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Crawford v. Washington: Reclaiming the Original Meaning of the Confrontation Clause

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Crawford v. Washington: Reclaiming the Original Meaning of the Confrontation Clause

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***CRAWFORD v. WASHINGTON:* RECLAIMING THE ORIGINAL MEANING OF THE CONFRONTATION CLAUSE**

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I. INTRODUCTION

In early 2004, the Supreme Court handed down *Crawford v. Washington*,² a decision that “redefines the scope and effect of the Confrontation Clause.”³ Specifically, *Crawford* reframed the analysis used by courts faced with hearsay that falls into a recognized exception in the Federal Rules of Evidence. Before *Crawford*, if a hearsay statement was admissible under the Federal Rules, it was presumed to simultaneously satisfy any Confrontation Clause requirements. After *Crawford*, courts must employ a two-step analysis for hearsay statements. First, courts must determine whether the statement is testimonial in nature. Then, if the statement is deemed testimonial, the courts must then

¹ J.D. Candidate, Touro Law Center, 2005. The author wishes to thank her parents for their love and support, her sister and brother-in-law for their encouragement, and the 2004 World Series Champion Boston Red Sox for finally winning it all.

² 124 S. Ct. 1354 (2004).

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

analyze whether its admission would offend the Sixth Amendment.⁴

II. THE CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment mandates that criminal defendants have an opportunity to examine the witnesses against them, a procedural guarantee that applies with equal force to both federal and state criminal proceedings.⁵ The Founders adopted England's common-law system, which favored "live testimony in court subject to adversarial testing" — in other words, testimony subject to cross-examination.⁶ Despite this general practice, however, abuses occurred in the English courts under sixteenth and seventeenth-century statutes requiring pre-trial examination of suspects and witnesses.⁷ These statutes mirrored the civil law practices on the Continent, where private examination by judicial officers was the normal practice.⁸ These examinations produced *ex parte* affidavits that were subsequently used against the accused in open court.⁹ In response to politicized

⁴ *Crawford*, 124 S. Ct. at 1364.

⁵ *Pointer v. Texas*, 380 U.S. 400, 403 (1965) ("[T]he Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right.").

⁶ *Crawford*, 124 S. Ct. at 1359.

⁷ *Id.* at 1360 (citing 1 & 2 Phil. & M., c. 13 (1554) and 2 & 3 *id.*, c. 10 (1555)).

⁸ *Id.* at 1359.

⁹ *See, e.g.*, CRIMINAL TRIALS 389-520 (David A. Jardine ed., 1850). Sir Walter Raleigh was tried for high treason, based upon the confession of his alleged conspirator, Lord Cobham, who claimed he and Raleigh had planned to kill the King and put Arabella Stuart into power. Cobham later retracted his accusations. At Raleigh's trial, the Attorney General, Sir Edward Coke, used

trials like that of Sir Walter Raleigh, where untested written statements were used to prosecute (or, arguably, to persecute) defendants, English law “developed a right of confrontation that limited these abuses.”¹⁰

As the concept of a right to confront adverse witnesses evolved, British courts struggled with procedural protections meant to balance the defendants’ rights against the court’s need for every person’s testimony. When faced with the unavailability of a deceased witness, the Court of the King’s Bench held that “the admissibility of an unavailable witness’s pretrial examination depended on whether the defendant had had an opportunity to cross-examine him.”¹¹ This case, *King v. Paine*, illustrated the common-law rule requiring the opportunity for cross-examination before allowing evidence to be introduced against criminal defendants.¹²

As the Supreme Court noted in *Pointer v. Texas*, American courts have adopted this procedural protection:

Cobham's statements, yet Cobham himself did not testify. Raleigh, at trial, challenged the Attorney-General:

If you proceed to condemn me here by bare inferences, without an oath, without a subscription, without witnesses, upon a paper accusation, you try me by the Spanish Inquisition. If my accuser were dead or abroad, it were something; but he liveth . . . Why, then, I beseech you, my Lords, let Cobham be sent for; let him be charged upon his soul; upon his allegiance to the King, and if he will then maintain his accusation to my face, I will confess myself guilty.

Id. at 418-20.

¹⁰ *Crawford*, 124 S. Ct. at 1360 (citing 13 Car. 2, c. 1, § 5 (1661) (treason statute requiring “face to face” confrontation of witnesses)).

¹¹ *Id.* at 1360 (describing *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696)).

There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.¹³

In fact, "the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions . . . thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact."¹⁴ During debates over the ratification of the American Constitution, this concern about a defendant's right to confront adverse witnesses fueled some of the controversy. Antifederalists objected to ratification without the guarantees that would become the Bill of Rights in part because they feared prosecution upon *ex parte* statements.¹⁵ The first Congress responded to such criticism, says the *Crawford* Court, "by including the Confrontation Clause in the proposal that became the Sixth Amendment."¹⁶ The Supreme Court has traditionally been mindful, however, of the need to balance the Sixth Amendment right of criminal defendants to confront adverse witnesses against

¹² *Id.*

¹³ *Pointer*, 380 U.S. at 405.

¹⁴ *California v. Green*, 399 U.S. 149, 156 (1970).

¹⁵ *See Green*, 399 U.S. at 156.

¹⁶ *Crawford*, 124 S. Ct. at 1363.

“a societal interest in accurate factfinding, which may require consideration of out-of-court statements.”¹⁷

III. THE RULE AGAINST HEARSAY

To be considered competent to offer testimony, witnesses are required by the Federal Rules of Evidence to have “personal knowledge of the matter.”¹⁸ This requirement is described in the Advisory Committee Notes as a manifestation of “the common-law insistence upon ‘the most reliable sources of information.’”¹⁹ An individual who personally witnessed an event is more likely to have relevant, credible information to share with the court than someone who learned of the events second-hand. This rationale explains the general prohibition against allowing second-hand testimony — hearsay — into evidence. Since a witness other than the person who made the statement introduces hearsay evidence, its reliability is suspect. In the context of a criminal prosecution, if the accused is denied the opportunity to cross-examine the person who made the incriminating statement, this raises concerns about the defendant’s Sixth Amendment right to confrontation.²⁰

¹⁷ *Bourjaily v. United States*, 483 U.S. 171, 182 (1987).

¹⁸ FED. R. EVID. 602.

¹⁹ FED. R. EVID. 602 advisory committee's note (quoting JOHN W. STRONG, MCCORMICK ON EVIDENCE § 10 (5th ed. 1999)).

²⁰ Allowing hearsay into evidence only presents a Confrontation Clause problem when such evidence is offered against a *criminal* defendant. Civil plaintiffs, civil defendants, and government prosecutors do not enjoy a constitutional right to confront adverse witnesses.

The Congress codified the general prohibitions against allowing hearsay testimony into evidence in the Federal Rules of Evidence. The Rules define hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”²¹ After declaring hearsay to be generally inadmissible,²² the Federal Rules of Evidence list several exemptions and exceptions.²³ The Second Circuit Court of Appeals explained that “certain exceptions . . . are thought to be justified because statements made under the specified circumstances have a high degree of reliability.”²⁴ The excited utterance exception, for example, is considered reliable because someone “under the stress of excitement caused by [an] event” does not have the time to reflect or confabulate but instead speaks the truth.²⁵ In *Idaho v. Wright*,²⁶ the Supreme Court explained that excited utterances are presumptively reliable: “such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the

²¹ FED. R. EVID. 801(c).

²² FED. R. EVID. 802. “Hearsay is not admissible except as provided by these rules . . .” *Id.*

²³ See, e.g., FED. R. EVID. 803(2). “The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

²⁴ *Brown v. Keane*, 355 F.3d 82, 87 (2d Cir. 2004).

²⁵ See, e.g., *City of Dallas v. Donovan*, 768 S.W.2d 905, 908 (Tex. App. 1989) (“A statement made while in a condition of excitement theoretically stills the capacity for reflection and prevents fabrication.”).

²⁶ 497 U.S. 805 (1990).

statement provide sufficient assurances that the statement is trustworthy and that cross-examination would be superfluous.”²⁷

The Supreme Court in *Ohio v. Roberts*²⁸ addressed the potential gap between the Federal Rules of Evidence and the Sixth Amendment. At Roberts’ trial, one witness was unavailable to testify; consequently, the prosecution introduced testimony given at a preliminary hearing by the unavailable witness.²⁹ After conviction, the defendant challenged admission of the hearsay evidence, arguing that it violated his right to confront the witness.³⁰ When the case reached the United States Supreme Court, the Court weighed the traditional preference for testimony tested for accuracy by cross-examination against the competing public interest in effective law enforcement.³¹

The *Roberts* decision set forth “a ‘general approach’ for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause.”³² Evidence prohibited by the Sixth Amendment may not always precisely overlap with evidence prohibited by the rule against hearsay.³³ While the Federal Rules may provide an exception — for example, business records — that would encompass proffered testimony, the records may still violate the Sixth Amendment and be barred. Conversely, hearsay

²⁷ *Id.* at 820.

²⁸ 448 U.S. 56 (1980).

²⁹ *Id.* at 58-59.

³⁰ *Id.* at 59.

³¹ *Id.* at 64.

³² *Wright*, 497 U.S. at 814 (citing *Roberts*, 448 U.S. at 65).

testimony offered by a criminal defendant against a witness of the prosecution does not offend the Sixth Amendment, but may still be barred if it does not fall within an exception to the rule against hearsay.

Roberts and other hearsay cases identified two major categories of hearsay statements that implicate the Confrontation Clause. The first category includes prior statements of a testifying witness³⁴ and former testimony subject to cross-examination.³⁵ Because the defendant has an opportunity in either of these situations to cross-examine the declarant, the courts reasoned that the prior or current opportunity for cross-examination satisfies the Confrontation Clause.³⁶ This opportunity for cross-examination comports with what the *Roberts* Court termed “the Framers’ preference for face-to-face accusation.”³⁷ The Federal Rules of

³³ *Id.*

³⁴ See *Green*, 399 U.S. at 149. Prior statements by witnesses are included among the exemptions to the general prohibition against hearsay in the Federal Rules of Evidence, and allowed into evidence if they are inconsistent with current testimony (for impeaching a witness), consistent with the current testimony (for rehabilitating impeached witness), or a prior statement of identification. FED. R. EVID. 801(d)(1).

³⁵ *White v. Illinois*, 502 U.S. 346 (1992). Former testimony is excepted from the Federal Rules hearsay prohibition when the declarant is unavailable, which may happen when the declarant claims a privilege, refuses to testify, cannot recall the relevant events, is incapacitated or dead, or is absent and unable to be brought into court. FED. R. EVID. 804(a).

³⁶ *Green*, 399 U.S. at 158 (“[T]here is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant’s out-of-court statements, as long as the declarant is testifying . . . and subject to full and effective cross-examination.”).

³⁷ *Roberts*, 448 U.S. at 65.

Evidence include “prior statement by [a] witness” among the exemptions to the rule against hearsay.³⁸

The second category identified in *Roberts* raises potential Sixth Amendment problems. When a declarant’s statements have not previously been subjected to cross-examination, they may still be admissible under an exception to the rule against hearsay. Unlike the first category, determining that a statement falls within a recognized hearsay exception does not simultaneously end the Sixth Amendment analysis since there was no opportunity for cross-examination. This second category was further divided by the *Roberts* Court into two subcategories: firmly rooted hearsay exceptions, and statements that carry particularized guarantees of trustworthiness.³⁹ Both require a closer examination to ensure that a criminal defendant’s right to confrontation is not violated. The *Roberts* Court found two separate ways in which the Confrontation Clause restricts admissible hearsay:

[I]n conformance with the Framers’ preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. . . . [Secondly,] [r]eflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause

³⁸ FED. R. EVID. 801(d)(1). The Rule requires that the prior statement be inconsistent with the testimony for impeachment purposes, consistent with the testimony to rebut impeachment, or one of identification.

³⁹ *Roberts*, 448 U.S. at 65-66.

countenances only hearsay marked with such trustworthiness that “there is no material departure from the reason of the general rule.”⁴⁰

In other words, if the statement sought to be introduced was not elicited in a setting that provided the defendant with a prior opportunity to cross-examine the maker of the statement, there must be some other “indicia of reliability . . . though there is no confrontation of the declarant.”⁴¹ When faced with hearsay, the Court has traditionally focused its analyses on the reliability of the statement to determine whether the statement would offend the Sixth Amendment. As the Supreme Court explained in *California v. Green*:

[T]he question as we see it must be . . . whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. On that issue, neither evidence nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause.⁴²

The *Roberts* Court went further, concluding that some exceptions to the rule against hearsay “rest upon such solid foundations that admission of virtually any evidence within them

⁴⁰ *Roberts*, 448 U.S. at 65 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

⁴¹ *Id.* at 65 (citing *Dutton v. Evans*, 400 U.S. 74, 89 (1970)).

⁴² *Green*, 399 U.S. at 160-61.

comports with the ‘substance of the constitutional protection.’”⁴³ The Supreme Court announced that the statement of an unavailable declarant “is admissible only if it bears adequate indicia of reliability . . . [which] 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.”⁴⁴

Under *Roberts*, then, statements that do not fall within a firmly rooted hearsay exception, but which exhibit “particularized guarantees of trustworthiness,” may be admissible even without an opportunity for the accused to cross-examine the declarant.⁴⁵ The Court in *Idaho v. Wright* elaborated, instructing courts to find such guarantees by examining the totality of the circumstances, but “only those [circumstances] that surround the making of the statement and that render the declarant particularly worthy of belief.”⁴⁶ Hearsay statements that fall into recognized exceptions would therefore be admitted into evidence whenever the court determined that the statement was reliable, regardless of whether the criminal defendant had an opportunity for cross-examination. In *White v. Illinois*, the Supreme Court confirmed that a statement falling within “a firmly rooted hearsay exception is so trustworthy that adversarial testing can be expected to add little to its

⁴³ *Roberts*, 448 U.S. at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

⁴⁴ *Id.* (internal quotes omitted).

⁴⁵ *Id.*

⁴⁶ *Wright*, 497 U.S. at 819.

reliability.”⁴⁷ In short, if the prosecution can persuade the court that the proffered statement falls within a firmly rooted hearsay exception, no further Confrontation Clause inquiry is needed. This category, therefore, does not require that the prosecution make good faith efforts to locate the witness, only that the prosecution convince the court that the statement falls within a firmly rooted hearsay exception.⁴⁸

Although the Court did not enunciate a comprehensive list of which hearsay exceptions qualify as firmly rooted, it did explicitly identify excited utterances,⁴⁹ statements made for purposes of obtaining medical treatment,⁵⁰ dying declarations,⁵¹ and statements made during the course of and in the furtherance of a conspiracy.⁵² The various Circuit Courts of Appeal have added

⁴⁷ *White*, 502 U.S. at 357.

⁴⁸ *Brown*, 355 F.3d at 87, stating:

As a general proposition, in a criminal trial, a statement made out of court may be admitted against the accused as evidence of what it asserts only where the state, as the proponent of the presumptively barred evidence, carries its burden of showing that its admission does not violate the defendant's right of confrontation.

⁴⁹ *White*, 502 U.S. at 356.

⁵⁰ *Id.* See also FED. R. EVID. 803(4).

⁵¹ *Lilly v. Virginia*, 527 U.S. 116, 126 (1999). See also *Crawford*, 124 S. Ct. at 1367 n.6 (“Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. . . . We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.”).

⁵² *Bourjaily*, 483 U.S. at 183 (1987) (“We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court’s holding in *Roberts*, a court need not independently inquire into the reliability of such statements.”). See also FED. R. EVID. 801(d)(2)(E).

records of regularly conducted activity,⁵³ the absence of a public record,⁵⁴ adoptive admissions,⁵⁵ and statements by a party's agent⁵⁶ to the list of firmly rooted hearsay exceptions. The plurality opinion in *Lilly v. Virginia* suggested that statements against penal interest do not qualify for firmly rooted status.⁵⁷

Essentially, the courts prior to *Crawford* focused on the reliability of the hearsay statement, not the Sixth Amendment's strict protections for criminal defendants. As long as the prosecution could convince the court that a proffered statement fell within a firmly rooted hearsay exception or exhibited particularized guarantees of trustworthiness, the statement was admissible without any further Confrontation Clause analysis.

IV. *CRAWFORD v. WASHINGTON*

Twenty-four years after its *Roberts* ruling, the Supreme Court rejected the "particularized guarantees of trustworthiness" option for hearsay admissibility in *Crawford v. Washington*.⁵⁸ The

⁵³ *United States v. Ray*, 930 F.2d 1368, 1371 (9th Cir. 1990) ("The business records exception to the hearsay rule is a firmly rooted exception."). *See also* FED. R. EVID. 803(6).

⁵⁴ *United States v. Hale*, 978 F.2d 1016, 1021 (8th Cir. 1992) ("[Defendant's] counsel admitted that Rule 803(10) is 'firmly rooted' in the common law as an exception to the hearsay rule."). *See also* FED. R. EVID. 803(10).

⁵⁵ *United States v. Beckham*, 968 F.2d 47 (D.C. Cir. 1992). *See also* FED. R. EVID. 801(d)(2)(B).

⁵⁶ *United States v. Saks*, 964 F.2d 1514, 1525-26 (5th Cir. 1992) ("The agency exception is equally rooted in our jurisprudence. . . . We conclude that if statements meet the requirements of Rule 801(d)(2)(D) . . . the Confrontation Clause is satisfied."). *See also* FED. R. EVID. 801(d)(2)(D).

⁵⁷ *Lilly*, 527 U.S. at 134 n.4.

⁵⁸ *Crawford*, 124 S. Ct. at 1370.

defendant, Crawford, was convicted of stabbing the man who allegedly attempted to rape Crawford's wife, Sylvia.⁵⁹ In a statement to police, Sylvia recounted the events leading up the altercation; at trial, Sylvia asserted marital privilege and refused to testify.⁶⁰ The prosecution offered Sylvia's recorded police statement at trial and the court admitted it as a statement against penal interest under the *Roberts* particularized guarantee of trustworthiness exception to the rule against hearsay.⁶¹ Crawford challenged the prosecution's use of Sylvia's statement, alleging that it violated his constitutional right to confront the witnesses against him.⁶² After a lengthy historical examination of the origins of the right to confrontation and cross-examination,⁶³ the United States Supreme Court agreed that admitting such statements violated the Sixth Amendment:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. . . . [The Confrontation Clause] is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.⁶⁴

⁵⁹ *Id.* at 1356-57.

⁶⁰ *Id.* at 1357.

⁶¹ *Id.* at 1358.

⁶² *Id.*

⁶³ *Crawford*, 124 S. Ct. at 1359-63. The Court concluded that "[t]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 1363.

⁶⁴ *Id.* at 1370. The Court also expressed concern over the disparate determination of reliability under the *Roberts* test: "Whether a statement is deemed reliable depends heavily on which factors the judge considers and how

To reach this conclusion, the Court reasoned that since the text of the Confrontation Clause was insufficient to resolve the issue, it was therefore necessary to undertake a historical analysis of the concept of cross-examination.⁶⁵ After an explication of the original concerns surrounding the Confrontation Clause, the *Crawford* Court expressed its displeasure with the *Roberts* doctrine. The Court criticized the subjective nature of a reliability test.⁶⁶ More fundamentally, the Court was concerned with the *Roberts* test's "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."⁶⁷ The Court reasoned that "[d]ispensing 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."⁶⁸

These statements would seem to indicate that the *Crawford* Court meant to impose cross-examination as an absolute prerequisite for the admission of hearsay evidence against criminal defendants. However, the Supreme Court then announced a new distinction for courts analyzing out-of-court statements. Examining the language of the Confrontation Clause, the Court

much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts." *Id.* at 1371.

⁶⁵ *Id.* at 1359 ("We must therefore turn to the historical background of the Clause to understand its meaning.").

⁶⁶ *Id.* at 1371.

⁶⁷ *Id.*

⁶⁸ *Crawford*, 124 S. Ct. at 1371.

inferred from the word “witnesses” that the Founders meant to prohibit *testimonial* statements such as “*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.”⁶⁹ The *Crawford* Court therefore overturned *Roberts* to the extent that it no longer considered “particularized guarantees of reliability” sufficient to obviate Confrontation Clause problems with respect to *testimonial* hearsay. In the words of the Colorado Supreme Court, for *testimonial* statements, *Crawford* “rejects the reliability prong of the *Roberts* test in favor of an inquiry into whether the defendant had a prior opportunity to cross-examine the witnesses.”⁷⁰

Consequently, the Court restricted the admission of *testimonial* hearsay to cases in which the declarant is unavailable and there has been a prior opportunity for cross-examination, but declined to explicitly define *testimonial* hearsay.⁷¹ The *Crawford* Court’s distinction between *testimonial* and non-*testimonial* hearsay applies to statements that fall into both *Roberts* categories, firmly rooted hearsay exceptions and statements that exhibit particularized guarantees of trustworthiness.

⁶⁹ *Id.* at 1364 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

⁷⁰ *People v. Fry*, 92 P.3d 970, 976 (Colo. 2004).

⁷¹ *Crawford*, 124 S. Ct. at 1374 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’ ”); see *Cooper v. McGrath*, 314 F. Supp. 2d 967, 985 (N.D. Cal. 2004) (reasoning that unavailability after

V. THE CONFRONTATION CLAUSE AFTER *CRAWFORD*

After *Crawford*, the lower courts face at least two unresolved questions. First, what statements and scenarios qualify as “testimonial” for Confrontation Clause purposes? Second, what standards apply to *non*-testimonial hearsay?

The Definition of Testimonial Hearsay

The lower courts have already faced several cases requiring decisions about which statements qualify as testimonial hearsay. The more obvious testimonial statements include plea allocutions⁷² and statements to prosecutors.⁷³ Referring to the *Crawford* Court’s reliance on history, the District Court of Indiana reasoned that “[l]ike the justices of peace in England, prosecutors are trained in the law, and charged with the duty of assembling evidence to use against the accused at trial.”⁷⁴ The court concluded that “[i]f *ex parte* statements made in response to police questioning are testimonial, then *ex parte* statements made by a target in response

Crawford requires the prosecutor to show a good faith effort to obtain the witness’s testimony at trial).

⁷² United States v. McClain, 377 F.3d 219, 222 (2d Cir. 2004) (“[A] plea allocation by a co-conspirator who does not testify at trial may not be introduced as substantive evidence against a defendant unless the co-conspirator is unavailable and there has been a prior opportunity for cross-examination.”); see People v. Woods, 779 N.Y.S.2d 494 (N.Y. App. Div. 2004); United States v. Massino, 319 F. Supp. 2d 295 (E.D.N.Y. 2004).

⁷³ United States v. Saner, 313 F. Supp. 2d 896 (S.D. Ind. 2004.).

⁷⁴ *Id.* at 901.

to a prosecutor's questioning, statements elicited by government questioning 'with an eye toward trial,' must also be testimonial statements."⁷⁵ When faced with statements made to investigators by the patient of a doctor under investigation for Medicare fraud, the Northern District of Illinois agreed that "statements to the HHS Agents fall within the realm of testimonial statements."⁷⁶

The lower courts have also addressed some statements that are clearly *non*-testimonial in nature. The Supreme Court of Connecticut concluded in *State v. Rivera* that statements or confessions to family members were not testimonial.⁷⁷ Rivera, the defendant, was convicted of felony-murder, burglary, and arson for robbing a home and killing the homeowner.⁷⁸ Glanville, who was with Rivera the night of the murder, subsequently confessed his part in the crime to his nephew, Caraballo.⁷⁹ When Rivera's trial was already in progress, Caraballo was arrested on unrelated charges; Caraballo told the police about Glanville's statements, and then testified at Rivera's trial.⁸⁰ Rivera argued that Caraballo's account of Glanville's statements amounted to inadmissible hearsay.

The Connecticut Supreme Court, taking *Crawford* into consideration, disagreed. In determining whether Glanville's

⁷⁵ *Id.* at 902.

⁷⁶ *United States v. Mikos*, No. 02CR137-1, 2004 WL 2091999, at *18 (N.D. Ill. Sept. 16, 2004).

⁷⁷ 844 A.2d 191 (Conn. 2004).

⁷⁸ *Id.* at 195.

⁷⁹ *Id.* at 197.

⁸⁰ *Id.* at 198.

confession to Carabello was testimonial in nature, the Court considered the circumstances under which it was made. Glanville, the Court noted, “made the statement in confidence and on his own initiative to a close family member, almost eighteen months before the defendant was arrested.”⁸¹ The Court concluded that Glanville’s statement to Caraballo “clearly does not fall within the core category of *ex parte* testimonial statements that the court was concerned with in *Crawford*.”⁸²

The Eighth Circuit agreed that confessions to family members do not raise Confrontation Clause concerns. *United States v. Lee* involved two men, Lee and Kehoe, who broke into a gun dealer’s home; held the dealer, his wife, and her eight-year-old daughter hostage while they searched the house for cash, guns, and munitions; and then murdered all three victims.⁸³ At trial, Kehoe’s mother testified that both Lee and Kehoe had confessed the murders to her.⁸⁴ Lee contended that his Sixth Amendment rights “were violated by the admission of hearsay statements made by nontestifying codefendant Kehoe” to his mother.⁸⁵

The Eighth Circuit determined that circumstances surrounding a defendant’s confession to his mother “do not raise

⁸¹ *Id.* at 202.

⁸² *Rivera*, 844 A.2d at 202.

⁸³ 374 F.3d 637, 641-42 (8th Cir. 2004).

⁸⁴ *Id.* at 642. Kehoe’s brother also testified that Kehoe had confessed the murders to him, but since Kehoe’s brother was involved in selling the stolen weapons, the Eighth Circuit determined that these statements were admissible because they were made to a co-conspirator in furtherance of a crime. *Id.* at 644.

⁸⁵ *Id.* at 643.

the same confrontation concerns as the introduction of witness statements previously made in court proceedings or during police interrogations.”⁸⁶ The *Lee* Court noted that the Supreme Court had declined to indicate what types of statements were testimonial, and reasoned that “Kehoe’s statements were more like casual remarks to an acquaintance than formal testimonial statements made to law enforcement.”⁸⁷ Therefore, the Eighth Circuit did not consider the hearsay statements introduced by the mother of Lee’s codefendant to be barred by the Confrontation Clause.⁸⁸

When faced with hearsay statements that do not obviously fall into either testimonial or non-testimonial categories, the courts have reached a consensus with respect to what definition of “testimonial” to apply. The Court of Appeals of Minnesota articulated three formulations of “core testimonial evidence” noted by the *Crawford* Court:

(1) “ex parte in-court testimony or its functional equivalent,” such as affidavits, custodial examinations, prior trial testimony not subject to cross-examination, or “similar pretrial statements that declarants would reasonably expect to be used prosecutorially”; (2) “extrajudicial statements” of the same nature “contained in formalized testimonial materials”; and (3) “statements that were made under circumstances that would lead an objective witness reasonably to believe that the

⁸⁶ *Id.* at 645.

⁸⁷ *Id.* at 645.

⁸⁸ *Lee*, 374 F.3d at 645. The Eastern District of Illinois concurs in the *Lee* court’s reasoning and has held that declarant’s statements to her family and friends were admissible because “[t]here was no government involvement in these conversations, therefore they are not testimonial in nature and *Crawford* does not apply.” *Mikos*, 2004 WL 2091999, at *18.

statements would be available for use at a later trial.”⁸⁹

For example, in *State v. Barnes*,⁹⁰ the Supreme Judicial Court of Maine had to determine whether reporting threats to the police could be considered a testimonial statement. Barnes was convicted of killing his mother. A year and a half before she was murdered, the victim drove to the police station “sobbing and crying” and reported that “her son had assaulted her and had threatened to kill her more than once during the day.”⁹¹ The defendant protested the admission of his mother’s statements to the police. Barnes argued that because his mother’s statements were made to the police, they were testimonial in nature and therefore admission without an opportunity to cross-examine violated his Sixth Amendment rights.⁹²

The Supreme Judicial Court of Maine weighed a number of factors to determine whether Barnes’ mother’s statements were testimonial. The *Barnes* court considered the circumstances, including the facts that “the police did not seek her out,” that her statements were made “when she was still under the stress of the assault,” and that she “was not responding to tactically structured police questioning.”⁹³ Given this factual context, the Court

⁸⁹ *State v. Wright*, 686 N.W.2d 295, 301 (Minn. Ct. App. 2004). See *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004).

⁹⁰ 854 A.2d 208 (Me. 2004).

⁹¹ *Id.* at 210. Barnes’ mother was so distraught that the police called an ambulance for her. *Id.*

⁹² *Id.* at 211.

⁹³ *Id.* at 211.

distinguished this situation from *Crawford's* example of police interrogations.⁹⁴ “[T]he interaction between [defendant’s] mother and the officer was not structured police interrogation triggering the cross-examination requirement of the *Confrontation Clause* as interpreted by the Court in *Crawford*.”⁹⁵

Calls to 911 emergency assistance for help present similar difficulties for the courts. In New York, courts have issued opinions reaching opposite conclusions on whether 911 calls qualify as testimonial under *Crawford*. The key difference between *People v. Cortes*,⁹⁶ in which the court reasoned that 911 calls are testimonial, and *People v. Moscat*,⁹⁷ in which the court determined that 911 calls are *not* testimonial, is that the former involved a third-party *witness* to violence, while the latter involved a call for help by the *victim* of violence.

During Cortes’ trial for attempted murder, the prosecution sought to introduce a 911 call placed by an anonymous witness to the shooting.⁹⁸ Since the witness did not reveal his identity to the 911 operator, he “could not be located by the prosecution and was therefore unavailable for cross-examination.”⁹⁹ The contents of the anonymous phone call included the intersection where the shooting took place, a description of the shooter, and an ongoing narration

⁹⁴ *Id.* at 211-12.

⁹⁵ *Barnes*, 854 A.2d at 211-12.

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

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

⁹⁸ *Cortes*, 781 N.Y.S. 2d at 402.

⁹⁹ *Id.* at 403. Just before hanging up, the unidentified caller said, “I gotta hang up because people, people are gonna think I’m out calling the cops.” *Id.* at 404.

of events as they unfolded.¹⁰⁰ In holding such calls to be testimonial (and, therefore, barred without an opportunity for cross-examination), the court read *Crawford* broadly: “Noting the investigative and prosecutorial functions of government officers, the [*Crawford*] Court said that the involvement of any such officer in the production of testimonial evidence presents a risk.”¹⁰¹ Considering that the 911 operator worked for the police, the *Cortes* court concluded that “the circumstances of some 911 calls, particularly those reporting a crime, are within the definition of interrogation.”¹⁰²

The specific call at issue in *Cortes* included questions by the 911 operator about “the shooter’s location, description, and direction of movement, all necessary for the police to conduct their investigation.”¹⁰³ The court reasoned that 911 operators follow formalized procedures to collect information, and that these procedures “meet the definition of formal.”¹⁰⁴ Additionally, “callers to 911 reporting crimes are likely to know the use to which the information will be put.”¹⁰⁵ Concluding that 911 calls are testimonial under *Crawford*, the *Cortes* court said, “the 911 call reporting a crime preserved on tape is the modern equivalent, made

¹⁰⁰ *Id.* at 404. (“Caller: He’s killing him, he’s killing him, he’s shooting him again. . . . He shot him and now he’s running. And he shot him two or three times.”).

¹⁰¹ *Id.* at 403.

¹⁰² *Id.* at 405.

¹⁰³ *Cortes*, 781 N.Y.S. 2d at 404. For example, the 911 operator asked which borough, which direction, and prompted the caller to complete a description of the shooter’s clothes, i.e., “What kind of pants?” *Id.*

¹⁰⁴ *Id.* at 406.

¹⁰⁵ *Id.* at 407.

possible by technology, to the depositions taken by magistrates or JPs under the Marian committal statute.”¹⁰⁶

The Criminal Court of the City of New York reached the opposite conclusion in *Moscat*, albeit under different factual circumstances.¹⁰⁷ *Moscat* involved a 911 call placed by the complainant in a domestic violence case.¹⁰⁸ Noting that the case “represents an early opportunity for trial courts like this one to begin to work out in practice the meaning and concrete applications of the new principles of Sixth Amendment analysis,” the court concluded that “the 911 call here is not ‘testimonial’ in nature as the term ‘testimonial’ is used in *Crawford*.”¹⁰⁹ Instead of focusing on the factual details of the case at hand, the *Moscat* Court analyzed the *Crawford* holding and its application to calls made by victims of domestic violence.¹¹⁰

The court reasoned that 911 calls are not initiated by the police, and are generally not made out of a desire to spark a police investigation, but rather a desire for immediate assistance.¹¹¹ The court also noted in passing that 911 operators are, in New York, *civilian* police employees.¹¹² The determinative factor for the

¹⁰⁶ *Id.* at 415.

¹⁰⁷ *Moscat* is the trial court's ruling on a motion *in limine* to exclude the 911 call at issue.

¹⁰⁸ *Moscat*, 777 N.Y.S. 2d at 875.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 878. (“The issue is of special importance to courts — like this one — dedicated to trying cases of alleged domestic violence . . . [because] complainants in domestic violence cases often refuse to come to court to testify at trial.”).

¹¹¹ *Id.* at 879.

¹¹² *Id.* at 878.

court, however, was that a woman who calls 911 for help “is not contemplating being a ‘witness’ in future legal proceedings; she is usually trying simply to save her own life.”¹¹³ A 911 call for help, the court concluded, “is essentially different in nature than the ‘testimonial’ materials that . . . the Confrontation Clause was designed to exclude.”¹¹⁴ Further, the *Moscat* Court reasoned that:

The 911 call — usually, a hurried and panicked conversation between an injured victim and a police telephone operator — is simply *not* the equivalent to a formal pretrial examination by a Justice of the Peace in Reformation England. If anything, it is the electronically augmented equivalent of a loud cry for help. The Confrontation Clause was not directed at such a cry.¹¹⁵

Despite broad — and opposite — conclusions reached by in *Cortes* and *Moscat*, most courts faced with 911 calls decline to announce a bright-line rule.¹¹⁶ Instead, these courts prefer case-by-case analysis to determine whether each 911 call falls into the category of testimonial or not. The District Court of New York in *State v. Isaac* examined *Moscat*, *Cortes*, and several other 911-related cases to conclude that “[t]he law and logic of *Cortes* have much to recommend them, but this Court is unable to apply them

¹¹³ *Moscat*, 777 N.Y.S. 2d at 880.

¹¹⁴ *Id.* at 879.

¹¹⁵ *Id.* at 880.

¹¹⁶ See, e.g., *State v. Powers*, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (“We reject the State’s request for a bright line rule admitting all 911 recordings Instead, we hold that the trial court, on a case-by-case basis, can best assess the proposed admission of a 911 recording as testimonial or nontestimonial . . .”).

quite so broadly.”¹¹⁷ Instead, the *Isaac* Court interpreted the term “testimonial ‘reasonably and with restraint’” to determine that, under the particular facts of the case, the 911 call was not admissible.¹¹⁸

Another 911 case, *People v. Caudillo*, similarly analyzed the *Cortes* and *Moscat* holdings.¹¹⁹ In *Caudillo*, an officer responding to a 911 domestic violence call observed a car matching the description of one involved in a gang-shooting earlier the same evening.¹²⁰ The license plate and description of the car were relayed to the police via an anonymous phone call reporting “men with guns” at a convenience store.¹²¹ The officer arrested the men standing around the car, including Caudillo, who was charged with assault with a firearm.¹²²

At trial, the prosecution proffered the anonymous 911 tape including the description of the car, and the trial court admitted it, concluding that the call “was made under stress . . . and is admissible.”¹²³ The *Caudillo* Court quotes at length from *Moscat* and *Cortes* before undertaking an analysis of the three formulations of “testimonial hearsay” under *Crawford*:

First, the 911 call was not “*ex parte* in-court testimony or its functional equivalent” . . . [because] the dispatcher . . . was attempting to obtain information to assist the police in responding appropriately by providing assistance to any victims

¹¹⁷ *State v. Isaac*, No. 23398/02, 2004 WL 1389219, at * 8 (N.Y. Dist. Ct. 2004).

¹¹⁸ *Id.* at *9, *12.

¹¹⁹ *People v. Caudillo*, 19 Cal. Rptr. 3d 574 (Cal. Ct. App. 2004).

¹²⁰ *Id.* at 577.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 582-83.

and apprehending the gunman. . . . Second, the 911 call cannot be described as an “extrajudicial statement[] . . . contained in formalized testimonial materials” . . . [because] its purpose was to advise the police . . . so that they could take appropriate action to protect the community. Finally, the 911 call was not “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” . . . [because t]he caller was simply requesting help from the police¹²⁴

Still, the *Caudillo* Court refrained from announcing a broad holding with respect to 911 calls, instead concluding that “[u]nder the circumstances of this case, we believe that the admission of the 911 call did not violate the Confrontation Clause.”¹²⁵

Perhaps the most detailed analysis of the admissibility of 911 calls and related statements made to police is the Appellate Court of Illinois’ opinion in *People v. West*.¹²⁶ A female cabdriver was kidnapped, robbed, and raped by two male passengers.¹²⁷ When the victim escaped, she ran to a nearby house, where Dorothy Jackson let her in and placed a call to 911 on the victim’s behalf.¹²⁸ During the call, Jackson “would ask the woman questions posed by the dispatcher, and provide the dispatcher with the woman’s answers,” including the location of Jackson’s house, the victim’s physical condition, a description of the victim’s stolen

¹²⁴ *Caudillo*, 19 Cal. Rptr. 3d at 590.

¹²⁵ *Id.* at 590.

¹²⁶ No. 1-02-2358, 2004 Ill. App. LEXIS 1536, at *1 (Ill. App. Ct. 2004).

¹²⁷ *Id.* at *2.

¹²⁸ *Id.* at *4.

cab, and in what direction the assailants went.¹²⁹ At trial, the prosecution proffered this 911 call, in addition to testimony by officers who spoke to the victim at the scene, doctors who treated the victim, and officers who questioned the victim at the hospital.

The court determined that the victim's responses to police questioning at the hospital were "taken for law enforcement purposes," and were therefore barred by the Confrontation Clause.¹³⁰ The *West* Court then concluded that the statements provided by the victim to the officer who arrived at Jackson's house were "obtained in response to the officer's preliminary task of attending to the medical concerns of the victim" and were therefore *not* testimonial in nature.¹³¹ Similarly, the court held the victim's statements to doctors "regarding the nature of the alleged attack, and the cause of her symptoms and pain" were admissible, but that her statements "concerning fault or identity" were testimonial under *Crawford*.¹³²

The 911 call made by Jackson presented a closer question for the *West* Court. The court examined *Moscat* and *Cortes*, before rejecting any bright line rule. Instead, the court concluded that a

¹²⁹ *Id.* at *4.

¹³⁰ *Id.* at *11 ("[A]t the time [the victim] was questioned at the hospital, the defendant was already in custody and . . . their questioning of [the victim] was conducted for the purpose of further investigating the defendant's involvement and to gather evidence . . .").

¹³¹ *West*, 2004 Ill. App. LEXIS 1536, at *13 ("[T]here is no indication in the record here that [the responding officer] was aware of the nature of the crime, the identity[] of the alleged assailant, or the medical concerns of the victim. The questions posed by the officer were preliminary in nature . . . not for the purposes of producing evidence . . .").

¹³² *Id.* at *17-18.

court should “determine, on a case-by-case basis, whether the statement at issue was: (1) given for the purpose of initiating police action or criminal prosecution; or (2) provided in response to an interrogation, the purpose of which was to gather evidence for use in a criminal prosecution.”¹³³ If the answer to either question is yes, the statement is testimonial in nature and barred by *Crawford*. However, the *West* Court explained that “statements which are made ‘to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation’ . . . are not testimonial in nature.”¹³⁴ This distinction closely mirrors the different factual circumstances faced by the *Cortes* and *Moscat* courts — in one case, a third-party witness reports a crime to initiate police action; in another, a victim calls 911 for immediate assistance to end a dangerous situation.

The *West* Court ultimately held that the victim’s 911 statements “concerning the nature of the alleged attack, [her] medical needs, and her age and location are not testimonial,” while statements describing “her vehicle, the direction in which her assailants fled, and the items of personal property they took are testimonial.”¹³⁵

While there is no discernible consensus yet among state and federal courts faced with post-*Crawford* determinations of what, precisely, is a testimonial statement, the case-by-case approach set forth in *Isaac*, *West*, and *Caudillo* is likely to carry

¹³³ *Id.* at *22.

¹³⁴ *Id.* at *22-23.

¹³⁵ *Id.* at *23-24.

the day. Instead of a bright-line rule holding 911 calls to be either testimonial or not testimonial, this approach allows the courts to apply the three formulations of testimonial set forth in *Crawford* to determine whether the 911 operator was collecting information for the purpose of providing emergency assistance, or to aide the police in a criminal investigation. The former does not seem to fall under the *Crawford* definition of testimonial, while the latter is arguably akin to “[t]he principal evil at which the Confrontation Clause was directed” — *ex parte* testimony being introduced as evidence against the accused.¹³⁶

What Standards Apply to Non-Testimonial Hearsay?

The second unanswered question after *Crawford* is what standards should be applied to non-testimonial hearsay. The *Crawford* Court suggested in *dicta* that “not all hearsay implicates the Sixth Amendment’s core concerns.”¹³⁷ Thus it is possible that the *Roberts* framework still applies to non-testimonial hearsay. For example, the Supreme Court of Connecticut suggested that “nontestimonial hearsay statements may still be admitted as evidence against an accused in a criminal trial if it satisfies both prongs of the *Roberts* test, irrespective of whether the defendant has had a prior opportunity to cross-examine the declarant.”¹³⁸

¹³⁶ *Crawford*, 124 S. Ct. at 1359-63.

¹³⁷ *Crawford*, 124 S. Ct. at 1364 (“Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether [*White v. Illinois*] survives our decision today.”).

¹³⁸ *Rivera*, 844 A.2d at 201.

When faced with a non-testimonial statement, the court concluded, “application of the *Roberts* test remains appropriate.”¹³⁹

The First Circuit agreed that *Roberts* remained controlling for non-testimonial hearsay in *Horton v. Allen*.¹⁴⁰ In light of *Crawford*’s distinction between testimonial and non-testimonial statements, the First Circuit noted that the challenged statements “were made during a private conversation . . . [and not] under circumstances in which an objective person would ‘reasonably believe the statement would be available for use at a later trial.’”¹⁴¹ Therefore, the First Circuit reasoned that the statements were non-testimonial and fell outside the scope of *Crawford*: “Accordingly, we apply *Roberts* to determine whether the admission of [declarant’s] hearsay statements violated [defendant’s] *Confrontation Clause* rights.”¹⁴²

The Second Circuit in *United States v. Saget*, however, was not convinced that *Roberts* survives for non-testimonial hearsay.¹⁴³ *Saget* was convicted of various conspiracy and firearms trafficking charges, in part on the strength of statements by his separately indicted co-conspirator, Beckham.¹⁴⁴ Beckham spoke twice with a confidential informant who recorded the conversations; portions of these conversations that implicated Beckham and *Saget* were

¹³⁹ *Id.* at 202.

¹⁴⁰ 370 F.3d 75 (1st Cir. 2004).

¹⁴¹ *Id.* at 84.

¹⁴² *Id.*

¹⁴³ 377 F.3d 223 (2d Cir. 2004). The court also noted that at least two Supreme Court Justices would completely overrule *Roberts*. *Id.* at 227.

¹⁴⁴ *Id.* at 224.

introduced at Saget's trial.¹⁴⁵ The Second Circuit declared that *Crawford* "redefine[d] the Court's Sixth Amendment jurisprudence by holding that the term 'witnesses' does not encompass all hearsay declarants."¹⁴⁶ Beckham's statements, the Second Circuit reasoned, "were elicited by an agent of law enforcement officials, but without his knowledge, and not in the context of the structured environment of formal interrogation."¹⁴⁷ Beckham did not have any reasonable suspicion that the statements he made to the confidential informant would be used at a criminal trial. Therefore, the statements were not testimonial under *Crawford*, and the Second Circuit was forced to determine whether *Roberts* still applied to non-testimonial statements.

The Second Circuit noted that the *Crawford* Court's criticisms of *Roberts*' reliability approach "would apply with equal force to its application to nontestimonial statements."¹⁴⁸ Although the Second Circuit declared "the continued viability of *Roberts* with respect to non-testimonial statements is somewhat in doubt,"¹⁴⁹ the Court concluded that "*Crawford* leaves the *Roberts* approach untouched with respect to nontestimonial statements."¹⁵⁰ Therefore, the Second Circuit "assume[d] for purposes of this

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 227.

¹⁴⁷ *Id.* at 228.

¹⁴⁸ *Saget*, 377 F.3d at 227.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

opinion that its reliability analysis continues to apply to control non-testimonial hearsay.”¹⁵¹

VI. CONCLUSION

Although many issues have yet to be resolved, including the precise definition of testimonial hearsay and what rules apply to *non*-testimonial hearsay, it is clear that *Crawford* mandates a change in hearsay rules for both state and federal courts. Instead of allowing hearsay into evidence against a criminal defendant upon a mere showing of reliability, the Confrontation Clause requires that the defendant have had an opportunity to cross-examine the declarant, and that the declarant be unavailable to testify. *Roberts*’ “particularized guarantees of trustworthiness” are no longer enough to satisfy the Confrontation Clause, at least in the context of testimonial hearsay. It is also likely that firmly rooted hearsay exceptions — which the *Roberts* Court declared did not offend Sixth Amendment guarantees purely by virtue of being firmly rooted — must also be subjected to the two-prong *Crawford* test.

As the Supreme Court explained in *Crawford*, this refinement of Sixth Amendment jurisprudence honors the original values of the Confrontation Clause. Specifically, this formulation of the Confrontation Clause assures that out-of-court statements

¹⁵¹ *Id.*

offered as evidence against the accused are tested “in the crucible of cross-examination.”¹⁵²

¹⁵² *Crawford*, 124 S. Ct. at 1371.