts*, the Sixth Amendment's Confrontation Clause does not bar the admission of an unavailable witness' statement against a criminal defendant if the statement "bears adequate 'indicia of reliability.'" *Id.* To meet the *Roberts* test, evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Id.*

bright line rule against the admission of out-of-court testimonial statements that were not subject to prior cross-examination.[16] Thus, after *Crawford*, the only means of proving the reliability of a testimonial[17] hearsay statement in a criminal trial is through cross-examination of the declarant.[18] In effect, *Crawford* created "significant new limitations" on the type testimony admissible against criminal defendants.[19]

Although *Crawford* altered the analysis concerning the admissibility of hearsay evidence by redefining the relationship between the Confrontation Clause and the hearsay rule, the decision's "enhanced Confrontation Clause protection" [20] applies only to testimonial statements.[21] Thus, the analysis turns on the definition of "testimonial." The Court, however, expressly declined to provide a concrete definition of the term, leaving "for another day any effort to spell out a comprehensive definition of 'testimonial.'"[22] As a result, the Court left critical concepts in the analysis undefined.

The new standard enunciated in *Crawford* has already begun to materially alter the presentation of hearsay evidence in criminal trials. The prosecution will no longer be allowed to use prior statements of witnesses who do not testify at trial, unless the defendant had a prior opportunity to cross-examine the witness.[23] Yet due to the Court's failure to delineate a more complete definition of testimonial, the full, long-term import of the decision is unknown. The state and lower federal courts' interpretation of the decision will determine the reach of the ruling.

This Note argues that the Court's new Confrontation Clause analysis reaffirms the fundamental right of confrontation that *Roberts* failed to secure. In practice, however, the decision could reach

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For further discussion of *Roberts*, see *infra* Part III.C.

16. *Crawford*, 541 U.S. at 68.

17. *See* discussion accompanying notes 122–128.

18. *Crawford*, 541 U.S. at 59.

19. Erwin Chemerinsky, *Court Bars Out-of-Court 'Testimonial' Statements*, TRIAL, July 2004, at 82, 85.

20. Gerald F. Uelmen, *Preserving* Crawford *Objections*, CHAMPION, July 2004, at 46.

21. *Crawford*, 541 U.S. at 68.

22. *Id.*

23. *Id.*

beyond the concerns of the Sixth Amendment and thus subject certain forms of hearsay to unwarranted constitutional scrutiny, risking the unnecessary exclusion of valuable evidence. Accordingly, this Note suggests that *Crawford* must be confined to its proper realm: protection of a defendant's right with respect to *testimonial* statements. To preserve *Crawford*'s restoration of the basic Sixth Amendment principles, a *per se* rule cannot be applied to determine whether a particular statement is testimonial. Rather, the critical question of what constitutes a testimonial statement must be determined by examining the facts surrounding the proffered statement in each particular case.

Part II of this Note summarizes the facts of *Crawford* and provides an overview of commentary arising from the Court's opinion. Part III explains the significance of hearsay with respect to the Confrontation Clause. Additionally, Part III.C traces the procedural history leading to the Supreme Court's decision in *Crawford*, noting the Court's progression in Confrontation Clause jurisprudence. Part IV raises the critical questions left unanswered by the Court after *Crawford*. Further, Part IV.B examines a trend in how the lower federal and state courts have interpreted *Crawford* as applied to specific factual scenarios in various areas of litigation. This section argues that although *Crawford* fundamentally changed the structure of the hearsay analysis, an assessment of the lower courts' interpretation of testimonial reveals that in practice, the scope of the decision might not be as expansive as anticipated.[24] Part V recommends that due to the potential implications of applying *Crawford* to statements beyond the concern of the Sixth Amendment, lower courts must cautiously consider the application of *Crawford* on a case-by-case basis.

II. A SHIFT IN THE LAW WITH; A LACK OF GUIDANCE

In *Crawford v. Washington*,[25] the United States Supreme Court received an opportunity to reconsider the relationship between the Confrontation Clause and the admissibility of hearsay evidence. The Court reassessed the history, text, and policy underlying the

24. *See infra* Part IV.B.
25. 541 U.S. 36 (2004).

confrontation right, holding that "[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."[26]

A. Crawford v. Washington: *Facts of the Case*

A jury convicted Michael Crawford of attempted murder and assault for stabbing a man who allegedly attempted to rape his wife, Sylvia.[27] At trial, Crawford claimed self-defense.[28] Both the defendant and his wife provided separate recorded statements to the police. Sylvia's statement arguably contradicted her husband's claim of self-defense.[29] "Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent."[30] Rather, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing.[31] At issue was whether the admission of the statement complied with the Sixth Amendment's Confrontation Clause.[32]

The trial court admitted the statement based on the test set forth in *Roberts*, and offered several reasons to support the trustworthiness of the statement: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense; she had direct knowledge as an eyewitness; she was describing recent events; and she was questioned by a "neutral" law enforcement officer.[33] While the Washington Court of Appeals reversed, the Washington Supreme Court reinstated the conviction, unanimously concluding that although the statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness.[34]

The United States Supreme Court reversed the conviction,

26. *Id.* at 69.
27. *Id.* at 38.
28. *Id.*
29. *Id.*
30. *Id.*; WASH. REV. CODE § 5.60.060 (1) (1994).
31. *Crawford*, 541 U.S. at 40.
32. *Id.*; U.S. CONST. amend. VI.
33. *Crawford*, 541 U.S. at 38-40.
34. *Id.* at 40.

stating that prior case law erroneously permitted the admission of the wife's recorded statement based on "amorphous notions of 'reliability'" without considering the constitutional requirement that testimony against an accused be subject to cross-examination.[35] The Court held that the Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[36] Thus, the Sixth Amendment's Confrontation Clause bars the use of a testimonial statement made by a witness who fails to appear at a criminal trial, unless the witness is unavailable to testify at trial and was subject to cross-examination at the time the declarant made the statement.[37] The Court concluded that the wife's statement, made during a police investigation, was testimonial in nature, and the defendant had no prior opportunity for cross-examination.[38] Accordingly, the Court excluded the statement.[39]

In reaching its decision, the Court turned to the historical background of the Confrontation Clause.[40] The Court found that the history supported two inferences concerning the Sixth Amendment.[41] First, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[42] Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[43] Accordingly, a prior opportunity to cross-examine was a necessary, not merely a sufficient, condition for the admissibility of testimonial statements of an unavailable declarant against the accused in a criminal case.[44]

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35. *Id.* at 61.
36. *Id.*
37. *Id.* at 53-54.
38. *Id.* at 68.
39. *See id.* at 69 (reversing the state supreme court's decision to admit the wife's statement against the defendant).
40. *Id.* at 42.
41. *Id.* at 49-50.
42. *Id.* at 50.
43. *Id.* at 53-54.
44. *Id.* at 54.

The Court described the standard previously set forth in *Roberts* as "malleable" and "subjective,"[45] noting that "[t]he *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability."[46] The Confrontation Clause requires reliable evidence, but reliability can only be assessed through cross-examination.[47] Thus, according to the Court, *Roberts* obscured the principles underlying the Clause.[48]

Justices Rehnquist and O'Connor concurred in the judgment but dissented from the decision to overrule *Roberts*, stating that the *Crawford* decision complicated rather than clarified the rules.[49] Chief Justice Rehnquist acknowledged the lack of guidance in how to apply the Court's new analysis, stating that "the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers . . . [t]hey need them now, not months or years from now . . . parties should not be left in the dark in this manner."[50] Thus, although all nine justices voted to overturn Crawford's conviction, the majority's ruling failed to provide a definitive structure that would reconcile the hearsay exceptions with the demands of the Confrontation Clause.

B. "A Legal Landmark:"[51] Commentary on Crawford

The moment the United States Supreme Court handed down the *Crawford* opinion, legal commentators declared the decision to be the "blockbuster criminal ruling of the year"[52] and a "legal landmark on the right to confront one's accuser."[53] *Crawford* established a new standard for the admissibility of hearsay in criminal trials that departed from over twenty years of precedent.[54] Accordingly, many

45. *Id.* at 60, 63.
46. *Id.* at 62.
47. *Id.*
48. *See id.*.
49. *Id.* at 69 (Rehnquist, C.J., concurring in the judgment but dissenting from the Court's decision to overrule *Roberts*).
50. *Id.* at 75-76.
51. Robin Franzen, *Lawyer's Logic, Skills Sway Justices*, THE OREGONIAN, July 6, 2004, at A01.
52. Uelmen, *supra* note 20, at 46.
53. Franzen, *supra* note 51, at A01.
54. *See Crawford*, 124 S. Ct. at 68-69 (abrogating Ohio v. Roberts, 448 U.S. 56 (1980)).

commentators noted that the ruling "change[d] the law of evidence followed by every criminal court in the United States"[55] and anticipated that the decision would cause "rapid and profound changes in how hearsay statements are used against a defendant in a criminal trial."[56]

In many respects, the "importance of *Crawford* cannot be overstated"[57] as the decision "calls into question the continued vitality of virtually all the exceptions to the hearsay rule that have become part of the legal landscape over several decades."[58] Specifically, commentators expect *Crawford* to have a significant impact on the admissibility of hearsay evidence in domestic violence and child abuse cases.[59] For instance, in domestic violence cases, prosecutors are frequently faced with victims who recant their testimony, fail to show up for trial, or refuse to take the stand.[60] Prior to *Crawford*, out-of-court statements that met hearsay exceptions constituted a significant form of evidence prosecutors used to prove their cases.[61] Accordingly, prosecutors fashioned "victimless" prosecutions.[62] In other words, the government attempted to prove the defendant's guilt without testimony from the

55. Chemerinsky, *supra* note 19, at 82.

56. Rene L. Valladares & Franny A. Forsman, Crawford v. Washington: *The Confrontation Clause Gets Teeth*, NEV. LAW., Sept. 2004, at 12, 12.

57. Chemerinsky, *supra* note 19, at 85.

58. Mickenberg, *supra* note 7, at S8. For example, statements made during grand jury proceedings can no longer be admitted against a criminal defendant unless the defendant is afforded the opportunity to confront the accuser. Crawford, 541 U.S. at 68.

59. *See* Sherrie Bourg Carter & Bruce M. Lyons, *The Potential Impact of* Crawford v. Washington *on Child Abuse, Elderly Abuse and Domestic Violence Litigation*, CHAMPION, Oct. 2004, at 21, 22. Criminal litigation involving child abuse, elderly abuse and domestic violence share several common characteristics. *Id.* at 21. Generally, the only witnesses in these cases are the alleged victims and the professionals who interviewed them after the alleged crime. *Id.* Additionally, these cases often involve witnesses who are unavailable to testify at trial for a number of reasons. *Id.*

60. *See, e.g.*, People v. Moscat, 777 N.Y.S.2d 875, 878 (Crim. Ct. 2004) (stating that "some complainants in domestic *assault* cases are unwilling to testify at trial because they fear the defendant, because they are economically or emotionally dependent upon the defendant").

61. *See* Carter & Lyons, *supra* note 59, at 22.

62. *Moscat*, 777 N.Y.S.2d at 878.

complainant by using other evidence that fell within certain exceptions to the hearsay rule, such as statements made by a victim to doctors at the hospital, as statements made for the purpose of seeking medical treatment,[63] or statements by the victim to police officers arriving at the scene as "excited utterances."[64] Such statements are now inadmissible if testimonial.[65]

Additionally, commentators anticipate *Crawford*'s impact to be especially strong in child abuse cases.[66] In such cases, the state often calls as witnesses the adults who claim the child told them about the abuse but does not call the child as a witness.[67] After *Crawford*, most of the adults' hearsay testimony may be inadmissible unless the defense is able to cross-examine the accuser.[68] Whether such statements are admissible depends on how the courts apply the term "testimonial" to statements made to examining doctors, schoolteachers, family members, social workers, and police officers responding to suspicion of abuse.[69]

While *Crawford*'s impact is apparent and substantial in certain areas, the Court left critical questions unanswered. Thus, while the potential impact of *Crawford* is monumental, in many respects the ultimate effect of the decision is "unknown and unpredictable."[70] As a result, in practice, lower courts' interpretation of the opinion will

63. *See* FED. R. EVID. 803(4), (6); *see also* People v. Swinger, 689 N.Y.S.2d 336, 349 (Crim. Ct. 1998) (holding that statements made by the complainant to a hospital doctor were made for the purposes of treatment and thereby admissible as "business records").

64. *Moscat*, 777 N.Y.S.2d at 878; *see* FED. R. EVID. 803(2); *see also* People v. Fratello, 92 N.Y.2d 565, 570–71 (Ct. App. 1998) (statements by victim to first officers at the scene are admissible as excited utterances).

65. Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 513 (2005). Mosteller notes that after *Crawford* certain "[i]nvestigative and prosecutorial practices are certain to change." *Id.* For example, practices of videotaping victims' statements to investigating officers shortly after the alleged crime were once extremely "useful to the prosecution, but now produce inadmissible testimonial statements." *Id.* at 513.

66. *See, e.g.*, Peter Adomeit, *Raleigh's Revenge*: Crawford v. Washington, W. MASS. L. TRIB., Oct. 17, 2004, at 4.

67. *See* Mickenberg, *supra* note 7, at 8.

68. *Id.*

69. *See* Mosteller, *supra* note 65, at 518.

70. *Id.* at 512.

determine the actual impact of *Crawford.*

III. HISTORICAL PERSPECTIVE

The interplay between the Confrontation Clause and the hearsay rule in criminal litigation[71] is critical to understanding the implications of *Crawford.* Additionally, the procedural history of Confrontation Clause jurisprudence provides insight into how the Court arrived at its decision.

The admission of hearsay evidence against a criminal defendant implicates the Sixth Amendment because the court does not afford the defendant the opportunity to confront the out-of-court declarant.[72] Although the hearsay rule and the Confrontation Clause were generally designed to protect similar values, the two claims are distinct.[73] For instance, the Confrontation Clause may bar the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.[74]

A. Hearsay

As a matter of both federal and state law, hearsay is generally inadmissible unless the statement falls within an exception to the hearsay rule.[75] Rule 801 of the Federal Rules of Evidence defines

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71. The impact of the hearsay rule differs between civil and criminal cases. JACK B. WEINSTEIN & MARGARET A. BERGER, 5 WEINSTEIN'S FEDERAL EVIDENCE § 802.05(1) (Joseph M. McLaughlin ed., 2d ed. 2004). The difference results, in part, from the applicability of the Sixth Amendment in criminal cases. *Id.* at § 802.05(1)(b).

72. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980); California v. Green, 399 U.S. 149, 155–56 (1970).

73. *See, e.g.*, *Green*, 399 U.S. at 155 (noting that the values protected under the hearsay rule and the Confrontation Clause are similar but do not completely overlap).

74. *Roberts*, 448 U.S. at 63 ("[t]he historical evidence leaves little doubt . . . that the Clause was intended to exclude some hearsay [evidence]"); *see, e.g.*, Barber v. Paige, 390 U.S. 719 (1968) (holding that admitting former testimony of the codefendant would violate the Confrontation Clause when the state made no effort to produce a witness).

75. *See* FED. R. EVID. 802; 1 B.E. WITKIN, CALIFORNIA EVIDENCE § 1, at 679–80 (4th ed. 2000) ("Hearsay evidence is evidence of a statement made out of court and offered to prove the truth of the matter stated. Unless it comes within one of the established exceptions to the *hearsay rule*, evidence of this type is inadmissible."). Although this Note predominately cites to the Federal

hearsay as "a statement,[76] other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[77] Hearsay statements are generally inadmissible at trial due to their lack of reliability because the statements are not made under oath and the adverse party has no opportunity to cross-examine the declarant.[78] Moreover, the judge and jury do not have an opportunity to evaluate a witness' "perception, memory, and narration" in the courtroom.[79]

Even when an out-of-court statement is offered for the truth of the matter asserted, the statement may nonetheless be admissible as either an exception or an exemption to the hearsay rule.[80] The Federal Rules of Evidence enumerate nearly thirty types of admissible hearsay evidence that have developed over three centuries.[81]

B. The Confrontation Clause

The Confrontation Clause guarantees the right of the accused to confront hostile witnesses and, thus, protects the right of cross-examination.[82] Defendants possess the right to test the credibility of

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Rules of Evidence, most states have enacted similar evidentiary rules modeled after the federal rules. *See, e.g.*, CAL. EVID. CODE § 1200 (Deering 2004).

76. Rule 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person to be an assertion." FED. R. EVID. 801(a).

77. FED R. EVID. 801(c).

78. 1 WITKIN, *supra* note 75; *see also* Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145 (1991) (stating that hearsay is "inherently unreliable" and "presumptively untrustworthy because the out-of-court declarant cannot be cross-examined immediately as to any inaccuracy or ambiguity in his or her statement").

79. WEINSTEIN & BERGER, *supra* note 71, at § 802.02; *See also* California v. Green, 399 U.S. 149, 158 (1970) (stating that the ability to cross-examine a witness is the "greatest legal engine ever invented for the discovery of truth").

80. For exemptions (i.e., statements defined as "not hearsay"), see FED. R. EVID. 801(d). For exceptions, see FED. R. EVID. 803.

81. Co-conspirator statements are one example of an exemption to the hearsay rule. FED. R. EVID. 801(d)(2)(E). Examples of exceptions to the hearsay rule include business records, statements made for the purposes of medical diagnosis and treatment, excited utterances, statements regarding the declarant's state of mind, past record recollections, dying declarations, and statements against penal interest. FED. R. EVID. 803(2)–(6), 804(b)(2)–(3).

82. *See* U.S. CONST. amend. VI; *see also* Ohio v. Roberts, 448 U.S. 56, 63

their accusers in order to prevent *ex parte* (outside of court) hearsay statements.[83] The confrontation right is designed to enhance the truth-finding function of trial through face-to-face confrontation during the witness's direct testimony and through the opportunity for confrontation by cross-examination.[84] Thus, the Confrontation Clause increases the likelihood that an accusation by an adverse witness is truthful by requiring the witness to confront the accused.[85] Additionally, the Clause promotes truthfulness by forcing the witness to make accusations under oath.[86] The means of testing accuracy are so important that "the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process.'"[87]

The express language of the Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[88] A literal interpretation of the clause would bar all hearsay, even if the statement fell within an exception.[89] Although the Supreme Court has repeatedly reaffirmed defendants' confrontation rights,[90] the Court has never considered cross-examination at trial an absolute right.[91] The Court has also indicated that the admission of hearsay

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(1980) (emphasizing that the primary interest secured by the Confrontation Clause is right of cross-examination).

83. *See* California v. Green, 399 U.S. 149, 156 (1920); Mattox v. United States, 156 U.S. 237, 242–43 (1895).

84. *See Roberts*, 448 U.S. at 63; Maryland v. Craig, 497 U.S. 836, 845–46 (1990).

85. *See Mattox*, 156 U.S. at 242–43 (noting that confrontation rights allow the accused to test the demeanor and credibility of an adverse witness).

86. *See Green*, 399 U.S. at 158 (stating that requiring a witness to make an accusation under oath is helpful in "impressing [the witness] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury").

87. *Roberts*, 448 U.S. at 64 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

88. U.S. CONST. amend. VI.

89. *See Roberts*, 448 U.S. at 63.

90. *See* Pointer v. Texas, 380 U.S. 400, 405 (1965) ("[t]here are few subjects . . . upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

91. *See* Illinois v. Allen, 397 U.S. 337, 346–47 (1970) (holding that the right of confrontation is not absolute). A defendant can waive his or her right

evidence does not automatically violate the defendant's right to confront an adverse witness.[92]

C. *Influential Case Law Before* Crawford

One of the most influential cases in modern Confrontation Clause jurisprudence connecting the Confrontation Clause and the hearsay rule is *Ohio v. Roberts*.[93] In *Roberts*, the Supreme Court discussed the interplay between the hearsay rule and the Confrontation Clause in an effort to clarify the standards for determining when hearsay evidence can be admitted without offending a defendant's confrontation right. The defendant in *Roberts* was charged with check forgery and possession of stolen credit cards.[94] At a preliminary hearing, the defense counsel called Anita Isaacs, the daughter of the man whose checks and credit cards the defendant allegedly stole.[95] Defense counsel attempted to have Isaacs admit that she gave the defendant her parents' checks and credit cards without informing him that she lacked her parents' permission to do so.[96] The daughter denied giving Roberts the check and credit cards.[97] A county grand jury subsequently indicted Roberts for forgery and for receiving stolen property.[98]

At trial, the prosecution relied on an Ohio statute[99] to introduce a transcript of the testimony elicited at Robert's preliminary hearing from the daughter who had since become unavailable.[100] At issue

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to cross-examination by either failing to make a timely objection or by preventing a witness from testifying. *See, e.g.*, United States v. Thai, 29 F.3d 785, 814–15 (2d Cir. 1994) (holding that defendant waives his confrontation right when defendant procures the witness' silence through actual violence or murder).

92. *See, e.g.*, Dutton v. Evans, 400 U.S. 74 (1970) (allowing the admission of co-conspirator's spontaneous out-of-court statements that were against his penal interest because they fell within an exception to the hearsay rule).

93. 448 U.S. 56 (1980).

94. *Id.* at 58.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. OHIO REV. CODE ANN. § 2945.49 (West 1975) permits the use of preliminary examination testimony of a witness who "cannot for any reason be produced at the trial."

100. *Roberts*, 448 U.S. at 59.

was whether the Confrontation Clause barred the admission of an absent declarant's preliminary hearing testimony.[101] The U.S. Supreme Court ruled that the testimony was admissible under the Confrontation Clause, holding that the Sixth Amendment permitted the previous testimony of an unavailable witness when the testimony had been subjected to the equivalent of cross-examination at the preliminary hearing.[102]

With regard to the former testimony exception to the hearsay rule, the Court noted two ways in which the Confrontation Clause limits the admissibility of hearsay evidence.[103] First, the clause establishes an unavailability requirement.[104] In other words, "[i]n the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[105] Second, to increase accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence, the hearsay must be marked with adequate "indicia of reliability" when the witness is shown to be unavailable.[106] The reliability prong of the *Roberts* test is satisfied if the evidence "falls within a firmly rooted hearsay exception."[107] Yet if the evidence does not come under a firmly rooted exception, the proponent must show "particularized guarantees of trustworthiness" to avoid the exclusion of the evidence.[108]

Although *Roberts* provided general guidelines for determining the admissibility of hearsay statements under the Confrontation Clause, the Court's failure to specifically define the breadth of the phrase "firmly rooted hearsay exception" caused confusion and uncertainty in the lower courts. As a result, the Supreme Court continued to reevaluate the relationship between the Confrontation Clause and the hearsay rule in a series of decisions following *Roberts*.

In 1986, the Court clarified the scope of *Roberts* in *United States*

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101. *See id.* at 62.
102. *See id.* at 75.
103. *Id.* at 65.
104. *Id.*
105. *Id.*
106. *Id.* at 65–66 (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).
107. *Id.* at 66.
108. *Id.*

v. Inadi.[109] There, the Court held that despite the language in *Roberts* concerning the necessity of producing an available declarant, statements of co-conspirators may be admissible even when the declarant is available but not produced.[110] The Court stated that the unavailability requirement in *Roberts* could not "fairly be read to stand for the proposition . . . that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."[111] The Court clarified that the unavailability requirement in *Roberts* applied only when the challenged statement was prior testimony (as was the case in *Roberts*).[112]

Six years later, in *White v. Illinois*,[113] the United States Supreme Court extended the reasoning of *Inadi* to excited utterances and statements made while receiving medical care.[114] In effect, the Court seemed to limit *Roberts* solely to former testimony situations, stating that the "unavailability" requirement "stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."[115] The Court stated that "there is little benefit, if any, to be accomplished by imposing an 'unavailability rule.'"[116] Thus, the Court reasoned that proving a declarant's unavailability would not substantially add to the fact-finding process or the accuracy of the statements.[117]

The Court once again considered the relationship between the Confrontation Clause and hearsay evidence in *Lilly v. Virginia*.[118] At

109. 475 U.S. 387 (1986).
110. *Id.* at 394–95. The Court reasoned that in the context of co-conspirator statements, an out-of-court statement is more reliable evidence than the declarant's in-court testimony. *Id.* at 395. According to the Court, the "statements provide evidence of the conspiracy's context that cannot be replicated" because "[c]onspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand." *Id.*
111. *Id.* at 394.
112. *Id.*
113. 502 U.S. 346 (1992).
114. *Id.* at 348–49.
115. *Id.* at 354.
116. *Id.*
117. *Id.* at 354–55.
118. 527 U.S. 116 (1999).

issue in *Lilly* was whether the admission into evidence of the non-testifying accomplice's entire confession, which contained some statements against the accomplice's penal interest and other statements that inculpated the accused, violated the "accused's Sixth Amendment right to be confronted with the witnesses against him."[119] The Court held that the admission of the confession violated Lilly's confrontation rights.[120] The plurality opinion, written by Justice Stevens and joined by Justices Souter, Ginsberg, and Breyer, concluded that the "[declaration] against penal interest" exception is not a "firmly rooted" hearsay exception as defined by the Confrontation Clause.[121]

The decision in *Lilly* narrowed the admissibility of accomplice's statements to situations in which their trustworthiness could be established.[122] More importantly, the impact of *Lilly* "further solidifie[d] the defendant's necessity to confront the witness in situations where veracity may be questionable."[123] The *Lilly* decision created a "resurgence in the utility of the confrontation clause."[124] Further, in a separate concurring opinion, Justices Breyer, Scalia, and Thomas indicated their readiness to move beyond the *Roberts* framework and to consider an approach that focused on whether the challenged hearsay resembles the old *ex parte* affidavits against which the Confrontation Clause originally guarded.[125]

Despite the plurality's decision in *Lilly* and the Court's speculation that it was "highly unlikely"[126] that accomplice confessions implicating the accused could survive *Roberts*,[127] courts continued to admit such statements.[128] The Court in *Crawford* noted

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119. *Id.* at 124.
120. *Id.* at 139.
121. *Id.* at 133.
122. *See* Leslie Morsek, Lilly v. Virginia: *Silencing the "Firmly Rooted" Hearsay Exception with Regard to an Accomplice's Testimony and Its Rejuvenation of the Confrontation Clause*, 33 AKRON L. REV. 523, 544 (2000).
123. *Id.*
124. *Id.* at 547.
125. *Lilly*, 527 U.S. at 141–42 (Breyer, J., concurring).
126. *Id.* at 137.
127. *See id.*
128. *See, e.g.*, Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in* Lilly v. Virginia, 53 SYRACUSE L. REV. 87, 105 (2003) (discussing a study that found, after *Lilly*, appellate courts admitted accomplice

that notwithstanding *Lilly*, lower courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the opportunity for cross-examination.[129] Perhaps if the lower courts had taken heed after *Lilly*, the Court may have never issued *Crawford*. The courts, however did not take heed and, thus, the willingness of three Justices in *Lilly* to abandon the *Roberts* framework and the subsequent failure of courts to follow the *Lilly* decision ultimately set the stage for *Crawford*.

Although pre-*Crawford* the Court had been "careful not to equate"[130] the Confrontation Clause and the hearsay rule, the Court's rulings arguably endorsed a view that recognized "the similarity, if not [the] equivalency," of the Clause and the hearsay rule.[131] Under the doctrine that evolved after *Roberts*, admitting hearsay evidence did not offend the Confrontation Clause if the prosecution could prove that the evidence fell within a firmly rooted exception to the hearsay rule or possessed particularized guarantees of trustworthiness. Thus, *Crawford* imposed a radically new structure for analyzing hearsay statements in a criminal case.

IV. AVOIDING THE *CRAWFORD* TRAP

After *Crawford*, the proper determination of whether an out-of-court statement is admissible against a criminal defendant no longer turns on whether the statement falls within a recognized exception to the hearsay rule. Instead, if the declarant made an out-of-court statement and the defendant did not have an opportunity for cross-examination, the statement must be excluded if testimonial.[132]

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statements to the authorities in twenty-five out of seventy cases—more than one-third of the time).

129. Crawford v. Washington, 541 U.S. 36, 64 (citing United States v. Aguilar, 295 F.3d 1018, 1021–1023 (9th Cir. 2002)).

130. Idaho v. Wright, 497 U.S. 805, 814 (1990).

131. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 592–93 (1992).

132. *Crawford*, 541 U.S. at 68.

A. "Testimonial" Undefined

Although the Court expressly declined to define testimonial,[133] the Court's opinion did provide some guidance in determining what types of statements the term may encompass. The Court generally defined testimonial statements as "extrajudicial statements . . . contained in formalized testimonial materials," such as plea allocutions; prior testimony at a preliminary hearing, before a grand jury, at a former trial, or at a deposition; statements made in an affidavit; confessions to the police; and responses to police interrogations.[134] Further, an out-of-court statement taken by a law enforcement officer constitutes a testimonial statement if the declarant made the statement under circumstances that would "lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[135] The Court, however, noted that "not all hearsay implicates the Sixth Amendment's core concerns. An off-hand remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."[136]

While the common factor underlying the Court's discussion of what constitutes a testimonial statement appears to be the official or formal quality of such a statement, the limits of the term are unknown. Moreover, the Court did not state which characteristics might determine whether a given statement constitutes testimony. After *Crawford*, some of the most controversial areas of litigation include the admissibility of 911 calls,[137] excited utterances to police officers,[138] statements made to family and friends,[139] domestic

133. *Id.* at 50-52.

134. *See id.* at 51-52. As noted by the Court, "interrogation" is meant in a "colloquial, rather than any technical legal, sense." *Id.* at 53 n.4.

135. *Id.* at 1352 (citing Brief for National Association of Criminal Defense Lawyers et al., Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410)).

136. *Id.*

137. *See* discussion *supra* accompanying notes 9–11, 244–256.

138. *See, e.g.*, Leavitt v. Arave, 371 F.3d 663 (9th Cir. 2004) (questioning whether victim's excited utterances while seeking police assistance were testimonial under *Crawford*); State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004) (questioning whether *Crawford* barred excited utterances to law enforcement officers immediately after the victim of a traumatic crime became free).

violence and child abuse cases,[140] police field investigations,[141] and the admissibility of affidavits and reports.[142]

B. Applying Crawford

According to legal commentators and appellate courts, *Crawford* will cause a "sea change"[143] or a "paradigm shift"[144] in the admissibility of hearsay evidence in criminal trials. While *Crawford* significantly altered the structure of the hearsay analysis, the Court's opinion required that lower courts apply their own interpretation of "testimonial."[145] Accordingly, the exact parameters of what constitutes a testimonial statement under *Crawford* are not readily apparent, and many cases reflect a tendency to apply a narrower definition of the term.[146] As a result, the following review of the lower court cases questioning the application of *Crawford* reveals that the courts have discovered ways to circumvent the decision. This section will identify the significant trends and examine the analysis in the lower court decisions that have distinguished

139. *See, e.g.*, United States v. Lee, 374 F.3d 637 (8th Cir. 2004) (questioning whether the nontestifying codefendant's statements to his relatives were admissible under *Crawford*); United States v. Mikos, No. 02 CR 137-1, 2004 WL 1631675 (N.D. Ill. July 16, 2004) (questioning whether statements to family members were testimonial).

140. *See, e.g.*, People v. Vigil, No. 02CA0833, 2004 WL 1352647 (Colo. Ct. App. June 17, 2004) (questioning whether *Crawford* prohibited videotaped statements of a child victim); Snowden v. Maryland, 846 A.2d 36 (Md. Ct. Spec. App. 2004) (questioning whether a social worker's hearsay statements could be admitted to replace the testimony of a child witness without violating the Confrontation Clause); People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004) (questioning whether the introduction of victim-child's statement to Children Assessment Center's executive director violated *Crawford*).

141. *See, e.g.*, People v. Newland, 775 N.Y.S.2d 308 (Sup. Ct. 2004) (determining whether *Crawford* barred the introduction of brief, informal remarks made to an officer while he conducted a field investigation).

142. *See, e.g.*, People v. Thompson, 812 N.E.2d 516 (Ill. App. Ct. 2004) (examining whether the introduction of victim's affidavit in support of a restraining order violates *Crawford* if the victim does not testify at trial); City of Las Vegas v. Walsh, 91 P.3d 591 (Nev. 2004) (determining whether the admission of a health professional's affidavit prepared for the prosecution to use in a DUI trial violated *Crawford*).

143. Mickenberg, *supra* note 7, at S8.

144. People v. Cage, 15 Cal. Rptr. 3d 846, 851 (Ct. App. 2004).

145. Crawford v. Washington, 541 U.S. 36, 68 (2004).

146. *See supra* discussion accompanying notes 138–142.

Crawford.

1. State Cases

Many state courts have adopted a loose "totality of the circumstances" test to determine whether a statement is testimonial. Two key elements in the decision are whether the declarant made the statement in response to structured questioning by a government official and whether the declarant would reasonably expect his or her statement to be used at trial.

a. State v. Forrest

In *State v. Forrest*,[147] the court considered whether *Crawford* barred excited utterances to law enforcement officers immediately after the victim of a traumatic crime became free from her captor.[148] Willie Forrest III was convicted of first-degree kidnapping, assault with a deadly weapon, and assault upon a law enforcement officer.[149] Law enforcement officers rescued Cynthia Moore from the defendant who had kidnapped her.[150] At the time of her rescue, she was "shaking, crying, and very nervous."[151] Immediately thereafter, she told the detective what the defendant had done to her.[152] Moore did not testify at trial, and the state sought to introduce her statements to the detective.[153] At issue was whether these statements were testimonial.[154]

The court held that the statements were not testimonial and admitted them pursuant to the excited utterance exception to the hearsay rule.[155] The court found that the facts in the present case were analogous to a 911 call situation. "Just as with a 911 call, a spontaneous statement made to police immediately after a rescue can be considered 'part of the criminal incident itself, rather than as part

147. 596 S.E.2d 22 (N.C. Ct. App. 2004).
148. *Id.* at 24.
149. *Id.* at 23.
150. *Id.*
151. *Id.* at 24.
152. *Id.*
153. *Id.* at 26.
154. *Id.*
155. *Id.* at 27–28.

of the prosecution that follows.'"[156] Further, the court noted that the police do not typically initiate a "spontaneous statement made immediately after a rescue from a kidnapping at knife point."[157] The victim made the statements to the police immediately following the incident; it was not a "formal statement, deposition, or affidavit."[158] She was not aware that she was "bearing witness" or that "her utterances might impact further legal proceedings."[159]

The court in *Forrest* first looked to the Supreme Court's opinion in *Crawford*.[160] Since the Court declined to define "testimonial," the *Forrest* court relied on *Moscat*, "one of the first cases to interpret *Crawford*."[161] The *Forrest* court then applied the facts of the case to determine whether the statements at issue fit within the *Moscat* court's analysis.[162] Holding that the proffered statements were not testimonial, the court in *Forrest* distinguished *Crawford* and declined to apply an expansive definition of "testimonial."[163]

Further, after the court determined the statement was not testimonial, the court proceeded to consider whether the statements "fit within a recognized exception to the hearsay rule."[164] The court's use of the traditional hearsay analysis suggests that even after *Crawford*, the Confrontation Clause does not impose any restrictions on hearsay that is non-testimonial in nature.

b. State of Maine v. Barnes

The Court in *Barnes*[165] addressed the issue of whether a mother's statements to the police were testimonial in nature.[166] Barnes was charged with the murder of his mother.[167] Before trial, Barnes moved *in limine* to exclude testimony including his prior

156. *Id.* at 27 (quoting People v. Moscat, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004)).
157. *Id.* (citing *Moscat*, 777 N.Y.S.2d at 880).
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 26.
162. *Id.* at 26–27.
163. *Id.* at 27.
164. *Id.* at 28.
165. 854 A.2d 208 (Me. 2004).
166. *Id.* at 211.
167. *Id.* at 209.

statements that he wanted to kill his mother.[168] The court denied his motion.[169] "In addition to other evidence of prior threats, the jury heard the testimony of a police officer."[170] The officer testified that Barnes' mother drove herself to the police station more than a year before the murder and came into the station crying.[171] "[S]he said that her son had assaulted her and had threatened to kill her more than once during the day."[172] The court admitted this testimony pursuant to the excited utterance exception to the hearsay rule, and the jury convicted Barnes.[173] At issue on appeal was whether the mother's statements to the police when she reported the crimes were testimonial in nature.[174]

Under *Crawford*, the Maine Supreme Court held that the mother's statements were not testimonial in nature and thus their admission did not violate the defendant's confrontation rights.[175] The court looked to a number of factors in reaching its decision.[176] First, the police "did not seek [the mother] out."[177] Rather, the mother went to the police on her own resolve.[178] Second, the mother made the statements while she was still under the stress of the incident.[179] As a result, any questions posed to her by the police were asked to determine the cause of her distress.[180] Third, she did not respond to tactically structured police questioning, but instead sought help from the police.[181]

Similar to *Forrest*, the court in *Barnes* refrained from articulating a *per se* definition of "testimonial." Rather, the court considered whether the statement at issue constituted the type of statement specifically referred to in *Crawford*, stating that the

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 211.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*

"appropriate application of the principles expressed in *Crawford*, will require detailed attention to the specific facts in each case."[182]

The above cases are representative of the numerous instances in which state courts have distinguished *Crawford* based on a narrow definition of "testimonial." While the Court in *Crawford* left the definition open to a broad interpretation, many lower courts have limited it to those statements that lie at the "core" of Sixth Amendment concerns.[183]

When applicable, *Crawford* has greatly affected the

182. *Id.* at 212.

183. *See* People v. Griffin, 93 P.3d 344 (Cal. 2004) (holding that a statement made by the victim to a friend at school is not testimonial under *Crawford*); People v. Johnson, 18 Cal. Rptr. 3d 230 (Ct. App. 2004) (holding that the use of hearsay laboratory report at probation revocation hearing did not violate *Crawford*); People v. Cervantes, 12 Cal. Rptr. 3d 774, (Ct. App. 2004) (holding that an out-of-court statement made to others for the purpose of seeking medical attention does not violate *Crawford* if the declarant expected the statement would be related to the police, but did not reasonably expect it would be used at a later trial); People v. Edwards, 101 P.3d 1118 (Colo. Ct. App. 2004) (holding that excited utterances by victim are admissible notwithstanding *Crawford*); State v. Rivera, 844 A.2d 191 (Conn. 2004) (holding that co-conspirator statements are not covered by *Crawford*); Somervell v. State, 883 So.2d 836, (Fla. Dist. Ct. App. 2004) (holding that statements made by an autistic child to his mother are not testimonial); Blanton v. Fla., 880 So.2d 798 (Fla. Dist. Ct. App. 2004) (holding that the opportunity to depose the victim satisfies *Crawford*); *In re* T.T., 815 N.E.2d 789 (Ill. App. Ct. 2004) (holding that all statements by a child victim to a social worker or treating doctor are not *per se* testimonial); Kansas v. Young, 87 P.3d 308 (Kan. 2004) (holding that the opportunity to cross-examine the witness at the preliminary hearing satisfies *Crawford*); People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004) (stating in dicta that the introduction of child-victim's statement to Children's Assessment Center's executive director did not violate *Crawford* because the director was not a government employee); State v. Vaught, 682 N.W.2d 284 (Neb. 2004) (holding that statements made by victim to a physician for purposes of medical treatment are not testimonial under *Crawford* because the parents took the child to the doctor for medical treatment, not to prepare testimony for trial); People v. Newland, 775 N.Y.S.2d 308, 309 (App. Div. 2004) (holding that *Crawford* does not bar the introduction of brief, informal remarks *made* to an officer while he was conducting a field investigation when those remarks were not made in response to "structured police questioning"); Cassidy v. Texas, 149 S.W.3d 712 (Tex. Ct. App. 2004) (holding that *Crawford* does not bar excited utterances during a police interview at the hospital where the victim is being treated for severe injuries); State v. Orndorff, 95 P.3d 406 (Wash. Ct. App. 2004) (holding that a 911 call is admissible under *Crawford*).

admissibility of hearsay by excluding evidence previously admissible under *Roberts*. For instance, in *City of Las Vegas v. Walsh*,[184] the court held that the admission of a health professional's affidavit prepared for the prosecution to use in a DUI trial violated *Crawford*.[185] Additionally, in *State v. Courtney*,[186] the court held that statements made to a child-protection worker in preparation for trial were inadmissible.[187] In both cases, the prosecution prepared the evidence specifically for use at trial. As a result, the statements were inadmissible after *Crawford*.[188]

Yet in cases where the formal nature of the statement is less clear, lower court decisions reflect a tendency to interpret *Crawford* narrowly and consider the admissibility of non-testimonial statements under the traditional hearsay analysis.

2. Federal Cases

Similar to many of the state courts, numerous federal courts have discovered ways to circumvent the *Crawford* decision by interpreting "testimonial" narrowly and finding that a proffered statement falls within any of the limited number of examples set forth by the Court in *Crawford*.

a. Leavitt v. Arave

In *Leavitt*,[189] the Ninth Circuit addressed the issue of whether a victim's excited utterances to the police were testimonial under *Crawford*.[190] In *Leavitt*, the victim became frightened by a prowler

184. 91 P.3d 591 (Nev. 2004).
185. *Id.* at 595.
186. 682 N.W.2d 185 (Minn. Ct. App. 2004).
187. *Id.* at 205.
188. *See* People v. Pirwani, 14 Cal. Rptr. 3d 673 (Ct. App. 2004) (holding that CAL. EVID. CODE § 1380 (Deering 2004), which permitted the introduction of elderly or dependent adults' videotaped statements to law enforcement officials, was unconstitutional under *Crawford*); People v. Sisavath, 13 Cal. Rptr. 3d 753, 757 (Ct. App. 2004) (holding that a child's statement to a police officer at the scene of the incident was testimonial because the child was unavailable, and the statement was "knowingly given in response to structured police questioning").
189. 371 F.3d 663 (9th Cir. 2004).
190. *Id.* at 683.

who tried to break into her home.[191] Under distress, she called the police and spoke to dispatchers and to police officers.[192] Among other statements, she named Leavitt as the prowler because he had tried to enter her house earlier that day.[193] At issue, in part, was whether the admission of the hearsay testimony violated Leavitt's rights under the Confrontation Clause.[194]

The court held that the statements were not testimonial and did not violate Leavitt's confrontation rights.[195] Among the factors the court considered was who initiated the action.[196] Here, the victim sought the help of the police, and she was not interrogated by them.[197] Thus, the court found that the statements against Leavitt did not implicate "the principle evil at which the Confrontation Clause was directed[:] . . . the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[198]

b. Horton v. Allen

In *Horton*,[199] the court ruled that *Crawford* does not apply to statements introduced under the state-of-mind exception to the hearsay rule when the statements are made to a private individual.[200] A jury convicted Russell Horton of committing two first-degree murders and an assault with intent to murder.[201] Horton provided inconsistent testimony concerning his whereabouts on the night of the murders.[202] "He first told the police that he had met up with [Frederick] Christian, that they had gone for a walk . . ., and [that he] had gone home at approximately 11 p.m."[203] Horton then changed his story and stated that he and Christian were with another man,

191. *Id.* at 668.
192. *Id.*
193. *Id.*
194. *Id.* at 683.
195. *Id.*
196. *Id.*
197. *Id.* at 684 n.22.
198. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 50 (2004)).
199. 370 F.3d 75 (1st Cir. 2004).
200. *Id.* at 84–85.
201. *Id.* at 78.
202. *Id.* at 79.
203. *Id.*

Kepler Desir, and two others.[204] The trial court admitted Henry Garcia's testimony that on the day of the murders, "Christian had stated that he needed money and that Desir had refused to give him drugs on credit."[205] The court affirmed the admission of the testimony under the state-of-mind exception to the hearsay rule.[206]

After the appeal was briefed, the Supreme Court decided *Crawford*.[207] At issue, in part, was whether Christian's statements qualified as testimonial.[208] The court found the statements were not testimonial in nature and that *Crawford* thus did not apply.[209] In reaching its decision, the court looked to the "three 'formulations of [the] core class[es] of testimonial statements'" mentioned in *Crawford*.[210] The court in *Horton* found that the statements admitted at trial did not fit into these specific formulations.[211]

Rather than applying a broad definition of "testimonial," the courts in the above cases looked to the passages in *Crawford* that set forth examples of testimonial statements. Other circuit courts have held that testimonial statements include "prior testimony at a preliminary hearing or other court proceeding, as well as confessions and responses made during police interrogations."[212] For instance, the Second Circuit has concluded that *Crawford* looks to the

204. *Id.*
205. *Id.* at 83.
206. *Id.*
207. *Id.*
208. *Id.* at 84.
209. *Id.*
210. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)). The first "core class of 'testimonial' statements" consists of "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford*, 541 U.S. at 51. The second formulation described testimonial statements as "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id.* at 52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)). Finally, the third explained that testimonial statements are those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3).
211. *Horton*, 370 F.3d at 84.
212. United States v. McClain, 377 F.3d 219, 221 (2d Cir. 2004).

"reasonable expectation of the declarant,"[213] namely, "the declarant's awareness or expectation that his or her statements may later be used at a trial."[214]

3. Hybrid Approach

State courts and courts in every circuit are now being required to interpret *Crawford*. At one extreme, *Crawford* is certain to apply where the statement was given before a grand jury. In such cases, the impact will certainly cause a "sea change" in the admissibility of hearsay statements, barring previously admissible testimony.[215] At the other extreme, a statement to a doctor for the purpose of obtaining medical treatment is not likely to invoke *Crawford*.[216] Most statements, however, fall in a grey area between these two extremes.

Crawford left the definition of "testimonial" open to broad interpretation. The opinion, however, also left room for a number of arguments distinguishing the decision. Accordingly, many courts that have considered cases in the grey areas of litigation have construed the *Crawford* decision narrowly, focusing on the explicit language set forth in the decision rather than applying an expansive definition of "testimonial."[217]

After *Crawford*, the issue of how to handle non-testimonial statements remains unclear. Despite the Court's criticism of *Roberts*, the Court "leaves the *Roberts* approach untouched with respect to

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213. United States v. Saget, 377 F.3d 223, 229 (2d Cir. 2004).

214. *Id.* at 228.

215. *See, e.g.*, United States v. Wilmore, 381 F.3d 868 (9th Cir. 2004) (holding that the use of grand jury testimony to impeach a witness violated *Crawford* when the witness was unavailable for cross-examination).

216. *See, e.g.*, State v. Vaught, 682 N.W.2d 284 (Neb. 2004) (holding that statements made by a victim to a physician for purposes of medical treatment are not testimonial because the statements are not prepared for the purpose of litigation).

217. *See, e.g.*, United States v. Reyes, 362 F.3d 536 (8th Cir. 2004) (holding that co-conspirator statements are not testimonial); United States v. Dorman, 108 Fed. Appx. 228 (6th Cir. 2004) (holding that statements of future intent are not barred by *Crawford*); United States v. Taylor, 328 F. Supp. 2d 915 (N.D. 2004) (holding that a co-defendant's statement against interest to a fellow criminal is admissible as a statement against interest if made in a private setting); Hutzenlaub v. Portuondo, 325 F. Supp. 2d 236 (E.D.N.Y. 2004) (holding that *Crawford* does not apply retroactively).

nontestimonial statements."[218] Certain well-defined exceptions remain unaffected by *Crawford* because exceptions such as excited utterances, business records, and state of mind do not encompass testimonial statements.[219] While the continued viability of *Roberts* with respect to non-testimonial statements is uncertain,[220] many lower courts have continued to apply the *Roberts* reliability analysis to non-testimonial hearsay.[221] This hybrid approach (continuing to apply the traditional hearsay analysis for non-testimonial statements and instituting the new analysis for testimonial statements) leaves many areas of the law unchanged. Accordingly, as applied in practice, many statements that were previously admissible under *Roberts* will remain admissible under *Crawford*.

V. THE ADMISSIBILITY OF HEARSAY IN THE WAKE OF *CRAWFORD*

The *Crawford* decision undoubtedly caused a fundamental change in the structural analysis regarding the admissibility of hearsay in criminal trials. Over the past two decades, courts and legislatures have created numerous exceptions to the hearsay rule under the reliability framework set forth in *Roberts*.[222] As a result, the law permitted prosecutors to introduce statements of non-testifying witnesses made during police interrogations, grand jury

218. *Saget*, 377 F.3d at 227.

219. *See* Crawford v. Washington, 541 U.S. 36, 56 (stating that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example business records or statements in furtherance of a conspiracy"). Note, however, that *Crawford* could affect the admissibility of dying declarations when such hearsay has resulted from a police interrogation. *Id.* at 56 n.6.

220. The Court expressly declined to overrule *White* and preserved the possibility of "an approach that exempted such [non-testimonial] statements from Confrontation Clause scrutiny altogether." *Id.* at 68. The Court indicated that *Roberts* might also be applied in this context. *Id.*

221. *E.g.*, *Saget*, 377 F.3d at 227; *see, also*, People v. Moscat 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004).

222. For example, California enacted a number of hearsay exceptions relying on the *Roberts* "indicia of reliability" test that made clearly testimonial statements admissible although the declarant was never subjected to cross-examination. *See, e.g.*, CAL. EVID. CODE § 1360 (Deering 2004) (exception for minors describing acts of child abuse); *Id.* § 1370 (exception for statements describing the infliction of physical injury); *Id.* § 1380 (exception for elderly abuse).

proceedings, and allocutions.[223] Admitting hearsay evidence did not offend the Confrontation Clause if the prosecution could prove that the evidence fell within a firmly rooted exception to the hearsay rule or possessed particularized guarantees of trustworthiness. Accordingly, many commentators argued that the doctrine that developed after *Roberts* and its progeny created an inadequate framework by simply equating the Confrontation Clause with the hearsay analysis.[224]

While both the Confrontation Clause and the hearsay rule protect the right of cross-examination,[225] the confrontation right also requires that testimony be given under oath, face-to-face with the adverse party, and, if feasible, in open court.[226] Thus, the Confrontation Clause provides a fundamental right that is "very distinct in nature and consequences from ordinary hearsay doctrine."[227] Further, the scope of the confrontation right is narrower than the rule against hearsay, as the confrontation right only applies to testimonial statements.[228]

The *Roberts* analysis failed to interpret the Sixth Amendment Confrontation Clause in a way that secured its "intended constraint on judicial discretion."[229] Instead of articulating a separate doctrine for the confrontation right, the prior doctrine made the confrontation right dependent on a "vague and unpredictable morass of hearsay law."[230] *Roberts* failed to differentiate between testimonial statements and other types of hearsay, thus subjecting non-testimonial evidence to unwarranted constitutional scrutiny.[231] The

223. *See Crawford*, 541 U.S. at 64-65.

224. *See, e.g.*, Daniel Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1012 (1998) (noting that the approach taken by the Court before *Crawford* has tended to meld the Clause and the ordinary hearsay doctrine).

225. *See infra* Part III.B.

226. *See* Friedman, *supra* note 224, at 1024.

227. *Id.* at 1014.

228. *See id.* (stating that the Confrontation Clause provides the defendant a right to confront adverse witnesses—i.e., "those who make testimonial statements").

229. Crawford v. Washington, 541 U.S. 36, 67 (2004).

230. Richard D. Friedman, *Confrontation as a Hot Topic: The Virtues of Going Back to Square One,* 21 QLR 1041, 1042 (2003).

231. Lilly v. Virginia, 527 U.S. 116, 142 (1999) (Breyer, J., concurring).

Roberts test also failed to "protect against paradigmatic confrontation violations,"[232] permitting the admission of *ex parte* statements prepared as testimony for trial when such statements fell within a well-recognized hearsay exception or when the court determined that they otherwise appeared reliable.[233] In other words, *Roberts* missed the mark.

Crawford separated the Confrontation Clause analysis from hearsay law, and as a result the Court arguably took a step closer to securing the original principle that prompted the establishment of the Confrontation Clause: prosecution witnesses must testify face-to-face with the accused by requiring cross-examination of testimonial hearsay evidence.[234] The Court's analysis provides, in theory, a bright line rule: if testimonial, the accused must have the opportunity for cross-examination.

The *Crawford* Court criticized *Roberts* for being too subjective and for failing to provide a framework that secured the basic principles the Sixth Amendment sought to protect. As the dissent observed, however, *Crawford*'s failure to provide sufficient guidance in how to apply the new theory in practice "casts a mantle of uncertainty over future criminal trials in both federal and state courts."[235] Accordingly, the new doctrine proposed in *Crawford* could be subject to the same pitfalls as *Roberts*. If the category of testimonial statements is too limited, the new doctrine might not be any more favorable to the admissibility of hearsay than the reliability structure in *Roberts*. Yet an expansive definition of "testimonial" that includes statements beyond those the Sixth Amendment sought to protect would unnecessarily subject the evidence to unwarranted constitutional scrutiny. The possible implications of applying a broad definition of "testimonial" require courts to read *Crawford* carefully and consider the circumstances surrounding a proffered statement.[236]

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232. *Crawford*, 541 U.S. at 60; *see id.* at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.").

233. *See Lilly*, 527 U.S. at 141 (Breyer, J., concurring).

234. *See* Friedman, *supra* note 230, at 1045.

235. *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring in judgment but dissenting from Court's decision to overrule *Roberts*).

236. *Id.* at 56 n.6. The Court refuses to generalize about all statements that

With regard to the principal evils against which the Sixth Amendment sought to protect, the Court in *Crawford* drew an analogy between today's police interrogations and the sixteenth and seventeenth century practice of pretrial examinations.[237] While the resemblance between the two forms of evidence is reasonable, the analogy should not be extended too far. Under a broad interpretation of *Crawford*, the Sixth Amendment could bar critical evidence such as a 911 call that conveys a victim's cry for help. In most instances a 911 call for help is "essentially different in nature"[238] than the "principal evil at which the [Confrontation] Clause was directed"[239] and sought to exclude. Thus, *Crawford* must be confined to its proper realm—protecting the defendant's right to confrontation with respect to *testimonial* statements. Whether a particular statement is testimonial cannot be determined by applying a per se rule. Rather, whether a statement is testimonial must be determined by the facts surrounding the proffered statement in each case.

Interpreting *Crawford*, lower courts have identified a number of key factors for determining whether a statement is testimonial. These include: who initiated the contact, whether the declarant made the statement to a friend or family member as opposed to a police officer or other government agent, whether the declarant was in police custody at time he or she made the statement, and whether the declarant reasonably thought that the statement would be used at

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fall within the scope of the dying declaration exception. This refusal suggests the Court contemplates that in classifying hearsay as testimonial or non-testimonial, the trial judge should weigh the specific circumstances surrounding the making of the statement. Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay under* Crawford v. Washington: *Some Good News, but* . . . . , CHAMPION, Sept.–Oct. 2004, at 16, 16–18.

237. During the sixteenth and seventeenth centuries in England, Justices of the Peace in felony cases would commonly examine witnesses and defendants *ex parte* prior to trial and use the examination as evidence at trial in lieu of live testimony. *Crawford*, 541 U.S. at 43. The Court explains that police interrogations are testimonial in nature because they bear a "striking resemblance" to the pretrial examinations by English Justices of the Peace against which the Confrontation Clause was directed. *Id.* at 52.

238. People v. Moscat, 777 N.Y.S.2d 875, 879 (Crim. Ct. 2004); *see* People v. Caudillo, 19 Cal. Rptr. 3d 574 (Ct. App. 2004); People v. Corella, 18 Cal. Rptr. 3d 770 (Ct. App. 2004); People v. Conyers, 777 N.Y.S.2d 274, 276–77 (Sup. Ct. 2004).

239. *Crawford*, 541 U.S. at 50.

trial.[240] Even when the declarant makes a statement to a government official, courts must consider whether the declarant made a statement in response to "structured"[241] questioning.[242]

Applying the new analysis on a case-by-case basis could lead to inconsistent results depending on how a particular court frames its inquiry. On their faces, the results of post-*Crawford* cases appear to be contradictory. Certainly, some courts take a more expansive view of *Crawford* than others, which arguably results in inconsistent application of the rule.[243] Yet the *Crawford* analysis is factually determinative. Thus, apparently contradictory holdings may stem from critical factual distinctions among the cases. For instance, in *People v. Cortes*,[244] the court barred the admission of a 911 tape that described an ongoing shooting.[245] The court found the contents of the tape were testimonial in nature because the dispatcher elicited detailed information from the caller regarding the event.[246] In *People v. Moscat*,[247] however, the court found that a 911 call was not testimonial and the evidence was admissible under the excited utterance exception.[248]

Despite these two apparently contradictory holdings, the two cases are factually distinct. In *Cortes*, the call came from a witness

240. *See, e.g.*, *Moscat*, 777 N.Y.S.2d at 879–80 (finding that a 911 call is not testimonial in nature because it is the citizen who initiates the contact with police and because the call is part of the event itself and, thus, not contemplated as part of future legal proceedings).

241. *See Crawford* 541 U.S. at 53 n.4.

242. While the above factors provide guidance in determining whether a statement is testimonial, they do not create a per se dividing line between testimonial and non-testimonial statements. For further discussion on the difficulties of developing such a dividing line, see Mosteller, *supra* note 65.

243. *Compare* People v. Cage, 15 Cal. Rptr. 3d 846 (Ct. App. 2004) (applying a narrow view of testimonial, and holding that a victim's statements to an officer at the hospital was not testimonial hearsay) *with* People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 (Ct. App. 2004) (employing a more expansive view of *Crawford* and holding that a videotaped interview of a child by a trained interviewer was inadmissible as testimonial hearsay because it was "eminently reasonable to expect that the interview would be available for use at trial").

244. 781 N.Y.S.2d 401 (Sup. Ct. 2004).

245. *Id.* at 407.

246. *Id.* at 404.

247. 777 N.Y.S.2d 875 (Crim. Ct. 2004).

248. *See* discussion *infra* accompanying notes 9–11.

to a shooting,[249] while in *Moscat* the court treated the call as from a woman who feared for her life.[250] She did not contact 911 to report a crime. Rather, she sought help. The court in *Cortes* focused on the fact that the purpose of the 911 call was to report a crime, while the court in *Moscat* saw the 911 call as a call for help.[251] The *Moscat* court emphasized that 911 calls are generally made by a caller who requires "protection from immediate danger."[252] Thus, under the analysis in *Moscat*, a 911 call for help usually qualifies as an "excited utterance" and is exempt from the hearsay rules because very little time has passed between the incident and the call for help.[253]

Additionally, the court in *Cortes* reasoned that the method for taking 911 calls fell within the definition of a "formal statement" or an "interrogation," producing a statement that is testimonial evidence and barred by the Sixth Amendment.[254] The court looked to the dictionary definition of "interrogation" and reasoned that "interrogate" means "to question" and "to examine by asking questions."[255] Other state courts, however, have distinguished police interrogations from police questioning.[256]

The distinction between the sets of facts surrounding the 911 calls in the above cases illustrates why the determination of whether a particular statement is testimonial must be decided on a case-by-case basis. One could imagine a situation in which a 911 call lacked

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249. *Cortes*, 781 N.Y.S.2d at 403.

250. *Moscat*, 777 N.Y.S.2d at 879–80.

251. *See* Richard Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 4, 10 (noting that "[i]n some cases, the caller does not perceive that she is in immediate danger, and the primary purpose of the call is . . . to initiate investigative and prosecutorial machinery").

252. *Moscat*, 777 N.Y.S.2d at 879.

253. *Id.* For more cases discussing the admissibility of 911 calls after *Crawford*, see People v. Caudillo, 19 Cal. Rptr. 3d 574, 582–90 (Ct. App. 2004); People v. Corella, 18 Cal. Rptr. 3d 770, 774–79 (Ct. App. 2004); People v. Conyers, 777 N.Y.S.2d 274, 276–77 (Sup. Ct. 2004).

254. *Cortes*, 781 N.Y.S.2d at 406.

255. *Id.* at 405 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1913)).

256. *See, e.g.*, Hammon v. Indiana, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (concluding that police "interrogation" is distinct from police "questioning" and is much narrower in scope).

trustworthiness—for instance, if the caller made a false accusation out of revenge or anger. In such situations, the defendant would argue she should have the chance to confront her accuser to ensure the accuracy and trustworthiness of the allegation. On the other hand, when the call occurs in the midst of violence or soon thereafter, there is less concern about the trustworthiness of the statement because the call generates from the "urgent desire of a citizen to be rescued from immediate peril" rather than from the desire of the prosecution or the police to seek evidence.[257] Further, if little time has passed between the exciting event and the call for help, the court should consider the call as an excited utterance because the caller had no opportunity to reflect or falsify her account of the event.[258]

The apparent inconsistencies in the lower courts' decisions confirm that that the exact parameters of what constitutes a testimonial statement under *Crawford* are difficult to determine. The new standard set forth in *Crawford* is factually determinative based on the circumstances surrounding the proffered statement as well as a particular court's interpretation of "testimonial."

The notion of a fact determinative, case-by-case analysis is not a novel concept in criminal law. For instance, other areas of criminal law where courts must make a fact based, case-by-case analysis include the Fourth Amendment search and seizure issues[259] and Fifth Amendment *Miranda* warnings.[260] In each of these areas, the

257. *Moscat*, 777 N.Y.S.2d at 879.

258. *See id.* at 880.

259. The Supreme Court has consistently rejected the use of bright-line rules in Fourth Amendment analysis, instead emphasizing the fact-specific nature of the reasonableness inquiry. *See, e.g.*, Preston v. United States, 376 U.S. 364, 366–367 (1964); Ohio v. Robinette, 519 U.S. 33 (1996) (explaining that no bright-line rule of reasonableness exists under the Fourth Amendment, and whether a search or seizure is unreasonable depends upon the facts and circumstances of each case); *see also* James Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 439 (noting that the reasonableness standard governing all Fourth Amendment claims is a "fact-specific" inquiry).

260. *See, e.g.*, Schnecklothe v. Bustamonte, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.").

application of a bright-line rule would upset the balance of constitutional protection.

While the proposed approach may leave prosecutors unable to predict with any degree of certainty whether hearsay evidence will be admissible at trial, the alternative of applying a generalized, broad definition will extend the definition of testimonial to encompass statements beyond the "principal evils" that the Sixth Amendment sought to exclude.

Thus, until the Supreme Court describes more completely the defining characteristics of testimonial statements and further clarifies the scope of *Crawford*, lower courts must decide whether a particular statement is testimonial on a case-by-case basis, looking to the specific factors outlined in the Court's decision.

VI. CONCLUSION

Regardless of what constitutes a testimonial statement, *Crawford* "radically transformed" the Confrontation Clause doctrine.[261] Only months after the Court decided *Crawford*, hundreds of lower state and circuit courts around the country are applying the Court's decision to numerous hearsay exceptions and ultimately defining the reach of the new Confrontation Clause doctrine. Although much of the *Crawford* opinion arguably supports an expansive interpretation of testimonial, many courts have found ways to circumvent the decision.

While the Court's new analysis represents a move closer to restoring the basic principles that the Sixth Amendment sought to protect, the impact of the opinion will differ greatly depending on how courts ultimately define the term "testimonial." In light of the potential impact *Crawford* could have on the exclusion of critical evidence from criminal trials and the uncertainty of the boundaries that constitute a testimonial statement, the decision must be confined to protecting the defendant's right with respect to *testimonial* statements. Accordingly, the lower courts are correct to define

261. Friedman, *supra* note 251, at 5.

"testimonial" cautiously, focusing on the circumstances surrounding the proffered statement in each case.

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