

Confrontation After *Crawford*: The Decision’s Impact on How Hearsay Is Analyzed Under the Confrontation Clause

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A number of people have graciously given their time, expert knowledge, and skill in advising and assisting the Author in the preparation of this Article. In appreciation, the Author would like to acknowledge: Mr. William A. Wildhack III, David Kim, Judge O.H. Eaton, and Professors Robert D. Batey, Thomas C. Marks, Jr., Michael I. Swygert, and Michael P. Allen. Any portion of this Article that is deemed meritorious is largely a result of their contributions and those that are not are the result of the Author’s deficiencies alone. Additionally, the Author would like to express appreciation to Ms. Connie Evans and the best faculty support services staff imaginable.

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I. INTRODUCTION

The Confrontation Clause¹ guarantees to the accused a process, not a product.² The essential purpose of the Clause is to provide the accused with a meaningful³ opportunity to participate in the development of the testimonial case against him or her, through the crucible of cross-examination, but does not guarantee to the accused that participation will produce either a favorable or a reliable result.⁴

¹ U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"

² *Crawford v. Washington*, 541 U.S. 36, 61 (2004) ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee."). *See also* *Lagunas v. State*, No. 03-03-00566-CR, 2005 WL 2043678, at *9 (Tex. App. Aug. 26, 2005) ("A central holding of *Crawford* is that the Confrontation Clause is a rule of procedure, not of evidence.").

³ "Meaningful" may be subject to interpretation. *See* *Blanton v. State*, 880 So. 2d 798, 801 n.3 (Fla. Dist. Ct. App. 2004) ("*Crawford* does not expressly address the issue of whether the opportunity for cross must be 'meaningful,' although common sense suggests that this notion is implicit in *Crawford*. Indeed, what constitutes a 'meaningful' opportunity for cross might be the subject of much debate in the years to come.").

⁴ *Crawford*, 541 U.S. at 61 ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."); *United States v. Owens*, 484 U.S. 554, 559 (1987) (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)) ("[W]e agree with the answer suggested 18 years ago by Justice Harlan. '[T]he Confrontation Clause guar-

Likewise, the reliability of the testimonial evidence is not a substitute, under the Clause, for the absence of such a meaningful opportunity to participate.⁵ This is the essence of the Supreme Court's new interpretation of the Confrontation Clause in the case of *Crawford v. Washington*.⁶

The *Crawford* decision, by a significant 7-2 majority, rejected twenty-four years of flawed constitutional confrontation jurisprudence regarding the admission of hearsay against the criminal accused.⁷ Lower courts' early reactions to this decision, though explored extensively below, include such remarks as these:

- “[A] Copernican shift in federal constitutional law. . . .”⁸
- “So what is all the fuss about? A paradigm shift in [C]onfrontation [C]ause analysis, that’s what.”⁹
- “*Crawford* redefines the scope and effect of the Confrontation Clause”¹⁰
- “[A] recent and substantial change in Sixth Amendment jurisprudence announced by the United States Supreme Court”¹¹
- “[A] case of great importance.”¹²
- “[*Crawford*] may fairly be characterized as a revolutionary decision in the law of evidence.”¹³

antees only “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.””).

⁵ “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” *Crawford*, 541 U.S. at 62. Here Justice Scalia echoes a previous conclusion by Professor Jonakait: “Just as the state cannot deny an accused a jury trial by establishing that a nonjury trial was the better way to determine the facts, the accused cannot be denied an adversary criminal trial even if an inquisitorial proceeding would have determined the truth better in the accused’s case.” Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 585 (1988).

⁶ 541 U.S. 36 (2004). Justice Scalia delivered the opinion of the Court, joined by Justices Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Chief Justice Rehnquist, concurring in the judgment only, wrote an opinion, joined by Justice O’Connor. *Id.* at 69 (Rehnquist, C.J., concurring).

⁷ In *Crawford*, the Court rejected its rationale and analytical framework from *Ohio v. Roberts*, 448 U.S. 56 (1980), for determining admissibility under the Confrontation Clause of “testimonial” hearsay against an accused. For further discussion, see *infra* notes 48–55 and accompanying text (exploring the many criticisms of *Roberts*).

⁸ *People v. Victors*, 819 N.E.2d 311, 323 (Ill. App. Ct. 2004).

⁹ *People v. Cage*, 15 Cal. Rptr. 3d 846, 851 (Ct. App. 2004), *review granted*, 99 P.3d 2 (Cal. 2004).

¹⁰ *United States v. Saget*, 377 F.3d 223, 226 (2d Cir. 2004).

¹¹ *Hammon v. State*, 809 N.E.2d 945, 950 (Ind. Ct. App. 2004).

¹² *United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004).

- “[*Crawford* effected] a sea change in our understanding of the [C]onfrontation [C]ause”¹⁴

One judge predicted that “the fallout from Justice Scalia’s ‘clarification’ of the Confrontation Clause in *Crawford* will reverberate through the evidentiary landscape for some time to come and will create countless dilemmas for trial and appellate courts”¹⁵ *Crawford* necessitates that we rethink our approach to the question of admissibility of hearsay on behalf of the prosecution under the Confrontation Clause. The purpose of this Article is to clarify—to the extent that such is possible—this new approach, the rationale behind it, and to explore its present and potential impact.

A. *The Crawford Case*

The facts of *Crawford* are unremarkable. Michael Crawford, accompanied by his wife Sylvia, sought out and located Kenneth Lee, ostensibly because Lee had attempted to rape Sylvia.¹⁶ Upon locating him in his apartment, a fight ensued between Michael and Lee. As a result, Lee was stabbed, and Michael’s hand was cut during the altercation.¹⁷ Police, after giving appropriate *Miranda*¹⁸ warnings, interrogated both Michael and Sylvia two times.¹⁹ Michael’s account of the incident was to the effect that prior to the blow, he “coulda swore” he saw Lee going for “somethin’.”²⁰ Sylvia’s account, though generally corroborating Michael’s as it related to events leading up to the fight, differed in its description of the fight itself. According to Sylvia, as Michael approached Lee, “[Lee] lifted his hand over his head maybe to strike Michael’s hand down or something and then he put his . . . right hand in his right pocket . . . took a step back . . . [and] Michael proceeded to stab him.”²¹ She added that, at that moment, Lee’s hands were out and open and he had nothing in them.²²

¹³ *People v. Pantoja*, 18 Cal. Rptr. 3d 492, 498 (Ct. App. 2004).

¹⁴ *State v. Grace*, 111 P.3d 28, 36 (Haw. Ct. App. 2005).

¹⁵ *Fowler v. State*, 809 N.E.2d 960, 966 (Ind. Ct. App. 2004) (Crone, J., concurring).

¹⁶ *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

¹⁷ *Id.*

¹⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁹ *Crawford*, 541 U.S. at 38.

²⁰ *Id.*

²¹ *Id.* at 39.

²² *Id.* at 39–40.

Washington charged Michael Crawford with assault and attempted murder.²³ At his trial, Michael asserted that he acted in self-defense.²⁴ Michael prevented his wife from testifying by asserting a Washington evidentiary spousal privilege that permits an accused to prevent his or her spouse from testifying for the prosecution, but this privilege did not preclude the state from attempting to introduce otherwise admissible prior statements of Sylvia.²⁵ The state successfully convinced the trial court to admit Sylvia's custodial account of the fight over Michael's hearsay and Confrontation Clause objections. The trial court found the declaration admissible under the state's "statement against interest" hearsay exception.²⁶

Regarding the Confrontation Clause issue, the trial court, applying the analytical framework espoused in the Supreme Court's decision in *Ohio v. Roberts*,²⁷ found sufficient "indicia of reliability" surrounding the making of Sylvia's statement to satisfy the Clause and justify the introduction of the now-unavailable spouse's prior statement.²⁸ Crawford was convicted of assault.²⁹ The Washington Court of Appeals reversed, applying a nine-factor test for determining reliability under the *Roberts* "particularized guarantees of trustworthiness" prong.³⁰ The Washington Supreme Court reinstated the conviction, finding that Sylvia's declaration bore sufficient "guarantees of trustworthiness" because, since neither Michael's nor Sylvia's statements clearly asserted that Lee had a weapon in his hand before being

²³ *Id.* at 40.

²⁴ *Id.*

²⁵ *Crawford*, 541 U.S. at 40. One issue not raised in the Supreme Court by the state in this case was that, by asserting the privilege, Michael in effect "waived" his right to cross-examine Sylvia and thereby was afforded his rights under the Confrontation Clause. Before the Washington Court of Appeals, the state made the argument regarding waiver, but such was rejected. *Id.* at 42 n.1. That court found that requiring the defendant to choose between assertion of the marital privilege and confronting his spouse creates an impermissible "Hobson's choice." *Id.* (citing *State v. Crawford*, 54 P.3d 656, 660 (Wash. 2002)). For discussion of the possible application of the "forfeiture by wrongdoing" rule as to these circumstances, see *infra* notes 123-39 and accompanying text.

²⁶ *Crawford*, 541 U.S. at 40.

²⁷ 448 U.S. 56 (1980).

²⁸ *Crawford*, 541 U.S. at 40. The trial court's reasoning included: Sylvia was not trying to shift blame; she was somewhat supporting Michael's claim of self defense or at least "justified reprisal"; she had first-hand knowledge; her statement was given shortly after the incident; and she gave the statement to a detective that was a "neutral" interrogator. *Id.*

²⁹ *Id.* at 41.

³⁰ *Id.* That court found it unreliable, in part, because Sylvia's statement contradicted an earlier one (she said she shut her eyes at one point in the fight) and the statement contradicted rather than corroborated Michael's statement. *Id.*

stabbed, the statements overlapped and interlocked, thereby rendering Sylvia's testimony reliable.³¹ The United States Supreme Court granted certiorari to decide whether the introduction of Sylvia's declaration violated the Sixth Amendment right of confrontation.³²

B. Crawford's Holding

Rejecting *Ohio v. Roberts*'s analytical approach and declining to "mine the record" for "indicia of reliability," the Supreme Court held that the prosecution's introduction of Sylvia's "testimonial" hearsay statement violated Michael Crawford's right of confrontation because Sylvia was unavailable at trial and Michael had no prior, meaningful opportunity to cross-examine her.³³ Chief Justice Rehnquist, though concurring in the judgment, wrote a separate opinion, joined by Justice O'Connor, claiming that the majority had unnecessarily overruled its previous seminal holding in *Roberts* and that the Court's new interpretation of the Clause would create a "mantle of uncertainty" in future criminal trials.³⁴

II. SUPREME COURT JURISPRUDENCE REGARDING THE CONFRONTATION CLAUSE AND HEARSAY

As Professor Richard D. Friedman observed, since the Supreme Court held in *Pointer v. Texas*³⁵ that the Sixth Amendment right of confrontation in the United States Constitution was binding in state prosecutions, greater emphasis has been placed on the Confrontation Clause's relationship to the admissibility of hearsay in criminal prosecutions.³⁶ Thus, the need for the Court to develop an analytical approach for determining the Clause's role in regulating the introduction of hearsay became more imperative.³⁷ Though some argued that the Clause should not regulate hearsay at all and that its admissibility should be governed only by evidence law,³⁸ the Supreme Court rejected this view in *California v. Green*,³⁹ stating:

³¹ *Id.* at 41–42.

³² *Crawford*, 541 U.S. at 42.

³³ *Id.* at 68–69.

³⁴ *Id.* at 69 (Rehnquist, C.J., concurring).

³⁵ 380 U.S. 400 (1965).

³⁶ Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1014 (1998).

³⁷ *Id.*

³⁸ Professor John Wigmore, consistent with Justice Harlan, took the view that the Confrontation Clause merely requires that witnesses actually produced be subject to cross-examination by the accused and that a hearsay declarant, who is not produced, is not such a witness. Therefore, in his view, the Clause did not regulate the admissi-

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.⁴⁰

The parameters of the relationship of the Clause and the admissibility of hearsay were not delineated by the Supreme Court until *Ohio v. Roberts*, in which it concluded:

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. . . .

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." . . .

. . . .

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.⁴¹

Implicit in this holding is that every hearsay declarant is a "witness against" for confrontation purposes. As such, that declarant's out-of-court statement is admissible when the declarant does not testify at trial only if a "necessity" for the statement can be

bility of hearsay at all. Patricia W. Bennett, *After White v. Illinois: Fundamental Guarantees to a Hollow Right to Confront Witnesses*, 40 WAYNE L. REV. 159, 162 (1993).

³⁹ 399 U.S. 149 (1970).

⁴⁰ *Id.* at 155–56 (citations omitted).

⁴¹ *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980) (citations omitted).

demonstrated, and the proponent is able to show that the hearsay was produced under circumstances so as to possess particularized guarantees of trustworthiness. In other words, hearsay from a non-testifying declarant, under the Clause, is admissible if it is intrinsically needed⁴² and it is intrinsically reliable.⁴³ Though the prosecutor has the burden to demonstrate the intrinsic reliability of the hearsay sought to be admitted, such burden is substantially alleviated if the hearsay falls within a “firmly rooted hearsay exception.”⁴⁴ According to some critical scholars, classifying hearsay as falling within a “firmly rooted” hearsay exception in order to avoid individualized analysis of reliability further exacerbated the efficacy of the Clause’s protection because of the ease by which the classification of “firmly rooted” has been applied and the conclusive effect of such classification.⁴⁵ Some argue

⁴² Originally, the *Roberts* framework seemed to contemplate that the usual circumstance justifying a finding of *necessity* would be the unavailability of the declarant’s present testimony. However, the Court subsequently in *United States v. Inadi*, 475 U.S. 387 (1986) (affirming admission of co-conspirator statements whether or not the declarant is available), and *White v. Illinois*, 502 U.S. 346 (1992) (discussing excited utterances and statements for the purpose of diagnosis or treatment), expanded the concept of *necessity* to include the need for the “better” evidence: that the hearsay was generated under circumstances that makes it arguably more reliable than the present, perhaps self-serving, testimony from the same declarant. See Toni M. Massaro, *The Dignity Value of Face-To-Face Confrontations*, 40 U. FLA. L. REV. 863, 876 (1988) (“The Court in *Inadi* limited the ‘unavailable-first’ language of *Roberts* by stating that the prosecution need only demonstrate the witness’s unavailability when the hearsay is a ‘weaker substitute for live testimony.’”).

⁴³ In *Idaho v. Wright*, 497 U.S. 805 (1990), the Court, in a narrow 5-4 opinion, rejected the view that reliability for confrontation purposes could be determined by the existence of corroborating evidence that confirms the truth of what was asserted in the hearsay statement. *Id.* at 820–24. The majority concluded that the determination of reliability was limited to examining the circumstances of the creation of the hearsay in order to determine that the declarant was likely sincere and accurate when he asserted the facts contained in the hearsay. *Id.* These circumstances are called “indicia of reliability” or “guarantees of trustworthiness.” *Id.* at 815 (citing *Roberts*, 448 U.S. at 66). In *Crawford v. Washington*, the Court noted that the concept of “indicia of reliability” is quite subjectively identified; allows opposite construction of identical indicia; and the determination is likely influenced by the desired result. 541 U.S. 36, 63–64 (2004).

⁴⁴ *Roberts*, 448 U.S. at 66 (“Reliability can be inferred without more in the case where the evidence falls within a firmly rooted hearsay exception.”); *White*, 502 U.S. at 355 n.8 (“[I]t is this factor that has led us to conclude that ‘firmly rooted’ exceptions carry sufficient indicia of reliability to satisfy the reliability requirement posed by the Confrontation Clause.”).

⁴⁵ See, e.g., Nancy H. Baughan, *Recent Developments: White v. Illinois: The Confrontation Clause and the Supreme Court’s Preference for Out-of-Court Statements*, 46 VAND. L. REV. 235, 261 (1993) (The Supreme Court has never defined what is a “firmly rooted” hearsay exception and that some courts have used criteria such as the longevity of the exception, an exception’s widespread acceptance, or its codification in the Federal Rules of Evidence to determine that a particular exception is indeed firmly rooted. The author concludes that none of the justifications absolutely guarantees

that, since the decision in *White v. Illinois*,⁴⁶ the Court has effectively constitutionalized the hearsay rules and most of the exceptions in spite of its previous declaration to the contrary in *Green*.⁴⁷

Roberts' two-pronged analytical framework has been applied by the Court to a diverse array of hearsay, such as the following: former testimony,⁴⁸ co-conspirator admissions,⁴⁹ excited utterances and statements for the purpose of medical diagnosis or treatment,⁵⁰ and statements against interest.⁵¹ As these examples reflect, its application was used to regulate more than simply "testimonial" declarations.

Criticism of *Roberts*' two-pronged analytical framework has been persistent, as reflected in this comment by one scholarly observer:

the reliability of admitted hearsay and notes the risk that "a court will give a presumption of constitutionality to evidence that is not necessarily reliable" without a clear definition of "firmly rooted.") (internal references omitted); John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 207-08 (1999) ("Under the general approach of *Roberts*, a 'firmly rooted' hearsay exception defines a class of hearsay statements so reliable that cross-examination would add very little to the jury's ability to assess them. Given these theoretical origins, one might expect that the two decades since *Roberts* would have produced a test for distinguishing 'firm' from 'not so firm' roots based on the likely reliability of statements falling within a given exception. Instead, the Court's standards—if there really are any standards at all—show little concern for reliability.") (footnotes omitted); Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court's Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145, 154 (1993) ("The *White* majority's accuracy rationale also fails because the doctrinal test it relies on—the concept of firmly rooted hearsay exceptions, originated in *Ohio v. Roberts*—shifts between longevity and political acceptance of the hearsay exceptions and, therefore, its application yields no meaningful guarantee of accuracy.") (footnote omitted).

⁴⁶ 502 U.S. 346 (1992).

⁴⁷ See Bennett, *supra* note 38, at 188-89:

. . . *White* virtually eviscerates the Confrontation Clause, consigning its corpse to burial in the hearsay rules of evidence. Before *White*, the Court was careful not to join the Confrontation Clause and the evidentiary hearsay rule. . . . As such, evidence law now defines the contours of the Confrontation Clause: hearsay definitions now shape the Clause. The *White* Court has pried the top off the evidentiary rules of hearsay, and dumped into its body the dictates of the Confrontation Clause. (footnotes omitted).

⁴⁸ *Roberts*, 448 U.S. at 72-73 (treating testimony in a preliminary hearing subject to cross-examination just like testimony in a prior trial).

⁴⁹ Two cases focused on co-conspirator admissions are *Bourjaily v. United States*, 483 U.S. 171 (1987), and *United States v. Inadi*, 475 U.S. 387 (1986).

⁵⁰ *White*, 502 U.S. at 355 (noting "substantial guarantees of . . . trustworthiness" associated with excited utterances and statements made in the course of obtaining medical care).

⁵¹ *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (clarifying that accomplice admissions that also support the guilt of a defendant are not within a firmly rooted exception).

Commentators and certain contemporary Justices have long criticized and bemoaned the Supreme Court's current analytical union between the hearsay rule and the Confrontation Clause. Such criticism has run the gambit between labeling the Court's current approach as a "poor criter[ion]" for governing the Confrontation Clause to labeling the current approach as one which would "constitutionalize the hearsay rule." The Court's current approach results in inconsistent results by setting forth ad hoc rules to justify prior holdings, while clinging to the precept that the hearsay rule somehow relates to the Confrontation Clause.

The specific problems associated with the Court's current approach are numerous. First, the Court's current approach requires a constitutional analysis of every out-of-court statement offered at a criminal trial, no matter how tangential to the issues at hand. Such a zealously broad approach could not have been intended by the framers. Second, the rigid approach set forth by the Court could conceivably allow any out-of-court statement into evidence which fortuitously fell into a firmly rooted hearsay exception or which demonstrated indicia of reliability, even if such statement took the form of an *ex parte* affidavit or similar device. Such an underinclusive version of the Confrontation Clause is also inconsistent with the history of the Clause and with prior Court holdings. Finally, the Court has bound the Confrontation Clause and the hearsay rule under extremely transitory principles causing prior precedent to continually be pitted against the new factual scenarios presented to the Court. Instead of accepting the realization that the current doctrine does not work, the Court remains faithful to the inharmonious relationship between the hearsay rule and the Confrontation Clause by continually reinterpreting past precedent to comport with contemporary facts.⁵²

⁵² Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 800-02 (2000) (footnotes omitted).

Other examples of pre-*Crawford* criticism of the Supreme Court's analytical approach to hearsay under the Confrontation Clause include: Bennett, *supra* note 38, at 200 ("The Confrontation Clause certainly should stand for something. At present, it is only a reflex to the rules of evidence. The Framers intended the Clause to occupy a more prestigious position. . . . In trials after *White*, cross-examination promises to be a hollow right, and confrontation a vanishing guarantee."); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 605-06 (1992) ("Others have so ably demonstrated the illusory protection afforded a defendant by the evidentiary version of confrontation If hearsay statements are being judicially analyzed to by-pass notions of trustworthiness and confrontation is measured by the parameters of the hearsay rule, then neither the evidentiary rule nor the constitutional doctrine will safeguard the accused.") (footnotes omitted); Douglass, *supra* note 45, at 206 ("Almost twenty years after *Roberts*, it is hard to conclude that the Confrontation Clause,

Crawford v. Washington is the culmination of this dissatisfaction with the *Roberts* approach. The *Crawford* Court echoed this criticism in rejecting the *Roberts* rationale, suggesting that it permitted admission of testimonial evidence, untested through the adversarial process of cross-examination, upon simply a judicial determination of reliability. As a result, other indicators of “reliability” became a permissible substitute for the “prescribed method of assessing reliability”—cross-examination.⁵³ Further, myriad factors may bear on a determination of reliability (an “amorphous” concept), and judicial identification and weighing of these factors are subjective processes that can be influenced by a desired result or lead to contradictory conclusions.⁵⁴ However, the main reason cited by the Court for rejecting the *Roberts* test is its “unpardonable” vice: that it permits core testimonial hearsay, not subject to cross-examination either previously or presently, to be admitted merely upon a determination that it is “reliable” in spite of the fact that the “Confrontation Clause plainly meant to exclude” it.⁵⁵

The Court refused to “mine the record” for *Roberts*’s indicia of reliability even though, had it done so, the result would likely have been the same.⁵⁶ Instead, it concluded that the Confrontation Clause bars testimonial hearsay evidence unless the declarant presently is subject to cross-examination, or the declarant is unavailable and the accused was afforded a prior, meaningful opportunity to cross-

as an exclusionary rule, has much practical impact on hearsay in criminal trials. . . . The ‘general approach’ of *Roberts* has evolved into an exclusionary rule that excludes very little.”); Jonakait, *supra* note 5, at 622 (“In interpreting the confrontation clause, the Supreme Court has misunderstood the purpose of the provision. As a result, evidence law now controls the content of the confrontation clause, and the clause now offers an accused little protection.”); Massaro, *supra* note 42, at 881 (“This conflation of the hearsay rules and the sixth amendment likely was prompted by the Court’s frustration in attempts to develop a workable, independent theory of the clause.”); Carolyn M. Nichols, *The Interpretation of the Confrontation Clause: Desire to Promote Perceived Societal Benefits and Denial of the Resulting Difficulties Produces Dichotomy in the Law*, 26 N.M. L. REV. 393, 429 (1996) (“The [Court’s] notion that the clause is simply a guarantee of reliable evidence needs to be disregarded”); Swift, *supra* note 45, at 152 (“Under the *White* majority’s accuracy rationale, there is no need for cross-examination of the declarant when hearsay is admitted under firmly rooted hearsay exceptions. The Court flatly states that such hearsay ‘is so trustworthy that adversarial testing can be expected to add little to its reliability.’ . . . The Justices’ claim is overbroad, unjustified and embarrassing. I know of no commentator—academic or practitioner—who shares this extreme view.”).

⁵³ *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004).

⁵⁴ *Id.* at 63.

⁵⁵ *Id.*

⁵⁶ *Id.* at 68.

examine the declarant.⁵⁷ Finding that the custodial interrogation of Michael Crawford's unavailable wife, even though unsworn, was "testimonial" and also finding that there was no prior opportunity for the accused to cross-examine her, its introduction violated the Sixth Amendment.⁵⁸

Though *Crawford's* impact is profound, its ultimate scope is problematic. It seems clear, however, that some previous conclusions of the Court concerning confrontation survive and are applicable to testimonial statements. These are:

- The Confrontation Clause does not preclude non-hearsay uses of testimonial statements against an accused.
- When the prosecution seeks to admit testimonial hearsay against the accused, and the declarant presently testifies subject to cross-examination, the Confrontation Clause is satisfied.
- When the prosecution seeks to introduce testimonial hearsay against an accused having no present opportunity to cross-examine the declarant, it must demonstrate unavailability of the declarant after a good-faith effort to procure the witness.
- When the accused procures the unavailability of the declarant, the forfeiture-by-wrongdoing rule prevents the accused from challenging testimonial hearsay on confrontation grounds.
- When a court improperly admits testimonial hearsay over a confrontation objection, the constitutional harmless error analysis will be applicable.

A brief exploration of these surviving elements of constitutional confrontation analysis may be helpful in understanding *Crawford's* impact.

A. *Non-hearsay Use of Testimonial Statements*

In a footnote to the majority opinion, Justice Scalia, citing *Tennessee v. Street*,⁵⁹ writes, "[t]he Clause does not bar the use of

⁵⁷ *Id.* See also *State v. Hale*, 691 N.W.2d 637, 646 (Wis. 2005) (noting that *Crawford* "strongly suggests" that the Confrontation Clause cannot be satisfied by "confrontation by proxy," and holding that a co-defendant's prior opportunity to cross-examine a prosecution witness who testified in his separate trial, but who was no longer available, was insufficient to satisfy *Crawford*, and thus the former testimony of this witness was inadmissible).

⁵⁸ *Crawford*, 541 U.S. at 68.

⁵⁹ 471 U.S. 409 (1985).

testimonial statements for purposes other than establishing the truth of the matter asserted.”⁶⁰ Several post-*Crawford* cases, relying on this assertion, rejected confrontation claims regarding testimonial non-hearsay statements.⁶¹ Illustrative of these cases is one decided by the Arkansas Supreme Court, which found no confrontation violation when a victim’s statement to police regarding alleged criminal activity by the defendant’s cousin was offered only as evidence establishing a motive for the defendant to retaliate against the victim.⁶² When a prosecutor uses a testimonial statement for non-hearsay purposes, it is the fact of the utterance that gives it its probative value, not its truth. The Third Circuit Court of Appeals commented that “*Crawford* does not apply where the *reliability* of testimonial evidence is not at issue, and a defendant’s right of confrontation may be satisfied even

⁶⁰ *Crawford*, 541 U.S. at 59 n.9 (citing *Street*, 471 U.S. at 414).

⁶¹ See, e.g., *People v. Combs*, 101 P.3d 1007, 1020 (Cal. 2004) (determining that non-hearsay use of the co-perpetrator’s videotaped statement, made during a reenactment of a robbery and murder, and made in the presence of the defendant, provided the basis for the introduction of an adoptive admission by the defendant who reacted to it); *People v. Lewis*, 782 N.Y.S.2d 321, 322 (App. Div. 2004) (holding that officers’ testimony that they informed the defendant, prior to his confession, that the co-defendant had implicated him, was not admitted for a hearsay purpose but simply to describe the circumstances that prompted the defendant to admit his involvement). See also *United States v. Logan*, 419 F.3d 172, 178 (2d Cir. 2005) (finding that comparing the co-conspirator’s false alibi with the “false” confession of the defendant, for the purpose of demonstrating that the defendant was “aware” of the plan to falsely use a baseball game as an alibi, was a non-hearsay use and constituted no infringement of the confrontation guarantee); *United States v. Eberhart*, 388 F.3d 1043, 1051 (7th Cir. 2004) (finding the confrontation issue not preserved and quoting *Crawford*, the court went on to remark: “Were we to reach the argument on the merits, it would fail. As discussed, Bolden’s statement was offered solely to explain the course of the investigation. The Confrontation Clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted’”); *People v. Goldstein*, 786 N.Y.S.2d 428, 431–32 (App. Div. 2004) (holding that statements of others relied upon by an expert witness as a basis for his opinion did not offend *Crawford* because they were “non-testimonial” and not offered as proof of the facts uttered); *People v. Newland*, 775 N.Y.S.2d 308, 309–10 (App. Div. 2004) (finding that statements by a burglary witness offered to explain why police searched a shopping cart were non-hearsay and thus not controlled by *Crawford*); *State v. Smith*, 832 N.E.2d 1286, 1291 (Ohio Ct. App. 2005) (considering as non-hearsay a co-confidential informant’s taped statements, offered to show the effect they had on the defendant and to place in context the defendant’s admissible reply, and thus not implicating the Confrontation Clause); *State v. McClanahan*, No. 22277, 2005 WL 1398835 (Ohio Ct. App. June 15, 2005) (admitting as not violating the Confrontation Clause an unidentified male’s report to a patrolling officer that a neighbor was shooting his gun off and pointing to defendant’s house for the non-hearsay purpose of explaining why the police went to that location and not to prove that the defendant fired a weapon).

⁶² *Dednam v. State*, No. CR 04-573, 2005 WL 23329 (Ark. Jan. 6, 2005).

though the declarant does not testify.”⁶³ Regarding non-hearsay, it is whether the statement was made, who made it, what was said, to whom it was said, or other circumstances surrounding its making that produces its relevancy, and such does not depend upon the declarant’s credibility.

Instead, its probative value depends simply upon the reporter of the statement who is in court and available for cross-examination. In such cases, the reporter is, in essence, the “accuser” and he can be confronted.⁶⁴ Ordinarily, upon the introduction of non-hearsay statements, a court will give a limiting instruction to the jury to confine its consideration of the statement to its non-hearsay purpose.⁶⁵ Where there was no such limiting instruction, but the circumstances created no “risk that the jury would mistakenly assume the truth” of the out of court non-hearsay testimonial statement, one court found no *Crawford* violation.⁶⁶ However, even where there is a plausible non-hearsay basis for introducing a testimonial statement, if the court fails to give a limiting instruction and there is a risk that the jury may have relied upon the statement for its truth, admission of the evidence must be analyzed under *Crawford* as if it were testimonial hearsay.⁶⁷ In some cases, even if an instruction is given, there may be a high likelihood that the jury would not or could not follow it. If the jury disregarded the instruction and improperly considered the testimonial statement for its truth, it would make the declarant a de facto accuser and therefore raise confrontation concerns. In such cases, the use of the testimonial statement even for non-hearsay purposes may offend the Confrontation Clause.⁶⁸

⁶³ *United States v. Trala*, 386 F.3d 536, 544 (3d Cir. 2004).

⁶⁴ *Id.* at 545 (noting that the opportunity to cross-examine the reporter of the out-of-court non-hearsay statement of an accomplice satisfies the Confrontation Clause).

⁶⁵ *See, e.g.*, FED. R. EVID. 105 (allowing jury instructions when evidence is admitted for one purpose even though it would otherwise be inadmissible for another purpose). *See also Lewis*, 782 N.Y.S.2d at 322 (noting the presumption that a jury will follow such an instruction).

⁶⁶ *Trala*, 386 F.3d at 545 (observing that the relevance of a particular statement was based upon the fact that it was “obviously false”).

⁶⁷ *State v. Clark*, 598 S.E.2d 213, 220 (N.C. Ct. App. 2004).

⁶⁸ *Cf. Bruton v. United States*, 391 U.S. 123, 136–37 (1968) (finding the risk too great that a jury would, notwithstanding a limiting instruction, misuse an accomplice’s extrajudicial, custodial confession, implicating the declarant and Bruton in a joint trial, and consider it against both the declarant and Bruton). *But see Tennessee v. Street*, 471 U.S. 409 (1985) (affirming admission of an accomplice’s extrajudicial, custodial statement in the prosecutor’s rebuttal case after the accused opened the door by referring to the accomplice’s statement in his case-in-chief).

B. *The Present Availability of the Hearsay Declarant to Testify and be Cross-Examined by the Accused Satisfies the Confrontation Clause*

Crawford reinforces the previously settled constitutional confrontation view by stating: “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”⁶⁹ In a series of cases prior to *Crawford*, the Court determined that the belated opportunity of the accused to cross-examine the hearsay declarant at the present trial satisfies the Clause.⁷⁰ Even a substantial good faith lack of present memory by the declarant who testifies at trial will not deprive the defendant of a sufficient opportunity to confront his accuser, as long as the declarant is willing to answer questions propounded to him by the accused.⁷¹ In a recent post-*Crawford* case, the

⁶⁹ *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (citing *California v. Green*, 399 U.S. 149, 162 (1970)). Post *Crawford*, the Colorado Supreme Court explained:

Although the [*Crawford*] Court found the opportunity for cross-examination to be the essential requirement of the Confrontation Clause, it did not hold that all testimonial statements must be subject to cross-examination at the time they were made. To the contrary, if the declarant will appear at trial, cross-examination on the witness stand remains sufficient. The Supreme Court was careful to explain that *Crawford* did not apply to instances where a witness testifies at trial. The opinion explicitly reaffirmed the *Green* decision

People v. Argomaniz-Ramirez, 102 P.3d 1015, 1018 (Colo. 2004).

⁷⁰ *United States v. Owens*, 484 U.S. 554, 559 (1987) (A correctional officer’s hospital identification of Owens as the individual who brutally attacked him with a metal pipe was properly admitted over Owens’s confrontation objection since the officer testified at trial, subject to cross-examination, even though the officer, at trial, suffered a failure of recollection regarding the identity of the attacker and other details. The court found this “belated” opportunity sufficient, quoting Justice Harlan: “[T]he Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”) (citations omitted); *Nelson v. O’Neil*, 402 U.S. 622, 627–30 (1971) (holding that admission of co-defendant Runnels’ pretrial confession implicating himself and O’Neil over defendant O’Neil’s confrontation objection in their joint trial did not violate the Clause where Runnels subsequently testified in his own behalf, giving O’Neil a belated opportunity to cross-examine him); *Green*, 399 U.S. at 161, 164–65 (No Confrontation Clause violation found in the introduction of a custodial statement and preliminary hearing testimony of a sixteen-year-old drug seller, identifying the defendant as his drug supplier, where the defendant had a belated opportunity to cross-examine the declarant, even though the declarant admitted making the prior statements but could not “remember” much of their contents. The Court stated that it was not convinced that contemporaneous cross-examination of the declarant at the time the statement is made and before the trier of fact is so much more effective than belated cross-examination of the declarant that the former should be made the “touchstone of the Confrontation Clause”).

⁷¹ *Owens*, 484 U.S. at 556, 561 (noting that Foster, the declarant, did have some significant recollection even though he suffered substantial memory loss). One wonders whether a nearly complete good faith failure of recollection would still sat-

Supreme Court of South Dakota found no *Crawford* violation arising from the admission of various statements of a four-year-old child to family, police, and clinicians because the child, though likely having no present, accurate recollection, was available to testify at trial.⁷² As a result, the South Dakota court reversed a pre-trial order that had excluded these statements.⁷³

Similarly, a testifying declarant's present bad faith claim of lack of memory would not preclude a court from finding a sufficient op-

isfy the Clause. It would seem under such circumstances, the declarant would be, in effect, incompetent, and therefore "unavailable" for confrontation purposes. On this we must await further clarification by the Supreme Court. As to this issue, see *State v. Gorman*, 854 A.2d 1164 (Me. 2004). In a prosecution of her son for murder, the mother testified for the state that she did not recall her son's confession to her after the killing nor could she recall grand jury testimony to that effect. *Id.* at 1177. The State thereupon introduced her prior inconsistent statement given at the grand jury proceeding under a hearsay exception. *Id.* In the Maine Supreme Court, the defendant contended his confrontation rights were violated under the *Crawford* test because the mother was essentially "unavailable" for present cross-examination. *Id.* The Court rejected this contention stating: "In *Owens*, the United States Supreme Court held that even when a witness has no present memory of a prior out-of-court statement, the right of confrontation is satisfied if the accused has the opportunity to cross-examine the witness at trial . . ." *Id.* See also *United States v. Milton*, 8 F.3d 39, 46-47 (D.C. Cir. 1994) (applying *Owens* prior to *Crawford*, the court held that the introduction of grand jury testimony by a witness who at trial testified and claimed that, due to drug addiction, she had no memory of her testimony or the basis for it, did not violate the Sixth Amendment right of confrontation); *People v. Harless*, 22 Cal. Rptr. 3d 625, 637 (Ct. App. 2004) (holding that a child sexual assault victim's partial memory failure, which neither precluded her from explaining her prior statements nor prevented the jury from assessing her demeanor and determining which was most credible—her present testimony or prior statements—afforded the defendant an opportunity for effective cross-examination so as not to violate the Confrontation Clause under *Crawford*); *State v. Fields*, No. 25455, 2005 WL 1274539 (Haw. Ct. App. May 31, 2005) (concluding that a girlfriend's claim of lack of memory regarding the defendant's abuse and her conversations with the police about it did not preclude her from being subject to cross-examination and negated any confrontation objection to the introduction of her prior testimonial statements); *State v. Price*, 110 P.3d 1171, 1174 (Wash. Ct. App. 2005) (holding that the introduction of a four-year-old sexual abuse victim's testimonial statement did not offend the Confrontation Clause where the child testified at trial subject to cross-examination even though, when asked to describe the abuse, she replied, "Me [sic] forgot").

⁷² *State v. Carothers*, 692 N.W.2d 544, 549 (S.D. 2005). See also *Johnson v. State*, 878 A.2d 422, 428 (Del. 2005) (holding that a detective's trial testimony relating a statement made to him by a witness, wherein the witness revealed overhearing the defendant and another describing a burglary and shooting was admissible under *Crawford* since the witness testified subject to cross-examination, and the fact that the witness could not recall speaking to the detective and could not recall any details of the conversation between the defendant and the other person did not preclude satisfaction of the accused's confrontation rights).

⁷³ *Carothers*, 692 N.W.2d at 549.

portunity for the accused to confront the accuser.⁷⁴ In such a case, through examination of the declarant, the accused can inquire as to the reasons for the declarant's faulty memory and other circumstances so that the jury can observe both the declarant's demeanor and present testimony and then determine whether to rely on the current explanation or accept the prior testimonial statement. Obviously, a declarant who appears at the present trial but refuses to answer questions propounded by the accused—or successfully asserts a privilege—would not be available for confrontation purposes.⁷⁵ In one post-*Crawford* child sexual assault case, the twelve-year-old victim testified on direct to various matters but would not answer the prosecutor's questions as to the assault's details.⁷⁶ On cross-examination, however, she answered every question (none of which related to the assault's details) propounded by the defense. There, the court concluded that the child was available for cross-examination within the meaning of *Crawford* and stated, “[W]e need not decide what the legal consequences would be, if any, if she had instead answered some, but not all, of those questions [on cross-examination].”⁷⁷ Additionally, severe and improper restrictions upon the scope of permissible cross-examination imposed by the trial court can preclude a meaningful opportunity to confront the witness.⁷⁸

⁷⁴ See, e.g., *Dicaro v. United States*, 772 F.2d 1314, 1327 (7th Cir. 1985) (An accomplice's grand jury testimony was properly admitted in spite of the declarant's present trial testimony that he had almost total amnesia. The court, determining the claim to have been in bad faith and noting that the declarant responded to extensive questioning by the accused, stated that this “lapse nonetheless did not so negatively affect ‘the jury’s ability to determine the veracity of the out-of-court statement’ that it offended the Confrontation Clause) (citations omitted); *but see* *State v. Williams*, 889 So. 2d 1093, 1101 (La. Ct. App. 2004) (No opportunity for effective cross-examination existed where the declarant-accomplice denied making the prior statement and refused to testify further on behalf of the state but agreed to answer the defendant's questions. The court stated, “It would make no sense for the defense to ask [the accomplice] about a statement that he testified he did not make.”).

⁷⁵ *Owens*, 484 U.S. at 561–62 (“Just as with the constitutional prohibition, limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the meaning of the Rule no longer exists.”); *see also* *Crawford v. Washington*, 541 U.S. 36, 40 (2004) (Crawford's wife was determined to be unavailable by asserting a spousal privilege).

⁷⁶ *People v. Sharp*, 825 N.E.2d 706, 712–13 (Ill. App. Ct. 2005).

⁷⁷ *Id.* at 713.

⁷⁸ *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (noting the trial court's restriction precluding defense questioning of a key prosecution witness as to his prior juvenile criminal behavior, which would have strongly suggested bias, violated the accused's confrontation rights).

For the declarant to be present and subject to cross-examination by the accused, it need not always be the government that calls the declarant to testify. In *Nelson v. O'Neil*,⁷⁹ the declarant testified on his own behalf in the joint trial, satisfying his co-defendant's confrontation rights.⁸⁰ There are times when the prosecution may desire to introduce testimonial hearsay in lieu of calling an available declarant. In such cases, the state, desiring to avoid a confrontation issue, may find a possible solution to this dilemma. The evidentiary rule prevalent in the federal system⁸¹ and in many states⁸² permits a person against whom hearsay is admitted (in this case the accused) to call an available hearsay declarant exercising his right to Compulsory Process,⁸³ and then cross-examine the declarant regarding the statement. This procedure may satisfy the Clause if exercised⁸⁴ and may constitute a waiver of confrontation rights if not exercised.⁸⁵ A number of commentators and one pre-*Crawford* court would likely ridicule this suggestion.⁸⁶ Of course, for waiver to occur, the government must

⁷⁹ 402 U.S. 622 (1971).

⁸⁰ *Id.* at 622.

⁸¹ FED. R. EVID. 806.

⁸² See, e.g., FLA. STAT. § 90.806 (1999). See also Douglass, *supra* note 45, at 252 (referring to numerous states' rules along with the common law).

⁸³ U.S. CONST. amend. VI.

⁸⁴ See *State v. Lanski*, 696 N.W.2d 387 (Minn. 2005) (concluding, without mentioning Rule 806, that a confrontation objection to introduction of the accused's wife's hearsay as a testimonial statement was waived by his calling her to testify).

⁸⁵ See Douglass, *supra* note 45, at 229 ("Properly applied, however, a rule providing that defendants must request a subpoena to invoke the confrontation right should not work serious hardship on defendants. In essence, the rule requires that a defendant mean what he says when he asks for confrontation."); *id.* at 243 (reporting that the Supreme Court in "*Inadi* tells us that 'if [the defendant] independently wanted to secure [the declarant's] testimony, . . . [t]he Compulsory Process Clause would have aided [him] in obtaining the testimony' and Federal Rule of Evidence 806 would permit the defendant to question that declarant 'as if under cross-examination.')" (footnote omitted). One court recently went further and held that *Crawford's* requirement that there be an "opportunity" for cross-examination is met when the accused is given notice of the charges against him, is given a copy of the witnesses' statement, and he has an opportunity to depose that witness. *Blanton v. State*, 880 So. 2d 798, 801 (Fla. Dist. Ct. App. 2004). This appears a bit extreme. *But see* *Lowery v. Collins*, 996 F.2d 770 (5th Cir. 1993) (holding that the failure of the defendant, in a child sexual assault prosecution, to call the available victim as a witness did not constitute a "waiver" of his confrontation rights, reasoning that such would create a constitutionally impermissible choice between exercising his right of confrontation or insisting on his due process right to have the state satisfy its burden of proof). In contrast, compare these cases with *State v. Cunningham*, 903 So. 2d 1110 (La. 2005), discussed *infra* notes 274-75.

⁸⁶ One such commentator writes as follows:

The ultimate in burden-shifting is endorsed by the *White* majority opinion when it states that defendants can themselves call hearsay de-

have placed the accused on notice of its intent to introduce the testimonial hearsay in time for the accused realistically to compel the declarant's attendance and testimony pursuant to this evidentiary rule.⁸⁷

C. The Confrontation Clause's Unavailability Requirement

To dispense with present cross-examination of a witness who furnishes testimonial evidence against the accused, there must be a necessity to do so, and the accused must have had a prior meaningful opportunity to cross-examine the witness. However, unlike under the pre-*Crawford* analytical framework,⁸⁸ necessity under *Crawford* is lim-

clarants as hostile witnesses. This idea borders on the ludicrous, particularly when such declarants are the victims of the alleged crime, as was the case in *White*. The risk of calling a non-prepared and therefore unpredictable hostile witness, let alone the victim, are enormous.

Swift, *supra* note 45, at 168 (footnotes omitted). Similarly, another author offers the following:

The *Inadi* approach changes this scheme with regard to hearsay from an available declarant. Now the defendant must produce the person he wishes to confront, and he must wait until it is his turn to produce witnesses before he can cross-examine. This approach suggests that our entire trial system could be similarly restructured in such a way that the opposing side would not be allowed to cross-examine a witness after he testifies, but would only be permitted to call the witness and conduct cross-examination as part of its own case. In other words, the prosecution would be allowed to introduce all its direct examination from several witnesses unimpeded by defense cross-examination. The defense would then call those witnesses unimpeded by the prosecution's cross-examination. Finally, the prosecution could call and cross-examine all the favorable defense witnesses. If *Inadi* is correct, this system must be constitutional, for the defendant gets his chance to cross-examine. The change, however, is clearly a radical alteration in the way we conduct trials, and one that should be found to violate the sixth amendment.

Jonakait, *supra* note 5, at 620. Additionally, at least one court would seem to oppose this possibility:

. . . [T]he State contends that Defendant waived his right to object to the introduction of the Sykes [murder victim's wife's] statement because the court had offered him the right to subpoena Sykes as a witness. This begs the issue. Calling Sykes as a witness, in and of itself, would hardly render the statement admissible. Defendant should not be required to call Mrs. Sykes as a witness simply to facilitate the State's introduction of evidence against the Defendant.

State v. Cox, 876 So. 2d 932, 938 (La. Ct. App. 2004).

⁸⁷ See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defining constitutional waiver as the voluntary and intentional relinquishment "of a known right or privilege").

⁸⁸ In addition to satisfying the necessity prong of the *Roberts* formula by demonstrating the declarant was unavailable, subsequent pre-*Crawford* cases expanded the concept of necessity to include the "need" to introduce the "better" evidence. Even though the declarant may be available, prior hearsay statements would be admissible

ited to the unavailability of the witness-declarant.⁸⁹ What constitutes satisfaction of the requirement of unavailability of the declarant will likely be governed by previously existing Confrontation Clause jurisprudence. This jurisprudence reflects that unavailability of the declarant is not limited to the physical unavailability of the declarant but includes the unavailability of the present testimony of the declarant.⁹⁰ The declarant may be deemed presently unavailable because he or she is dead,⁹¹ ill,⁹² or incompetent,⁹³ or cannot be located or compelled to appear.⁹⁴ Additionally, the declarant may be deemed unavailable if his or her present testimony cannot be procured because of the assertion of a privilege⁹⁵ or a refusal of the witness to respond to questions.⁹⁶ These categories defining unavailability are

if made under circumstances making it arguably more reliable than the present testimony from the same declarant because those circumstances could not be replicated. *See supra* note 42 (describing subsequent cases). *See generally* White v. Illinois, 502 U.S. 346 (1992) (regarding excited utterances and statements made for the purpose of medical diagnosis or treatment); United States v. Inadi, 475 U.S. 387 (1986) (regarding co-conspirator statements).

⁸⁹ Crawford v. Washington, 541 U.S. 36, 68 (2004) (“Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”).

⁹⁰ *See* DiBattisto v. State, 480 So. 2d 169 (Fla. Dist. Ct. App. 1985) (observing that the availability of the declarant contemplates “more than mere presence and includes the reasonable likelihood that he is or soon will be able to give reliable, coherent testimony”).

⁹¹ Mattox v. United States, 156 U.S. 237, 240–41 (1895) (upholding the admission of a deceased witness’ prior testimony).

⁹² *See, e.g.*, Warren v. United States, 436 A.2d 821 (D.C. 1981) (recognizing sufficient “grave risks to the witness’ psychological health [to] justify excusing her live in-court testimony”); State v. Burns, 332 N.W.2d 757 (Wis. 1983) (finding that severe mental illness that would be exacerbated if the declarant were required to testify at trial satisfied the unavailability requirement).

⁹³ Even mental illness, short of incompetency, may render a witness unavailable. *See, e.g.*, DiBattisto, 480 So. 2d at 169.

⁹⁴ *See, e.g.*, Ohio v. Roberts, 448 U.S. 56, 75–76 (1980) (reporting on efforts undertaken to locate a witness).

⁹⁵ *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 40 (2004) (recognizing Washington’s marital privilege); People v. Seijas, 114 P.3d 742 (Cal. 2005) (recognizing unavailability resulting from the exercise of the privilege against self-incrimination).

⁹⁶ *See, e.g.*, Jones v. United States, 441 A.2d 1004, 1007 (D.C. 1982) (affirming the admission of former testimony upon bad faith refusal of the declarant to testify); State v. Page, 104 P.3d 616, 624 (Or. Ct. App. 2005) (holding that an accomplice’s unequivocal refusal to testify rendered him unavailable). Such refusal, however, though rendering the witness unavailable, does not necessarily have to be in “bad faith.” *See, e.g.*, *In re Rolandis G.*, 817 N.E.2d 183 (Ill. App. Ct. 2004) (finding that a seven-year-old’s refusal to continue testifying as to the sexual assault against him resulted in the child being “unavailable,” even though the child testified as to knowing the defendant and other preliminary matters); Howard v. State, 816 N.E.2d 948 (Ind. Ct. App. 2004) (recognizing that a twelve-year-old’s refusal to testify due to embar-

consistent with the requirement for unavailability under the Federal Rules of Evidence for hearsay purposes.⁹⁷

Whether a witness-declarant's present claim of failure of recollection would render him or her unavailable for confrontation purposes is more problematic. The Supreme Court held in *United States v. Owens*⁹⁸ that a witness's present significant good faith lapse of memory did not render him "unavailable" for confrontation purposes where the witness, presently, willingly responds to questions.⁹⁹ The *Owens* Court noted that a semantic oddity exists due to the fact that such a significant good faith lack of memory may render the witness "unavailable" for hearsay purposes under the Federal Rules of Evidence but "available" for confrontation purposes.¹⁰⁰ Additionally, a bad faith claim of lack of memory would not render the witness unavailable if the witness willingly responds to questions presently propounded to him.¹⁰¹ However, if the witness suffers a good faith failure of recollection to the extent that he or she is virtually incompetent to testify to relevant matters, it is likely that the resulting absence of a meaningful opportunity to presently examine the witness would render that person unavailable for confrontation purposes. Cross-examination under such circumstances would be tantamount to cross-examining a mound of clay. In such cases, unless there was a prior opportunity for the accused to cross-examine such a witness, the witness's testimonial hearsay *may* not be constitutionally available as a substitute for his or her irretrievable memory. A definitive determination will have to await further illumination of the *Owens* decision by the Supreme Court.¹⁰²

Unavailability for confrontation purposes has a corollary requirement that the government must have made a good faith effort to secure the present testimony of the declarant, which proved to be

rassment rendered her "unavailable"). *See also* *Fowler v. State*, 829 N.E.2d 459, 466 (Ind. 2005) (concluding that a witness' refusal to answer questions while on the stand did not make the witness unavailable for confrontation purposes in absence of a request by the accused to compel the witness to answer).

⁹⁷ FED. R. EVID. 804(a)(1), (2), (4), (5).

⁹⁸ 484 U.S. 554 (1987).

⁹⁹ *Id.* at 559.

¹⁰⁰ *Id.* at 563. *See* FED. R. EVID. 804(a)(3) (announcing that unavailability for hearsay purposes includes situations in which the declarant "testifies to a lack of memory of the subject matter of the declarant's statement").

¹⁰¹ *Dicaro v. United States*, 772 F.2d 1314, 1327 (7th Cir. 1985).

¹⁰² *See supra* notes 70-71 and accompanying text (discussing *Owens*). In contrast, lower court cases indicated a witness' complete or near-complete memory loss will not render the witness unavailable for cross-examination. *See supra* note 71.

futile.¹⁰³ Post-*Crawford*, this requirement persists.¹⁰⁴ What constitutes good faith in all cases of unavailability is a question of reasonableness under the circumstances.¹⁰⁵ A good faith, diligent effort to produce the declarant's present testimony is determined by a factual analysis of each case. The effort must be more than perfunctory and more than simply the product of the prosecutor's "indifference or strategic preference" for the admission of the testimonial hearsay.¹⁰⁶ The proper inquiry is whether the effort not undertaken would have been pursued if no testimonial hearsay existed upon which the prosecutor could rely.¹⁰⁷ If the answer to this question is "yes," then such failure would amount to a lack of good faith effort. The nature and circumstances of the unavailability, and of the viable means to overcome it, together with the gravity of the case and importance of the witness

¹⁰³ *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The basic litmus of Sixth Amendment unavailability is established: '[A] witness is not "unavailable" . . . unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial' (emphasis added by the Court, quoting *Barber v. Page*, 390 U.S. 719, 724-25 (1968))).

¹⁰⁴ *See, e.g., People v. Wilson*, 30 Cal. Rptr. 3d 513, 540 (Cal. 2005) (applying the unavailability requirement post-*Crawford*, the court noted that the necessary "due diligence" component involves an inquiry into relevant factors such as the timeliness of the search, importance of the hearsay, and whether leads were pursued competently, and further explaining that the prosecution has no obligation to take "adequate preventive measures" to stop an important witness from fleeing absent prior "knowledge of a 'substantial risk' of such a potential flight"); *State v. Grace*, 111 P.3d 28, 37 (Haw. Ct. App. 2005) (holding that the fact the prosecution made "no effort whatsoever" to procure declarants of testimonial statements for trial rendered those statements inadmissible under the Confrontation Clause); *State v. Clark*, 598 S.E.2d 213, 219 (N.C. Ct. App. 2004) (finding sufficient a demonstration of the "State's good-faith efforts to procure [the declarant] in order for the trial court to declare her unavailable").

¹⁰⁵ *Warren v. United States*, 436 A.2d 821, 826-27 (D.C. 1981) ("This rule applies to all cases of witness unavailability, but is moderated by the recognition that 'the lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.'" (quoting *California v. Green*, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring))).

¹⁰⁶ *People v. Arroyo*, 431 N.E.2d 271, 274 (N.Y. 1982) (observing that a missing witness' "unavailability also had to be established to satisfy the court that the prosecutor's failure to produce her was not due to indifference or a strategic preference for presenting her testimony in the more sheltered form of hearing minutes rather than in the confrontational setting of a personal appearance on the stand").

¹⁰⁷ *State v. Edwards*, 665 P.2d 59, 64 (Ariz. 1983) (supporting the idea that "[a]n appropriate standard to apply is to ask whether the leads which were not followed would have been the subject of investigation if the State had been trying to find an important witness and had no transcript of prior testimony" (citing *United States v. Mann*, 590 F.2d 361, 367 (1st Cir. 1978))).

are important factors in determining the sufficiency of the government's efforts.¹⁰⁸

Where the unavailability of the witness is a result of death, obviously little may be required to show a good faith effort. However, even here concerns have arisen. Should a key witness in a homicide case be required to be sustained by extraordinary life-support systems in order to make the witness available at a future date for cross-examination by the accused? One court found that the government had no authority to interfere with a patient's privacy right to remove a life-sustaining apparatus to do so.¹⁰⁹

In an interesting post-*Crawford* case,¹¹⁰ a murder defendant claimed that the introduction of an absent alien's testimonial statement, in spite of the fact that the defendant had a prior opportunity for cross-examination, violated the Confrontation Clause because the declarant was deported by the government before his retrial. The defendant claimed that a good faith effort required the government "to ensure that its witnesses are not forcibly removed from the United States until all appeals in a case are exhausted, because of the possibility of retrial."¹¹¹ Finding no authority for such a "sweeping" responsibility and observing that the defendant did not claim the government purposefully sought, by the deportation, to make the declarant unavailable for a possible future retrial, the court found the

¹⁰⁸ For example, in *Roberts* the victim of an unlawful credit card use offense testified at the defendant's preliminary hearing, but did not appear at trial. The court found that the government sustained its burden of establishing that its efforts to procure the witness were reasonable. Those efforts, as determined in a "voir dire hearing" from the testimony of the victim's mother, were essentially that the witness was living with the parents at the time of the preliminary hearing but had left that summer and was traveling outside Ohio. As a result of a social worker from San Francisco contacting her, the mother had made an effort to locate her but determined that she was no longer in San Francisco. The mother further stated that she would not know how to reach her in an emergency. The prosecutor learned these facts some four months prior to trial, yet issued subpoenas to the witness at her mother's home on five occasions—a place where she was known not to be. Justice Brennan, in his dissent joined by Justices Marshall and Stevens, took issue with this finding, writing, "It would serve no useful purpose here to essay an exhaustive catalog of the numerous measures the state could have taken in a diligent attempt to locate Anita," and concluded that the sole reason why Anita was not available is that the state did not seek to find her. *Roberts*, 448 U.S. at 80, 81 (Brennan, J., dissenting). The result may be explained by the fact that the prosecution was for a low-grade felony offense and the expenditure of further time and resources in an attempt to locate her may have been deemed unreasonable. Still, this is a debatable conclusion under these facts.

¹⁰⁹ *People v. Adams*, 265 Cal. Rptr. 568 (Ct. App. 1990).

¹¹⁰ *Williams v. United States*, 881 A.2d 557 (D.C. 2005).

¹¹¹ *Id.* at 564.

prosecution had met its burden of demonstrating unavailability for confrontation purposes.¹¹²

Where the factor giving rise to a claim of unavailability is illness, the person's importance and prognosis may justify requesting a brief delay of the trial, a continuance, or examination of the witness at bedside in order to permit the testimony.¹¹³

Unavoidable absence is a reason frequently invoked as a basis for witness unavailability. A good faith effort in such cases depends largely upon the circumstances. If the whereabouts of the witness are unknown, some "diligent" effort to locate the witness must be undertaken.¹¹⁴ If the witness' whereabouts are known and within the territorial jurisdiction of the court in which the testimony is sought, a good faith effort requires that a subpoena be properly sought and issued.¹¹⁵ The mere showing that the witness is beyond the territorial jurisdiction of the court does not satisfy the confrontation requirement, unless the government demonstrates a good faith effort to use available procedures to obtain voluntary cooperation of the witness or foreign jurisdiction.¹¹⁶ If no procedure exists for compelling the presence of a witness residing in a foreign country, a good faith effort may be found if request is made of the witness to return and testify and an offer to pay expenses incurred is tendered.¹¹⁷ Where the witness is residing in another state, a good faith effort may require using processes such as the *Uniform Act to Secure Witnesses From Within or Without a State in Criminal Proceedings*.¹¹⁸ Under the Uniform Act, if the witness resides in a state recognizing the compact, all that is required is to apply for the issuance of a subpoena in the trial court of

¹¹² *Id.*

¹¹³ CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 1005 (Little Brown 1995).

¹¹⁴ See *supra* note 108 (discussing the diligent effort described in *Roberts*).

¹¹⁵ See *Stores v. State*, 625 P.2d 820 (Alaska 1980) (finding that prior testimony in a deposition is inadmissible when the state knew that the witness both planned to leave the area and was willing to testify at trial if called); *Palmieri v. State*, 411 So. 2d 985, 986 (Fla. Dist. Ct. App. 1982) (holding that merely sending a subpoena by normal mail does not meet the burden for a good faith effort to procure a witness).

¹¹⁶ See *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (concluding that a decision not to even ask for a federal prisoner in a different jurisdiction to be produced because authorities might deny the request does not render a witness unavailable).

¹¹⁷ See *Mancuso v. Stubbs*, 408 U.S. 204, 223 (1972) (Marshall, J., dissenting) (arguing that even though compelling a witness residing in another country to submit to a subpoena may be problematic, a state should still at least notify the witness of the trial and invite the witness to come at the witness' own expense, perhaps offer to pay the witness' expenses, and ultimately seek federal assistance in reaching out to the authorities of the other country).

¹¹⁸ *E.g.*, FLA. STAT. § 942.01-.06 (2001).

general jurisdiction in the state where the witness is located, returnable to the trial court in the state where the witness is to testify. Failure to comply with the subpoena would subject the witness to contempt in the state issuing the subpoena. Where the prosecutor fails to use this available process, the court may find that a good faith effort has not been demonstrated.¹¹⁹ Where the witness is a United States citizen residing in a foreign country, a good faith effort to procure his attendance may require a state or federal prosecutor to seek the issuance of a subpoena from the federal district court pursuant to process provided for in the federal code.¹²⁰ Failure to use this procedure has resulted in a finding of a lack of good faith effort and the exclusion of testimonial hearsay.¹²¹

Finally, where a witness' bad faith refusal is the basis for being unavailable, seeking a contempt citation may be a required effort. But, a contempt citation is not required in every case.¹²²

¹¹⁹ See *State v. Zaehring*, 325 N.W.2d 754, 759 (Iowa 1982) (finding that failing to attempt use of the provisions of the Uniform Act to Secure Witnesses from Without the State until time constraints precluded success did not meet any standard for a good faith effort, particularly when the state knew fourteen months earlier that the witness moved).

¹²⁰ The code provides, in part, as follows:
A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country . . . if the court finds that particular testimony . . . is necessary in the interest of justice, and . . . if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance . . .

28 U.S.C. § 1783(a) (2000).

¹²¹ *People v. St. Germain*, 187 Cal. Rptr. 915, 921–22 (Ct. App. 1982) (holding that former testimony was improperly admitted where a state prosecutor failed to utilize this federal procedure, the witness was in Holland, and the witness refused to cooperate voluntarily).

¹²² One court chronicled the futility of seeking testimony in one such case as follows:

Here, the government told Smith that he had no Fifth Amendment privilege to refuse to testify, and that refusing to testify would place him in contempt of court as well as in breach of his plea agreement. It offered him protection in exchange for his testimony. Nevertheless, Smith persisted in refusing to testify; he told the government, the trial judge in *voir dire*, his appointed counsel, the trial judge again, and the jury of his refusal. To continue efforts to try to convince the witness to testify would have been futile in light of his steadfastness. When there is no possibility of procuring the testimony of a witness, the law requires nothing of the prosecutor because further action would be futile.

Jones v. United States, 441 A.2d 1004, 1007 (D.C. 1982) (footnote and citation omitted).

D. *The Forfeiture by Wrongdoing Rule Still Prevails*

The *Crawford* Court, while rejecting the *Roberts* “reliability” approach, expressly accepted the rule of forfeiture by wrongdoing, which “extinguishes confrontation claims on essentially equitable grounds.”¹²³ Therefore, if the accused procures the absence of the witness-declarant, he cannot complain that the declarant’s testimonial hearsay should not be introduced because he cannot presently confront that witness.¹²⁴ The Seventh Circuit explained this rule as follows:

A defendant may waive his right to object on hearsay and Confrontation Clause grounds to the admission of out-of-court statements made by a declarant whose unavailability he intentionally procured. The primary reasoning behind this rule is obvious—to deter criminals from intimidating or “taking care of” potential witnesses against them. But the rule is also grounded in principles of equity. Admission of the witness’s statements at least partially offsets the benefit the defendant obtained by his misconduct.¹²⁵

One post-*Crawford* case indicated that authority exists for expanding the rule to apply even in cases where the predicate wrongdoing is the same crime for which the defendant is being tried and the wrongdoing was not for the purpose of precluding the witness from testifying.¹²⁶ In *United States v. Mayhew*,¹²⁷ a United States

¹²³ *Crawford v. Washington*, 541 U.S. 36, 62 (2004). However, the Supreme Court did not address its applicability to the facts of the case even though Sylvia’s unavailability to testify and be cross-examined stemmed from the defendant’s exercise of a state’s spousal evidentiary privilege. The Court’s absence of comment may stem from the fact that the state did not raise before the Supreme Court the related issue of “waiver,” as it had in the state appellate court. *Id.* at 40–43. Additionally, the *Crawford* Court may have declined to do so because an exercise of a legitimate privilege is not encompassed within the rule because it is not considered wrongful. *See id.* at 42 n.1. Recall that the Court was not inclined to force a “Hobson’s choice” on the defendant between marital privilege and confrontation. *See supra* note 25 (discussion on waiver). It seems advisable to expand the equitable rule to cases in which the declarant’s unavailability is procured by the voluntary act of the defendant even where that act is not “wrongful.” In such cases the defendant, truly desiring cross-examination, holds the key to such process in his hands and should not preclude the introduction of testimonial hearsay simply because he does not want to put the key in the lock.

¹²⁴ *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

¹²⁵ *United States v. Thompson*, 286 F.3d 950, 961–62 (7th Cir. 2002) (footnote and citations omitted).

¹²⁶ *People v. Pantoja*, 18 Cal. Rptr. 3d 492, 499 n.2 (Ct. App. 2004) (avoiding applying this expanded interpretation of the rule by finding the testimonial statement inadmissible upon state hearsay rules).

¹²⁷ 380 F. Supp. 2d 961 (S.D. Ohio 2005).

District Court judge actually applied an expanded doctrine under these circumstances, stating clearly that:

Requiring the court to decide by a preponderance of the evidence the very question for which the defendant is on trial may seem, at first glance, troublesome. . . . [H]owever, this Court holds as follows: equitable considerations demand that a defendant forfeits his Confrontation Clause rights if the court determines by a preponderance of the evidence that the declarant is unable to testify because the defendant intentionally murdered her, regardless of whether the defendant is standing trial for the identical crime that caused the declarant's unavailability.¹²⁸

Another post-*Crawford* case has apparently applied the rule expansively.¹²⁹ However, a United States District Court has rejected such an expansion, concluding that the forfeiture by wrongdoing doctrine is applicable “to actions whose *purpose* is to prevent the testimony.”¹³⁰ Otherwise, no confrontation protection would be afforded to an accused in any murder prosecution regarding any deceased victim’s testimonial hearsay statements.¹³¹

The Supreme Judicial Court of Massachusetts, in *Commonwealth v. Edwards*,¹³² was called upon to adopt, for the state, the Doctrine of Forfeiture by Wrongdoing Rule and to determine its scope. Finding that some version of the doctrine had been adopted in at least fourteen states and the District of Columbia, and noting that the rule is founded upon the sound equitable principle that one should not profit by his own misconduct, the court adopted the rule.¹³³ The court cited as further justification the fact that the rule discourages misbehavior towards witnesses and serves to shield witnesses from threats or harm.¹³⁴ Considering the appropriate scope of the doctrine, the court stated: “Without question, the doctrine should apply in cases where a defendant murders, threatens, or intimidates a wit-

¹²⁸ *Id.* at 968 (noting that the evidence described clearly indicated that the motive for the killing was other than to silence her as a witness).

¹²⁹ *Gonzalez v. State*, 155 S.W.3d 603, 610 (Tex. App. 2004) (“In light of this doctrine, we hold that Gonzalez is precluded from objecting to the introduction of Maria’s statements on Confrontation Clause grounds because it was his own criminal conduct (in this case, murder) that rendered Maria unavailable for cross-examination.”).

¹³⁰ *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at *5 (D. Colo. Mar. 3, 2005).

¹³¹ *Id.* at *6.

¹³² 830 N.E.2d 158 (Mass. 2005).

¹³³ *Id.* at 168.

¹³⁴ *Id.* at 167.

ness in an effort to procure that witness's unavailability."¹³⁵ Though finding that no court had yet expanded the rule to include collusion between the defendant and witness, it also found that the public policy interest underlying the rule would be best served by extending its scope to such collusive behavior.¹³⁶ Thereupon the court held:

that a defendant forfeits, by virtue of wrongdoing, the right to object to the admission of an unavailable witness's out-of-court statements on both confrontation and hearsay grounds on findings that (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability. A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial.¹³⁷

Another court opined that the application of this doctrine in domestic violence cases will be problematic, stating the following:

Application of the "wrongdoing" exception to the Confrontation Clause undoubtedly will be difficult in many domestic violence cases where a victim does not cooperate with the prosecution. If that is the case, police and prosecutors may then have to embark on a separate investigation into whether the defendant caused the victim's unavailability. The question will probably also frequently arise as to what amounts to "wrongdoing" by a defendant in such a scenario, i.e. will only physical "wrongdoing" (another battery) by a defendant suffice, or can psychological pressure on a victim not to cooperate be enough, and if so, how is such pressure to be measured?¹³⁸

Could the rule be expanded to apply to cases where, without "wrongdoing," the accused, in cross examining a state witness, elicits a portion of a testimonial statement of a non-testifying declarant, thereby "opening the door" on redirect to the revelation of additional details of the same statement? A panel of the Sixth Circuit Court of Appeals concluded that it could not, stating the following:

Rather, the relevant inquiry is whether Cromer's right to confront the witnesses against him was violated by O'Brien's redirect testi-

¹³⁵ *Id.* at 168–69 (footnotes omitted).

¹³⁶ *Id.* at 169.

¹³⁷ *Id.* at 170. In collusion cases there must be a causal connection between the defendant's actions and the witness' unavailability. *Edwards*, 830 N.E.2d at 171. The court suggested that such may be sufficient in cases where a defendant aids, encourages, or facilitates a witness' unavailability even where that witness had previously decided "on his own" not to testify. *Id.*

¹³⁸ *Hammon v. State*, 809 N.E.2d 945, 951 n.3 (Ind. Ct. App. 2004).

mony. If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements. Thus, the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation. In this, too, we agree with Professor Friedman, who has postulated that a defendant only forfeits his confrontation right if his own wrongful conduct is responsible for his inability to confront the witness. If, for example, the witness is only unavailable to testify because the defendant has killed or intimidated her, then the defendant has forfeited his right to confront that witness. A foolish strategic decision does not rise to the level of such misconduct and so will not cause the defendant to forfeit his rights under the Confrontation Clause. O'Brien's redirect testimony relating the [confidential informant]'s physical description therefore violated Cromer's right of confrontation.¹³⁹

E. Harmless Error Analysis Continues to be Applicable to Crawford Violations

As pointed out by the minority in *Crawford*, a trial court's mistaken applications of the new constitutional confrontation rule established by *Crawford* will be subject to harmless-error analysis.¹⁴⁰ Even though the majority in *Crawford* expressed no opinion regarding the constitutional harmless-error analysis, virtually every case relying upon *Crawford*—and finding error—has undertaken to determine whether the error was harmless.¹⁴¹ One court stated that

¹³⁹ United States v. Cromer, 389 F.3d 662, 679 (6th Cir. 2004) (citing Friedman, *supra* note 36, at 1031) (internal citation omitted).

¹⁴⁰ Crawford v. Washington, 541 U.S. 36, 76 (2004) (Rehnquist, C.J., concurring).

¹⁴¹ State v. Cox, 876 So. 2d 932, 939 (La. Ct. App. 2004) (asserting the need for harmless-error analysis despite the Supreme Court's refusal to require it). Courts engaging in such analysis often find a harmless *Crawford* error. See, e.g., People v. Cage, 15 Cal. Rptr. 3d 846, 857–58 (Ct. App. 2004) (holding that the introduction of an accomplice's statement, made during a "classic station-house interview," violated the Confrontation Clause but finding it harmless); Blanton v. State, 880 So. 2d 798, 802 (Fla. Dist. Ct. App. 2004) (finding that, even if testimonial and erroneously admitted, the error is harmless if the accusations contained in the statement are proved by other witnesses such that the out-of-court statement is considered "merely cumulative"); State v. Wright, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004), *aff'd*, 701 N.W.2d 802 (Minn. 2005) (declining to examine whether statements made to police were testimonial after finding a jury's verdict "surely unattributable" to the statements and finding that their admission was thus "harmless beyond a reasonable doubt"); State v. Bell, 603 S.E.2d 93, 116 (N.C. 2004) (holding that a robbery victim's prior testimonial statement to investigating police, introduced during the penalty phase of a capital case, violated the Confrontation Clause but was harmless because the state was able to show other "overwhelming evidence of the defendant's guilt"); Wall v.

“[w]hile *Crawford v. Washington* fundamentally alters the way we analyze claims of error under the Confrontation Clause, the opinion does not change the way we evaluate the effect of any such error.”¹⁴² The Supreme Court in *Delaware v. Van Arsdall*¹⁴³ had previously prescribed various factors the reviewing court should apply, among others, in order to determine harmlessness regarding Confrontation Clause violations:

[T]he constitutionally improper denial of a defendant’s opportunity to impeach a witness for bias, like other *Confrontation Clause* errors, is subject to *Chapman* harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the

State, 143 S.W.3d 846, 851–53 (Tex. App. 2004) (holding that an assault victim’s excited utterance to police at the hospital and in response to questioning was testimonial, and that its admission was a violation of the Confrontation Clause, but the error in admitting it was harmless because other “lawfully admitted evidence overwhelmingly prove[d] the defendant’s guilt”).

In other cases, courts found *Crawford* errors harmful. See, e.g., *People v. Pirwani*, 14 Cal. Rptr. 3d 673, 688–89 (Ct. App. 2004) (holding that the victim’s videotaped statement to police regarding the loss of money was testimonial and that admitting it was harmful error because the statement contributed to evidence of guilt); *People v. Vigil*, 104 P.3d 258, 264 (Colo. Ct. App. 2004) (finding that a child sexual assault victim’s videotaped statement in a police interview was testimonial, a significant part of the case rather than corroborative, and that admitting it was harmful error); *People v. Shepherd*, 689 N.W.2d 721, 727 (Mich. Ct. App. 2004) (determining it “not at all clear” that a jury would have returned a guilty verdict absent the erroneous introduction of an accomplice-boyfriend’s testimonial plea allocution, thus making the admission harmful error); *State v. Johnson*, 98 P.3d 998, 1007 (N.M. 2004) (holding that the introduction of a robbery eyewitness’ custodial police interview violated the Confrontation Clause and was not harmless beyond a reasonable doubt as to the robbery conviction); *State v. Morton*, 601 S.E.2d 873, 876 (N.C. Ct. App. 2004) (finding an accomplice’s custodial statement to police was testimonial and its admission at trial was both erroneous and harmful); *Lee v. State*, 143 S.W.3d 565, 570–71 (Tex. App. 2004) (holding that the roadside testimonial statement of a passenger of the defendant to an officer was erroneously admitted and harmful because of the “reasonable likelihood” that its admission affected the jury’s deliberations).

¹⁴² *T.P. v. State*, No. CR-03-0574, 2004 WL 2418045, at *5 (Ala. Crim. App. Oct. 29, 2004).

¹⁴³ 475 U.S. 673 (1986).

extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.¹⁴⁴

Post-*Crawford* decisions have continued to apply *Van Arsdall*'s factors in resolving harmless error issues under the Confrontation Clause.¹⁴⁵

III. CONTROVERSIAL AFTERMATH IN THE WAKE OF *CRAWFORD*'S CONFRONTATION "RE-INTERPRETATION"

Three important and problematic issues remain to be addressed in the wake of *Crawford*'s new and revolutionary interpretation of the Confrontation Clause as it relates to testimonial hearsay. They are:

- What hearsay is testimonial and subject to the dictates of the *Crawford* opinion?
- Should *Crawford*'s rule be applied retroactively?
- To what extent, if any, does the Confrontation Clause regulate the introduction of "non-testimonial" hearsay?

In the immediate post-*Crawford* period, many courts attempted to address these questions and in doing so produced significant disagreement and controversy. The balance of this Article examines each of these concerns in turn.

A. What is "Testimonial Hearsay?"

Though the *Crawford* Court held unequivocally that, where a prosecutor seeks to introduce "testimonial" hearsay against an accused, the Confrontation Clause requires that the declarant be unavailable and that the accused have had a prior, meaningful opportunity to cross-examine that declarant, the Court declined to define the scope of hearsay that would be considered testimonial. Justice Scalia, writing for the majority, declared: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"¹⁴⁶ In doing so, the Court was aware that its failure to adopt such a definition would lead to uncertainty in the lower courts but concluded that such confusion resulting from unpredictability would not be permanent.¹⁴⁷ Justice Thomas and Justice Scalia had been alone in the *White* case advocating the rejection of the *Roberts*

¹⁴⁴ *Id.* at 684.

¹⁴⁵ There is an excellent discussion of *Van Arsdall*'s applicability in *Johnson*, 98 P.3d at 1002-04. See also *Cox*, 876 So. 2d at 939; *Wall*, 143 S.W.3d at 852.

¹⁴⁶ *Crawford v. Washington*, 541 U.S. 36, 68 (2004). At oral argument, much of petitioner's argument was interrupted by numerous questions from the justices as to the scope of the term "testimonial." Transcript of Oral Argument at 3-23, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 22705281.

¹⁴⁷ *Crawford*, 541 U.S. at 68 n.10.

test in favor of the testimonial test, but would have limited the classification to a “discrete” category of “formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions,” which were historically abused by prosecutors and constituted the principal evil the Confrontation Clause sought to prevent.¹⁴⁸ In the majority opinion in *Crawford*, Justices Scalia and Thomas were joined by five colleagues.¹⁴⁹ It is plausible that these new adherents to the testimonial approach would not have joined the majority unless the scope of the classification of hearsay as “testimonial” was expanded from the limited and “discrete” category previously posited by Justices Thomas and Scalia.¹⁵⁰

The *Crawford* Court provided some direction to guide courts in their struggle to apply the term “testimonial hearsay” to specific hearsay statements. First, the Court noted that the Clause applies to “witnesses” against the accused and that a “witness” is, according to an 1828 dictionary, one who bears testimony.¹⁵¹ Quoting that same dictionary, the Court stated, “‘Testimony’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”¹⁵² The Court then drew a distinction between casual remarks and more formal statements: “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”¹⁵³

The Court also emphasized, without adopting, some formulations of testimonial statements that have been suggested: (1) the petitioner’s contention that testimonial hearsay should include “*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”;¹⁵⁴ (2) Justices Thomas and Scalia’s view espoused in *White* about

¹⁴⁸ *White v. Illinois*, 502 U.S. 346, 365 (1992) (Scalia & Thomas, JJ., concurring in part and concurring in the judgment).

¹⁴⁹ *Crawford*, 541 U.S. at 37, 70 (listing Justice Scalia as delivering the Court’s opinion, joined by Justices Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer).

¹⁵⁰ It is also plausible that in order to maintain the seven-member majority the Court needed to leave the question open as to the continued viability of the *Roberts* test when applied to non-testimonial evidence. See *infra* section III.C. (discussing non-testimonial evidence after *Crawford*).

¹⁵¹ *Crawford*, 541 U.S. at 51.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

including “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions”;¹⁵⁵ and (3) the position taken in an amicus brief filed by the National Association of Criminal Defense Lawyers, which would include “statements that were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial.”¹⁵⁶

The Court concluded that any categorization of testimonial hearsay would include statements taken by police officers in the course of interrogations, observing that “[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath [is] not dispositive.”¹⁵⁷ The Court further stated, “even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.”¹⁵⁸ Here again, the Court declined

¹⁵⁵ *Id.* at 51–52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

¹⁵⁶ *Id.* at 52 (quoting Brief of Amici Curiae the National Association of Criminal Defense Lawyers et al. in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No.02-9410), 2003 WL 21754961). This view was also advanced in the amicus brief filed by an impressive array of law professors: Sherman J. Clark (University of Michigan Law School), James J. Duane (Regent University School of Law), Richard D. Friedman (University of Michigan Law School), Norman Garland (Southwestern University School of Law), Gary M. Maveal (University of Detroit Mercy School of Law), Bridget McCormack (University of Michigan Law School), David A. Moran (Wayne State University Law School), Christopher B. Mueller (University of Colorado School of Law), and Roger C. Park (Hastings College of Law, University of California). Brief Amicus Curiae of Law Professors Sherman J. Clark et al. in Support of Petitioner at 1, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21754958. This brief suggests that a statement is “testimonial” when “made with reasonable anticipation of evidentiary use.” *Id.* at 13. The amici further elaborated as follows:

Just as in this case, the question of whether a given statement should be considered testimonial can usually be rather easily resolved, as indicated by the following “rules of thumb,” [1] A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. [2] A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made directly to the authorities or not. [3] If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. [4] A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. [5] And neither is a statement made in the course of going about one’s ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.

Id. at 21 (citation omitted).

¹⁵⁷ *Crawford*, 541 U.S. at 52.

¹⁵⁸ *Id.* at 53.

to provide a definition—in this case of the term “interrogation” as used to classify testimonial hearsay—but did note that it used the term “in its colloquial, rather than any technical legal, sense.”¹⁵⁹ Therefore, Sylvia Crawford’s taped statement to police officers, obtained during their interrogation of her, clearly qualified. Justice Stevens, dissenting in a case decided weeks after *Crawford*, opined that questioning pursuant to a *Terry* investigative stop and the responses “[s]urely . . . qualifies as an interrogation and it follows that responses to such questions are testimonial in nature.”¹⁶⁰ It is likely that certain conversations with police officers would clearly not meet even the colloquial use of the term interrogation.¹⁶¹ As will be seen, however, the issue as to when questioning by police qualifies as “interrogation,” in the colloquial sense, that is, when statements made to police amount to “testimony,” has and will likely remain for some time a matter of substantial controversy.

The Court may have deemed its description of views regarding the critical classification of hearsay as testimonial to be helpful, but within these formulations uncertainty abounds. Even at oral argument, some of this uncertainty was revealed. Could statements made to nongovernmental officers be testimonial if the declarant had a reasonable expectation that they would have evidentiary use?¹⁶² Why is the intent of the declarant always critical in classifying his or her

¹⁵⁹ *Id.* at 53 n.4 (“Just as various definitions of ‘testimonial’ exist, one can imagine various definitions of ‘interrogation,’ and we need not select among them in this case. Sylvia’s recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.”).

¹⁶⁰ *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177, 195 (2004) (Stevens, J., dissenting) (describing actions associated with *Terry v. Ohio*, 392 U.S. 1 (1968)).

¹⁶¹ A conversation with law enforcement officers that is not the product of police interrogation and made without any expectation by the declarant of evidentiary use would not qualify as testimonial. *See, e.g., Wilson v. State*, 151 S.W.3d 694, 698 (Tex. App. 2004) (holding that statements made by a visibly upset owner of a car that had been wrecked and abandoned were not testimonial when the owner approached investigating officers inquiring about the status of her car and its occupants, and the officers were simply answering her questions and determining why she was upset).

¹⁶² The uncertainty is apparent in this interchange:

QUESTION: Would there be anything that fit in your category where the person to whom the statement is made is not an officer, either a police officer or prosecutor?

MR. FISHER: I think there may be, and the reason—I think there may be a—a rare, rare case, Justice Ginsburg, in a scenario—you know, come up with hypotheticals. One possible scenario might be somebody giving a statement to their friend and directing them to tell the police. So, you know, simply using an intermediary where we know the statement is going to the police, but—

Transcript of Oral Argument at 11, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 22705281.

statement as testimonial?¹⁶³ If an undercover agent or confidential informant is used to obtain statements from declarants having no expectation of evidentiary use, are such statements testimonial?¹⁶⁴

¹⁶³ The Court challenged petitioner's counsel on this point as follows:

QUESTION: Why—why should it depend on the intent of the declarant? I—why is that—why does that make the declarant a witness within the meaning of the Confrontation Clause? I mean, suppose—suppose the police get—get the statement from the declarant surreptitiously. They do not let—let him know that they are, in fact, the police. That—that would disqualify it under the law professors' test from being testimony?

MR. FISHER: Well, in that—

QUESTION: Because he would not know that this was going to be used in court.

MR. FISHER: Well, I mean, I think that's a situation—you know, and this is where the definitional problem gets difficult. I mean, because the other part of the Confrontation Clause is a limitation on State power, and it says—you know, going all the way [to] Blackstone, it's a limitation on the State molding statements that it's going to use later in a criminal investigation. So if that kind of a situation were present where somebody is molding somebody's statement, I think that might be something the Confrontation Clause is concerned with as well.

QUESTION: Are you—just—just with the dialogue with Justice Scalia, because I'm interested in the same problem, is it the intent of the speaker or the intent of the person taking the statement that would be—be more relevant in your view?

MR. FISHER: I see, Your Honor. I think that proper—the proper test would be if—if one of the two people is so—you know, is doing something with the purpose of understanding it's going to be used in a criminal case, then we have a testimonial situation. I think you—this Court could say that, but it—you have to look back—

QUESTION: You mean even the speaker or the person taking the statement. Is that what you're saying? I don't understand your response.

MR. FISHER: I think certainly the speaker and I think there may be situations—and this is—this is something the Court can deal with about when this—about when the—when the governmental officer is the only one and—and is under such a circumstance that the governmental officer is molding the statement in such a way and molding what somebody is going to say—

Id. at 11–13.

¹⁶⁴ The Court raised this question as follows:

QUESTION: It's your view that a co-conspirator statement is not testimonial then?

MR. FISHER: I think that's the ordinary course of events. Yes, Justice Ginsburg.

QUESTION: Well, why is that if it meets the test of a statement made to the police?

MR. FISHER: Well, if there's an undercover officer present, it meets—it meets the—the—you know, the test of a statement made to the po-

Where statements are recorded by police using a wiretap, are they testimonial?¹⁶⁵

Respondent, reflecting in oral argument upon the uncertainty of formulations regarding the classification of hearsay as testimony, indicated that whatever definition or test the Court might announce,

[It] is going to have problems. The bugs are going to have to be worked out. It'll take years of—of cases, and the—and the reality is—and I, of course, mean no disrespect to any judge—anytime you get—you have a judge making a discretionary decision, on the same set of facts there's simply going to be some judges that will make exactly opposite decisions¹⁶⁶ based upon the same set of facts. That's just human nature.

Post-*Crawford* cases confirm this prediction.

A flurry of decisions since *Crawford* have dealt with the questions posed in oral argument and have struggled with many more. A survey of cases that have grappled with the questions left unanswered in *Crawford* may in some instances afford enlightenment, while others reveal the extent of the confusion. In one of the earliest decisions grappling with the unanswered questions of *Crawford* in regard to 911 calls, one judge advanced Chief Justice Rehnquist's criticism of the *Crawford* majority for failing to provide needed guidance, stating:

The case of Octivio Moscat presently before this Court demonstrates that the Chief Justice's comments are apt. If anything they are understated. There are thousands of homicide and assault cases every year where a 911 call for help made by the victim to the police is an important piece of evidence. Are such calls testimonial in nature, or not? Do they constitute "police interrogation" (because the caller answers questions posed by the police operator), or not? May they be admitted into evidence under various traditional exceptions to the hearsay rule? Or would their admission violate the Sixth Amendment? The *Crawford* decision is rich in detail about the law of England in the 16th, 17th and 18th centuries, but—as the Chief Justice points out—it

lice. But then I think this is where the law professors have it right, and this is where I'm agreeing with Justice Breyer.

Id. at 15.

¹⁶⁵ This interesting question led to the following brief exchange:

QUESTION: Well, how—how about a wire tap? You've got a wire tap going, and you hear co-conspirators on—on the other end of the wire. Is that testimonial or not?

MR. FISHER: I think that's the traditional kind of co-conspirator statement that is not covered by the testimonial approach. . . .

Id. at 16.

¹⁶⁶ *Id.* at 52.

fails to give urgently needed guidance as to how to apply the Sixth Amendment right now, in the 21st century.¹⁶⁷

Interestingly, a *New York Times* column indicated that this judge may have actually *relished* the task of entering the fray and even made up a fictitious case to do so.¹⁶⁸

In a number of situations, courts have not had any apparent difficulty in gleaning, from the *Crawford* opinion, the appropriate classification of statements as “testimonial” or “non-testimonial.” For example, courts have generally agreed on rulings regarding statements made to third parties unconnected to law enforcement,¹⁶⁹ statements made during custodial or structured interrogations,¹⁷⁰ statements made during a plea allocution or during testimony given in court proceedings,¹⁷¹ statements made by co-conspirators in the course of the conspiracy,¹⁷² and dying declarations.¹⁷³ Surprisingly, controversy has arisen regarding the classification of sworn affidavits and certificates.¹⁷⁴ Predictably, confusion and disagreement has resulted in attempts to classify statements made during 911 calls,¹⁷⁵ statements made to first responders,¹⁷⁶ statements made to police during field investigations,¹⁷⁷ and children’s statements of abuse to child

¹⁶⁷ *People v. Moscat*, 777 N.Y.S.2d 875, 877–78 (Crim. Ct. 2004).

¹⁶⁸ The article includes the following remarkable assertions:

There was a problem, however, with the decision rendered by Judge Greenberg in *People v. Moscat*. None of the assumptions the judge based his opinion on were actually fact. The person captured on the tape in that particular case was, it turned out, a neighbor, not the victim. The call had been made some nine hours after the alleged assault, not while it was happening. And prosecutors eventually abandoned the case.

Defense lawyers and prosecutors alike say the judge was simply eager to be one of the first to interpret the Supreme Court’s ruling, a way to get attention in the legal world. The judge says that prosecutors told him the victim was on the tape, an assertion that prosecutors deny. He says he is comfortable with the heart of his decision.

Sabrina Tavernise, *Legal Precedent Doesn’t Let Facts Stand in the Way*, N.Y. TIMES, Nov. 26, 2004, at A1.

¹⁶⁹ See *infra* notes 179–94 and accompanying text.

¹⁷⁰ See *infra* notes 202–05 and accompanying text.

¹⁷¹ See *infra* notes 206–09 and accompanying text.

¹⁷² See *infra* notes 210–22 and accompanying text.

¹⁷³ See *infra* notes 223–31 and accompanying text.

¹⁷⁴ See *infra* notes 232–75 and accompanying text.

¹⁷⁵ See *infra* notes 276–325 and accompanying text.

¹⁷⁶ See *infra* notes 326–81 and accompanying text.

¹⁷⁷ See *infra* notes 382–87 and accompanying text.

protective agents or doctors.¹⁷⁸ We turn now to a review of post-*Crawford* jurisprudence regarding each of these situations.

1. Statements Made to Persons Not Connected to Law Enforcement

As revealed below, statements made by children, adult victims, and witnesses to persons unconnected to law enforcement have consistently been found to be non-testimonial and unaffected by *Crawford*. Statements made by children to—or overheard by—parents provide the first examples of statements made to persons not connected to law enforcement but which prosecutors may later wish to use. Where there was no indication that the child reasonably contemplated any evidentiary use of his or her statement of abuse and the statement was made to persons unconnected to law enforcement, courts, with rare dissension, have concluded that the statements were “non-testimonial.”¹⁷⁹ One court, classifying such statements to parents as non-testimonial, rejected the argument that they should be deemed testimonial since the parents, in questioning the ten-year-old molestation victim, suspected some “illegal or nefarious” activity, were engaged in “investigating” that suspicion, and turned over the fruit of their investigation to police.¹⁸⁰

¹⁷⁸ See *infra* notes 181–89, 196–200 and accompanying text.

¹⁷⁹ See, e.g., *Herrera-Vega v. State*, 888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004) (reasoning that “testimonial” evidence would not include spontaneous statements made by a child to her mother while being dressed, nor statements the child made to her father a few minutes later); *Somervell v. State*, 883 So. 2d 836, 838 (Fla. Dist. Ct. App. 2004) (considering as non-testimonial statements of abuse that the mother of an autistic child heard while the child was pretending to talk to the accused on the phone); *State v. Doe*, 103 P.3d 967, 972–73 (Idaho Ct. App. 2004) (finding that a four-year-old’s statements to her mother and other relatives fell within the state’s excited utterance exception to hearsay and were thus not testimonial, and also affirming the lower court’s admission of statements made to a doctor by both the child and her mother as non-testimonial); *State v. Bobadilla*, 690 N.W.2d 345, 350–51 (Minn. Ct. App. 2004) (affirming the admission of a statement made to a mother by her three-year-old child regarding abuse, reasoning that the mother’s questions arose from her concern for the child’s health and not in anticipation of a case against defendant); *State v. Brigman*, 615 S.E.2d 21 (N.C. Ct. App. 2005) (finding a six-year-old victim’s statement to his foster mother describing acts of sexual abuse by his mother were non-testimonial). Compare *In re Rolandis G.*, 817 N.E.2d 183, 189 (Ill. App. Ct. 2004) (holding a seven-year-old’s statements to her mother were non-testimonial) and *People v. R.F.*, 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) (finding a three-year-old sexual abuse victim’s statement to mother and grandmother were non-testimonial) with *In re E.H.*, 823 N.E.2d 1029, 1035–36 (Ill. App. Ct. 2005) (finding accusatory statements made by a child to a grandmother about abuse allegedly occurring more than a year earlier to be testimonial, even though not made to a governmental official, and erroneously admitted at trial).

¹⁸⁰ *Purvis v. State*, 829 N.E.2d 572, 579 (Ind. Ct. App. 2005).

Other instances involve statements to physicians. In one case, a four-year-old victim's statement to an emergency room physician, admissible under the exception for statements made for purposes of medical diagnosis or treatment, was found not to be "testimonial," with the court explaining as follows:

We believe on the facts of this case that the victim's statement to the doctor was not a "testimonial" statement under [*Crawford*]. As discussed above, the victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment. In the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination.¹⁸¹

Similarly, a fifteen-year-old abuse victim's statement to an emergency room doctor was determined to be non-testimonial since the doctor was "not performing any function remotely resembling that of a Tudor, Stuart or Hanoverian justice of the peace" and there was no government involvement except the duty that would apply to any person having knowledge relating to a crime to furnish that information to the police.¹⁸²

Statements describing abuse, related by children to medical personnel who are not acting in concert with police and who have no governmental obligation to investigate abuse offenses, have been generally denominated as non-testimonial even where these practitioners may specialize in diagnosing child abuse, regularly preserve their interviews,¹⁸³ and relay interview contents to appropriate law en-

¹⁸¹ State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004).

¹⁸² People v. Cage, 15 Cal. Rptr. 3d 846, 854-55 (Ct. App. 2004) (citing *Crawford v. Washington*, 514 U.S. 36, 43 (2004)) (referring to *Crawford's* discussion of the role of justices of the peace in English common law). See also State v. Fisher, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (holding a twenty-nine-month-old's statement to a treating family physician stating that the child's mother's boyfriend hit him—which contradicted an earlier statement to an emergency room doctor to the effect that he fell down stairs—was admissible as a statement for the purpose of diagnosis or treatment and non-testimonial because the physician was not a government official and the defendant was not then a suspect).

¹⁸³ State v. Scacchetti, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (finding child's statement to a nurse practitioner employed by a children's research center specializing in diagnosing abuse was non-testimonial, even though this practitioner was clearly aware her examinations might be used in a criminal case).

forcement authorities.¹⁸⁴ However, in *In re T.T.*,¹⁸⁵ an Illinois appellate court found that statements of a seven-year-old sexual abuse victim to a doctor, a pediatrician and chair of the Cook County Hospital division of child protective services, were non-testimonial to the extent that the child's statements responded to questions regarding the nature of the assault, described pain and injury, and aided the physical examination (thus qualifying under the medical treatment hearsay exception).¹⁸⁶ But, to the extent that the doctor elicited "accusatorial" statements regarding fault and identity of the perpetrator, they were testimonial and governed by *Crawford*.¹⁸⁷ The court emphasized that the fact that a Department of Children and Family Services agent engaged in a "prosecutorial" investigative role in regard to the sexual abuse had referred the child to the doctor "for medical evaluation of alleged sexual abuse" was not controlling.¹⁸⁸ In emphasizing this point, the court seemed to justify the admission of the non-testimonial portion of the statement, rather than explaining the rejection of the testimonial portion.¹⁸⁹ However, if such referral is not "controlling" in the latter instance, this case is authority for the proposition that "accusatorial" statements by children to physicians, unconnected to law enforcement, can be testimonial.

Adult victim and other adult statements to relatives, friends, accomplices, co-conspirators and others unconnected with law enforcement have likewise been found to be non-testimonial,¹⁹⁰ but

¹⁸⁴ *Cage*, 15 Cal. Rptr. 3d at 855 ("After all, *anyone* who obtains information relevant to a criminal investigation might (and certainly should) pass it along [to] the police.").

¹⁸⁵ 815 N.E.2d 789 (Ill. App. Ct. 2004).

¹⁸⁶ *Id.* at 804.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 803 ("We also find unpersuasive respondent's assertion that the relationship between DCFS and Dr. Lorand at the time of the examination indicated that she constructively acted as the government's agent in interrogating G.F.").

¹⁸⁹ *Id.* at 804. See also *People v. West*, 823 N.E.2d 82, 89 (Ill. App. Ct. 2005) (applying *T.T.*'s rationale to a rape victim's statement to an emergency room nurse and physician and excluding as testimonial under *Crawford* that portion of her statements concerning fault and identity).

¹⁹⁰ *Parle v. Runnels*, 387 F.3d. 1030, 1037 (9th Cir. 2004) (avoiding the need for determining the retroactive application of *Crawford* in post-conviction proceedings by declaring entries of threats and abuse contained in the diary of a domestic homicide victim non-testimonial since the entries were not made with the expectation that they would be used at a trial); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (holding a homicide accomplice's private conversation with a friend, made shortly before the killings and which related to one of the victims, to be non-testimonial and outside the scope of *Crawford*); *State v. Smith*, 881 A.2d 160, 172-74 (Conn. 2005) (holding that a murder victim's state-of-mind statement to her mother that the defendant "was going to kill me" was non-testimonial); *State v. Jones*, No. 9911016309, 2004 WL

courts have yet to confront the situation, discussed in oral argument in *Crawford*, of a declarant communicating with a relative, friend, or other person unconnected to law enforcement *with the expressed intention that the communication be relayed by that individual to law enforcement*

2914276, at *4 (Del. Super. Ct. Dec. 14, 2004) (deciding that statements made by the defendant to his girlfriend of his plan to murder another were not testimonial under *Crawford*, since he was not revealing his plan to a judge or policeman, but was simply bragging about it to his lover); *State v. Leonard*, 910 So. 2d 977, 987 (La. Ct. App. 2005) (classifying a victim's statement to his girlfriend, admissible under the Existing State of Mind hearsay exception, as non-testimonial); *State v. Heggart*, 908 So. 2d 1245, 1248 (La. Ct. App. 2005) (concluding that a murder victim's present sense utterances made to a friend (former lover) during a telephone conversation immediately prior to the killing were non-testimonial); *People v. Shepherd*, 689 N.W.2d 721, 729 (Mich. Ct. App. 2004) (finding that jailhouse statements the defendant's boyfriend made to visiting relatives, overheard by a guard, to be "clearly" non-testimonial, reasoning that "[e]ven under the broadest definition of testimonial, it is unlikely that Mr. Butters would have reasonably believed that the statements would be available for use at a later trial"); *State v. Blackstock*, 598 S.E.2d 412, 420 (N.C. Ct. App. 2004) (finding that an adult victim's hospital conversations about the cause of his injuries, made to his wife and daughter over a period of several days, were non-testimonial because there were no circumstances indicating that the victim had a reasonable expectation that they would be used prosecutorially); *Miller v. State*, 98 P.3d 738, 744 (Okla. Crim. App. 2004) (ruling that a co-defendant's confession implicating the defendant and made to fellow inmates while incarcerated was not testimonial under *Crawford*, since "[i]t was not admitted through affidavit, a formalized deposition, and was not a confession resulting from a custodial interrogation," but holding it improperly admitted in contravention of the Confrontation Clause nonetheless after finding the statement lacked sufficient indicia of reliability under the former *Roberts* reliability approach to non-testimonial evidence); *Texas v. Woods*, 152 S.W.3d 105, 114 (Tex. Crim. App. 2004) (holding a homicide co-defendant's casual "street corner" statements to acquaintances both before and shortly after the murder to be non-testimonial, thus making the rules articulated in *Crawford* inapplicable); *State v. Wilkinson*, 879 A.2d 445, 447 (Vt. 2005) (finding an aggravated assault victim's excited utterance to his cousin non-testimonial); *State v. Orndorff*, 95 P.3d 406, 407-08 (Wash. Ct. App. 2004) (finding one adult victim's excited utterance immediately after a home invasion was not testimonial, and explaining that the utterance fit into none of the categories described in *Crawford* and "[i]t was not a declaration or affirmation made to establish or prove some fact; it was not prior testimony; and [the declarant] had no reason to expect that her statement would be used prosecutorially"); *State v. Ferguson*, 607 S.E.2d 526, 528-29 (W. Va. 2004) (finding a murder victim's "excited utterances" to friends were not testimonial, and refusing to extend "*Crawford's* largely unexplored ban on 'testimonial hearsay' that has not been tested by cross-examination" to statements made separate from any official investigation to "non-official and non-investigational witnesses"); *State v. Manuel*, 697 N.W.2d 811, 824 (Wis. 2005) (ruling that a homicide eyewitness' spontaneous statement to his girlfriend in a private conversation without any expectation that she would relay it to police was non-testimonial); *State v. Manuel*, 685 N.W.2d 525, 532 (Wis. Ct. App. 2004) (finding non-testimonial a statement an eyewitness to a homicide made to his girlfriend, describing the incident that had just occurred, because it fell within the state's "statement of recent perception" hearsay exception, which required that the statement not be made in contemplation or anticipation of litigation).

for *evidentiary use*.¹⁹¹ Statements made under such circumstances may very likely be classified as testimonial by courts in the future. However, it does appear that something other than simply a victim's disclosure of a brutal attack and a plea for help to a stranger will be needed to make that stranger an "agent" of the police and the victim's statement "testimonial," even though the stranger subsequently relays that information to the police.¹⁹²

In *Hammond v. United States*,¹⁹³ the District of Columbia Court of Appeals found a murder accomplice's statement against interest implicating himself and the defendant, made to his girlfriend soon after the killing, to be non-testimonial under *Crawford* since the statements were "not elicited during structured police interrogation or given by the declarant to any law enforcement officer."¹⁹⁴

Even though the person eliciting a structured statement is not classified as a member of law enforcement, if he or she has an independent legal obligation to investigate (not just report) criminal activity—such as child abuse—or the person's special abilities are utilized by law enforcement to facilitate an investigation, most courts have treated such statements as testimonial.¹⁹⁵ Astonishingly, some

¹⁹¹ See *supra* note 162 (recounting discussion of this question during oral argument in *Crawford*).

¹⁹² *West*, 823 N.E.2d at 91–92 (distinguishing as non-testimonial statements made to a 911 dispatcher for the purposes of securing help and as testimonial statements to the dispatcher describing the direction in which the assailants fled and the property they took).

¹⁹³ 880 A.2d 1066 (D.C. 2005).

¹⁹⁴ *Id.* at 1100.

¹⁹⁵ For example, one court classified as testimonial a child sexual abuse victim's statement to a Department of Children and Family Services agent (who had a legal obligation to investigate reports of abuse) and who was working in cooperation with law enforcement. *In re T.T.*, 815 N.E.2d 789, 800 (Ill. App. Ct. 2004). The court commented that, because "child abuse has both criminal and social welfare implications, DCFS and the State's Attorney may naturally share some involvement in a particular case," and held that "where DCFS works at the behest of and in tandem with the State's Attorney with the intent and purpose of assisting in the prosecutorial effort, DCFS functions as an agent of the prosecution." *Id.* at 801. See also *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005) (holding as testimonial statements made by a child to a "forensic interviewer" referred by governmental officials and prior to the child being examined by a doctor, when two video recordings of the session were made consistent with the regular protocol, one was retained by the center employing the interviewer, and the other was delivered to law enforcement); *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 756–57 (Ct. App. 2004) (ruling a four-year-old child sexual assault victim's statement was testimonial where the police utilized the service of the county's Multidisciplinary Interview Center, a facility "specially designed and staffed for interviewing children suspected of being victims of child abuse," and the interview session, conducted by a forensic interview specialist, who was not a government employee, was personally monitored by a deputy district attor-

courts¹⁹⁶ reached a contrary conclusion by exaggerating and distorting one of the illustrative formulations for determining whether a statement is testimonial (which was identified but not adopted in *Crawford*), that is, “pretrial statements that declarants would reasonably expect to be used prosecutorially,” and virtually ignoring the others.¹⁹⁷ One court in Ohio, for example, has held that statements made by a rape victim to a nurse, in a “specialized healthcare facility designed to provide expert care to victims of violent sexual assault,” were not testimonial, despite the investigating officer having taken the victim to the unit for treatment and remaining present during the interview.¹⁹⁸

A Minnesota court similarly held that a seven-year-old child-molestation victim’s videotaped statement to a nurse practitioner with the Midwest Children’s Resource Center (MCRC) was not testimonial even though an investigating detective and child-protection worker

ney and his investigator); *In re Rolandis G.*, 817 N.E.2d 183, 188 (Ill. App. Ct. 2004) (finding that a child abuse victim’s statements were testimonial because they were made to an agent of a child advocacy center in an interview one week after the incident with a detective observing the interview through a two-way mirror); *State v. Snowden*, 867 A.2d 314, 325 (Md. 2005) (determining that statements of two child sexual abuse victim, ages eight and ten, were testimonial when elicited by a sexual abuse investigator of the Department of Health and Human Services during a structured interview conducted at the request of—and in the presence of—the investigating police officer); *State v. Mack*, 101 P.3d 349, 352 (Or. 2004) (holding that a three-year-old child’s statement, in a child murder prosecution, was testimonial where police had asked a Department of Human Services caseworker to conduct the interviews that produced the statements and the police were present and videotaped the sessions).

¹⁹⁶ *State v. Karsky*, 696 N.W.2d 816 (Minn. Ct. App. 2005); *In re D.L.*, No. 84643, 2005 WL 1119809 (Ohio Ct. App. May 12, 2005); *State v. Stahl*, No. 22261, 2005 WL 602687, at *4 (Ohio Ct. App. Mar. 16, 2005); *State v. Lee*, No. 22262, 2005 WL 544837 (Ohio Ct. App. Mar. 9, 2005).

¹⁹⁷ See *supra* notes 154–56 for a description of these formulations.

¹⁹⁸ *Stahl*, 2005 WL 602687, at *4. Though the officer, who had previously interviewed the victim and obtained a statement, did not participate in the interview, a complete description of the assault was elicited for various purposes, including facilitating the collection of physical evidence consisting of photographs, swabs, dental floss, fingernail scrapings, hair samples, and descriptions of bruises. *Id.* at *6. The victim, prior to the interview, signed a form authorizing release of evidence “to a law enforcement agency for use only in the investigation and prosecution of this crime.” *Id.* The court, though, took note that the form made no reference to statements made during the examination, *id.* at *7, and that the victim “could have reasonably believed that she was at DOVE for the purpose of providing physical evidence, without necessarily understanding that she was also providing testimonial evidence.” *Id.* at *6. *Stahl* expanded upon a very similar decision reached by that court one week earlier, *Lee*, 2005 WL 544837. The only material difference between the two cases was that no law enforcement officer was present during the interview in the *Lee* case. For another Ohio case arriving at the same conclusion on similar facts, see *In re D.L.*, 2005 WL 1119809.

referred the child to the nurse for the purpose of being interviewed and the detective observed the interview from another room.¹⁹⁹ Justifying its conclusion, the court stated:

Here, although the MCRC examination may have been arranged by Detective Manuel and a child-protection worker, there is no indication that T.L.K. thought that her statements might be used in a later trial. T.L.K. was driven to MCRC by her foster mother, and she was shielded from the police presence throughout the MCRC examination. The record is clear that Detective Manuel did not interrupt or direct any portion of the interview or examination. The length of time between the alleged abuse and the examination also suggests that T.L.K. was not aware of any prosecutorial purpose of the examination and did not “reasonably believe that her disclosures would be available for use at a later trial.”²⁰⁰

Apparently, the ability of the officer and others to disguise the evidentiary purpose of the interview from a seven-year-old child was controlling. The court concluded that the defendant failed to meet his burden of showing that “the circumstances surrounding the contested statements led [the child] to reasonably believe her disclosures would be available for use at a later trial or, that the circumstances would lead a reasonable child of her age to have that expectation.”²⁰¹

2. Statements Made During Custodial or Structured Interrogations

It is certainly not surprising that courts dealing with cases involving interrogations closely resembling Sylvia’s interrogation in *Crawford* faithfully classify them as testimonial. Statements elicited from accomplices or co-conspirators, during police interrogations, are easily classified as testimonial.²⁰² A formal voluntary statement of an eyewitness to a murder, which was reduced to writing, signed, and

¹⁹⁹ *Karsky*, 696 N.W.2d at 819.

²⁰⁰ *Id.* at 820 (quoting *State v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005)).

²⁰¹ *Id.* at 820 (quoting *Scacchetti*, 690 N.W.2d at 396).

²⁰² *See, e.g.*, *State v. Cox*, 876 So. 2d 932, 938 (La. Ct. App. 2004) (declaring co-conspirator’s statement during police interrogation “falls squarely within the reach of *Crawford*”); *State v. Morton*, 601 S.E.2d 873, 875–76 (N.C. Ct. App. 2004) (holding statements made in an interview at the sheriff’s office after *Miranda* rights were given to be testimonial); *State v. Carter*, No. 84036, 2004 WL 2914921, at *4–5 (Ohio Ct. App. Dec. 16, 2004) (finding codefendant’s statement during police interrogation to be testimonial). *See also* *Hernandez v. State*, 875 So. 2d 1271 (Fla. Dist. Ct. App. 2004) (ruling statements of co-defendant after arrest during a police-controlled phone call with the defendant were testimonial).

given at the police station, was also determined to be testimonial.²⁰³ The tape-recorded statements of two eyewitnesses to an assault, which were reduced to seventeen pages of transcript, were the product of structured police questioning and thus qualified as testimonial under any “conceivable definition” of the term “testimonial.”²⁰⁴ A child sexual abuse victim’s tape-recorded statement that was the product of police questioning and was made during a “classic station-house interview” was found to be “indistinguishable” from Sylvia’s statement in *Crawford* notwithstanding that Sylvia was in custody and this victim was not.²⁰⁵

3. Statements Made During a Plea Allocation or During Testimony Given in Court Proceedings

The Supreme Court in *Crawford* stated that the “unpardonable vice of the *Roberts* test” was its capacity to admit “core testimonial statements that the Confrontation Clause plainly meant to exclude.”²⁰⁶ Demonstrating this fact, the court cited numerous cases admitting under the *Roberts* test “plainly testimonial statements,” specifically noting that these included cases involving plea allocutions, grand jury testimony, and prior trial testimony.²⁰⁷ Courts, after *Crawford*, have not engaged in this “vice.” Post-*Crawford* cases have classified plea allocutions and grand jury testimony as testimonial.²⁰⁸ Similarly, the Colorado Supreme Court applied *Crawford* to preliminary hearing testimony.²⁰⁹

²⁰³ *Samaron v. State*, 150 S.W.3d 701, 707 (Tex. App. 2004) (noting that the statement was written and signed after being questioned by police rather than a spontaneous statement about what had happened).

²⁰⁴ *People v. Lee*, 21 Cal. Rptr. 3d 309, 314 (Ct. App. 2004) (finding that a tape recorded police interrogation filling seventeen pages of transcript certainly qualifies as testimonial “under any conceivable definition” (quoting *Crawford v. Washington*, 541 U.S. 36, 52 n.4 (2004))).

²⁰⁵ *People v. Cage*, 15 Cal. Rptr. 3d 846, 854 (Ct. App. 2004).

²⁰⁶ *Crawford*, 541 U.S. at 63.

²⁰⁷ *Id.* at 64–65.

²⁰⁸ *United States v. Bruno*, 383 F.3d 65, 78 (2d Cir. 2004) (finding “no question” that plea allocutions and grand jury testimony are testimonial statements under *Crawford*); *United States v. McClain*, 377 F.3d 219, 221 (2d Cir. 2004) (holding a plea allocation testimonial “as it is formally given in court, under oath, and in response to questions by the court or the prosecutor”); *People v. Shepherd*, 689 N.W.2d 721, 721 (Mich. Ct. App. 2004) (ruling transcript of guilty plea to subornation of perjury by defendant’s boyfriend was testimonial and wrongly admitted); *People v. Hardy*, 824 N.E.2d 953, 955 (N.Y. 2005) (finding use of redacted transcript of co-defendant’s plea allocation reversible error).

²⁰⁹ *People v. Fry*, 92 P.3d 970 (Colo. 2004) (finding, en banc, that the opportunity to cross-examine the subsequently unavailable declarant, afforded to the defendant at a preliminary hearing, did not constitute a meaningful prior opportunity to cross-

4. Statements Made by Co-conspirators in the Course and in Furtherance of the Conspiracy

Statements made by co-conspirators in the course of and in furtherance of a conspiracy and made to co-conspirators or others unconnected to law enforcement appear to be clearly outside the realm of being testimonial. Justice Scalia, speaking for the majority in *Crawford*, commented that statements in furtherance of a conspiracy are “by their nature” not testimonial.²¹⁰ The declarants making such statements have no expectation of their eventual evidentiary use and they are not generated or elicited by the efforts of law enforcement. A Texas Court of Appeals concluded that a co-conspirator’s pre-murder statements made to fellow conspirators in planning the crime, and overheard by a girlfriend of one of them, did not qualify as testimonial under *Crawford*.²¹¹ The court noted that these statements “were not made in a setting where it might reasonably be expected the statements would be used in judicial proceedings.”²¹² The Eighth Circuit Court of Appeals held that co-conspirator statements “made to loved ones and acquaintances . . . are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks” and therefore were not testimonial.²¹³

Beginning at the oral argument in *Crawford*, questions arose as to whether co-conspirator statements made in furtherance of a conspiracy—but made to confidential informants or undercover law enforcement agents who are feigning participation—would be considered testimonial.²¹⁴ It has been advanced that where a confidential informant is participating in the conversations producing the co-conspirator statements “for the very reason of obtaining evidence”

examine since the right to cross-examine was limited at the hearing to the issue of probable cause, and further holding that the introduction at trial of the preliminary hearing testimony violated the defendant’s confrontation rights); *State v. Stuart*, 695 N.W.2d 259 (Wis. 2005) (holding preliminary hearing testimony of an unavailable witness not admissible because, for confrontation purposes, there was no meaningful opportunity to cross-examine). *But see* *State v. McGowen*, No. M2004-00109-CCA-R3-CD, 2005 WL 2008183 (Tenn. Crim. App. Aug. 18, 2005) (finding, for confrontation purposes, cross-examination opportunity at preliminary hearing sufficient to justify the introduction at trial of testimony generated at the preliminary hearing when the witness became unavailable).

²¹⁰ *Crawford*, 541 U.S. at 56.

²¹¹ *Wiggins v. State*, 152 S.W.3d 656, 659 (Tex. App. 2004). *See also* *Bush v. State*, 895 So. 2d 836, 847 (Miss. 2005) (holding that “[u]nder *Roberts*, *Crawford*, *Mitchell*, and Rule [of Evidence] 803(d)(2)(E),” statements made by one co-conspirator to another in planning a robbery were admissible).

²¹² *Wiggins*, 152 S.W.3d at 659.

²¹³ *United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004).

²¹⁴ *See supra* note 164.

against them, the statements so generated would fall within the rule of *Crawford* and be excluded, but it appears that even these co-conspirator statements will be classified as non-testimonial.²¹⁵

Consistent with the petitioner's answer to a query on this issue during oral argument in *Crawford*,²¹⁶ the Second Circuit applied the "reasonable expectation" test to answer the question of "whether [the co-conspirator] served as a 'witness' who bears testimony within the meaning of the Clause, despite the fact that he was unaware that his statements were being elicited by law enforcement and would potentially be used in a trial."²¹⁷ In this case, the Second Circuit observed that the *Crawford* Court had alluded to various formulations of the reasonable expectation test and, though not adopting any of them, the *Crawford* majority commented that they share a "common nucleus" and define the scope of the Confrontation Clause at "various levels of abstraction."²¹⁸ Predicting that the Supreme Court would ultimately use the reasonable expectation test as "the anchor of a more concrete definition of testimony," the Second Circuit concluded that the co-conspirator's unwitting statements to a confidential informant in furtherance of the conspiracy did not constitute testimony since he had "no knowledge of the [confidential informant's] connection to investigators and believed that he was having a casual conversation with a friend and potential co-conspirator."²¹⁹

Using a different rationale, the Third Circuit Court of Appeals came to the same conclusion that a co-conspirator's statements made to a confidential police informant in furtherance of the conspiracy

²¹⁵ *United States v. Hendricks*, 395 F.3d 173, 182 (3d Cir. 2005), *rev'g* No. CRIM.2004-05F/R, 2004 WL 1125146 (D.V.I. May 11, 2004) (overturning a district court decision that incorporated this analysis and found that such statements were "testimonial," the appellate court noted the analysis was "not without some appeal," but stated "the conversations reasonably could be categorized as involving statements that [the confidential informant] expected to be used prosecutorially; obtaining evidence for the prosecution is, after all, the *raison d'être* of being a confidential informant"). As to this concern being raised in oral argument, *see supra* note 163.

²¹⁶ *See supra* note 162. Mr. Fisher, for the petitioner, cited the law professors who filed an amicus brief advancing the "reasonable expectation" test for classifying statements as testimonial. The test was described as an objective one that would ask: "Would a reasonable person in the position of declarant anticipate that the statement would likely be used for evidentiary purposes?" Transcript of Oral Argument at 9-10, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 22705281; Brief Amicus Curiae of Law Professors, *supra* note 156, at 20.

²¹⁷ *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004). *See also* *People v. Redeaux*, 823 N.E.2d 268, 271 (Ill. App. Ct. 2005) (arriving at the same conclusion but reasoning that the conspiratorial statement to the undercover agent was not the product of "interrogation" as that term was utilized in *Crawford*).

²¹⁸ *Saget*, 377 F.3d at 229.

²¹⁹ *Id.*

are not testimonial under *Crawford*.²²⁰ It justified this classification by noting that the *Crawford* Court cited with approval its own previous decision in *Bourjaily v. United States*²²¹—where admission of such a statement was found to be proper under the Clause—and referenced it “as an example of a case in which non-testimonial statements were correctly admitted against the defendant despite the lack of a prior opportunity for cross-examination.”²²²

5. Dying Declarations

The *Crawford* Court, though not deciding the question as to whether “testimonial” dying declarations should be exempted from the *Crawford* exclusionary rule upon historical grounds, did note that such an exception would be *sui generis*.²²³ It hinted that such an exception might be warranted by stating, “[t]he one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are.”²²⁴ Seizing on this, the Supreme Court of California, in a post-*Crawford* case, recognized such an exception when the dying declaration was given to police responding to the shooting of the declarant.²²⁵ The Supreme Court of California did so, concluding:

[I]f, as *Crawford* teaches, the confrontation clause “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding,” it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment.²²⁶

The Supreme Court of Georgia, in dicta, hinted that it might be amenable to recognizing an exception from the *Crawford* rule for testimonial dying declarations by quoting at length *Crawford*'s footnote

²²⁰ *Hendricks*, 395 F.3d at 183–84.

²²¹ 483 U.S. 171 (1987).

²²² *Hendricks*, 395 F.3d at 183. See also *Redeaux*, 823 N.E.2d at 270–71 (co-conspirator statement to undercover officer in the course of and in furtherance of the conspiracy was not the product of interrogation and was not testimonial).

²²³ *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

²²⁴ *Id.* (citations omitted).

²²⁵ *People v. Monterroso*, 101 P.3d 956, 971 (Cal. 2004).

²²⁶ *Id.* at 972 (quoting *Crawford*, 541 U.S. at 54).

six.²²⁷ Other courts found that dying declarations fall outside the ambit of exclusion under the Confrontation Clause after *Crawford*.²²⁸

Arriving at the opposite conclusion, one federal district court, noting that the *Crawford* Court deliberately left the question open, concluded that a stabbing victim's dying declaration, elicited through police questioning in the emergency room of a hospital, was "testimonial" under *Crawford*.²²⁹ The court stated that there was "no rationale in *Crawford* or otherwise under which dying declarations should be treated differently than any other testimonial statement."²³⁰ Another federal district court judge, though finding a murder victim's dying declaration admissible regardless of its testimonial nature under the Forfeiture by Wrongdoing Doctrine, rejected the contention by the government that otherwise it should be excepted from exclusion under *Crawford*.²³¹

²²⁷ *Walton v. State*, 603 S.E.2d 263, 265–66 (Ga. 2004) (discussing the unpreserved issue of the admission of a non-testimonial dying declaration made by the declarant to his brother).

²²⁸ For example, in *State v. Martin*, the Minnesota Supreme Court considered a statement by a murder victim—who had been shot in the chest and stabbed in the neck (cutting an artery)—who told his girlfriend "Call the police. Jeff and Lenair." 695 N.W.2d 578, 581 (Minn. 2005). The statement was made while the victim was in a great deal of pain, choking, and clutching his chest, just an hour before he died. *Id.* The court found that the severity of his injuries was sufficient to demonstrate an awareness of the declarant of his imminent demise and thus his statement qualified as a dying declaration. *Id.* at 583–84. The court additionally found the admission of this declaration did not offend the Confrontation Clause as interpreted by *Crawford* "because an exception for dying declarations existed at common law and was not repudiated by the Sixth Amendment." *Id.* at 585–86. Similarly, in *People v. Gilmore*, an Illinois appellate court found a critically wounded murder victim's hospital statement, describing his assailant and providing specific information that would lead to the perpetrator's identification, made to officers who had asked if he knew who shot him, to be a dying declaration. 828 N.E.2d 293 (Ill. App. Ct. 2005). Turning to the confrontation violation claim, the court recognized that since the declaration was the product of police questioning for the purpose of investigating a criminal offense, under *Crawford*, the statement was "testimonial." *Id.* at 301–02. However, the court, noting the dicta in *Crawford*'s footnote six, concluded that dying declarations were exempted from exclusion under the Clause. *Id.* at 302.

²²⁹ *United States v. Jordan*, No. CRIM. 04-CR-229-B, 2005 WL 513501, at *3 (D. Colo. Mar. 3, 2005).

²³⁰ *Id.* (emphasizing further the inherent reliability concerns regarding dying declarations and the fact that this exception was not even recognized at the time of the ratification of the Sixth Amendment).

²³¹ *United States v. Mayhew*, 380 F. Supp. 2d 961, 965 n.5 (S.D. Ohio 2005) (citing the inherent unreliability of such declarations as the reason they should not be exempted).

6. Certifications and Affidavits

It would appear that under even the narrowest interpretation, *Crawford*'s "testimonial" hearsay would include sworn affidavits and certifications. Such an interpretation would seem apparent from the *Crawford* majority's historical examination of colonial practices in admitting *ex parte* depositions and examinations,²³² and the Court's use of the definitions of a "witness" as one who "bears testimony" and "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."²³³ Additionally, all of the formulations of this "core class" of "testimonial" hearsay that the Court selected to highlight would appear to include affidavits and certifications:

Various formulations of this core class of "testimonial" statements exist: [1] "*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," [2] "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," [3] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.²³⁴

The *Crawford* Court even appeared to include unsworn—as well as sworn—affidavits in the category of testimonial hearsay sought to be regulated by the Clause, refuting the concurring Chief Justice's contention that it did not.²³⁵ The Court stated: "We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK."²³⁶

²³² *Crawford v. Washington*, 541 U.S. 36, 47–49 (2004).

²³³ *Id.* at 51.

²³⁴ *Id.* at 51–52 (citations omitted).

²³⁵ *Id.* at 71 (Rehnquist, C.J., concurring) ("Thus, while I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements.").

²³⁶ *Id.* at 52 n.3.

Concern and disagreement has arisen since the *Crawford* decision as to whether the term “testimonial” would include certifications, affidavits, or reports, sometimes authorized by law or sanctioned by rules of evidence, whereby an official or agent of the government or private entity makes certified statements as to whether certain procedures were followed or results obtained, or whether certain records exist. These certifications are often prepared with the knowledge they will be used as evidence and are often provided at the request of law enforcement officers or prosecutors. Their use, in some cases, provides proof essential to a successful prosecution, but courts appear divided as to their admissibility under *Crawford*.

The Supreme Court of Nevada considered a driving under the influence case in which the prosecution sought to admit into evidence an affidavit authorized by Nevada legislation and prepared by a healthcare professional who drew blood from the defendant.²³⁷ The statute authorized its admission at trial to prove the identity of the declarant, the identity of the person from whom the blood was drawn, proper custody and control of the blood, and the identity of the person who received it.²³⁸ Prior to trial, the trial court ordered its exclusion upon the defendant’s assertion that its introduction would violate his confrontation rights and the state sought mandamus to require its admission at trial.²³⁹ The Nevada Supreme Court refused to issue the writ, and declared that the affidavit, prepared pursuant to statute and solely for the prosecution’s use at trial, was testimonial under *Crawford* and could not be introduced unless the affiant was made available at trial for cross-examination.²⁴⁰

Similarly, a report prepared by an employee of a private laboratory documenting the results of a sexual assault victim’s blood test, which had been requested by and prepared for law enforcement, was held by a New York appeals court to have been improperly admitted under the business records exception to the hearsay rule and over the accused’s confrontation objection.²⁴¹ The court found that the report of the blood test was inadmissible as a business record because it was prepared in contemplation of litigation and therefore lacked the necessary indicia of reliability.²⁴² In finding a *Crawford* violation of the defendant’s confrontation rights, the court explained: “Because

²³⁷ *City of Las Vegas v. Walsh*, 91 P.3d 591, 595 (Nev. 2004).

²³⁸ *Id.* at 593.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *People v. Rogers*, 780 N.Y.S.2d 393, 396 (App. Div. 2004).

²⁴² *Id.* at 396–97.

the test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial.”²⁴³

In contrast, a Texas Court of Appeals decision ruled that an autopsy report, prepared by a now-deceased medical examiner, and admitted in a murder prosecution under the public records hearsay exception, was “non-testimonial.”²⁴⁴ After concluding that a medical examiner was not “other law enforcement personnel,” the court found his report was not excluded from the public records exception. Further, because, in part, it was an “objective, routine, scientific determination of an unambiguous factual nature” and prepared by one who did not have a motive to fabricate, it did “not fall within the categories of testimonial evidence described in *Crawford*.”²⁴⁵ It is difficult to imagine that an autopsy report, prepared by a medical examiner, would not have been prepared with an eye toward its use in a subsequent criminal prosecution. Since a report by a medical examiner is not simply an objective observation of a routine nature when it includes subjective analysis of the cause of death, it is difficult to justify the court’s classification of such a document as non-testimonial.

Recently, the Maryland Court of Special Appeals addressed this issue in a homicide case where the cause of death was not in dispute.²⁴⁶ This court found an autopsy report of a non-testifying medical examiner admissible under the business records and public records hearsay exceptions, but went on to address a *Crawford* challenge:

We hold that the findings in an autopsy report of the physical condition of a decedent, which are routine, descriptive and not analytical, which are objectively ascertained and generally reliable and enjoy a generic indicium of reliability, may be received into evidence without the testimony of the examiner. Where, however, contested conclusions or opinions in an autopsy report are central to the determination of *corpus delicti* or criminal agency and are offered into evidence, they serve the same function as testimony and trigger the Sixth Amendment right of confrontation.²⁴⁷

²⁴³ *Id.* at 397.

²⁴⁴ *Moreno Denoso v. State*, 156 S.W.3d 166, 180–83 (Tex. App. 2005).

²⁴⁵ *Id.* (noting also that even if the autopsy report was testimonial, the error in admitting it was harmless).

²⁴⁶ *Rollins v. State*, 866 A.2d 926 (Md. Ct. Spec. App. 2005).

²⁴⁷ *Id.* at 950–51, 954.

One judge of the Criminal Court of New York held that the statutorily-authorized certification by an agent of the Department of Motor Vehicles indicating that the defendant was properly noticed of his driver license suspension, was inadmissible because it was not a business record (not a contemporaneous entry) and because it violated confrontation rights of the defendant under *Crawford*.²⁴⁸ The court pointed out that “[p]ost *Crawford*, the people’s continued reliance on [the statute authorizing the certification] to permit such affidavits of non-testifying witnesses to be received in evidence to prove an element of the crime charged is simply untenable.”²⁴⁹

A Florida court of appeal, in *Shiver v. State*,²⁵⁰ considered the admissibility of a statutorily-authorized “breath test” affidavit, prepared by a non-testifying trooper and offered to establish an essential prerequisite to the admissibility of breathalyzer readings in DUI cases: that required maintenance had been performed upon the breathalyzer. The court concluded that this affidavit was testimonial since it had been prepared with a reasonable expectation that it would be used prosecutorially—in fact the only purpose the affidavit served was its use at trial.²⁵¹

Though the *Crawford* Court specifically labeled hearsay admitted under the business records exception non-testimonial,²⁵² modern ex-

²⁴⁸ *People v. Capellan*, 791 N.Y.S.2d 315, 318 (Crim. Ct. 2004). *See also* *People v. Pacer*, 796 N.Y.S.2d 787, 788 (App. Div. 2005) (deciding that an “affidavit of regularity/proof of mailing” prepared by a Department of Motor Vehicles employee was erroneously introduced to prove a necessary element of the offense charged, that the defendant knew his driving privileges had been revoked, and concluding it was error due to the fact that under *Crawford* the document was testimonial and the declarant did not testify); *People v. Niene*, 798 N.Y.S.2d 891, 894 (Crim. Ct. 2005) (finding the affidavit of an official in the Department of Consumer Affairs to the effect that no vendor’s license had been issued by that office to the defendant was “testimonial” and inadmissible). *But see* *State v. N.M.K.*, 118 P.3d 368, 372 (Wash. Ct. App. 2005) (finding that a certification by a Department of Licensing official, stating that no license had been issued to the defendant, was non-testimonial and admissible).

²⁴⁹ *Capellan*, 791 N.Y.S.2d at 318.

²⁵⁰ 900 So. 2d 615 (Fla. Dist. Ct. App. 2005). *See also* *Belvin v. State*, No. 4D04-4235, 2005 WL 1336497, at *3 (Fla. Dist. Ct. App. June 8, 2005) (concluding also that such a statutorily-authorized breath test affidavit was inadmissible testimonial hearsay, stating: “A breath test affidavit thus appears to fall squarely within *Crawford*’s ‘core class’ of ‘testimonial’ statements.”).

²⁵¹ *Shiver*, 900 So. 2d at 618.

²⁵² *Crawford v. Washington*, 541 U.S. 36, 56 (2004) (“Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records”); *see also id.* at 76 (Rehnquist, C.J., concurring) (“To its credit, the Court’s analysis of ‘testimony’ excludes at least some hearsay exceptions, such as business records and official records.”); *United States v. Gutierrez-Gonzales*, 111 F. App’x 732, 734 (5th Cir. 2004) (finding items contained in defendant’s immigration file were non-testimonial public records under *Crawford*); *Johnson v. Renico*, 314 F.

pansion of this exception permits its predicate—that it was made near the time of the happening of the event by a person with knowledge of the event, that it was the routine practice of the business to make such an entry, and that the record is what it purports to be—to be established by certification in lieu of the testimony of a custodian or other qualified person.²⁵³ Obviously, since such certification will be made in contemplation of its use in litigation and will often be procured by law enforcement officers or prosecutors, its continued use in criminal prosecutions is suspect under *Crawford*. A United States district judge, in a case of first impression, precluded the government from introducing business records by authentication using a certification authorized by Federal Rule of Evidence 902(11).²⁵⁴ Justifying this ruling, the court explained:

The statements within a certification contemplated by Rule 902(11) are testimonial statements because they contain “solemn declaration or affirmations made for the purpose of establishing or proving some fact,” namely that the proper foundation for the admission of the business record exists. They are the functional equivalent of ex parte in-court testimony that defendants cannot cross-examine. Indeed, the Rule 902(11) procedure itself takes the place of live, sworn testimony of a witness. Moreover, the Rule 902(11) declarants know that they are providing foundational testimony for business records to the government, and thus, must reasonably expect that their certifications will be used prosecutorially. Therefore, the Court concludes that the Rule 902(11) procedure violates defendants’ right to confrontation.²⁵⁵

However, in one post-*Crawford* decision, a court concluded, regarding similar certification provisions, that their use was non-

Supp. 2d 700, 707 (E.D. Mich. 2004) (holding statements contained in petitioner’s police booking information sheets “admitted pursuant to the business records exception . . . are by their nature nontestimonial, and their admission would not violate the holding in *Crawford* . . .”).

²⁵³ See, e.g., FED. R. EVID. 803(6) (amended in 2000 to allow proof that the record meets the criteria by means of testimony or certification); FED. R. EVID. 902(11) (allowing proof of authenticity of a business record to be established by certification). See also FLA. STAT. § 90.803(6) (as amended by 2003 Fla. Laws ch. 2003-259 § 2); MICH. R. EVID. 803(6) (amended in 2001); UTAH R. EVID. 803(6) (amended in 2001); PA. R. EVID. 803(6) (amended in 2001).

²⁵⁴ United States v. Wittig, No. 03-40142JAR, 2005 WL 1227790, at *2 (D. Kan. May 23, 2005) (noting that Rule 902(11) provides that authenticity of a business record may be established by “a written declaration of its custodian or other qualified person” to the effect that it was made contemporaneous with the event recorded by a person with knowledge, and that it was made by and kept in the regularly conducted activity).

²⁵⁵ *Id.* at *2 (citations omitted).

testimonial and not controlled by *Crawford*.²⁵⁶ The Fifth Circuit Court of Appeals, reviewing the conviction of a previously-deported alien for reentering the United States without consent of the Attorney General or Secretary of the Department of Homeland Security, held that admission of a Certificate of Nonexistence of Record (CNR), being non-testimonial, did not violate confrontation under *Crawford*.²⁵⁷ Though the court cited a prior case²⁵⁸ that held the contents of an immigration file were admissible as business records, it did not explain how this justified the admission of a CNR that was not a part of the contents of the defendant's immigration file, but merely an official's certification of the results of an inspection of that file. In this case, the official's observation was used to establish an essential element of the offense.²⁵⁹ Regarding the identical issue, the Ninth Circuit Court of Appeals recognized that the CNR certificate was prepared for litigation, but added that the certification addressed the absence of a document among "documents that were not prepared for litigation."²⁶⁰ Noting that this certificate did not "resemble the examples of testimonial evidence" described in *Crawford*, the court concluded that the certificate was non-testimonial and admissible.²⁶¹

Other post-*Crawford* cases likewise concluded that certifications or reports used in criminal prosecutions are non-testimonial under *Crawford*. In a driving while intoxicated case, the New Mexico Supreme Court reviewed the decision of a trial court excluding, as violating confrontation under *Crawford*, a blood alcohol report prepared by the Scientific Laboratory Division (SLD), a division of the New Mexico Department of Health.²⁶² The report described the

²⁵⁶ United States v. Rueda-Rivera, 396 F.3d 678, 680 (5th Cir. 2005).

²⁵⁷ *Id.*

²⁵⁸ United States v. Gutierrez-Gonzales, 111 F. App'x 732, 734 (5th Cir. 2004).

²⁵⁹ *Rueda-Rivera*, 396 F.3d at 680.

²⁶⁰ United States v. Cervantes-Flores, 421 F.3d 825, 833 (9th Cir. 2005).

²⁶¹ *Id.* at 833.

²⁶² State v. Dedman, 102 P.3d 628 (N.M. 2004). In a Massachusetts cocaine possession prosecution, a statutorily authorized certificate, admissible thereunder to establish the composition, quality and weight of the substance, was found to be non-testimonial under *Crawford*. Commonwealth v. Verde, 827 N.E.2d 701, 706 (Mass. 2005). The court, citing language in *Crawford*, commented:

[W]e do not believe that the admission of these certificates of analysis implicate[s] "the principal evil at which the Confrontation Clause was directed . . . particularly its use of *ex parte* examinations as evidence against the accused." The documentary evidence at issue here has very little kinship to the type of hearsay the confrontation clause was intended to exclude, absent an opportunity for cross-examination.

Id. (citations omitted). A similar Colorado statute authorizes admission of any report or finding by a criminalistics laboratory in lieu of the technician thereof personally

method the SLD used to test the defendant's blood and the results of that testing.²⁶³ Holding the exclusion to have been improper, the court found the report admissible under the public records exception. The court also found that since SLD employees were neither police officers nor law enforcement personnel and their report was neither investigative or prosecutorial nor prepared in an adversarial setting, the report was non-testimonial under *Crawford*.²⁶⁴ The court further explained that although this report was made by a government officer, it was only made to ensure an accurate measurement, not to produce testimony for introduction at a trial.²⁶⁵ Likewise, in *Luginbyhl v. Commonwealth*,²⁶⁶ the Virginia Court of Appeals, "[g]uided by the Supreme Court's decision in *Crawford* and the historical context in which it was rooted, as well as the reasoning of appellate courts in other states,"²⁶⁷ approved the introduction, over a Confrontation Clause challenge, of an absent breathalyzer operator's certificate attesting to the specific blood alcohol content of the defendant's blood and certifying that the equipment utilized was in good working order.²⁶⁸

In another driving while intoxicated case, the Court of Appeals of Indiana considered the constitutional propriety of introducing—over the defendant's confrontation objection—a certificate from the state's Director of Toxicology regarding the required inspection and necessary maintenance of the breath test instrument used in the case.²⁶⁹ This certificate, statutorily authorized, was introduced to es-

testifying to the analysis, comparison, or identification. *People v. Hinojas-Mendoza*, No. 03CA0645, 2005 WL 2561391, at *3–4 (Colo. Ct. App. July 28, 2005). Regarding the introduction in this case of such a report finding a white powder substance to be cocaine, the Colorado court held that it was non-testimonial and that *Crawford* did not require its exclusion. *Id.* at *4.

²⁶³ *Dedman*, 102 P.3d at 635.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 636.

²⁶⁶ 618 S.E.2d 347 (Va. Ct. App. 2005).

²⁶⁷ *Id.* at 355.

²⁶⁸ *Id.*

²⁶⁹ *Napier v. State*, 820 N.E.2d 144, 149 (Ind. Ct. App. 2005). See also *State v. Carter*, 114 P.3d 1001, 1007 (Mont. 2005) (Certifications, prepared by deputies, attesting to the proper inspection and maintenance of the Intoxilizer 5000 and which were a necessary prerequisite for the introduction of its blood alcohol reading in a DUI prosecution, were found to be non-testimonial. The court justified the conclusion that the certification did not fall within the "core group" of statements the Confrontation Clause was meant to exclude, stating: "[S]uch certification reports are not substantive evidence of a particular offense, but rather are foundational evidence necessary for the admission of substantive evidence. In other words, the certification reports are nontestimonial in nature in that they are foundational, rather than substantive or accusatory.").

establish the necessary evidentiary predicate for admitting the result of the breath test.²⁷⁰ The defendant claimed that this certificate was an affidavit, prepared for use in his criminal trial, and therefore was testimonial and controlled by *Crawford*. The court, though conceding that the certificate may be said to be an affidavit, concluded, directly contrary to the Florida *Shiver* decision,²⁷¹ that it was not testimonial within the meaning of *Crawford*. The court explained:

[W]e do not see how the admission of these certificates would serve to preclude any meaningful cross-examination of the breath test evidence presented against him. Even though the inspector of the machine and the Director of Toxicology who executed the certification of inspection did not testify at trial, the information contained in the certificates does not pertain to the issue of guilt. Rather, that information simply goes to inspection and certification matters. In our view, a defendant's inability to cross-examine that information which is contained in the certificates is not similar to the type of evidence that was of concern to the *Crawford* court. *Otherwise, the unreasonable alternative is to have a toxicologist in every court on a daily basis offering testimony about his inspection of a breathalyzer machine and the certification of the officer as a proper administrator of the breath test. Such a practice is obviously impractical.*²⁷²

It thus appears that, largely for pragmatic reasons, some courts are willing to create "exceptions" as to when an affidavit or certification, prepared for use in a criminal prosecution, will be considered testimonial for *Crawford* purposes. Such pragmatic concerns, however, may find compatibility with the dictates of *Crawford* without ignoring the obvious, which is that these certificates are testimonial.²⁷³ The Supreme Court of Louisiana, in *State v. Cunningham*,²⁷⁴ found such compatibility to exist where a statutory scheme authorized such affidavits to be introduced in lieu of the affiant's trial testimony only where: (1) sufficient and proscribed pretrial notice of the intent to do so is given by the state to the accused, (2) the accused had the election to have the state compel the attendance and testimony of the affiant at trial and (3) the accused fails to do so. Finding that these statutory requirements were satisfied, the court in *Cunningham* concluded that a criminalist's report identifying the contents of a baggie as marijuana was properly admitted, since the accused failed to timely

²⁷⁰ *Napier*, 820 N.E.2d at 147.

²⁷¹ *Shiver v. State*, 900 So. 2d 615 (Fla. Dist. Ct. App. 2005).

²⁷² *Napier*, 820 N.E.2d at 149 (citation omitted) (emphasis added).

²⁷³ For an analogous discussion regarding Federal Rule of Evidence 806, see *supra* notes 81–86 and accompanying text.

²⁷⁴ 903 So. 2d 1110, 1121 (La. 2005).

object and require the attendance of the declarant, and therefore effectively waived his constitutional right to confront him.²⁷⁵

7. Statements Made by Victims, Informants or Witnesses to Law Enforcement Personnel

a. Statements Made in 911 Calls

Prior to *Crawford*, Professors Richard D. Friedman and Bridget McCormick urged in regards to “dial-in testimony” reconsideration of *Roberts’s* “reliability” or “trustworthy” approach in favor of the testimonial approach that was ultimately embraced by *Crawford*.²⁷⁶ They did so, in part, specifically to address the phenomenon of using domestic violence victims’ prior 911 statements as substantive evidence against the accused where the victim does not testify at the trial.²⁷⁷ These professors observed:

The phenomenon we have described represents a dramatic change in the way criminal cases have traditionally been tried. Trying a case without the live testimony of the victim or complainant is nothing new; as we have acknowledged, that is how murder cases are necessarily tried. Instead, what is novel is that prosecutors are trying cases by relying on the out-of-court accusations of the complainant, sometimes in contravention of her live testimony and, most notably, often without presenting her live testimony, even though she may be perfectly available to testify. What is more, prosecutors routinely do so, and the courts are letting them do it.²⁷⁸

Anyone familiar with domestic violence and subsequent prosecutions arising out of it is aware of this phenomenon. Frequently, a call is made to 911 by someone asserting that she is the victim of abuse, often at the hand of her spouse or boyfriend, seeking an immediate law enforcement and emergency response. A tape recording of this call is often made. This domestic violence victim, unlike other victims, usually has a significant relationship to her alleged attacker. During the prosecutorial period and before the trial commences, circumstances often operate on such victims to render them reluctant to

²⁷⁵ *Id.* at 1122.

²⁷⁶ Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1172–74, 1224–28 (2002). These professors also participated in preparing an amicus brief in *Crawford* advancing the “testimonial” approach. *See supra* note 156 (listing the other professors and referring to parts of their argument).

²⁷⁷ *Id.* at 1174–80.

²⁷⁸ *Id.* at 1180.

testify on behalf of the prosecution at trial.²⁷⁹ The victim may reconcile with her spouse or attacker and may even continue or resume living with him. Because of this reconciliation, the victim may no longer desire to cooperate with the government. In other cases, she may refuse to cooperate due to fear of retaliation or loss of financial support. Finally, in some cases, the victim may not cooperate simply because she knows the 911 report was false and was made in anger. In such cases, prosecutors attempt to salvage their cases by seeking the introduction of the victim's 911 statements as a substitution for her unobtainable present testimony.²⁸⁰ Could a victim's statements made during a 911 call or to the responding officers be used substantively at trial over the confrontation objection of the defendant? Would the statements be deemed "testimonial" under *Crawford* such that they could not be admitted unless the victim presently testified or the accused had a prior meaningful opportunity to cross-examine her?

Professors Friedman and McCormack opined that not all statements made during 911 calls would necessarily be classified as testimonial and offered these considerations for classifying them:

Now consider statements made in 911 calls and to responding police officers. A reasonable person knows she is speaking to officialdom—either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities. The caller's statements may therefore serve either or both of two primary objectives—to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation, and to

²⁷⁹ See *Fowler v. State*, 809 N.E.2d 960, 965 (Ind. Ct. App. 2004) (identifying fear of reprisal, hope of reconciliation, and financial and support concerns as reasons a victim might decide not to cooperate with a prosecution, and citing one source as estimating that between as many "as eighty and ninety percent of domestic violence victims recant their accusations or refuse to cooperate with a prosecution." (citing Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n.76 (2003))); *People v. Moscat*, 777 N.Y.S.2d 875, 878 (Crim. Ct. 2004) ("Prosecutors like to point out 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, or because they are reluctant to break up their own families. Defense lawyers, for their part, like to point out that some complainants in domestic assault cases do not come forward to testify at trial because they fear that cross-examination will expose their original complaints as false or greatly exaggerated.").

²⁸⁰ See, e.g., *Moscat*, 777 N.Y.S.2d at 878 ("In any event, because complainants in domestic violence cases often do not appear for trial, prosecutors have in recent years increasingly tried to fashion 'victimless' prosecutions. In such a case, the government tries to prove the defendant's guilt without testimony from the complainant through other evidence.").

provide information to aid investigation and possible prosecution related to that situation. In occasional cases, the first objective may dominate—the statement is little more than a cry for help—and such statements may be considered nontestimonial, at least to the extent that they are not offered to prove the truth of what they assert. But as our discussion in Part I has shown, these statements are often more detailed, providing significant information that the police do not need for immediate intervention but that may be useful to the criminal justice system. A reasonable person in the position of the declarant would realize that such information would likely be used in a criminal investigation or prosecution. Accordingly, such a statement should be considered testimonial, and the confrontation right should apply to it.

. . . The more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial.

Thus, if any significant time has passed since the events it describes, the statement is probably testimonial. When, as is often the case, the 911 call consists largely of a series of questions by the operator, and responses by the caller, concerning not only the current incident but the history of the relationship, the caller's statements should be considered testimonial.²⁸¹

In spite of the fact that the United States Supreme Court adopted the “testimonial” approach, advanced by these professors in order to curb this practice, a survey of post-*Crawford* cases indicates a strong desire of some lower courts to preserve this source of admissible evidence by classifying 911 calls as “non-testimonial.”

Less than three weeks after the *Crawford* decision, the beginning of this trend was first, and perhaps prematurely,²⁸² exhibited in the opinion of a City of New York Criminal Court judge in *People v. Moscat*.²⁸³ In an opinion denying a motion in limine to exclude a 911 call purportedly made by the victim in a domestic violence case, this judge described such evidence as follows:

Perhaps the most common form of such evidence is a call for help made by a woman to 911. Typically, in such a call a woman tells the 911 operator (in New York City, a civilian police employee) that her boyfriend has just shot, stabbed or beaten her (and may be about to do so again); usually, the woman hurriedly answers a few questions from the operator and then asks the op-

²⁸¹ Friedman & McCormack, *supra* note 276, at 1242–43 (footnote omitted).

²⁸² See *supra* note 168 (describing a *New York Times* article alleging the judge was so eager to rule on a *Crawford* issue that he invented facts not presented in the trial).

²⁸³ 777 N.Y.S.2d at 875.

erator to send police officers and an ambulance to her aid. *The present case fits that description.*²⁸⁴

In concluding that the 911 call did not resemble police interrogations or circumstances wherein the declarant is “bearing witness” in contemplation of future legal proceedings, under one of *Crawford’s* suggested formulations of the term “testimonial,” the court explained:

A 911 call is typically initiated not by the police, but by the victim of a crime. It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril. Thus a pretrial examination is clearly “testimonial” in nature in part because it is undertaken by the government in contemplation of pursuing criminal charges against a particular person. But a 911 call is fundamentally different; it is undertaken by a caller who wants protection from immediate danger. A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid.

...
... Typically, a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a “witness” in future legal proceedings; she is usually trying simply to save her own life.²⁸⁵

The court also noted that the 911 call would likely be admitted as an excited utterance; under this exception the declarant’s ability to engage in reflective thinking must necessarily be diminished due to the stress produced by a startling event. In such a state, the court reasoned, the victim is not likely to fabricate her statement nor contemplate its use in future proceedings.²⁸⁶ Since the 911 call was not “testimonial,” the judge ruled that it could be introduced into evidence “without offending the Sixth Amendment” as long as it meets the requirements for an exception to the hearsay rules.²⁸⁷

A California Court of Appeal decision, citing *Moscat* and applying its rationale, approved of the admission of a spontaneous 911 call

²⁸⁴ *Id.* at 878 (emphasis added).

²⁸⁵ *Id.* at 879–80.

²⁸⁶ *Id.* at 880. See also *Commonwealth v. Eichele*, 66 Pa. D. & C.4th 460, 469 (Pa. Ct. Com. Pl. 2004) (deciding that an excited utterance a witness made to his girlfriend was not testimonial, and commenting that “[c]onceptually, an excited utterance is at the opposite end of the hearsay spectrum from testimonial hearsay”).

²⁸⁷ *Moscat*, 777 N.Y.S.2d at 880.

from the victim over confrontation objections.²⁸⁸ This court emphasized that it would be “difficult to identify any circumstances under which a . . . spontaneous statement would be ‘testimonial,’” since it must be made without reflection.²⁸⁹

The Eighth Circuit Court of Appeals found a twelve-year-old’s 911 call, made while witnessing an argument between his aunt and her boyfriend that escalated into an assault by firearm, was “emotional and spontaneous” and not “deliberate and calculated” and therefore “was an excited utterance, and under these circumstances, nontestimonial.”²⁹⁰

A Minnesota court of appeals likewise admitted a victim’s 911 excited utterance over a *Crawford* confrontation objection.²⁹¹ Also citing *Moscat*, the court found that the victim’s statement describing the attack and identifying the attacker was not testimonial.²⁹² It justified this conclusion by noting that statements made in 911 calls are normally made during, or moments after, a criminal episode, under stress, and the caller is usually seeking protection from an “immediate danger” and not because of a desire that the furnished information be used at a later trial.²⁹³ The court further explained the following:

Even under the broadest definition of “testimonial” cited in *Crawford*, which focuses on whether an objective witness would reasonably believe the statement would later be available for use at trial, the 911 call does not qualify as “testimonial” evidence. Statements in a 911 call by a victim struggling for self-control and survival only moments after an assault simply do not qualify as knowing responses to structured questioning in an investigative environment in which the declarant reasonably expects that the responses will be used in later judicial proceedings.²⁹⁴

However, the Supreme Court of Minnesota, though affirming this decision, rejected the categorical approach.²⁹⁵ The court noted that,

²⁸⁸ *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004).

²⁸⁹ *Id.* at 776.

²⁹⁰ *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005).

²⁹¹ *State v. Wright*, 686 N.W.2d 295, 303 (Minn. Ct. App. 2004), *aff’d*, 701 N.W.2d 802 (Minn. 2005).

²⁹² *Id.* at 302–03.

²⁹³ *Id.* at 302.

²⁹⁴ *Id.*

²⁹⁵ *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005). The court noted that the 911 call was placed shortly after the assailant had left and ended immediately after being notified by the operator of the perpetrator’s apprehension. *Id.* During the conversation, the caller was “trembling, stuttering, crying, [and] hyperventilating.” *Id.* (alternation in original) (internal quotation marks omitted). Finally, the court

in reference to 911 calls whereby the caller is seeking protection from imminent peril, some courts have categorically found statements made by the caller to be non-testimonial and others have reached the opposite conclusion.²⁹⁶ The court, noting that most courts take an ad hoc approach, concluded:

[I]t is appropriate to evaluate whether statements made during 911 calls are testimonial in light of the circumstances under which the calls are made. Accordingly, we decline to adopt a categorical rule that all statements made during 911 calls are nontestimonial.²⁹⁷

Also adhering to the *Moscat* rationale, the Ohio Court of Appeals held that an eyewitness's 911 report of a victim being attacked by her boyfriend, admitted as an excited utterance, was non-testimonial.²⁹⁸

The Ninth Circuit Court of Appeals determined that a "severely frightened" homicide victim's frantic call to police reporting an intruder was not a "testimonial" statement, and therefore not the type of statement with which the *Crawford* Court was concerned.²⁹⁹ The court explained that the victim was "in no way being interrogated by [police] but instead sought their help in ending a frightening intrusion into her home."³⁰⁰

In *People v. Caudillo*,³⁰¹ a California appeals court considered the propriety of admitting, over a confrontation objection, a bystander's eyewitness account made during a 911 call, describing a shooting and providing a description of the assailant and his car. The court noted that the defendant contended

that the 911 call in this case is distinguishable from the call considered by the court in *Moscat*. He points out that the caller in this case called for the specific reason of providing the police with information identifying the shooter so as to help in his apprehension and potential prosecution. He further points out that the caller was a third party witness, rather than the victim, arguing that the call was not part of the criminal incident itself.³⁰²

noted the operator was focused on "obtaining information for an immediate intervention rather than a future prosecution" and sought to calm her and assure her that she was safe. *Id.* Under these circumstances, the court concluded that the victim's 911 statements were non-testimonial. *Id.*

²⁹⁶ *Id.* at 810.

²⁹⁷ *Wright*, 701 N.W.2d at 811.

²⁹⁸ *State v. Byrd*, 828 N.E.2d 133, 136–37 (Ohio Ct. App. 2005).

²⁹⁹ *Leavitt v. Arave*, 371 F.3d 663, 683 & n.22 (9th Cir. 2004).

³⁰⁰ *Id.*

³⁰¹ 19 Cal. Rptr. 3d 574 (Ct. App. 2004), *review granted and opinion superseded by* 23 Cal. Rptr. 3d 294 (Cal. 2005).

³⁰² *Id.* at 588.

Rejecting these contentions, the court found the call to be non-testimonial, and thus not barred under *Crawford*, because the declarant was speaking to the dispatcher who was merely attempting to obtain information to permit an appropriate response in aiding the victim and apprehending the perpetrator, and this was in “stark contrast” to the statement Sylvia made to the police in *Crawford*, which was the product of formal interrogation and made after the arrest of both Sylvia and the defendant.³⁰³ Purporting to apply the “reasonable expectation” formulation described in *Crawford*, the court further justified its conclusion: “This was a classic 911 call, made immediately after a crime was committed. The caller was simply requesting help from the police by describing what she saw without thinking about whether her statements would be used at a later trial.”³⁰⁴

In stark contrast to *Caudillo* in California, consider the New York case of *People v. Dobbin*.³⁰⁵ An eyewitness to the robbery of a parking lot attendant made a 911 call reporting the crime and describing the robber.³⁰⁶ This court found the call to be testimonial and inadmissible under *Crawford*, explaining:

The 911 call, in this case, contains a solemn declaration for the purpose of establishing the fact that the defendant is committing a robbery. The caller is making a formal out of court statement to a government officer for the purpose of establishing this fact. The caller’s statement is not a “casual remark to an acquaintance.” The caller was officially reporting a crime to the government agency entrusted with this very serious and important function. As such, the 911 call falls within the category of out of court statements which reflect the focus of the Confrontation Clause; the out of court statements of “‘witnesses’ against the accused in other words, those who ‘bear testimony.’”³⁰⁷

The respondent’s prediction during the *Crawford* oral argument, that two different judges looking at exactly the same facts might come to opposite conclusions no matter what definition was adopted by the Court, seems to have been borne out in these cases.³⁰⁸

³⁰³ *Id.* at 590.

³⁰⁴ *Id.*

³⁰⁵ *People v. Dobbin*, 791 N.Y.S.2d 897 (Sup. Ct. 2004).

³⁰⁶ *Id.* at 898.

³⁰⁷ *Id.* at 900 (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)). The court also noted 911 callers would reasonably expect that evidentiary use would likely be made of the information conveyed. *Id.* at 901.

³⁰⁸ See *supra* note 166 and accompanying text (discussing this reality of human nature).

Contrary to the rationale and conclusion reached in *Moscat*, another New York trial judge found to be testimonial, and thus inadmissible under *Crawford*, a 911 call from an eyewitness reporting a robbery and shooting who, in response to the operator's questions, described the crime, its location, and the perpetrator.³⁰⁹ That the 911 statements would qualify as spontaneous declarations did not preclude this judge from finding it to be testimonial under *Crawford*. The judge observed:

Crawford requires a reexamination of the basis for treating spontaneous declarations as admissible hearsay, including statements in a 911 call reporting a crime. Calls to 911 to report a crime are testimonial under the test set out. When a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes.³¹⁰

Some courts observing the contradictory rationales and conclusions regarding *Crawford*'s application to 911 calls have opted for an ad hoc approach to determining whether a particular 911 call should be classified as testimonial under *Crawford*. In *People v. West*,³¹¹ for example, a female cab driver who had been raped by several men and whose cab had been stolen, approached the door of a house and cried out for help.³¹² The homeowner immediately called 911 and reported the crime, relaying to the victim the operator's questions as to her condition and the description of her cab, and then providing the victim's answers to the operator.³¹³ Citing *Crawford*, the defendant contended that the homeowner's statements during the 911 call were testimonial and therefore its admission, given the fact that the homeowner was unavailable at trial, violated his Sixth Amendment confrontation rights.³¹⁴

Noting the conflicting views of other courts, the *West* court declined to adopt a "bright line" rule for classifying all 911 calls as either testimonial or non-testimonial, but rather took a case-by-case approach to deciding the issue.³¹⁵ The court explained that consideration should be given to two questions in this inquiry. First, was the statement volunteered in order to "initiate police action or criminal

³⁰⁹ *People v. Cortes*, 781 N.Y.S.2d 401 (Sup. Ct. 2004).

³¹⁰ *Id.* at 415.

³¹¹ 823 N.E.2d 82 (Ill. App. Ct. 2005).

³¹² *Id.* at 85.

³¹³ *Id.*

³¹⁴ *Id.* at 87.

³¹⁵ *Id.* at 91.

prosecution”?³¹⁶ If so, it would qualify as testimonial because “an objective individual would reasonably believe that when he or she reports a crime they are ‘bearing witness’ and that their statement will be available for use at future criminal proceedings.”³¹⁷ Second, was the statement procured by interrogation, the purpose of which was to obtain evidence?³¹⁸ If so, it would be testimonial because, as a “product of evidence producing questions,” its use would “implicate the central concerns underlying the confrontation clause.”³¹⁹ As to the 911 call by the homeowner, the court concluded that the portion of the call concerning the nature of the attack, the victim’s needs, and her age and location were not testimonial because the dispatcher was motivated by a desire to secure medical attention and not to garner evidence.³²⁰ However, that portion of the call wherein the homeowner described the cab, articles that were taken, and the perpetrators’ direction of flight was garnered by the operator’s desire to involve the police and for evidentiary use.³²¹

A Washington court of appeals, quoting at length the considerations Professors Friedman and McCormack, thought pertinent to the classification of a 911 call as testimonial,³²² also rejected a “bright line” rule in favor of a case-by-case approach.³²³ The case involved a 911 call, in which the caller reported that the defendant had been in her home in violation of a no-contact order. The court concluded that the call was testimonial because, “[d]espite the seriousness of Powers’ alleged conduct, [the declarant’s] call was not ‘part of the criminal incident itself’ or a request for help entitling the State to prove their case without affording Powers the opportunity to cross examine the [declarant], the right *Crawford* protects.”³²⁴ Additionally, the court characterized her call as a report of a violation of a court order by Powers, which she made for the purpose of his apprehension and prosecution.³²⁵

³¹⁶ *Id.*

³¹⁷ *West*, 823 N.E.2d at 91.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 91–92.

³²² *State v. Powers*, 99 P.3d 1262, 1265 (Wash. Ct. App. 2004). See Friedman & McCormack, *supra* note 276 and accompanying text.

³²³ *Powers*, 99 P.3d at 1266.

³²⁴ *Id.* at 1264, 1266.

³²⁵ *Id.* at 1266.

b. Statements to First Responders

Another problematic area in the immediate post-*Crawford* period has been how to classify statements by victims and witnesses made directly to law enforcement personnel who immediately respond to a location upon being alerted to a possible criminal event.

After *Crawford*, the Indiana Court of Appeals consistently and categorically concluded that statements elicited as a result of initial questioning by responding officers arriving immediately or shortly after the occurrence were not testimonial, reasoning that the lack of structure, adversarial quality, and formality in such an interchange do not bear any resemblance to the term “interrogation” as described in *Crawford*, and because excited utterances, by their nature, preclude reflection and the ability to anticipate that evidentiary use would be made of such statements.³²⁶ In *Hammon v. State*, the Indiana Court of Appeals concluded that, had *Crawford* intended that all statements in response to any police questioning would qualify as “testimonial,” the Supreme Court would have so stated.³²⁷ Instead, the Indiana court noted that *Crawford*'s holding was limited to police “interrogation,” a narrower term, explaining as follows:

We conclude this choice of words clearly indicates that police “interrogation” is not the same as, and is much narrower than, police “questioning.” To the extent the Supreme Court said that it used the term “interrogation” “in its colloquial . . . sense,” we believe that reference to a lay dictionary for a definition of “interrogation” is appropriate. “Interrogation” is defined in one common English dictionary as “To examine by questioning formally or officially.” This is consistent with our prior observation that the common characteristic of all “testimonial” statements is the formality by which they are produced. We also believe that “interrogation” carries with it a connotation of an at least slightly adversarial setting.

³²⁶ See, e.g., *Rogers v. State*, 814 N.E.2d 695, 701–02 (Ind. Ct. App. 2004) (holding the excited utterance of a criminal negligence victim regarding a barroom altercation with a named individual, made to the first responding officers shortly after the occurrence, was non-testimonial); *Fowler v. State*, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004) (finding excited utterances of a “crying” and “bleeding” domestic violence victim made to a responding officer within fifteen minutes of placing a 911 call was non-testimonial, noting the officer’s questioning did not “qualify as classic, ‘police interrogation’ as referred to in *Crawford*”); *Hammon v. State*, 809 N.E.2d 945, 947–48 (Ind. Ct. App. 2004) (ruling non-testimonial the excited utterances made by a “frightened” and “timid” domestic abuse victim in response to “preliminary investigatory” questions of the first officer at the scene, and which described the incident and named the assailant), *vacated*, 829 N.E.2d 444 (Ind. 2005).

³²⁷ *Hammon*, 809 N.E.2d at 952.

. . . Whatever else police “interrogation” might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred.³²⁸

The court added this additional reasoning regarding excited utterances made to first responders being non-testimonial: “An unrehearsed statement made without time for reflection or deliberation, as required to be an ‘excited utterance,’ is not ‘testimonial’ in that such a statement, by definition, has not been made in contemplation of its use in a future trial.”³²⁹

The Supreme Court of Indiana, approximately one year later, though affirming the case, vacated the Court of Appeals’ decision.³³⁰ In doing so, it appeared to have rejected the Court of Appeals’ first

³²⁸ *Id.* (citations omitted). For another court using similar reasoning, see *People v. Bradley*, 799 N.Y.S.2d 472 (App. Div. 2005). That court found non-testimonial under *Crawford* a bloodied victim’s excited utterance, describing being thrown through a glass door by her boyfriend, which was given in answer to the initial question, “What happened?” by a police officer responding to a 911 call. *Id.* at 478–79. In doing so, the court rejected the formulation, suggested but not adopted in *Crawford* and advanced by the defendant, that the testimonial character of the victim’s utterance should depend on whether she had the expectation that her statement may be utilized in a subsequent trial. *Id.* at 479. Rather, the court considered controlling the determination of “the objective of the person posing the question.” *Id.* at 480. It stated:

Where the purpose of the inquiry is to gain general familiarity with the situation confronting a police officer to determine what happened, the officer is making only a preliminary investigatory inquiry. Thus, the response is not the product of a structured police interrogation and should not be regarded as testimonial. However, where the purpose of the inquiry is to gather incriminating evidence against a particular individual, the officer is advancing a potential prosecution, and the response takes on a testimonial character.

Id.

³²⁹ *Hammon*, 809 N.E.2d at 953. Applying similar reasoning, see also *State v. Anderson*, No. E2004-00694-CCA-R3-CD, 2005 WL 171441 (Tenn. Crim. App. Jan. 27, 2005), where the court, holding juveniles’ excited utterances to responding officers, implicating the defendant in a burglary that was still in progress, were testimonial under *Crawford*, stated:

[T]he essential characteristics that cause the juveniles’ statements to fall within the ambit of the excited utterance exception conflict with the characteristics that would make them testimonial. The underlying rationale for the excited utterance exception is that the perceived event produces nervous excitement, making fabrication of statements about that event unlikely. Because an excited utterance is a reactionary event of the senses made without reflection or deliberation, it cannot be testimonial in that such a statement has not been made in contemplation of its use in a future trial.

Id. at *4.

³³⁰ *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005).

categorical conclusion, but seemed to have ratified the second, stating:

[W]e agree with the Court of Appeals in its view that responses to initial inquiries at a crime scene are typically not “testimonial.” We do not agree, however, that a statement that qualifies as an “excited utterance” is necessarily nontestimonial. The Court of Appeals is likely correct that the declarant of an excited utterance will ordinarily lack the requisite motive because the heat of the moment makes it unlikely that the declarant is focusing on preservation rather than communication of information. But an interrogating officer may be so motivated. Thus, the “structured questioning” identified by some courts as an indicium of a testimonial statement may be best understood as evidence of a purpose to elicit testimonial statements.³³¹

Consistent with the approach taken by the earlier Indiana Court of Appeals decisions regarding statements made to first responders, courts in other jurisdictions have likewise determined such statements to be non-testimonial.³³² The Nebraska Supreme Court, in doing so, commented, “[c]ourts have almost uniformly held that statements made to police officers responding to an emergency call for help were, at the initial stage of the encounter, not testimonial, because they were intended to help officers assess the situation and

³³¹ *Id.* at 453.

³³² *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004) (holding domestic violence victim’s responses to first responder’s “unstructured” and “preliminary” questions were not testimonial); *People v. Cage*, 15 Cal. Rptr. 3d 846, 856–57 (Ct. App. 2004) (concluding that assault victim’s description of the assault and the identity of his mother as the assailant, made in the emergency room of a hospital to an officer responding to an “injured persons” call, and which consisted of what the defense described as “detailed answers given in direct response to questions” was not testimonial); *People v. King*, No. 02CA0201, 2005 WL 170727, at *2–3 (Colo. Ct. App. Jan. 27, 2005) (finding excited utterances made by a stabbed and bleeding sexual assault victim over a two-hour period to a responding officer both at the scene and during an ambulance ride were not testimonial under *Crawford*); *United States v. Webb*, No. DV-339-04, 2004 WL 2726100, at *2–4 (D.C. Super. Ct. Nov. 9, 2004) (declaring statements of an injured, bleeding and crying assault victim, responding to an officer’s repeated question as to what happened were non-testimonial because the questions that elicited them lacked formality and “premeditation” and were not primarily motivated by the desire to collect evidence but rather prompted by a concern for the victim’s safety); *State v. Maclin*, No. W2003-03123-CCA-R3-CD, 2005 WL 313977, at *17 (Tenn. Crim. App. Feb. 9, 2005) (holding aggravated assault victim’s excited utterances to responding police officers, whom she had summoned, were not testimonial because she was not involved in “a formal statement or a police interrogation” when she made the statements). *See also Spencer v. State*, 162 S.W.3d 877, 881 (Tex. App. 2005) (holding that a domestic violence victim’s excited utterance to responding officers, during the “initial assessment and securing of a crime scene” was not testimonial, but stating, “we decline to join those courts that have established a bright-line rule that excited utterances can never be testimonial”).

secure the scene.”³³³ Others, however, have applied an ad hoc approach to determining whether statements made to first responders qualify as testimonial under *Crawford*. One court said such an approach required an inquiry centered around whether the responding officer was acting at the time in an investigative capacity seeking to produce evidence for prosecutorial purposes or was involved in the preliminary task of securing the scene.³³⁴ Another court taking a case-by-case approach identified factors it deemed appropriate to consider when determining whether statements made to responding officers at the scene should be considered testimonial.³³⁵ These factors included (1) the formality of the setting generating the statements, (2) whether they were recorded, (3) the declarant’s “primary purpose in making the statements,” and (4) whether an “objective declarant” in her position would realize the evidentiary use that would be made of them.³³⁶ If the statement had been made to law enforcement, further consideration should include a determination as to who initiated the contact and the existence of “structured questioning.”³³⁷

³³³ *State v. Hembertt*, 696 N.W.2d 473, 483 (Neb. 2005). Finding that a “crying, hysterical, trembling” victim’s statements to responding officers who arrived within five minutes of receiving the call were non-testimonial under *Crawford*, the court concluded that these statements “were not made in anticipation of eventual prosecution, but were made to assist in securing the scene and apprehending the suspect.” *Id.* It would seem that since an arrest is usually the initial, indispensable step towards a successful prosecution, a statement made for the purpose of “apprehending” the perpetrator would be made anticipating eventual prosecution.

³³⁴ *People v. Kilday*, 20 Cal. Rptr. 3d 161, 172–73 (Ct. App. 2004) (holding that a “frightened and upset” domestic violence victim’s statements regarding an assault earlier that day, made initially to an officer responding to a domestic violence call placed by a concerned third party, where the officers were then unaware of the nature of the crime or identity of the perpetrator, were not-testimonial, but several later statements made after the scene was secured were considered testimonial), *review granted and opinion superseded by* 105 P.3d 114 (Cal. 2005).

³³⁵ *People v. Mackey*, 785 N.Y.S.2d 870, 873–74 (Crim. Ct. 2004) (listing and applying these factors, the court found statements made by an assault victim to a police officer she flagged down, describing an assault by her boyfriend, were non-testimonial). *See also* *State v. Barnes*, 854 A.2d 208, 211 (Me. 2004) (applying similar factors to determine that statements by a woman, under stress, who went to the police station and made statements to the police, at a time when they were unaware of any criminal activity, were not testimonial as they were not the product of “tactically structured police questioning”).

³³⁶ *Mackey*, 785 N.Y.S.2d at 873–74.

³³⁷ *Id.* at 874. A New York court applied an ad hoc analysis utilizing similar factors and found two of three successive statements to be non-testimonial. *People v. Watson*, No. 7715/90, 2004 WL 2567124, at *13–15 (N.Y. Sup. Ct. Nov. 8, 2004). The court found a spontaneous and unsolicited statement of a robbery victim to the immediately responding police officer about who robbed him, and another to the same officer prompted only by a question about whether anyone else was involved to be

The Minnesota Supreme Court in *State v. Wright*³³⁸ likewise joined those jurisdictions applying an ad hoc approach in classifying statements made to first responders. This court, reviewing decisions from other courts, identified eight useful considerations for determining whether such statements are testimonial:

1. Was the declarant a victim or observer?
2. What was the declarant's motive for speaking to the officer?
3. Who initiated the conversation?
4. Where did the conversation take place?
5. What was the declarant's emotional condition?
6. What was the level of structure and formality present in the conversation?
7. What was the officer's motivation in talking to the declarant?
8. Was the conversation recorded, and if so by what method?³³⁹

While noting that this list was long, the court emphasized that “other considerations also may prove useful.”³⁴⁰ Utilizing these factors, the court found that a statement made to a responding police officer a half hour after the incident by an “emotionally distraught” assault victim, who was not just an observer, who initiated the contact, and who was seeking protection, was non-testimonial.³⁴¹ The court found the statements to be non-testimonial in spite of the fact that the conversation was recorded by the officer taking notes and that these notes and the conversation were utilized to support a lawful arrest and aided the officer in giving subsequent testimony.³⁴²

Other courts applying similar factors concluded that statements given at the scene and shortly after the occurrence of a crime, if elicited by preliminary questions of responding and “investigating” officers, are non-testimonial.³⁴³

non-testimonial. *Id.* However, a third statement to the same officer, which amounted to a solicited narrative of crime, was testimonial. *Id.*

³³⁸ 701 N.W.2d 802 (Minn. 2005).

³³⁹ *Id.* at 812–13.

³⁴⁰ *Id.* at 813.

³⁴¹ *Id.* at 813–14.

³⁴² *Id.*

³⁴³ *People v. Victors*, 819 N.E.2d 311, 324 (Ill. App. Ct. 2004) (O'Malley, J., concurring) (pointing out that the victim's statement was given “mere minutes” after the incident, in response to a simple police question about what was happening and in an informal and unstructured setting). *See also State v. Greene*, 874 A.2d 750 (Conn. 2005). The Connecticut Supreme Court found non-testimonial a gunshot-victim's

The current Indiana approach for classifying such statements as testimonial, as revealed by its Supreme Court in *Hammon*, requires a determination as to whether, in the context of answering preliminary questions of the initially responding officer, the answers were either given or obtained “in significant part for purposes of preserving it for potential future use in legal proceedings.”³⁴⁴ The court suggested that even where the victim or others may not have a prosecutorial motivation (because of the victim’s excitement and the resulting impairment of the ability to reflect), if the officer was attempting to “pin down and preserve statements” as opposed to simply attempting to determine whether an offense has occurred, to provide protection and to apprehend the suspect, the statements obtained would be testimonial.³⁴⁵

In *United States v. Arnold*,³⁴⁶ the Sixth Circuit Court of Appeals applied its previous broad *Cromer* criteria³⁴⁷ for determining the testimonial nature of hearsay statements to the issue of whether a 911 call and subsequent statements by a distraught victim to first responders were testimonial.³⁴⁸ As applied in *Arnold*, that criterion is whether the statements made “knowingly to the authorities . . . describe[] criminal activity.”³⁴⁹ If so, then the statement is “almost always testimonial.”³⁵⁰ The court found that an assault victim’s 911 call and subsequent statements to responding police approximately fifteen minutes later describing the assault, the weapon used, and naming her attacker, to be testimonial.³⁵¹ Though the court noted that during the conversation with the officer she was “upset to the point that she had difficulty speaking,”³⁵² it concluded the statements

statement given immediately after the incident to an officer he approached on the street. *Id.* at 776. The statement, to some extent possibly elicited by the officer, described the location of the offense and informed the officer that he thought he had been shot. *Id.* at 775. He also informed the officer that he did not see his assailant. *Id.* at 712. Under these circumstances, the court concluded that the statement “can be ‘seen as part of the criminal incident itself, rather than as part of the prosecution that follow[ed].’” *Id.* (quoting *People v. Moscat*, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004)).

³⁴⁴ *Hammon v. State*, 829 N.E.2d 444, 456 (Ind. 2005).

³⁴⁵ *Id.*

³⁴⁶ 410 F.3d 895 (6th Cir. 2005).

³⁴⁷ *United States v. Cromer*, 398 F.3d 662, 665 (6th Cir. 2004).

³⁴⁸ *Arnold*, 410 F.3d at 903.

³⁴⁹ *Id.* at 904.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 897.

of the victim “were knowingly made to authorities” and “describe[d] criminal activity.”³⁵³

The foregoing description of varying attempts by courts to apply the *Crawford* testimonial approach to domestic violence and assault victims’ statements during 911 calls or to first responders gives rise to certain concerns. The phenomenon that domestic violence victims often refuse or are reluctant to participate in the prosecution of their previously identified tormentor should neither prompt nor justify courts applying *Crawford*’s testimonial approach to suspend logic, to selectively emphasize *Crawford* criteria that support admission and ignore others, or to undermine the underlying need and importance of confrontation in these situations. Professors Friedman and McCormack, by conceding that some 911 calls made by domestic violence victims may be non-testimonial “cries for help,” have unintentionally³⁵⁴ opened the door through which some post-*Crawford* courts have leapt, allowing into evidence domestic violence statements that are at the core of what the Confrontation Clause was meant to exclude: accusatorial statements knowingly made to law enforcement officers. They have done so by selectively emphasizing those criteria described in *Crawford* that would justify admission of these statements and ignoring those criteria that did not. Justifying the classification of statements made to first responders and 911 operators as non-testimonial simply because the questioning was not highly structured or formal is but one example.

Though *Crawford* clearly included structured and formal police interrogation in its concept of “testimonial,”³⁵⁵ it did not limit the classification to such.³⁵⁶ Many courts, but not all,³⁵⁷ seem to ignore or

³⁵³ *Id.* at 904.

³⁵⁴ The professors simply observed that in some cases the victim’s frantic 911 call could be admitted as a “cry for help” though they added, “at least to the extent they are not offered to prove the truth of what they assert.” Friedman & McCormack, *supra* note 276, at 1242 (emphasis added).

³⁵⁵ The *Crawford* opinion offers little evidence that structure and formality are necessary prerequisites for classifying police questioning as interrogation. It simply concluded that, within any “conceivable” definition of “interrogation,” Sylvia’s “recorded statement, knowingly given in response to structured police questioning” would qualify. *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004). *But see* *State v. Snowden*, 867 A.2d 314, 324 (Md. 2005) (“The [*Crawford*] Court, however, did emphasize the formal nature of police questioning in its articulation of when an ‘interrogation’ occurs. This characterization is buttressed by the most commonly understood sense of the verb ‘interrogate’: ‘to question formally and systemically.’” (citing MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 612 (10th ed. 1993))).

³⁵⁶ *See Stancil v. United States*, 866 A.2d 799, 811–12 (D.C. 2005) (“[T]he term ‘police interrogation’ is used frequently in the *Crawford* opinion, without any suggestion that it means something more technical than questioning in a structured

minimize the fact that the *Crawford* majority clearly meant the term “interrogation” to go beyond that which was evidence by Sylvia’s interrogation in *Crawford*, by specifically stating that they were using the term in its “colloquial” sense.³⁵⁸ The Supreme Judicial Court of Massachusetts, in *Commonwealth v. Gonsalves*,³⁵⁹ is one of the few courts that has not ignored the admonition of *Crawford* to construe the term “interrogation” in its colloquial sense. As part of its formulation of an impressive and comprehensive analytical approach³⁶⁰ for determining whether hearsay is “testimonial” under *Crawford*, the court addressed the meaning of “interrogation.”³⁶¹ Recognizing that *Crawford* utilized the term interrogation in the “colloquial” sense, the court attempted to determine its everyday common meaning within the general public and legal community.³⁶² To do so, the court consulted *Black’s Law Dictionary* and *Webster’s Third New International Dictionary*.³⁶³ In *Black’s Law Dictionary*, the court noted one definition of the term “investigatory interrogation” as “routine, nonaccusatory questioning by the police of a person who is not in custody.”³⁶⁴ It held that the term “interrogation” “must be understood expansively to mean all law enforcement questioning related to the investigation or prosecution of a crime.”³⁶⁵ It further concluded:

[Q]uestioning by law enforcement agents, whether police, prosecutors, or others acting directly on their behalf, other than to secure a volatile scene or to establish the need for or provide medical care, is interrogation in the colloquial sense. This in-

environment. Neither additional ‘formality’ nor an ‘adversarial setting,’ however slight, is required.”).

³⁵⁷ See, e.g., *Mason v. State*, 173 S.W.3d 105, 111 (Tex. App. 2005). Rejecting the view that “interrogation” for Sixth Amendment purposes should be given similar construction as that term is construed under the Fifth Amendment since the policies underlying these separate provisions are distinct, the Texas court concluded the interrogation, as it relates to the Confrontation Clause, should not be limited to “words or actions on the part of the police that were normally attendant to arrest and custody.” *Id.* The court went on to find that a victim’s excited utterance to a responding officer, describing an assault by her boyfriend, prompted simply by the question as to why she had called the police, was the product of “interrogation” as that term is construed, under *Crawford* and in the context of the Confrontation Clause. *Id.* See also *infra* notes 359–66 (discussing the approach followed in Massachusetts).

³⁵⁸ *Crawford*, 541 U.S. at 53 n.4.

³⁵⁹ 833 N.E.2d 549 (Mass. 2005).

³⁶⁰ For a full discussion of this analytical approach, see *infra* notes 388–90.

³⁶¹ *Gonsalves*, 833 N.E.2d at 554–55.

³⁶² *Id.* at 555.

³⁶³ *Id.*

³⁶⁴ *Id.* (citing BLACK’S LAW DICTIONARY 838 (8th ed. 2004)).

³⁶⁵ *Id.*

cludes “investigatory interrogation,” such as preliminary fact gathering and assessment whether a crime has taken place. Under our reading of *Crawford*, statements elicited by such interrogation are per se testimonial and therefore implicate the confrontation clause.³⁶⁶

Similarly, an Arizona court of appeals decision³⁶⁷ classified as testimonial an eyewitness’s statements describing a homicide, given at the scene of the crime to an officer (who already was aware that the defendant had shot the victim).³⁶⁸ The eyewitness who gave this statement, Cory, had been previously separated from another witness, Harold, before providing his version of the incident, and Cory’s questioning occurred only after the defendant had been arrested, handcuffed, and placed in a patrol car and after Harold had been interviewed for fifteen or twenty minutes.³⁶⁹ The court, in arriving at its conclusion that Cory’s statement was testimonial, made the following observation:

The historic underpinnings of the Confrontation Clause as analyzed in *Crawford* lead us to the following conclusions. First, not every police-citizen encounter will generate a testimonial statement because not every police-citizen encounter will be an interrogation. Statements made by witnesses to police so the police may secure their own or the witnesses’ safety, render emergency aid, or protect the security of a crime scene may not be testimonial. Questioning incidental to other law enforcement objectives, for example, “exigent safety, security, and medical concerns” implicates core confrontation clause concerns less than does police questioning directed toward the production of evidence for use in a potential prosecution.³⁷⁰

³⁶⁶ *Id.* 555–56 (footnote omitted).

³⁶⁷ *State v. Parks*, 116 P.3d 631 (Ariz. Ct. App. 2005).

³⁶⁸ *Id.* at 642.

³⁶⁹ *Id.* at 633–35.

³⁷⁰ *Id.* at 641.

Some courts, but not all,³⁷¹ that appropriately consider all or most of the *Crawford* criteria and formulations for determining the testimonial classification suspend logic in order to satisfy them. As shown above, some courts, following the lead of the early *Moscat* opinion, have divined that domestic violence victims making a 911 call or excitedly reacting to the first responder do so solely as a cry for help and without any motivation that their statements may be used as evidence to prosecute the abuser.³⁷² It is inconceivable that a victim, aware of the perpetration of a crime against her and purposely providing historical information about that crime to those she is aware are law enforcement personnel, would not be at least partially motivated by the desire to assist in the eventual prosecution of the perpetrator. To categorically speculate that in such situations she has *no* motivation to assist law enforcement in making the assailant atone for his criminal act is simply untenable.

Likewise, some courts' analytical leapfrog in using the theoretical underpinnings of the excited utterance exception—that it

³⁷¹ The following cases are illustrative of courts applying the *Crawford* formulations with sound logic and common sense. *Mason v. State* considers statements made to an officer responding to a 911 disturbance call. 173 S.W.3d 105, 106 (Tex. App. 2005). Upon arrival and in response to the officer's query about why she called the police, an upset, crying and angry domestic violence victim described an attack by her boyfriend. *Id.* The court held that such qualified as interrogation in the colloquial sense, and even if it did not, the victim's description of the crime and identity of the perpetrator to a policeman at the scene would lead an objective person to believe his or her statement would be available for use in a future prosecution. *Id.* at 111.

A Florida court considered similar statements in *Lopez v. State*, 888 So. 2d 693 (Fla. Dist. Ct. App. 2004). In response to a report of a kidnapping and assault, a police officer was dispatched to an apartment complex, where the officer encountered the victim, who was nervous and upset. *Id.* at 695. Upon the officer's query, the victim described being kidnapped and assaulted at gunpoint, pointed to the perpetrator, and said the gun was in his car. *Id.* The court held that though these statements qualified as excited utterances under Florida evidence law, they were testimonial and inadmissible under the Confrontation Clause in light of the *Crawford* decision. *Id.* at 702. The court concluded that the utterances of the victim, even though made in response to a question by police, were not likely the result of "interrogation" because it lacked sufficient structure, and the court determined that the statements clearly did not fall within the classification of "formalized testimonial materials." *Id.* at 698. However, it found that the statements were testimonial in light of the fact that, under the circumstances, "he surely must have expected that the statement he made to Officer Gaston might be used in court against the defendant." *Id.* at 700. *But see* *Anderson v. State*, 111 P.3d 350, 354, 356 (Alaska Ct. App. 2005) (claiming the *Lopez* court, in its holding, "apparently stands alone," and finding an assault victim's excited utterance in answer to a responding officer inquiry as to what happened (assailant hit victim with a pipe) was non-testimonial in spite of its accusatorial nature).

³⁷² See *supra* notes 167, 280–85 and accompanying text (discussing *Moscat*); *supra* notes 286–92, 296, 299 and accompanying text (discussing cases following *Moscat*).

necessarily be made while the declarant's ability to engage in reflective thought had been suspended by the stress of a startling event—to jump to the conclusion that one making a qualifying excited utterance could not be aware of the evidentiary use that might be made of them³⁷³ seems equally untenable. Even in the excitement and stress of the moment, a domestic violence victim's ability to provide useful and apparently accurate historical information—at least from a prosecutor's standpoint—about the abuse and abuser and purposely communicate it to inquiring officers, or persons acting on behalf of law enforcement officers, seems to belie the reality of such a conclusion.³⁷⁴

The Court of Appeals for the District of Columbia, in a well reasoned opinion, emphasized this by observing that courts over the years have broadened the excited utterance exception to include “non-spontaneous statement[s] made ‘within a reasonably short period’ after a startling event, even if it was made in response to police questioning.”³⁷⁵ Rejecting the categorical notion that all excited ut-

³⁷³ See *supra* notes 284–95, 298–304 and accompanying text (describing reasoning in *Moscat* and other cases).

³⁷⁴ Strictly construing the requirement that to qualify as an excited utterance the statement must be made “without opportunity to deliberate or fabricate,” one court found a seven-year-old burglary victim's statement to a responding police officer did not qualify. *State v. Branch*, 865 A.2d 673, 689–90 (N.J. 2005). In doing so the court observed the following:

There is no question that Juliana's statement related “to a startling event,” i.e., the burglary. There is little question that Juliana was still “under stress of excitement caused by the event” fifteen to twenty minutes after the burglary when the detective questioned her while she sat on her mother's lap. But it is somewhat doubtful that the statement was made “without *opportunity* to deliberate,” at least in the way those words are commonly understood.

Id. at 689. This court avoided a *Crawford* concern by deciding the issue on a state evidentiary ground. *Id.* at 691. However, many of the cases described above, which have found statements made to first responders or during 911 calls to be excited utterances, have not applied such a rigid interpretation to the exception's “lack of opportunity to deliberate” requirement. In spite of this fact, however, they still use this requirement to justify the conclusion that the statement is not testimonial under *Crawford*.

³⁷⁵ *Stancil v. United States*, 866 A.2d 799, 808, 815 (D.C. 2005) (determining nonetheless that sufficient uncertainty existed regarding the separation of various portions of the witness' utterances to the responding officers into testimonial and non-testimonial statements such that the case had to be remanded to determine “which, if any, statements by [the witness] were volunteered during Stage I, before interrogation began, rather than having been made in response to [an officer's] questions in Stage II; and what, if anything, [the witness] said before the officers had completed their initial task of securing the scene, separating the principals, and restoring a reasonable measure of calm”). See also *Pitts v. State*, 612 S.E.2d 1, 5 (Ga. Ct. App. 2005) (finding, without classifying the statements as excited utterances, that a

terances, because of their nature, are non-testimonial, this court concluded: "Some excited utterances are testimonial, and others are not, depending upon the circumstances in which the particular statement was made."³⁷⁶ Other courts have also rejected the categorical classification of all excited utterances as non-testimonial.³⁷⁷ One Texas appellate court said to do so would leave "the regulation of the Confrontation Clause to the Rules of Evidence, which is specifically prohibited by *Crawford*."³⁷⁸ A Florida court observed:

In our view, the findings necessary to support a conclusion that a statement was an excited utterance do not conflict with those

domestic violence victim's 911 call informing the operator that her husband, in violation of a court order, had broken into her house and was preventing her from leaving, made while the offense was still in progress and without "premeditation or afterthought" was non-testimonial, but that her later statements describing the incident to the first responders, shortly after their arrival, but after the husband had been arrested and taken away, were testimonial), *cert. granted*, 2005 Ga. LEXIS 534 (Ga. Sept. 19, 2005).

³⁷⁶ *Stancil*, 866 A.2d at 809 (suggesting that excited utterances, made in response to an officer's preliminary inquiry while attempting to secure the scene and to ensure the safety of those involved, including themselves, would not be classified as testimonial, while those excited utterances rendered to police engaging in structured questioning after the immediate emergency has passed would be deemed testimonial). One could imagine that, applying the *Stancil* rationale, an excited utterance would be classified as non-testimonial in this hypothetical scenario: An officer spots a crying and obviously distraught woman flagging him down, approaches her to ask about what is wrong, and receives the reply, "I've just been raped by that man driving off in the red car!" However, if the scenario is broadened to include the following, the subsequent excited utterances *would* qualify as testimonial: After radioing for others to intercept the fleeing assailant, the officer places the woman in his patrol car, encourages her to calm down, and then asks her to tell him exactly what happened, whereupon the victim, still sobbing, responds by giving him a narrative description of the attack and her attacker. *See also* *Drayton v. United States*, 877 A.2d 145, 151 (D.C. 2005). Following *Stancil*, the *Drayton* court found to be testimonial a child victim's excited utterances made to responding officers. *Id.* These officers sought his "account" of an incident during which his mother, in an argument over money, displayed a knife and threatened him. *Id.* The court concluded that since the scene had been secured, the officers at that point "were investigating a crime and fact-gathering in anticipation of potential future prosecution." *Id.* This conclusion was justified by the fact that the boy made the statement to the officers approximately fifteen minutes after the incident, after his mother had been disarmed, arrested and placed in a patrol car, and after police had received a description of the incident from a bystander. *Id.*

³⁷⁷ *See* *Lopez v. State*, 888 So. 2d 693, 702 (Fla. Dist. Ct. App. 2004) (discussed *supra* note 371); *Mason v. State*, 173 S.W.3d 105, 110 (Tex. App. 2005) ("We understand the State's position to be that, by definition, an excited utterance is not made under circumstances conducive to subjective contemplation of future legal proceedings. We cannot agree."); *Moore v. State*, 169 S.W.3d 467, 474 (Tex. App. 2005) ("Each statement must be analyzed individually independent of whether it is an excited utterance under the Texas Rules of Evidence.").

³⁷⁸ *Moore*, 169 S.W.3d at 474.

that are necessary to support a conclusion that it was testimonial. A statement made in the excitement of a startling event is likely to be more reliable given the fact that the declarant had little time to make up a story. But, under *Crawford*, reliability has no bearing on the question of whether a statement was testimonial. Some testimonial statements are reliable and others are not.³⁷⁹

It is clear that to avoid the same dilemma as was created by the *Roberts* “reliability” approach, where “indicia of reliability” were subjectively determined by judges,³⁸⁰ the Supreme Court will need to categorically identify specific factual applications of its classifications of “interrogation” and “testimonial” in the context of 911 calls and statements to first responders, otherwise result-oriented and contradictory applications will continue.³⁸¹

c. Statements Made During Law Enforcement’s “Field Investigation”

Where formality and structure exist in field investigation questioning sessions, courts have been quite uniform in classifying statements generated thereby as testimonial. For example, where an assigned officer spoke first to the mother of a three-year-old sexual abuse victim at the hospital, then interviewed the child the next day, the child’s statements elicited by the officer’s query that she repeat what she had told her mother were determined to be the product of police interrogation and thus testimonial.³⁸² Another court found that the existence of audio and video recordings of a patrol officer’s vehicle stop was sufficient to render the subsequent roadside questioning of a passenger, after the arrest of the driver, sufficiently structured and formal so that the resulting statements were “testimonial.”³⁸³ Other courts have considered it significant that officers tape-recorded the session³⁸⁴ or otherwise recorded it verbatim³⁸⁵ in their

³⁷⁹ *Lopez*, 888 So. 2d at 699.

³⁸⁰ *Crawford v. Washington*, 541 U.S. 36, 62–68 (2004) (surveying and criticizing courts’ application of the *Roberts* reliability approach).

³⁸¹ *See In re T.T.*, 815 N.E.2d 789, 802 (Ill. App. Ct. 2004) (“Moreover, a court’s attempt to fashion such factors into some type of litmus test for testimonial evidence would undermine the confrontation clause’s protections. Vague standards are manipulable, and the neutral motives of the government official toward the declarant are irrelevant.”).

³⁸² *People v. R.F.*, 825 N.E.2d 287, 291 (Ill. App. Ct. 2005).

³⁸³ *Lee v. State*, 143 S.W.3d 565, 570–71 (Tex. App. 2004).

³⁸⁴ *See, e.g., People v. Lee*, 21 Cal. Rptr. 3d 309, 314 (Ct. App. 2004) (referring to tape recorded statement of two witnesses, which filled seventeen pages of transcripts); *People v. Pirwani*, 14 Cal. Rptr. 3d 673, 688–89 (Ct. App. 2004) (considering theft victim’s videotaped statement to police concerning the loss as testimonial);

conclusions that the statements were the result of “interrogation” and were testimonial. Special circumstances, such as the fact that the police questioning occurred during the execution of a search warrant,³⁸⁶ or that the declarant being interviewed was a confidential informant,³⁸⁷ have also contributed to the classification of witnesses’ statements to officers during field investigations as testimonial.

8. The Massachusetts Analytical Approach

Approximately a year and a half after *Crawford*’s reinterpretation of how hearsay should be analyzed under the Confrontation Clause, the Supreme Judicial Court of Massachusetts, in *Commonwealth v. Gonzalves*,³⁸⁸ confronted for the first time the thorny issues left in that decision’s wake. The court formulated an impressive analytical approach for analyzing the admissibility of hearsay under the Clause in light of *Crawford*. This approach appears to remain faithful to the core values of the Clause as articulated in *Crawford*. In its formulation, the Massachusetts court recognized that prosecutors must adjust the manner in which they prosecute domestic violence and gang-related cases heretofore prosecuted without subjecting the alleged victims to cross-examination.³⁸⁹ Such an adjustment, the court ob-

People v. Vigil, 104 P.3d 258, 261–62 (Colo. Ct. App. 2004) (finding that a videotaped interview of a seven-year-old child abuse victim by a specially trained interviewer was an interrogation in spite of the fact that it was conducted in a relaxed setting and used non-leading and open-ended questioning).

³⁸⁵ See, e.g., State v. Lewis, 603 S.E.2d 559, 562–63 (N.C. Ct. App. 2004) (holding that an assault victim’s verbatim narrative statement taken by an officer was the product of interrogation and thus testimonial, as was the victim’s subsequent photo identification of the assailant).

³⁸⁶ See, e.g., United States v. Nielsen, 371 F.3d 574, 581–82 (9th Cir. 2004) (observing that answers given to questions about who had access to the place where drugs were found, when asked by agents executing a search warrant, were testimonial).

³⁸⁷ See, e.g., United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) (finding that such a statement falls “squarely within Professor Friedman’s paradigm: ‘A statement made knowingly to the authorities that describes criminal activity is almost always testimonial’” (citing Friedman, *supra* note 36, at 1042))).

³⁸⁸ 833 N.E.2d 549 (Mass. 2005).

³⁸⁹ *Id.* at 559. The court commented:

We recognize the ground shift this means for the prosecution of crimes, in strategy and method. The remedy of calling out-of-court declarants to the stand will not always be available, although it should be noted that they need only appear, not affirm their previous statement. Likewise, we recognize the particular impact this decision may have on the prosecution of domestic violence, as well as some gang-related crimes, which have been prosecuted not infrequently based on out-of-court statements in the absence of the initial complaining witness. In such cases, however, the prosecution can still present powerful evidence that a crime has occurred and that the defendant was the

served, is essential in order to conform “to the dictates of the Confrontation Clause as it is now understood,” adding, “[t]he system, over time, must adjust.”³⁹⁰

In *Gonsalves*, a woman overheard her twenty-year-old daughter arguing with her boyfriend in a nearby bedroom.³⁹¹ The mother heard “yelling, screaming, and crying.”³⁹² When she entered the bedroom, the boyfriend was gone and her daughter was on her bed crying.³⁹³ When her mother asked what had happened, the daughter described being assaulted by her boyfriend.³⁹⁴ Although neither the victim nor her mother called the police, they arrived fifteen minutes after the argument began, but after the defendant had left and the assault had ended.³⁹⁵ Upon their arrival, the victim was ambulatory but “hysterical, ranting, loud, hyperventilating, and pacing around the room.”³⁹⁶ The officers observed no apparent visible injuries.³⁹⁷ In response to their query as to what happened, the victim described the attack and identified her assailant by name and by physical description.³⁹⁸ This interview took no more than five minutes.³⁹⁹ The specific details of her statement were recorded in the officer’s incident report.⁴⁰⁰

The Massachusetts court recognized that under *Crawford*, in circumstances where the declarant is not presently—nor has she previously been—subject to cross-examination by the accused, the central issue regarding the admissibility of hearsay in a criminal prosecution under the Confrontation Clause is whether the hearsay is “testimonial.”⁴⁰¹ Additionally, it recognized that were the hearsay to

perpetrator. In the case at bar, the Commonwealth could offer the responding officer’s testimony as to the complainant’s physical appearance, her screams, her medical records, and photographs, as well as testimony from the mother as to the complainant’s screams and the fact that no one else was in a position to have inflicted her injuries. There will be an unavoidable adjustment period as past practices are modified and new approaches are developed.

Id. (citations omitted).

³⁹⁰ *Id.*

³⁹¹ *Id.* at 552.

³⁹² *Id.*

³⁹³ *Gonsalves*, 833 N.E.2d at 552.

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Gonsalves*, 833 N.E.2d at 552–53.

³⁹⁹ *Id.* at 552.

⁴⁰⁰ *Id.* at 561.

⁴⁰¹ *Id.* at 552.

be classified as “testimonial” under these circumstances, the Clause would bar its introduction.⁴⁰²

The court noted that *Crawford* had concluded that some hearsay would *always* be classified as “testimonial,” such as an affidavit, deposition, confession, testimony at a preliminary hearing, testimony before a grand jury and at trial, and statements that are the product of police interrogation.⁴⁰³ The Massachusetts court concluded these statements are “per se testimonial and *no further analysis is necessary*.”⁴⁰⁴ Apparently, if the statement falls within this “per se” category, the declarant’s motivation in giving it is not considered. For example, if the statement were the product of police interrogation, the fact that the emotional state of the declarant precluded awareness of the prosecutorial use that may be made of her statement would not be a relevant concern. In addressing the per se category, the court concentrated on the question of what constitutes “interrogation” in its colloquial sense, as that term was used in *Crawford*. As indicated earlier,⁴⁰⁵ this court gave an appropriately broad interpretation to the term “interrogation,” stating that it “must be understood expansively to mean all law enforcement questioning related to the investigation or prosecution of a crime.”⁴⁰⁶ Though its expansive interpretation would not encompass police questioning to “secure a volatile scene or to establish the need for or provide medical care,” it would include “investigatory interrogation,” such as preliminary fact gathering and assessment whether a crime has taken place.”⁴⁰⁷

Under this court’s analytical approach, if it is determined that the statement cannot be classified as testimonial per se, additional analysis would be required. Statements not deemed testimonial per se would include statements made in response to officers seeking to secure the scene or to determine the need for medical care, statements made to persons unconnected to law enforcement, and unprompted spontaneous statements to anyone.⁴⁰⁸ In this second analytical step, a court should evaluate whether the statement should

⁴⁰² *Id.*

⁴⁰³ *Id.* at 554, 561.

⁴⁰⁴ *Gonsalves*, 833 N.E.2d at 554 (emphasis added).

⁴⁰⁵ See *supra* notes 359–63 and accompanying text.

⁴⁰⁶ *Gonsalves*, 833 N.E.2d at 555.

⁴⁰⁷ *Id.* at 556–57 (disagreeing with the concurrence that judges will have difficulty delineating the difference between police questions that are or are not testimonial; this interpretation saying that judges are “familiar” and “well equipped” to make the necessary distinctions).

⁴⁰⁸ *Id.* at 557.

be classified as “testimonial in fact.”⁴⁰⁹ Seeking a “tool” to aid courts in resolving this classification issue, the court adopted the Sixth Circuit Court of Appeals’ articulation of a test: “The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying *whether a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime.*”⁴¹⁰ The Massachusetts Supreme Judicial Court elaborated that this test does not require any formality in the statement nor knowledge of judicial processes by the declarant.⁴¹¹ Its focus is on the intent of the declarant determined by evaluating the surrounding circumstances.⁴¹² The court concluded that “*all* statements the declarant knew or should have known might be used to investigate or prosecute an accused” should be classified as de facto testimonial.⁴¹³

Applying the two-step analysis to the facts of record in the instant case,⁴¹⁴ the court concluded that the victim’s statements to responding officers were the product of police interrogation (the scene had been secured and there was no apparent medical concern at the time of the interview), and therefore her generated statements would be deemed *per se testimonial* and inadmissible were she to remain unavailable for trial.⁴¹⁵ No further analysis was required. Regarding the daughter’s statements to the mother prior to the arrival of the police, the court (on a “limited record”) concluded that they were not *per se testimonial* since they were not “part of an affidavit, deposition, confession, or prior testimony at a preliminary hearing, before a grand jury, or at a former trial or procured through law enforcement interrogation.”⁴¹⁶ Necessarily taking the second analytical step, the court concluded that the victim’s statements to her mother were also not *testimonial in fact*, explaining:

Nothing in the record indicates the complainant offered the statements in order to establish the facts for later use by law en-

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 558 (quoting *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)).

⁴¹¹ *Id.*

⁴¹² *Gonsalves*, 833 N.E.2d at 558.

⁴¹³ *Id.*

⁴¹⁴ The state requested an interlocutory review of an adverse pre-trial ruling on a motion in limine, which excluded the statements as testimonial under *Crawford*. The Massachusetts Supreme Judicial Court granted review and through this decision vacated the lower court’s order, but remanded for further pretrial proceedings and instructed that the parties must be given an opportunity to reopen the evidence in light of the opinion. *Id.* at 562.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

forcement. We see no reason why a reasonable person in the complainant's position would anticipate that her statement, made in her own bedroom, to her mother, apparently without any knowledge that the police would become involved, would be used against the defendant in investigating and prosecuting the alleged assault.⁴¹⁷

The *Gonsalves* court's analytical approach, being faithful to the core values of the Confrontation Clause as interpreted by *Crawford*, deserves emulation by other jurisdictions struggling for a viable and straightforward solution to the perplexing problem of determining the compatibility of hearsay under the Confrontation Clause.

B. *Crawford's Retroactive Application*

Any discussion of *Crawford's* impact must consider the retroactive application of its remarkably altered construction of the Confrontation Clause's relationship to the introduction of testimonial hearsay. Clearly, the Court's establishment of a new rule concerning the admissibility of testimonial evidence under the Confrontation Clause must be given retroactive application to all criminal cases still pending at the time of the decision.⁴¹⁸ Though it may be applicable to pending cases, whether the accused had to preserve a confrontation

⁴¹⁷ *Id.*

⁴¹⁸ *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) ("When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987))). *See also* *People v. Price*, 15 Cal. Rptr. 3d 229, 237-38 (Ct. App. 2004) (noting that while *Crawford* itself does not address retroactivity, both parties in this case agreed it applied to the case at hand because "even a nonretroactive decision governs cases that are not yet final when the decision is announced"); *People v. Cage*, 15 Cal. Rptr. 3d 846, 854 (Ct. App. 2004) (holding that "*Crawford* indubitably applies retroactively in this case" (citing *Summerlin*, 542 U.S. at 348)); *State v. Cox*, 876 So. 2d 932, 938 (La. Ct. App. 2004) ("Even though the decision in *Crawford* is very recent, other courts have already considered its application to cases which had been tried before *Crawford* was decided. . . . [T]he Fifth Circuit applied the *Crawford* test even though *Crawford* was decided after the conclusion of [a] trial Other courts have also held *Crawford* to be applicable even though it was decided after the trial in those cases." (citations omitted)); *People v. Bell*, 689 N.W.2d 732, 734 (Mich. Ct. App. 2004) (applying *Crawford* retrospectively because the case was on appeal when *Crawford* was announced); *Samarron v. State*, 150 S.W.3d 701, 706 n.6 (Tex. App. 2004) (noting that no retroactivity analysis is needed because the case was still on direct appeal and not yet final when *Crawford* was announced).

In a rare case, a proceeding may not be final until habeas relief has been exhausted. *See, e.g., Ash v. Reilly*, 354 F. Supp. 2d 11, 16-17 (D.D.C. 2005) (finding *Crawford* applicable in a parole revocation proceeding, in spite of the fact that under the department's regulations revocation of parole is final and non-appealable, since the only permissible judicial review available was by habeas and such had not been exhausted).

issue by objection in the trial court is subject to some disagreement.⁴¹⁹ The more difficult question is whether, in post-conviction or habeas corpus proceedings, the *Crawford* rule should apply retroactively to cases that were final when *Crawford* was rendered.

The starting point for this issue's resolution is the Supreme Court's decision in *Teague v. Lane*.⁴²⁰ There, the Supreme Court, reviving Justice Harlan's view of retroactivity in cases collaterally attacking a conviction,⁴²¹ held that "new constitutional rules of criminal procedure" are not applicable in cases where the conviction had become final before the new rule was announced.⁴²² However, the *Teague* Court specified that retroactive application of a new rule would be permitted under two circumstances: (1) if the new rule categorizes private individual conduct as beyond the authority of the criminal law to regulate; and (2) if the new rule can be classified as a "watershed" rule of criminal procedure.⁴²³ The first exception is clearly not implicated by the *Crawford* decision. However, *Crawford* must be examined to determine if it actually creates a "new rule" as contemplated by *Teague*. Noting that it is often difficult to determine whether a decision proclaims a new rule, *Teague* made this observation:

[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.⁴²⁴

⁴¹⁹ Compare *People v. Kilday*, 20 Cal. Rptr. 3d 161, 169 (Ct. App. 2004) (rejecting forfeiture by failure to object where an objection below, if made, would have been futile and without support of then-existing law), and *Cage*, 15 Cal. Rptr. 3d at 854 (rejecting waiver by failure to object below in cases, such as this, where the change in the law is so unpredictable that it could not have been reasonably foreseen by trial counsel), with *Blanton v. State*, 880 So. 2d 798, 801 n.1 (Fla. Dist. Ct. App. 2004) (expressing doubt that the issue was preserved because of a failure to raise an objection based upon the Confrontation Clause unlike what was done in *Crawford*), and *Courson v. State*, 160 S.W.3d 125, 129 (Tex. App. 2005) (observing that *Crawford* clearly pointed out that the right of confrontation is neither "new nor novel" and therefore an objection on confrontation grounds was necessary to preserve the issue). See also *United States v. Solomon*, 399 F.3d 1231, 1237–38 (10th Cir. 2005) (finding a *Crawford* error had not been preserved and refusing to address it in the absence of a determination that it was plain error); *State v. Page*, 104 P.3d 616, 622–23 (Or. Ct. App. 2005) (finding a *Crawford* violation was "plain error," justifying review even though the error had not been preserved).

⁴²⁰ 489 U.S. 288 (1989).

⁴²¹ *Mackey v. United States*, 401 U.S. 667, 692–93 (1971).

⁴²² *Teague* at 310.

⁴²³ *Id.* at 311.

⁴²⁴ *Id.* at 301.

The majority in *Crawford*, though clearly rejecting *Roberts*'s previously applied analytical framework, exhaustively surveyed the results of the Court's previous decisions and concluded that those results were consistent with its current decision:

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.⁴²⁵

Chief Justice Rehnquist, in his opinion, though criticizing the majority's rejection of the *Roberts* analytical approach, noted that the *result* the majority reached "follows inexorably from *Roberts* and its progeny . . ."⁴²⁶ In light of this, one United States District Court concluded that *Crawford* did not establish a new rule and therefore its reasoning can be applied in a post-conviction proceeding involving a case that was final before the decision was handed down.⁴²⁷

The Ninth Circuit, conceding that the ambiguity of Justice Scalia's opinion makes it plausible that *Crawford* was simply a "correction of a misinterpretation" and not a "new rule," rejected this contention,⁴²⁸ stating: "On balance, an analysis of the historical application of the Confrontation Clause cases leads to the conclusion that *Crawford* announces a new rule that must be put through the [*Teague*-] *Summerlin* strainer."⁴²⁹ Most courts considering the retroactive effect of the *Crawford* decision under the *Teague* guidelines have so far concluded or assumed that *Crawford* does indeed announce a new rule and have simply considered whether the second *Teague* exception applied.⁴³⁰

⁴²⁵ *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (citations omitted).

⁴²⁶ *Id.* at 76 (Rehnquist, C.J., concurring).

⁴²⁷ *Richardson v. Newland*, 342 F. Supp. 2d 900, 924 (E.D. Cal. 2004) (observing that the *Crawford* Court's "opinion makes clear that the Supreme Court had never applied *Roberts* to out-of-court testimonial statements. . . . *Crawford* did not articulate a change in procedure, it merely reaffirmed and clarified procedures that had long been in place.").

⁴²⁸ *Bockting v. Bayer*, 399 F.3d 1010, 1012 (9th Cir. 2005).

⁴²⁹ *Id.* at 1015–16 (finding that *Crawford*'s new rule satisfied the "watershed" exception in *Teague* and therefore was applicable to the case). *See also* *Schriro v. Summerlin*, 542 U.S. 348, 352–53 (2004) (distinguishing between substantive and procedural rules in determining retroactivity); *see infra* note 434 and accompanying text (exploring *Summerlin* further).

⁴³⁰ *See generally* *Bintz v. Bertrand*, 403 F.3d 859 (7th Cir. 2005); *Murillo v. Frank*, 402 F.3d 786 (7th Cir. 2005); *Bockting*, 399 F.3d at 1012; *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004); *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004); *Hiracheta v. Att'y Gen. of Cal.*, 105 F. App'x 937 (9th Cir. 2004); *Evans v. Luebbbers*, 371 F.3d 438 (8th Cir. 2004); *Coleman v. United States*, No. Civ.A.04-4803, CRIM.A.01-038, 2005

There has been, and will probably continue to be, debate over whether *Crawford*'s new rule is a "watershed" rule as contemplated by *Teague*, which suggests that such watershed rules would be rare,⁴³¹ would have to "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction,"⁴³² and significantly reduce the impermissible risk that the innocent would be convicted by enhancing the pre-existing fact-finding procedures.⁴³³ Contemporaneous with the *Crawford* decision, the Supreme Court recently emphasized: "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one, 'without which the likelihood of an accurate conviction is *seriously* diminished.'"⁴³⁴ An example of a new procedural rule that would qualify as a watershed rule was the *Gideon v. Wainwright*⁴³⁵ decision, which created the right to court-appointed counsel for indigent defendants.⁴³⁶

So far, the prevailing view is that the new rule in *Crawford* does not qualify under the *Teague* exception as a watershed rule.⁴³⁷ Adherents to this view suggest *Crawford*'s new rule is not of the "magnitude"

WL 1595427 (E.D. Pa. July 5, 2005); *People v. Edwards*, 101 P.3d 1118 (Colo. Ct. App. 2004); *Danforth v. State*, 700 N.W.2d 530 (Minn. Ct. App. 2005); *People v. Dobbin*, 791 N.Y.S.2d 897 (Sup. Ct. 2004); *People v. Watson*, No. 7715/90, 2004 WL 2567124 (N.Y. Sup. Ct. Nov. 8, 2004) (en banc); *In re Markel*, 111 P.3d 249 (Wash. 2005).

⁴³¹ One court noted that, in the fifteen years since the *Teague* decision, only on eleven occasions has the Supreme Court considered whether a new rule qualified as a watershed rule warranting retroactive application to cases finalized before the new rule's creation, and in each instance, the Court held that the new rule was not. *Muyet v. United States*, No. 03 Civ. 4247, 2004 WL 2997866, at *9 (S.D.N.Y. Dec. 27, 2004).

⁴³² *Teague v. Lane*, 489 U.S. 288, 311 (1989).

⁴³³ *Id.*

⁴³⁴ *Schriro v. Summerlin*, 542 U.S. 348, 354–56 (2004) (holding that the new procedural rule precluding a sentencing judge, without a jury, from making factual aggravating findings required to impose the death penalty was not a watershed rule because it was not necessary to ensure accurate fact-finding and to prevent miscarriages of justice; therefore the rule does not apply retroactively to cases in which a conviction is already final) (quoting *Teague*, 489 U.S. at 313)).

⁴³⁵ 372 U.S. 335 (1963).

⁴³⁶ See *Beard v. Banks*, 542 U.S. 406, 407 (2004) ("This Court has yet to find a new rule that falls under this exception. In providing guidance as to what might do so, the Court has repeatedly, and only, referred to the right-to-counsel rule of *Gideon v. Wainwright* which 'altered [the Court's] understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.'" (alteration in original) (citations omitted)).

⁴³⁷ See *supra* note 430 (cataloging several decisions espousing this view). See also *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005) (applying *Teague*, but without explanation, and holding that *Crawford*'s new rule was not retroactive).

of *Gideon*, since *Crawford* did not “cut a new rule from whole cloth.”⁴³⁸ Since the *Crawford* rule does not necessarily enhance accuracy determinations in criminal cases,⁴³⁹ and since *Crawford* violations may be excused under the harmless error analysis, it is difficult to conclude that the rule “alters rights fundamental to due process.”⁴⁴⁰

The Ninth Circuit⁴⁴¹ and two New York court decisions⁴⁴² have concluded that the new *Crawford* rule is a watershed rule under *Teague* and is applicable retroactively in post-conviction cases. The Ninth Circuit, applying the *Summerville* test, concluded that retroactive application of the new rule in *Crawford* is required in order to avoid the likelihood of the serious diminution of the accuracy of convictions and stated: “The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental. Instead, it is an ‘absolute prerequisite to fundamental fairness.’”⁴⁴³ The court rejected the contention that a rule of constitutional law that is susceptible to a harmless error analysis could not also be a “bedrock rule of procedure.”⁴⁴⁴ It explained that the two concepts “hinge” on different considerations. The harmless error rule “depends on whether the impact of the error can be measured,” while the determination of whether a new rule is a bedrock rule depends on whether “it increases the likelihood of accurate convictions.”⁴⁴⁵ Finally, the Ninth Circuit rejected the conclusion that *Crawford* enhances reliability or accuracy in some

⁴³⁸ *People v. Edwards*, 101 P.3d 1118, 1123 (Colo. Ct. App. 2004) (“[*Crawford*] did not define or otherwise alter our understanding of the meaning of the right itself.”). See also *Brown v. Uphoff*, 381 F.3d 1219, 1226–27 (10th Cir. 2004) (“Unlike *Gideon*, *Crawford* does not ‘alter[] our understanding of what constitutes basic due process,’ but merely sets out new standards for the admission of certain kinds of hearsay.”) (citation omitted).

⁴³⁹ *Mungo v. Duncan*, 393 F.3d 327, 335 (2d Cir. 2004) (“As we see the operation of the *Crawford* rule, it is likely to improve accuracy in some circumstances and diminish it in others.”). This Second Circuit decision makes a compelling argument that, though *Crawford* will invariably exclude unreliable testimonial hearsay, it will also exclude testimonial hearsay that under the prior *Roberts* rule would have been admissible precisely because it was reliable, and thereby *Crawford* will diminish rather than enhance accuracy. *Id.* at 335–36.

⁴⁴⁰ *Uphoff*, 381 F.3d at 1226–27.

⁴⁴¹ *Bockting v. Bayer*, 399 F.3d 1010, 1012 (9th Cir. 2005).

⁴⁴² *People v. Dobbin*, 791 N.Y.S.2d 897, 905–06 (Sup. Ct. 2004); *People v. Watson*, No. 7715/90, 2004 WL 2567124, at *5 (N.Y. Sup. Ct. 2004) (en banc).

⁴⁴³ *Bockting*, 399 F.3d at 1019 (quoting *Sawyer v. Smith*, 497 U.S. 227, 244 (1990)).

⁴⁴⁴ *Id.* at 1021.

⁴⁴⁵ *Id.* at 1020.

cases but not in others⁴⁴⁶ and for that reason should not qualify as a “watershed” rule, stating:

The flaw in this analysis is that the Second Circuit has substituted its judgment of whether the *Crawford* rule is one without which the accuracy of conviction is seriously diminished, for the Supreme Court’s considered judgment. The Court has found repeatedly that the purpose of the Confrontation Clause is to promote accuracy⁴⁴⁷

Expressing a similar view, one New York judge concluded:

[T]he violation of a defendant’s right to cross-examine a witness who has made a testimonial statement against him or her, according to *Crawford*, calls into question the reliability of the testimony admitted at trial. This concern implicates the fundamental fairness of the trial, may have a significant effect on the integrity of the fact-finding process, and could compromise the jury’s determination of a defendant’s guilt, as long-standing Supreme Court precedent has shown. Accordingly, applying *Teague*’s teachings, this court finds that the rule announced in *Crawford* is a “watershed” rule of Criminal Procedure, and thus applies to cases on collateral review.⁴⁴⁸

Given *Teague*’s extremely high standard for qualifying under the watershed rule exception, it is unlikely that *Crawford*’s “new rule” meets it. Though retroactive application of *Crawford*’s new rule could dramatically enhance the accuracy of the determination of guilt in some cases, it would not likely have such effect in others. In spite of the Ninth Circuit’s conclusion to the contrary, it appears that, to meet the *Gideon* example, the accuracy enhancement must pervasively apply in all cases.

C. *The Confrontation Clause and Non-Testimonial Hearsay: the Remaining Viability of the Roberts Reliability Approach*

Clearly, the *Crawford* Court rejected the *Roberts* “reliability approach” as it applied to testimonial hearsay, articulating the following reasons:

The legacy of *Roberts* in other courts vindicates the Framers’ wisdom in rejecting a general reliability exception. The framework

⁴⁴⁶ *Mungo v. Duncan*, 393 F.3d 327, 335 (2004) (“[The *Crawford* Rule] is likely to improve accuracy in some circumstances and diminish it in others.”).

⁴⁴⁷ *Bockting*, 399 F.3d at 1020.

⁴⁴⁸ *People v. Watson*, No. 7715/90, 2004 WL 2567124, at *7–8 (N.Y. Sup. Ct. 2004) (en banc) (recognizing as well that lower federal courts have, for the most part and with little analysis, disagreed).

is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. . . .

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.⁴⁴⁹

Though Chief Justice Rehnquist and Justice O'Connor stated their "dissent from the Court's decision to *overrule Ohio v. Roberts*,"⁴⁵⁰ a close examination of the majority's opinion does not warrant this emphatic characterization of the impact of the decision on the continued viability of the *Roberts* analytical approach.

Justice Scalia, in the majority opinion, noted that as to non-testimonial hearsay, "it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."⁴⁵¹ Clearly, the Court left for "another day" the determination of the Confrontation Clause's role, if any, in the regulation of non-testimonial hearsay and whether the *Roberts* reliability approach should have any continued vitality in this context.⁴⁵² It is plausible that, to get the consensus of seven judges, a significant majority, on a monumental clarification of the Confrontation Clause, it was necessary to leave open the possibility of a continued role for *Roberts* to play with respect to non-testimonial hearsay.⁴⁵³ Lower courts, however, have struggled with this question on the possibility of *Roberts*'s continued role.

In one post-*Crawford* case, an Oklahoma appellate court applying the *Roberts* two-pronged analytical approach to non-testimonial hearsay read Justice Scalia's comment in *Crawford* regarding non-testimonial hearsay as having "noted that non-testimonial hearsay

⁴⁴⁹ *Crawford v. Washington*, 541 U.S. 36, 62–63 (2004).

⁴⁵⁰ *Id.* at 69 (Rehnquist, C.J., concurring) (emphasis added).

⁴⁵¹ *Id.* at 68.

⁴⁵² *Id.*

⁴⁵³ As one post-*Crawford* court noted, "A close reading of *Crawford* indicates that *Roberts* still applies to non-testimonial hearsay evidence, though the Court appears split on whether it should." *State v. Dedman*, 102 P.3d 628, 636 (N.M. 2004) (emphasis added).

might still be admissible against an accused in a criminal trial if both prongs of *Roberts* were satisfied, regardless of whether the defendant had a prior opportunity to cross-examine the declarant.”⁴⁵⁴ The Oklahoma court found the non-testimonial hearsay—a confession made to fellow inmates, which implicated the declarant and the defendant—lacked sufficient indicia of reliability and therefore, under the Confrontation Clause, it should not have been admitted.⁴⁵⁵ In another case, the North Carolina Court of Appeals read the same Scalia comment and concluded: “Although *Crawford* overrules the *Roberts* framework to the extent that it applies to testimonial statements, *Roberts* remains good law regarding non-testimonial statements.”⁴⁵⁶ The North Carolina court went on to conclude that a non-testimonial excited utterance was reliable, as it fell within a “firmly rooted” hearsay exception.⁴⁵⁷ A Florida appellate court, however, read Justice Scalia’s comment and reached the opposite conclusion.⁴⁵⁸ The Florida court stated that “*Crawford* made clear that where *non-testimonial* hearsay is at issue, such as that involved in this case, the individual states have ‘flexibility in their development of hearsay law’ and can even exempt such statements from confrontation clause scrutiny altogether.”⁴⁵⁹ The court, upon determining that the admitted statement was non-testimonial, ended the inquiry and affirmed.⁴⁶⁰

⁴⁵⁴ *Miller v. State*, 98 P.3d 738, 743 (Okla. Crim. App. 2004).

⁴⁵⁵ *Id.* at 748.

⁴⁵⁶ *State v. Blackstock*, 598 S.E.2d 412, 423 n.2 (N.C. Ct. App. 2004).

⁴⁵⁷ *Id.* at 423. *See also* *Rios v. Lansing*, 116 F. App’x 983, 988 (10th Cir. 2004) (quoting Justice Scalia’s comment regarding the treatment of non-testimonial hearsay, the court concluded simply: “Because non-testimonial hearsay is at issue here, the reliability test of *Roberts* still applies”).

⁴⁵⁸ *Herrera-Vega v. State*, 888 So. 2d 66, 66 (Fla. Dist. Ct. App. 2004). *See also* *Purvis v. State*, 829 N.E.2d 572, 578 (Ind. Ct. App. 2005) (quoting Justice Scalia’s ambiguous comment and concluding: “Thus, when the hearsay statements at issue are not testimonial, ordinary state law evidence laws and rules determine their admissibility”).

⁴⁵⁹ *Herrera-Vega*, 888 So. 2d at 69 (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)).

⁴⁶⁰ *Id.*

In contrast, most courts, if they even address the issue,⁴⁶¹ are more cautious and simply note the ambiguity. After determining the statement to be non-testimonial, most courts go on to apply the *Roberts* two-pronged analytical approach, choosing to err on the side of caution in case the Supreme Court later declares *Roberts* to have continued vitality.⁴⁶² However, the District of Columbia Court of Appeals, applying the *Roberts* framework to non-testimonial co-conspirator statements, categorically concluded: “*Crawford* did not alter the application of *Roberts* to non-testimonial statements; therefore, we accept the continued viability of *Roberts* to such statements.”⁴⁶³

⁴⁶¹ Not all courts acknowledge that there is an issue as to *Roberts*' applicability to non-testimonial statements. See, e.g., *Horton v. Allen*, 370 F.3d 75, 83–84 (1st Cir. 2004) (holding *Crawford* inapplicable unless statements are testimonial and applying *Roberts* to non-testimonial statements); *People v. Shepherd*, 689 N.W.2d 721, 729 (Mich. Ct. App. 2004) (concluding simply that “*Crawford* left *Roberts* intact regarding admissibility of non-testimonial hearsay”).

Other post-*Crawford* cases, without mentioning the issue, end their Confrontation Clause inquiry and resolve the case after simply determining the hearsay in question was non-testimonial under *Crawford*. See, e.g., *Napier v. State*, 820 N.E.2d 144, 149 (Ind. Ct. App. 2005) (determining that “inspection and operator certifications are simply not included in the class of evidence” giving rise to *Crawford* concerns); *Texas v. Woods*, 152 S.W.3d 105, 114 (Tex. Crim. App. 2004) (finding the statements in question did not “fall within the categories of testimonial evidence described in *Crawford*”).

⁴⁶² See, e.g., *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004) (“[W]hile the continued viability of *Roberts* with respect to nontestimonial statements is somewhat in doubt, we will assume for purposes of this opinion that its reliability analysis continues to control nontestimonial hearsay”); see also *United States v. Franklin*, 415 F.3d 537, 546 (6th Cir. 2005) (quoting with approval the assumption described in *Saget*); *State v. Doe*, 103 P.3d 967, 972 (Idaho Ct. App. 2004) (concluding the Supreme Court left it “open to dispute” as to whether *Crawford* “abrogates” *Roberts* as to non-testimonial hearsay, this court determined that “caution requires” the *Roberts* test be applied); *State v. Vaught*, 682 N.W.2d 284, 326–27 (Neb. 2004) (noting that *Crawford* made “no explicit statement regarding non-testimonial hearsay” but simply suggested that the Confrontation Clause may have no role in regulating such or that *Roberts* and its progeny may still apply to statements that are non-testimonial; although apparently convinced that no constitutional confrontation scrutiny need be applied to non-testimonial hearsay after *Crawford*, the court went on to apply the *Roberts* test anyway); *State v. Davis*, 613 S.E.2d 760, 780 (S.C. Ct. App. 2005) (quoting the ambiguous language in *Crawford*, and stating: “Accordingly, we turn to analyze whether [the nontestimonial statement] fall[s] under a firmly rooted hearsay exception or else bear[s] particularized guarantees of trustworthiness. . . .”); *State v. Manuel*, 685 N.W.2d 525, 532–33 (Wis. Ct. App. 2004) (reasoning that, because *Crawford* did not “expressly overrule *Roberts*” and its answer on this issue was “equivocal,” the question remains open as to what constitutional test is to be applied to non-testimonial hearsay; the court went on, in an “abundance of caution,” to apply the *Roberts* test to non-testimonial hearsay).

⁴⁶³ *Hammond v. United States*, 880 A.2d 1066, 1099 (D.C. 2005). See also *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (finding persuasive the argument that the *Roberts* framework survives *Crawford* as to non-testimonial hearsay); *Manuel*,

The likelihood of *Roberts*'s survival after *Crawford* appears unlikely since much of the criticism leveled by *Crawford* at the *Roberts* analytical approach as applied to testimonial hearsay would apply equally to non-testimonial hearsay.⁴⁶⁴ *Crawford* criticizes the *Roberts* approach as vague, amorphous, subjectively applied, and leading to contradictory conclusions regarding the same factors when considered by different judges or courts.⁴⁶⁵ However, the cautionary approach taken by many courts in applying *Roberts* to non-testimonial hearsay, in the absence of a clear determination of the issue by the Supreme Court, appears to be prudent.

IV. CONCLUSION

The Supreme Court in *Crawford* was correct to take the difficult, but necessary, step of rejecting the jurisprudence derived from the *Roberts* reliability approach and thereby restoring confrontation to its true purpose, which is ensuring that the accused has a meaningful opportunity to participate, through cross-examination, in the development of the testimonial evidence produced against him or her. The *Crawford* decision accurately revealed what many previously recognized: the *Roberts* reliability approach was seriously flawed and, as a result, capable of inconsistent application and the facilitation of the egregious introduction of core testimonial evidence that the Clause was designed to forbid. Because of the demonstrated flaws of the *Roberts* analytical approach, the Supreme Court should, in the near future, clearly discard its use even in the regulation of non-testimonial hearsay under the Clause.

Post-*Crawford* jurisprudence has shown both predictable and unpredictable controversy regarding the application of the key—but not clearly delineated—“testimonial” classification. The Supreme Court must clarify more precisely the parameters of the constitutional scope of testimonial hearsay.⁴⁶⁶ It must do so by describing appropriate and

697 N.W.2d at 826 (“We accept [the] argument that *Roberts* ought to be retained for nontestimonial hearsay, as we agree that evidence that may be admissible under the hearsay rules may nevertheless still be inadmissible under the Confrontation Clause.”).

⁴⁶⁴ *Doe*, 103 P.3d at 972 (noting that support for the conclusion that *Roberts* is abrogated and should not be applied to non-testimonial hearsay may be founded upon the fact that “*Crawford* thoroughly criticizes the failing of the *Roberts* reliability analysis and the inconsistencies in application that it has wrought”).

⁴⁶⁵ See *supra* notes 52–55 and accompanying text (exploring more fully many criticisms of *Roberts*).

⁴⁶⁶ Perhaps in a manner consistent with the Massachusetts Approach described *supra* notes 388–417 and accompanying text.

concrete factual applications of this term and not by perpetuating vague, broad formulations, which are too often applied in contradictory and inconsistent ways. The Supreme Court, in delineating the precise contours of the term “testimonial,” should ensure the inclusion of statements by victims and others, knowingly describing or reporting historical information concerning the commission of a crime and its perpetrator to law enforcement personnel, or those known to be acting on behalf of law enforcement. Such inclusion should not depend on the relative closeness in time of the statement to the criminal incident reported nor on the emotional state of the declarant.

Finally, the Supreme Court needs to affirm the current post-*Crawford* majority position that the “new rule” announced in *Crawford* does not fall within the *Teague* “watershed” exception. Even though the rule might significantly increase the accuracy of the truth determining process in a particular case, it would not do so pervasively in all cases. Thus, *Crawford*’s new rule regarding regulation of testimonial hearsay under the Confrontation Clause falls short of the polestar *Gideon* “watershed” standard and should not be applied to cases that were final before its announcement.