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MARQUETTE LAW REVIEW

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CRAWFORD, RETROACTIVITY, AND THE IMPORTANCE OF BEING EARNEST

J. THOMAS SULLIVAN*

In this Article Professor Sullivan examines the Supreme Court's evolving Confrontation Clause jurisprudence through its dramatic return to pre-Sixth Amendment appreciation of the role of cross-examination in the criminal trial reflected in its 2004 decision in Crawford v. Washington. *He discusses the past quarter century of the Court's confrontation decisions and their impact on his client, Ralph Rodney Earnest, recounting the defendant's conviction and twenty-four-year litigation journey through state and federal courts to his eventual release from prison in the only successful attempt to use* Crawford *retroactively known to date.*

* Judge George Howard, Jr. Distinguished Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock. This Article is based on the author's representation of New Mexico defendant Ralph Rodney Earnest from Earnest's direct appeal in 1984 through dismissal of murder charges resulting in his release from custody on September 5, 2006. Mr. Earnest's imprisonment for some twenty-four years reflects both the flexibility of judicial review as a vehicle for reassessing legal doctrine and the frustration experienced by individual litigants who often suffer significant deprivation of liberty during the process of judicial retrospection. I want to acknowledge the fine work of the New Mexico lawyers with whom I worked on behalf of Mr. Earnest throughout this lengthy litigation: Gary C. Mitchell of Ruidoso, New Mexico, Earnest's trial counsel, who preserved error and in so doing, ultimately made his release possible, and who successfully argued his *Crawford*-based application for state post-conviction relief in the Eddy County District Court; Susan Gibbs, who served as local counsel on direct appeal and later, in federal habeas proceedings, after I left the New Mexico Public Defender Department; and Assistant Public Defender Sheila Lewis, who served as local appellate counsel in the state post-conviction process. The case against Mr. Earnest was dismissed by the district court in Carlsbad, New Mexico, when the defense announced it was ready for trial on September 5, 2006, and the State admitted that it could not proceed due to the refusal of the key prosecution witness to testify, resulting in the immediate release of Earnest from custody. I also want to acknowledge the excellent editing assistance provided by Molly K. Sullivan, University of Arkansas at Little Rock Bowen School of Law, J.D. anticipated 2009.

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I. INTRODUCTION

> *Algernon*: The truth is rarely pure and never simple. Modern life would be very tedious if it were either, and modern literature a complete impossibility!
>
> *Jack*: That wouldn't be at all a bad thing.
>
> The Importance of Being Earnest, Act I[1]

The United States Supreme Court's decision in *Crawford v. Washington* represents a rare exercise in appellate decision making because Justice Scalia, writing for the majority, concluded that the Court had erred in previous decisions.[2] He explained: "[W]e view this as one of those rare cases in which the result below is so improbable that it reveals a *fundamental failure on our part* to interpret the Constitution in a way that secures its intended constraint on judicial discretion."[3] The *Crawford* Court held that the admission of a testimonial statement made by a non-testifying accomplice violates the Sixth Amendment Confrontation Clause[4] in the absence of a meaningful opportunity for the accused to cross-examine the declarant.[5] The *Crawford* Court rejected alternative theories for admission of these statements without cross-examination despite their presumed inherent reliability.[6] Moreover, the Court's rationale also resulted in the exclusion of certain uncrossed hearsay in

1. OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST, *reprinted in* EIGHT GREAT COMEDIES 286, 295 (1958).

2. 541 U.S. 36 (2004).

3. *Id*. at 67 (emphasis added).

4. U.S. CONST. amend. VI. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id*.

5. *Crawford*, 541 U.S. at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: *confrontation*.") (emphasis added).

6. *See id*. at 57. The New Mexico Supreme Court recognized and applied *Crawford* in *State v. Johnson*, 98 P.3d 998, 1011 n.1 (N.M. 2004).

contexts other than accomplice admissions to police,[7] significantly altering the scope of traditional Confrontation Clause analysis.

For at least one state court defendant, Ralph Rodney Earnest, *Crawford* was particularly significant because it afforded him relief from a murder conviction and a sentence of life imprisonment plus thirty-one and one-half years imposed nearly a quarter of a century earlier.[8] When the New Mexico

7. *See* Davis v. Washington, 547 U.S. 813, 825 n.4, 826–32 (2006) (holding that a statement made by the victim while seeking aid was not testimonial while a statement after the fact was testimonial); United States v. Feliz, 467 F.3d 227, 233 (2d Cir. 2006) (holding that an autopsy report was a "business record," not testimony); People v. Geier, 161 P.3d 104, 138–40 (Cal. 2007) (finding that a DNA report was not testimonial); Rollins v. State, 897 A.2d 821, 841 (Md. 2006) (distinguishing between statements of "fact" and statements of "opinion" in autopsy reports and ruling that the latter were testimonial but the former were not); Commonwealth v. Verde, 827 N.E.2d 701, 703 (Mass. 2005) (holding that a certificate of lab analysis identifying the nature and quantity of substance was not testimonial); State v. Caulfield, 722 N.W.2d 304, 306–07 (Minn. 2006) (holding that a report containing laboratory test analysis was "testimonial" and inadmissible without opportunity to cross-examine the analyst); State v. Dedman, 102 P.3d 628, 639 (N.M. 2004) (holding admission of record does not require opportunity for in-court cross-examination of expert who conducted test); State v. Bullcoming, 189 P.3d 679, 685 (N.M. Ct. App. 2007) (same); People v. Durio, 794 N.Y.S.2d 863, 867 (N.Y. Sup. Ct. 2005) (holding that an autopsy report was a "business record," not testimony); and State v. Forte, 629 S.E.2d 137, 143 (N.C. 2006) (holding that a police lab's report of DNA analysis was a "neutral" business record).

The issue of application of *Crawford* to admission of laboratory test reports not offered through the expert who conducted the test is before the United States Supreme Court in *Melendez-Diaz v. Massachusetts.* 69 Mass. App. Ct. 1114 (2007), *cert. granted*, 128 S. Ct. 1647 (U.S. Mar. 17, 2008); Petition for Writ of Certiorari, *Melendez-Diaz*, No. 07-591 (U.S. Oct. 26, 2007), 2007 WL 3252033. *Melendez-Diaz* was argued in November 2008. Transcript of Oral Argument, *Melendez-Diaz*, No. 07-591.

Crawford also opened the door to extensive litigation of confrontation claims within individual jurisdictions. *See, e.g.*, Dednam v. State, 200 S.W.3d 875, 880–81 (Ark. 2005) (holding no confrontation violation where a statement purportedly made by the murder victim to an officer concerning another offense was not offered for proof of matter asserted but to show a possible motive for the killing); Brown v. State, 238 S.W.3d 614, 618–19 (Ark. Ct. App. 2006) (finding no confrontation violation when a child declarant was present at trial and subjected to cross-examination regarding the subject of a videotaped deposition); Simmons v. State, 234 S.W.3d 321, 326 (Ark. Ct. App. 2006) (finding prior deposition testimony elicited in anticipation of civil trial was "testimonial," counsel had opportunity to cross-examine the declarant at deposition with an identical motive for cross at trial, and the witness's death rendered him unavailable, thus no error in admission of deposition testimony); Bogan v. State, No. CACR 05-892, 2006 WL 557128, at *1 (Ark. Ct. App. Mar. 8, 2006) (finding a confrontation claim moot where the appellant did not challenge on appeal alternative ground supporting revocation of probation); Wooten v. State, 217 S.W.3d 124, 126–27 (Ark. Ct. App. 2005) (finding no confrontation violation where a statement was not offered for the truth); Sparkman v. State, 208 S.W.3d 822, 825 (Ark. Ct. App. 2005) (finding a confrontation violation in admission of a videotaped statement harmless in light of accused's own admission to an investigating officer); Vallien v. State, No. CACR 04-985, 2005 WL 2865183, at *3 (Ark. Ct. App. Nov. 2, 2005) (holding confrontation violation harmless); Hilburn v. State, No. CACR 04-295, 2005 WL 419499, at *2 (Ark. Ct. App. Feb. 23, 2005) (finding no violation where the statement was not offered for the truth, but error not preserved).

8. *See* State v. Forbes *ex rel.* Earnest, 119 P.3d 144 (N.M. 2005), *cert. denied*, New Mexico v. Forbes, 127 S. Ct. 1482 (2007) (The Honorable Jay Forbes was the district judge who ordered habeas relief; the New Mexico attorney general directed its extraordinary writ at the presiding judge, with

Supreme Court fashioned a rule affording Earnest relief from that conviction based on a limited retroactive application of *Crawford*,[9] the court's decision invariably raised important questions about the retroactivity of United States Supreme Court decisions bearing directly on the accuracy of the fact-finding process.

In the Court's subsequent decision in *Whorton v. Bockting*,[10] which unanimously denied retroactive application of its *Crawford* holding,[11] the Court held to its bright-line approach to retroactivity imposed in *Teague v. Lane*.[12] There, a plurality of the Court[13] had determined that "new rules" of constitutional criminal procedure[14] are subject to retroactive application to cases already final only under certain limited circumstances.[15] Cases are final when the defendant has exhausted the direct appeal process through denial of a petition for writ of certiorari by the Court.[16] But cases still pending review in the direct appeal process, including consideration of certiorari, are entitled to retroactive application of the new rule and its benefits, provided the issue

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Earnest being the real party in interest in the case.).

9. *Forbes*, 119 P.3d at 148–49.

10. 127 S. Ct. 1173 (2007).

11. *Id*. at 1177.

12. 489 U.S. 288, 300–01 (1989).

13. Justice O'Connor wrote the opinion for a plurality of the Court. Justice White concurred in Parts I, II, and III of the opinion and in the judgment. *Id*. at 316 (White, J., concurring). Justice Blackmun wrote a separate opinion concurring in part and in the judgment, *id*. at 318 (Blackmun, J., concurring), while also concurring in part in a separate opinion written by Justice Stevens, *id*. (Stevens, J., concurring). Justice Stevens specifically noted his agreement with a critical part of Justice Brennan's dissenting opinion, *id*. at 326 (Stevens, J., concurring), in which Justice Marshall joined. Justice Brennan was especially critical of the Court's disposition of the case without oral argument and full briefing on the dispositive point. *Id*. at 330 (Brennan, J., dissenting). It is somewhat difficult to explain how a thinly supported new rule could dominate the Court's subsequent jurisprudence with respect to the very critical importance of "new rules" in the development of constitutional criminal procedure doctrine and for disposition of claims raised by individual litigants.

14. The new rules doctrine does not apply to interpretation of constitutional protections regarding substantive rights. For example, the doctrine does not affect a determination that a statute is facially unconstitutional, *see* Lanzetta v. New Jersey, 306 U.S. 451, 453–55 (1939) (holding the statute so vague as to fail to afford notice of conduct criminalized); Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926), or that a statute is unconstitutionally applied, *see* United States v. X-Citement Video, Inc., 513 U.S. 64, 68–69 (1994) (holding the statute would constitute a matter of substance, not procedure, and thus would not be restricted in its retroactive application). Similarly, a determination that a criminal prosecution infringes on a protected right of expression would involve a substantive, not procedural, determination. *See* Cohen v. California, 403 U.S. 15, 21–22 (1971) (involving a conviction based on lewd inscription on clothing protesting the draft).

15. See *infra* Part IV.A.1 for a discussion of exceptions to the *Teague* retroactivity doctrine.

16. *See* Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.").

has been properly preserved, consistent with the Court's subsequent position in *Griffith v. Kentucky*.[17]

The *Crawford* and *Bockting* litigation also led to an important, previously unresolved question of federalism that the Court has now addressed in *Danforth v. Minnesota*[18] regarding the extent to which state courts are at liberty to apply federal constitutional precedent more broadly than required by federal due process protections as mandated by the *Teague* doctrine.[19] Thus far, the New Mexico Supreme Court has been the only state court to fashion a retroactive remedy based on *Crawford*. And Earnest appears to have been the only convicted defendant to have benefited from the Court's changed posture on confrontation.[20]

II. THE CONFRONTATION CONTEXT OF *EARNEST*

Had the New Mexico Supreme Court denied relief on Earnest's claim for the retroactive benefit of *Crawford*, the case would have served as little more than a footnote in the history of Confrontation Clause litigation. The *Earnest* litigation raised the question now answered by *Danforth*, upholding the autonomy of state courts to fashion remedies for state defendants based on newly announced federal constitutional principles. And, given the emphasis on pre-constitutional and constitutional history in Justice Scalia's analysis of the confrontation claim in *Crawford*, the little noticed role of *Earnest* in that history deserves mention.

The *Earnest* litigation was lengthy. It included two trials, direct appeal in the state court,[21] argument and reversal on the confrontation issue in the United States Supreme Court,[22] and remand to the state supreme court.[23] State[24] and federal habeas corpus litigation finally concluded some nine years

17. *Teague*, 489 U.S. at 304–05; *Griffith*, 479 U.S. at 322–23.

18. 128 S. Ct. 1029, 1033 (2008).

19. In *Danforth*, the Court granted certiorari limited to Question I in the Petition, relating to the power of state courts to apply federal constitutional criminal procedure holdings retroactively to state inmates or whether they are bound to follow the federal retroactivity doctrine of *Teague*. Danforth v. Minnesota, 127 S. Ct. 2427 (2007) (granting certiorari in *Danforth v. State*, 718 N.W.2d 451 (Minn. 2006)). In deciding that *Teague* does not limit retroactive application of its decisions by state courts, the *Danforth* Court noted the plurality opinion issued in *Teague* but further observed that Justice O'Connor's approach in *Teague* was subsequently affirmed by a majority of the Court in *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989). *Danforth*, 128 S. Ct. at 1032 n.1.

20. *See* State v. Forbes *ex rel.* Earnest, 119 P.3d 144 (N.M. 2005).

21. *See* State v. Earnest (*Earnest I*), 703 P.2d 872 (N.M. 1985).

22. *See* New Mexico v. Earnest, 477 U.S. 648 (1986).

23. *See* State v. Earnest (*Earnest II*), 744 P.2d 539 (N.M. 1987), *cert. denied*, Earnest v. New Mexico, 484 U.S. 924 (1987).

24. Petition for Writ of Habeas Corpus, State v. Earnest, No. CR-82-54 (N.M. 5th Jud. Dist. Ct. July 9, 1990).

before *Crawford* changed the legal landscape favorably for Earnest's case.[25] To appreciate the significance of *Crawford* and the question of its retroactive application for Earnest, now resolved adversely as a matter of federal constitutional due process in *Bockting*,[26] it is necessary to understand the history of the *Earnest* litigation.

A. The Offense and the Prosecution

Earnest was charged with two co-defendants, Perry Connor and Philip Boeglin, in the capital murder of David Eastman in 1982 in Carlsbad, Eddy County, New Mexico.[27] There was no eyewitness to the offense, other than Boeglin and Connor.[28] Connor ultimately testified that Earnest was not involved in the murder of Eastman and that he and Boeglin had killed him as a result of their belief that Eastman was a drug informant.[29]

Following the discovery of Eastman's body, police were alerted that three potential suspects had been observed in Eastman's El Camino on the morning following his murder.[30] Police arrested the three, and Boeglin proceeded to give a series of statements to investigators on the day of the arrest, one of which jointly implicated him, Connor, and another individual he identified as "Rob" or "Rod" in the commission of Eastman's murder.[31] In the absence of Boeglin's statement and the inference that the other individual referred to was in fact Earnest, there was no evidence that Earnest had participated in the murder and kidnapping offenses.

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25. *See generally* Earnest v. Dorsey, 87 F.3d 1123 (10th Cir. 1996), *cert. denied*, Earnest v. Dorsey, 519 U.S. 1016 (1996).

26. Whorton v. Bockting, 127 S. Ct. 1173, 1181 (2007).

27. *Earnest*, 87 F.3d at 1127; State v. Earnest (*Earnest I*), 703 P.2d 872, 873 (N.M. 1985).

28. *See* State v. Forbes *ex rel.* Earnest, 119 P.3d 144, 145 (N.M. 2005).

29. Petition for Writ of Habeas Corpus at 6, Earnest v. State, CR-82-54 (N.M. 5th Jud. Dist. Ct. Oct. 1, 2004); *see also* State v. Earnest (*Earnest II*), 744 P.2d 539, 540 (N.M. 1987). "There was no physical evidence in the form of fingerprints, blood, or DNA linking Earnest to the murder, even though police recovered a handgun used in the killing and the victim was also beaten, which suggested the possible splatter of blood onto his assailants." Petition for Writ of Habeas Corpus, *supra*, at 6; *see also Earnest*, 87 F.3d at 1134.

> The State's brief accurately summarizes the circumstantial evidence that was offered at the second trial. (N.M. Br. 5–7). It fails to note, however, (i) that Earnest's fingerprints were not found on the murder weapon or at the crime scene and (ii) that a nitrate test on Earnest's hands for gunshot residue was negative.

Brief for the ACLU & the ACLU of N.M. as Amici Curiae in Support of Respondent at 11 n.9, New Mexico v. Earnest, 477 U.S. 648 (1986) (No. 85-162).

30. *Earnest*, 87 F.3d at 1134.

31. *Id*. at 1127, 1134 & n.8.

The three co-defendants were charged with first-degree murder, conspiracy to commit murder, aggravated kidnapping, and conspiracy to commit kidnapping.[32] Because the prosecution could have alleged aggravating circumstances, the murder charge carried a potential death sentence. Earnest was also charged with possession of methamphetamine.[33] Connor pleaded guilty in return for a life sentence.[34] The cases against Earnest and Boeglin were severed for trial, and Earnest's first trial on the charges was terminated by mistrial when Boeglin refused to testify as a witness for the State after being granted use immunity for his testimony.[35]

B. Conviction, Preservation of Error, and the Direct Appeal

At Earnest's second trial, Boeglin again refused to testify.[36] The trial court found that Boeglin was unavailable based on his refusal to testify even under grant of immunity and threat of contempt.[37] Based on this finding of unavailability, the trial court admitted Boeglin's jointly inculpatory statement in evidence over Earnest's objection.[38] Earnest was convicted on all counts and appealed his convictions to the New Mexico Supreme Court.[39]

Earnest's claim on direct appeal rested on the issue of whether his Sixth Amendment right to confrontation was violated by the admission of Boeglin's statement, or whether Boeglin's unavailability rendered his statement admissible despite the absence of any opportunity for Earnest to test Boeglin's credibility and the accuracy of the statement through cross-examination.[40]

1. Confrontation as Cross-Examination: *Douglas v. Alabama*

The Sixth Amendment confrontation right was first made expressly applicable in the context of state prosecutions in *Pointer v. Texas*.[41] *Pointer* involved the question of admission of sworn, prior testimony given during a

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32. *Id*. at 1127.

33. State v. Earnest (*Earnest I*), 703 P.2d 872, 873 (N.M. 1985).

34. Petitioner's Brief on the Merits at 12, New Mexico v. Earnest, 477 U.S. 648 (1986) (No. 85-162).

35. *Earnest I*, 703 P.2d at 874–75.

36. *Id*. at 875.

37. *Id*. Boeglin was sentenced to a total term of twenty-six years for contempt. State v. Boeglin, 686 P.2d 257, 257–59 (N.M. Ct. App. 1984). His contempt conviction was subsequently vacated by the New Mexico Court of Appeals. *Id*.

38. *Earnest I*, 703 P.2d at 875. Boeglin was later tried and convicted despite his testimony that police had suppressed evidence supporting his defense of duress in participating in the murder of the victim, Eastman. *See* State v. Boeglin, 731 P.2d 943, 950 (N.M. 1987).

39. *Earnest I*, 703 P.2d at 873; *see also* State v. Earnest, No. CR-82-54 (N.M. 5th. Jud. Dist. Ct. Sept. 19, 1983) (judgment, sentence, and commitment).

40. *See Earnest I*, 703 P.2d. at 873–74.

41. 380 U.S. 400, 406 (1965).

preliminary hearing, at which time the accused presumably had an opportunity to cross-examine the witness but without assistance of counsel.[42] The *Pointer* Court rested its holding on existence of an "adequate opportunity" for cross-examination.[43] Without assistance of counsel, Pointer did not have that opportunity, and admission of the witness's prior testimony at trial was inappropriate in the absence of live testimony and the opportunity for cross-examination before the jury. Consequently, the Court grounded its confrontation analysis in the existence of a meaningful opportunity for cross-examination for the accused at some point in the criminal proceedings.[44]

On the same day it held in *Pointer* that the Sixth Amendment confrontation protection applied to state proceedings in *Pointer*, the Court also considered the nature of confrontation in *Douglas v. Alabama*.[45] The constitutional preference for cross-examination was unequivocally demonstrated in *Douglas* when the Court rejected the prosecutor's use of an accomplice's statement as a basis for cross-examining the declarant, who had refused to testify at trial.[46] The prosecutor had simply read the statement before the jury over defense counsel's objection, asking the uncooperative witness to affirm each portion of its contents.[47] The prosecutor then called three law enforcement officers to testify that the statement was in fact made by the accomplice, but the statement itself was neither offered nor admitted in evidence.[48] Thus, the prosecutor succeeded in using the statement without the defense being afforded any meaningful opportunity to cross-examine the accomplice as to the accuracy of the confession or his credibility.[49]

Douglas signified the Court's uncompromising view of the constitutional significance of cross-examination as essential to the confrontation guarantee until the decision in *Ohio v. Roberts*,[50] issued fifteen years after *Douglas*.

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42. *Id*. at 403.

43. *Id*. at 406–08. Subsequent decisions emphasized the meaningful opportunity for cross-examination in the evaluation of admissibility of prior testimony. *See* Mancusi v. Stubbs, 408 U.S. 204, 213 (1972) ("Before it can be said that Stubbs' constitutional right to confront witnesses was not infringed, however, the *adequacy* of Holm's examination at the first trial must be taken into consideration.") (emphasis added); *see also* California v. Green, 399 U.S. 149, 165–68 (1970).

44. *Pointer*, 380 U.S. at 407–08.

45. 380 U.S. 415 (1965).

46. *Id*. at 416–17.

47. *Id*. The Court had long recognized, however, that under certain circumstances the confrontation right did not necessarily depend upon the opportunity for cross-examination of a witness who was not available to testify at trial. For instance, in *Mattox v. United States*, 146 U.S. 140 (1892), the Court recognized the common law rule admitting dying declarations as exceptions to the usual requirement for cross-examination based upon their presumed inherent reliability, being made under perception of impending death. *Id*. at 151.

48. *Douglas*, 380 U.S. at 417.

49. *Id*. at 419–20.

50. 448 U.S. 56 (1980).

2. The Devaluation of Cross-Examination in *Ohio v. Roberts*

The Court's abrupt shift away from recognition of cross-examination as the heart of confrontation served to accommodate common law evidence concepts within the Sixth Amendment guarantee.[51] In *Ohio v. Roberts*, the majority effectively integrated confrontation and principles underlying the traditional prohibition against admission of hearsay and, more importantly, its many exceptions.[52] In so doing, the majority introduced a confrontation doctrine in which the actual process of confrontation through cross-examination was itself subject to exception when, in the Court's view, cross-examination seemed unlikely to afford significant benefit in searching for truth.[53]

The factual context of *Roberts* suggests that the majority unnecessarily departed from established principles guiding construction of the confrontation guarantee in fashioning the new doctrine ultimately repudiated in *Crawford*. In *Roberts*, the witness testified at the preliminary hearing, was subjected to cross-examination, and was shown to be unavailable to testify at trial despite the prosecution's diligent efforts to procure her attendance.[54]

Consistent with its traditional holdings, the Court could have simply reaffirmed the principle that previously cross-examined testimony is generally admissible when the prosecution cannot reasonably secure the attendance of the witness for trial.[55] Instead, the Court opened the door to admission of uncrossed hearsay by holding that cross-examination before the jury was not required if a statement bore sufficient "indicia of reliability" to warrant its admission.[56] The reliability requirement, according to *Roberts*, was met when the statement fell within a "firmly rooted hearsay exception" traditionally recognized as justifying admission or the statement had "particularized guarantees of trustworthiness."[57]

3. Disposition of the Direct Appeal in the State Supreme Court

On direct appeal, the New Mexico Supreme Court reversed Earnest's convictions based on a violation of his Sixth Amendment right to confront witnesses,[58] noting his reliance on the United States Supreme Court's decision

51. *See id.*
52. *See id.* at 66.
53. *See id.* at 65–66.
54. *Id.* at 58–60.
55. *See id.* at 65–66.
56. *Id.* at 66.
57. *Id.*
58. State v. Earnest (*Earnest I*), 703 P.2d 872, 875–76 (N.M. 1985).

in *Douglas v. Alabama*.[59] The court rejected the State's argument that Boeglin's statement bore sufficient indicia of reliability for admission without cross-examination based on the Supreme Court's intervening decision in *Ohio v. Roberts*.[60] In setting aside the defendant's conviction in *Earnest*, the court affirmed the preference for cross-examination in the presence of the jury at trial in concluding:

> Boeglin's prior statement made to police officers shortly after his arrest was not made during the course of any judicial proceeding and defendant was in no way afforded an opportunity to cross-examine Boeglin. We therefore determine that admission of Boeglin's prior statement was highly prejudicial, violated defendant's confrontation rights, and deprived defendant of meaningful cross-examination.[61]

Thus, the court concluded not only that Earnest's convictions rested on constitutional error, but also that the error was prejudicial, requiring reversal.[62] However, the court rejected Earnest's prior jeopardy claim based on the trial court's declaration of mistrial when Boeglin refused to testify at the first trial.[63] Instead, because trial counsel had objected to the trial court's aggressive efforts to force Boeglin to testify against his client, the New Mexico Supreme Court held that Earnest had invited the mistrial and thus could not plead prior jeopardy as a bar to the retrial, despite the trial court's express withdrawal of his mistrial motions.[64]

C. New Mexico v. Earnest*: The United States Supreme Court Weighs In*

Following the reversal of Earnest's conviction on direct appeal, the attorney general successfully petitioned the United States Supreme Court for certiorari.[65] After hearing oral argument, the Court vacated the judgment of

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59. 380 U.S. 415 (1965).

60. *Earnest I*, 703 P.2d at 876; *see also* Ohio v. Roberts, 448 U.S. 56, 66 (1980). The *Earnest I* court relied on the Tenth Circuit's application of *Roberts* in *United States v. Rothbart*, 653 F.2d 462, 465 (10th Cir. 1981), limiting the application of the *Roberts* rationale to instances in which the prosecution offered prior testimony that had been subjected to cross-examination, a formulation correctly anticipating *Crawford*. *Earnest I*, 703 P.2d at 876.

61. *Earnest I*, 703 P.2d at 876.

62. *Id*.

63. *Id*. at 874.

64. *See id*. (citing United States v. Dinitz, 424 U.S. 600, 607 (1976); United States v. Jorn, 400 U.S. 470, 485 (1971)). The supreme court ruled that counsel was admonished by the trial court that his motions for mistrial risked termination of proceedings that might otherwise have resulted in acquittal because of insufficient evidence. *Id*. The court then concluded that trial counsel failed to withdraw his motions prior to declaration of a mistrial. *Earnest I*, 703 P.2d at 874–85.

65. New Mexico v. Earnest, 474 U.S. 918 (1985).

the New Mexico Supreme Court and remanded the case for reconsideration in light of its just-issued decision in *Lee v. Illinois*.[66] Concurring, then-Associate Justice Rehnquist, joined by the Chief Justice and Justices Powell and O'Connor, observed that *Lee* overruled *Douglas v. Alabama* by implication,[67] adopting the rationale of *Ohio v. Roberts*.[68] In *Roberts*, the Court ruled that the Confrontation Clause does not always require cross-examination at trial by holding that admission of preliminary hearing testimony subject to cross-examination would be admissible in the event of the declarant's unavailability to testify at trial.[69]

In *Lee*, the Court extended the "indicia of reliability" test articulated in *Roberts* to include jointly inculpatory statements made by accomplices to police.[70] Thus, Justice Rehnquist observed that after *Lee*, state courts could admit statements of non-testifying co-defendants assuming that the prosecution could "overcome the weighty presumption of unreliability attaching to [those] statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns."[71] But significantly, the *Lee* majority did not hold that the accomplice's statement was properly admitted, and Lee was afforded relief from the conviction.[72]

On remand from the order vacating its judgment for reconsideration in light of *Lee*, the New Mexico Supreme Court affirmed Earnest's convictions.[73] In so doing, it followed Justice Rehnquist's lead and concluded that Boeglin's statement to the police demonstrated sufficient indicia of reliability to warrant admission despite his unavailability for cross-examination.[74] The primary basis for its decision was its characterization of Boeglin's statement as a declaration against his penal interest[75] because it

66. New Mexico v. Earnest, 477 U.S. 648, 648 (1986); Lee v. Illinois, 476 U.S. 530 (1986).

67. *Earnest*, 477 U.S. at 649 (Rehnquist, J., concurring).

68. *Id*. at 649–50; Ohio v. Roberts, 448 U.S. 56 (1980).

69. *Roberts*, 448 U.S. at 68–70. The burden of establishing the unavailability of the witness must be borne by the prosecution. *See* Barber v. Page, 390 U.S. 719, 722–25 (1968).

70. *See Lee*, 476 U.S. at 543–44.

71. *Earnest*, 477 U.S. at 649–50 (Rehnquist, J., concurring).

72. *Lee*, 476 U.S. at 546–47. The state courts had concluded that the "interlocking" nature of statements given to police by the defendant and the accomplice rendered the statement sufficiently reliable to warrant its admission without the accused being afforded an opportunity to test its credibility by cross-examination. *Id*. at 538–39. An equally divided Court in *Parker v. Randolph*, 442 U.S. 62 (1979), had suggested that the interlocking confessions of the accused and co-defendant avoided the harm of admission of a co-defendant's uncrossed confession deemed so prejudicial as to defy cure by admonition in *Bruton v. United States*, 391 U.S. 123, 137 (1968). *See Parker*, 442 U.S. at 72–73.

73. State v. Earnest (*Earnest II*), 744 P.2d 539, 541 (N.M. 1987).

74. *Id*. at 540.

75. Curiously, the court never addressed the text or applicability of the state's evidence rule

exposed him to prosecution for a capital crime and a potential death sentence.[76]

The state court also found that Boeglin's statement was reliable because it was corroborated by evidence of the offense itself, noting:

> [T]here was independent evidence presented at trial which substantially corroborated Boeglin's description of events surrounding the murder. For example: Boeglin's description of a drug deal involving fourteen grams of methamphetamine was corroborated by Michael Blount; Boeglin's description of the accomplices' belief that the victim was an informant was corroborated by Dana Boeglin; Boeglin's description of an attempt to kill the victim with an overdose of methamphetamine was corroborated by the testimony of a toxicologist; and Boeglin's description of where the gun used to kill the victim was hidden led to recovery of the gun. In sum, Boeglin's statement bore sufficient independent indicia of reliability to rebut the weighty presumption of unreliability; the trial court therefore did not err in admitting it into evidence.[77]

None of these corroborating facts, however, rendered the statement credible with regard to allegations concerning the involvement of other individuals, Connor and "Rod" or "Rob"—as Boeglin had identified the other participant in the crime.[78]

Later in *Idaho v. Wright*,[79] the Supreme Court held that where hearsay statements are admitted as exceptions to the hearsay rule and without opportunity for cross-examination, the "indicia of reliability" justifying admission may not include evidence corroborating the factual contents of the

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governing admission of declarations against penal interest:

> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

N.M. R. EVID. 11-804(B)(3).

76. *Earnest II*, 744 P.2d at 540.

77. *Id*.

78. *See* Earnest v. Dorsey, 87 F.3d 1123, 1134 n.8 (10th Cir. 1996).

79. 497 U.S. 805 (1990).

statement.[80] That limitation, as applied to Boeglin's statement, is obvious. Accomplice statements are considered inherently suspect due to the accomplice's self-interest,[81] which may be promoted by cooperating with authorities or, more aggressively, by supplying information sought by authorities that may not be truthful.[82] The fact that evidence surrounding the offense corroborated aspects of Boeglin's statement merely demonstrated that he was more than likely involved in the offense himself; it did not demonstrate Earnest's guilt. In *Wright*, the Court confirmed this approach in ruling that "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."[83]

Although the New Mexico Supreme Court rejected the argument that Boeglin sought leverage from police in giving the inculpatory statement, it focused on objective factors rather than considering Boeglin's state of mind or apparent motive.[84] The court concluded that his statement was reliable "because the colloquy between Boeglin and the investigating officers reflect[ed] the fact that Boeglin was not offered any leniency in exchange for his statement."[85] Thus, because officers told Boeglin he could not expect leniency, the court found that his statement was not motivated by *hope* of gaining leniency, something that could never be discerned from the officers'

80. *Id*. at 823.

81. *See* Lilly v. Virginia, 527 U.S. 116, 131 (1999); Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting) (concluding that such statements "have traditionally been viewed with special suspicion"); Lee v. Illinois, 476 U.S. 530, 541 (1986); Bruton v. United States, 391 U.S. 123, 136 (1968) (concluding that such statements are "inevitably suspect").

82. A particularly poignant story reflecting the self-interest of a suspect implicating another individual involves the confession by Christopher Ochoa, who admitted to a rape and murder he did not commit, and his implication of a friend, Richard Danziger, in the same crime. Diane Jennings, *A Shaken System*, DALLAS MORNING NEWS, Feb. 24, 2008, at 1A. Ochoa was motivated by fear of the death penalty. *Id*. Some twelve years after both men were convicted and sentenced to life terms, they were exonerated by the confession of another individual whose responsibility was corroborated by DNA evidence. *Id*. Ochoa testified against Danziger at trial, later admitting that he lied under oath in order to obtain the life sentence promised in return for his own plea of guilty. *Id*. Both men were ultimately released on the basis of the true killer's confession made in a letter to the Travis County, Texas, district attorney and the recovery of DNA evidence demonstrating that this confession was accurate. *Id*. Ochoa completed his education, including graduating from the University of Wisconsin School of Law, the institution whose Innocence Project had championed the case, and now practices criminal law. *Id*. Danziger, however, was assaulted in prison, suffering a severe brain injury that has left him permanently impaired and living with assistance paid for from the settlement of his civil suit against the City of Austin and Travis County. *Id*.

83. 497 U.S. at 822.

84. *See* State v. Earnest (*Earnest II*), 744 P.2d 539, 540 (N.M. 1987).

85. *Id*.

statements to the contrary since it involved Boeglin's perception rather than objective facts.[86]

Indeed, before giving the inculpatory statement, Boeglin explained to the detectives: "I was hoping I could make some kind of deal."[87] At this point, the detectives advised that they would not offer him any deal for his cooperation.[88] Based on objective facts, the court concluded that Boeglin had no reasonable expectation of "mak[ing] some kind of deal" with officers.[89] But the critical issue in determining the credibility of the statement should not have been whether Boeglin could have made a deal by cooperating with authorities, but more accurately, whether he *thought* he could have. Having indicated his interest in making a deal, one could question whether there was any reasonable explanation for his subsequent disclosures since his expression of interest in making a deal undermined any reasonable inference that he confessed to expiate guilt.

Nevertheless, the New Mexico Supreme Court's factual conclusion was controlling on this point and binding on subsequent federal habeas corpus review.[90]

D. Earnest *in Post-Conviction*

Following affirmance of his conviction on remand from the United States Supreme Court, Earnest turned to state[91] and federal avenues[92] for post-conviction relief.

1. Earnest's State Constitutional Claim in State Habeas Corpus[93]

Initially, Earnest filed an application for state post-conviction relief, urging the state courts to consider his claim that Boeglin's statement had been improperly admitted without cross-examination in light of the confrontation protection afforded by the New Mexico Constitution.[94] This claim had been included in the original direct appeal but not argued aggressively as an

86. *See id.*

87. Earnest v. Dorsey, 87 F.3d 1123, 1134 (10th Cir. 1996).

88. *Id*.

89. *See id.*

90. Deference to state court fact-finding by federal habeas courts is mandated by 28 U.S.C. § 2254(d) (2000), including facts found by state appellate courts. *See* Sumner v. Mata, 449 U.S. 539, 545–46 (1981).

91. New Mexico Rule of Criminal Procedure for the District Courts 5-802G currently provides a state post-conviction remedy for New Mexico inmates challenging their state court convictions.

92. 28 U.S.C. § 2254 (2000) creates a statutory federal habeas corpus remedy for state court inmates claiming violations of federal constitutional rights in state court proceedings.

93. Petition for Writ of Habeas Corpus, *supra* note 24, at 2.

94. N.M. CONST. art. II, § 14, cl. 3 ("In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him . . . .").

alternative ground for relief.[95] The New Mexico Supreme Court's reversal of Earnest's conviction based on *Douglas* rendered the state constitutional argument moot, of course.[96] Although on remand the court noted the excellent briefs and oral arguments of both parties, it did not address the state constitutional claim in its opinion affirming Earnest's conviction.[97]

In his initial application for state habeas relief, Earnest argued that because New Mexico courts had traditionally interpreted the state constitutional confrontation guarantee as coextensive with cross-examination,[98] the relaxed standard for Sixth Amendment confrontation recognized in *Ohio v. Roberts* would not overcome the state law protection.[99] New Mexico precedent consistently described the right of confrontation as securing to the accused the right to cross-examine witnesses.[100] Historically, cross-examination had been a core state constitutional value.[101] In *Valles v. State*, the court of appeals observed that federal constitutional interpretation is instructive in providing guidance to construction of state constitutional protections, but it did not hold that federal interpretation would bind state interpretation or control the parameters of the right.[102]

Thus, Earnest relied on New Mexico decisions establishing an unbroken line of authority that recognized cross-examination as the core of the confrontation guarantee under the state constitution,[103] prior to the Supreme Court's reversal in *New Mexico v. Earnest*.[104] On remand, the state supreme court elected to follow the lead of Justice Rehnquist in his concurrence[105] and

95. The United States Supreme Court has recognized that a state court decision resting on an "adequate and independent" state law ground precludes consideration of a federal constitutional claim. *See* Michigan v. Long, 463 U.S. 1032, 1041–42 (1983).

96. *See* State v. Earnest (*Earnest I*), 703 P.2d 872, 876 (N.M. 1985).

97. State v. Earnest (*Earnest II*), 744 P.2d 539, 540 (N.M. 1987). In the brief on remand, the author argued vigorously that the state court should consider Earnest's reliance on the New Mexico constitutional confrontation protection as an alternative basis for review. Brief for Defendant/Appellant on Remand at 2, *Earnest II*, 744 P.2d 539 (No. 15,162). Regardless of what the court may have thought about the quality of briefing, it did not discuss the state constitutional analog to the Sixth Amendment Confrontation Clause in affirming the conviction.

98. Petition for Writ of Habeas Corpus, *supra* note 24; *see* State v. James, 415 P.2d 350, 352 (N.M. 1966).

99. *See* Earnest v. Dorsey, 87 F.3d 1123, 1130 (10th Cir. 1996).

100. *See, e.g.*, *James*, 415 P.2d at 352.

101. *See* State v. Martin, 209 P.2d 525, 527 (N.M. 1949); State v. Jackson, 233 P. 49, 52 (N.M. 1924); Territory v. Ayers, 113 P. 604, 605 (N.M. 1910); Valles v. State, 563 P.2d 610, 613 (N.M. Ct. App. 1977), *cert. denied*, 567 P.2d 486 (N.M. 1977); State v. Sparks, 512 P.2d 1265, 1266 (N.M. Ct. App. 1973); State v. Holly, 445 P.2d 393, 395 (N.M. Ct. App. 1968).

102. 563 P.2d at 613.

103. State v. Martinez, 623 P.2d 565, 568 (N.M. 1981).

104. 477 U.S. 648 (1986).

105. *Id*. at 649 (Rehnquist, J., concurring).

supplanted cross-examination with the indicia of reliability test[106] articulated in *Roberts*[107] and used in *Lee v. Illinois*.[108]

New Mexico has recognized that the state constitution may afford litigants in state proceedings greater protection than that provided for by comparable federal constitutional guarantees.[109] Ten years after its affirmance on remand in *Earnest II*, the state supreme court adopted the "interstitial approach" to evaluation of state constitutional law claims in *State v. Gomez*.[110]

The interstitial approach adopted by the *Gomez* court recognized that state constitutional protections may be interpreted more broadly than their federal constitutional counterparts in certain circumstances, including those situations in which the federal guarantee suffers from flawed analysis.[111] In adopting this approach, New Mexico rejected the lock-step alternative in which state constitutional guarantees are construed as co-extensive with comparable federal constitutional protections.[112] The *Gomez* court also held that preservation of the state constitutional claim was sufficient for appeals if the state constitutional provision relied upon is expressly raised by the litigant.[113]

Despite Earnest's reference to Article II, Section 14 of the New Mexico Constitution in his original brief on direct appeal[114] and his express reliance on state constitutional confrontation protection as an alternative theory for relief in arguing the case on remand from the Supreme Court and in his first application for post-conviction relief,[115] the state courts consistently refused to address the argument that admission of Boeglin's statement without cross-examination violated protections afforded by the state charter.[116] Following its denial of relief on the post-conviction petition by the trial court,[117] the supreme court denied Earnest's petition for writ of certiorari to review that action.[118]

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106. State v. Earnest (*Earnest II*), 744 P.2d 539, 540 (N.M. 1987).

107. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

108. 476 U.S. 530, 543 (1986).

109. *See, e.g.*, State v. Breit, 930 P.2d 792, 803 (N.M. 1996) (recognizing greater due process protection afforded by the state constitution where litigation was tainted by prosecutorial misconduct).

110. 932 P.2d 1, 7 (N.M. 1997).

111. *Id*.

112. *See id.* at 6.

113. *Id*. at 8.

114. Brief in Chief at 19, 23, State v. Earnest, No. 15,162 (N.M. Mar. 21, 1984).

115. Petition for Writ of Habeas Corpus, *supra* note 24.

116. *See* State v. Earnest (*Earnest II*), 744 P.2d 539 (N.M. 1987); State v. Earnest (*Earnest I*), 703 P.2d 872 (N.M. 1985).

117. State v. Earnest, No. CR-82-54 (N.M. 5th Jud. Dist. Ct. Aug. 29, 1990) (order denying petition for writ of habeas corpus).

118. Earnest v. State, No. 19,545 (N.M. Oct. 17, 1990) (order denying petition for writ of

2. Earnest's Federal Habeas Litigation

Thwarted in the state courts, Earnest petitioned for federal habeas relief,[119] arguing that the state court had improperly applied *Lee* in holding that Boeglin's confession was properly admitted at trial.[120] In *Lee*, the Supreme Court did not hold that accomplice confessions were admissible per se or that they necessarily fell within a deeply rooted exception to the hearsay rule.[121] In fact, the Court reversed in *Lee*, finding that the accomplice statement was not properly admitted and rejecting the argument that its "interlocking" content—tending to corroborate much of Lee's own statement to police—rendered it reliable.[122] Moreover, with respect to accomplice statements, the *Lee* Court stressed that these statements are presumptively unreliable,[123] requiring the proponent to demonstrate particularized guarantees of trustworthiness to sustain the burden for admission without opportunity for cross-examination.[124]

But the magistrate judge held that the state court had found particularized guarantees of trustworthiness in Boeglin's inculpation of himself in a capital crime and concluded that he did not make the statement in an effort to shift blame to his accomplices.[125] And the magistrate judge concurred in the state court's conclusion while expressly not considering the factual corroboration linking Boeglin to the offense to which he confessed in the reliability analysis.[126] Thus, the federal habeas court agreed with the state court's conclusion that Boeglin's statement was sufficiently reliable to have been

certiorari).

119. 28 U.S.C. § 2254 (2000) affords state court defendants the option of pursuing violations of federal constitutional rights in state proceedings by petitioning for habeas relief in the federal district courts, provided the claims have previously been exhausted in available state proceedings. *See* Rhines v. Weber, 544 U.S. 269, 275–76 (2005) (Federal habeas corpus may order litigation held in abeyance pending exhaustion of available state remedies when necessary to prevent dismissal of petition barring consideration of colorable federal claims on the merits.); O'Sullivan v. Boerckel, 526 U.S. 838, 847–48 (1999) (Exhaustion requirement extends to require defendant to exhaust discretionary remedies available in state process, even if state court policy discourages litigation.); Rose v. Lundy, 455 U.S. 509, 516–17, 519 (1982) (Federal habeas petition containing both claims that have been previously presented and decided by state courts and claims that have not previously been presented to state courts are "mixed" petitions that must be dismissed to afford petitioner opportunity to exhaust available state remedies.).

120. *See* Earnest v. Dorsey, 87 F.3d 1123, 1130–31 (10th Cir. 1996).

121. *See* Lee v. Illinois, 476 U.S. 530 (1986).

122. *Id*. at 545–46.

123. *Id*. at 541.

124. *Id*. at 543.

125. *Earnest*, 87 F.3d at 1131–32.

126. *Id*. at 1132.

admitted without Earnest being afforded an opportunity for cross-examination while using a more restrictive formula for reaching its conclusion.[127]

The Tenth Circuit rejected the argument that an accomplice's inculpatory statement to police, such as Boeglin's, fell within a firmly rooted hearsay exception and thus was admissible without cross-examination based on that theory of reliability under *Roberts*.[128] But the circuit court agreed with the federal habeas court that Boeglin's statement carried sufficient indicia of reliability based upon the facts that guaranteed its trustworthiness.[129] Earnest's federal habeas litigation ended in 1996 when the Supreme Court again denied his petition for certiorari challenging the state court's application of *Roberts* and *Lee* to the admission of Boeglin's statement at trial.[130]

III. *CRAWFORD*: RESTORATION OF CROSS-EXAMINATION AS THE KEY TO CONFRONTATION

Earnest's confrontation claim remained dormant until the Supreme Court reversed the Washington Supreme Court in *Crawford v. Washington* in 2004.[131]

Crawford involved the admission of a co-defendant's statement to police without the defendant being afforded any opportunity to cross-examine the declarant on the statement's contents or the circumstances under which the statement was given.[132] Michael Crawford was charged with the murder of an individual he believed had tried to rape his wife, Sylvia.[133] He and Sylvia both gave statements to police that diverged on potentially important points concerning his motivation for the fatal assault.[134] In his statement to police,

127. *Id*. at 1133.

128. *Id*. at 1131 (citing *Lee*, 476 U.S. at 544 n.5). The circuit court explained, "Although it is a statement against penal interest, *cf.* FED. R. EVID. 804(b)(3), the Supreme Court has held that in this context that hearsay exception 'defines too large a class for meaningful Confrontation Clause analysis.'" *Earnest*, 87 F.3d at 1131.

129. *Earnest*, 87 F.3d at 1134.

130. *See* Earnest v. Dorsey, 519 U.S. 1016 (1996).

131. Crawford v. Washington, 541 U.S. 36 (2004). The procedural context of *Crawford* is significant because the Supreme Court heard the case following affirmance of Crawford's direct appeal in the state court. *See* State v. Crawford, 54 P.3d 656 (Wash. 2002). Under the *Teague* new rules doctrine, Teague v. Lane, 489 U.S. 288, 301 (1989), the Court is restricted in announcing a change in interpretation of constitutional criminal procedure rules, and generally new procedural rules cannot be recognized in the federal habeas process. *See* Caspari v. Bohlen, 510 U.S. 383, 396–97 (1994).

132. *Crawford*, 541 U.S. at 38.

133. *Id*.

134. *Id*. at 38–40. The facts of the case suggest the same troubling scenario that provides the compelling plot of Otto Preminger's classic film, ANATOMY OF A MURDER (Columbia 1959), the best criminal law movie ever made. The film was based on the novel of the same title, authored by former Michigan Supreme Court Justice John Donaldson Voelker, writing under the pen name

Michael claimed that he went to confront the victim, a fight ensued, and he stabbed the victim in self-defense.[135]

At trial, the prosecution offered Sylvia's statement, which deviated from Michael's claim of self-defense.[136] Contrary to Michael's account, Sylvia denied having seen a weapon in the victim's hand during the fight.[137] Despite the fact that spousal privilege barred the prosecution from calling Sylvia as a witness, Washington law permitted admission of her out-of-court statement to police as a declaration against her penal interest.[138] Because Sylvia admitted that she led her husband to the victim's apartment, the state trial court ruled that her statement implicated her as a party to the assault and consequently fell within the exception for statements against the declarant's penal interest.[139]

Michael's trial counsel objected to admission of the statement, but the state court found the statement sufficiently reliable to warrant admission in the absence of cross-examination.[140] The prosecutor argued in closing that Sylvia's statement was "damning evidence" contradicting Michael's claim of self-defense, and the jury convicted.[141]

A. Crawford *in Context*

The legal landscape of confrontation changed dramatically in the Supreme Court's decisions from *Douglas* in 1965 through *Roberts*'s and *Lee*'s diminution of cross-examination as a critical component in the confrontation construct. The changed landscape after *Crawford* reflected an aberration in the traditional view of confrontation of the most troubling out-of-court statements as grounded in the opportunity for cross-examination. A

"Robert Traver." ROBERT TRAVER, ANATOMY OF A MURDER (1958). For more on Justice Voelker, see Eileen Kavanagh, *Robert Traver as Justice Voelker—The Novelist as Judge*, 10 SCRIBES J. LEGAL WRITING 91 (2005).

135. *See Crawford*, 541 U.S. at 38–40.

136. *Id*. at 39–40.

137. *Id*.

138. WASH. R. EVID. 804(b)(3); *Crawford*, 541 U.S. at 40.

139. *Crawford*, 541 U.S. at 40.

140. *Id*. The Court summarized the trial court's views of Sylvia's statement as a declaration against her interest:

> The trial court here admitted the statement . . . offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or "justified reprisal"; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a "neutral" law enforcement officer.

Id.

141. *Id*. at 40–41.

consideration of the landscape demonstrates that the Court's departure from cross-examination as a primary concern in *Roberts* and *Lee* was neither well-grounded in history[142] nor suggestive of a true commitment to the new doctrine in which reliability analysis supplanted the cross-examination process as primary in consideration for admission of all hearsay.

In light of the *Roberts* and *Lee* confrontation formulation, admission of Sylvia's statement against Michael at trial was arguably consistent with the Court's compromise of the traditional notion of confrontation as fundamentally coextensive with the opportunity for cross-examination. Under *Roberts* and *Lee*, either of two operating premises supported admission of her statement to police and the consequent conviction.[143] Sylvia's statement was either admissible because it reflected a firmly rooted exception to the hearsay rule or because it bore sufficient indicia of reliability such that its credibility or inherent truthfulness could be fairly inferred without the necessity for testing by cross-examination.[144]

In assessing the existing legal landscape of confrontation, it is important to note two distinct lines of thought that would coalesce in *Crawford*: the traditional suspicion with which statements made by accomplices to police have been viewed because of the declarant's acknowledged self-interest in spreading blame or attempting to negotiate for leniency, and the historical understanding that testimonial statements offered to incriminate the accused in a criminal trial must be tested by cross-examination. In *Crawford*, these two considerations undermined the credibility of the Court's approach in *Roberts* and *Lee*, at least when addressing the lack of cross-examination in factually similar contexts.

1. Confrontation and the Jury: *Coy v. Iowa*

The Court's liberalized approach to confrontation evident in *Roberts* and *Lee* did not reflect a consensus that all presumably reliable out-of-court statements should be admitted without testing by cross-examination. Even in these decisions, the majority demanded that the prosecution demonstrate the unavailability of the declarant and its diligence in attempting to secure the presence of the witness for trial.[145]

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142. *Compare* Pointer v. Texas, 380 U.S. 400 (1965), *and* Douglas v. Alabama, 380 U.S. 415 (1965), *with* Lee v. Illinois, 476 U.S. 530 (1986), *and* Ohio v. Roberts, 448 U.S. 56 (1980).

143. *See Roberts*, 448 U.S. at 66.

144. *See id.*

145. For example, in the wake of *Pointer*, the Court held in *Barber v. Page*, 390 U.S. 719, 723–25 (1968), that prior testimony from a co-defendant taken when the accused was represented by counsel would be admissible in the co-defendant's absence from trial only where the prosecution demonstrated due diligence in attempting to procure his attendance to testify before the jury. The co-defendant was incarcerated in a federal penitentiary in Texas at the time of Barber's trial in

Viewing admission of uncrossed out-of-court statements as justifiable only in circumstances in which the witness could not be produced for testimony before the jury, the majority continued to press for reasonableness in reliance on the exception to the preferred procedure of offering testimony before the jury where it would be tested by cross-examination.[146] This is because the confrontation guarantee embraces not only the concept of testing for the opportunity to question the witness but also the value of having jurors assess the credibility of responses given based on observation of the witness during the cross-examination.[147] The Court had fully explained the function of cross-examination in *California v. Green*,[148] where the majority explained that confrontation at trial is significant because it forces the witness to testify under oath and penalty of perjury; ensures the opportunity for cross-examination, affording the accused the best available means to test the accuracy of the testimony; and does so in the presence of jurors, allowing them to consider the witness's demeanor in making a determination as to his credibility.[149]

Later, in *Coy v. Iowa*,[150] Justice Scalia wrote for the majority in reiterating the constitutional preference for face-to-face confrontation between the accused and the witnesses against him in the presence of the jury: "We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[151]

Even the *Roberts* Court had conceded the constitutional preference for face-to-face confrontation: "The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial . . . ."[152]

But *Coy*, while not overruled, was significantly limited in *Maryland v. Craig*,[153] where a different majority concluded that the policy interest in protecting minor children from the trauma of testifying in open court before the jury in child abuse cases justified alternative procedures for eliciting

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Oklahoma, *id*. at 720, and the record showed that the prosecution had not taken appropriate steps to procure his presence at trial, *id*. at 723.

146. *See Lee*, 476 U.S. at 545; *Roberts*, 448 U.S. at 74.

147. *Lee*, 476 U.S. at 540 (quoting California v. Green, 399 U.S. 149, 158 (1970)); *Roberts*, 448 U.S. at 63–64 (quoting Mattox v. United States, 156 U.S. 237, 242–43 (1895)).

148. 399 U.S. 149 (1970).

149. *Id*. at 158.

150. 487 U.S. 1012 (1988).

151. *Id*. at 1016.

152. *Roberts*, 448 U.S. at 63 (citing California v. Green, 399 U.S. 149, 157 (1970) ("[I]t is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause.")).

153. 497 U.S. 836 (1990).

testimony.[154] While the Court did not dispense with face-to-face confrontation between these witnesses and the accused, as the Iowa procedure—employing a screen in the courtroom to prevent children from having to observe their alleged abusers—had, the Court approved procedures to remove the cross-examination from the immediate presence of jurors.[155] Thus, videotaped depositions and testimony by closed-circuit television may supplant direct confrontation in the courtroom before the jury, if necessary to prevent further trauma to the child from testifying before strangers.[156]

Nevertheless, the underlying proposition that direct confrontation during the cross-examination process remained the preferred model for ensuring the accused's Sixth Amendment right to confront the witnesses against him continued to require that significant policy interests be demonstrated before that model was rendered inapplicable. One of those interests, of course, is the public's legitimate expectation for prosecution despite the unavailability of a key prosecution witness.

2. Accomplice Declarations as Inherently Suspect: *Lee v. Illinois*

The Supreme Court reversed Lee's conviction based on the admission of her co-defendant's statement to police that inculpated both of them.[157] The declarant, Lee's boyfriend, Thomas, was unavailable to testify because he invoked his Fifth Amendment privilege.[158] Assuming that declarations against the penal interests of declarants are generally trustworthy and thus admissible under *Ohio v. Roberts*—despite the fact that the contents of the statement cannot be tested by cross-examination—the reversal in *Lee* must have been predicated on something in the nature of the particular declarant's status as an accomplice or the statement itself.

The critical factors that supported the reversal included the non-testifying accomplice's generic status as an accomplice in the commission of the crime.[159] The Court observed: "Over the years since *Douglas*, the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."[160] This same concern, that an accomplice's accusation is "presumptively suspect" because of the possibility that the declarant has something to gain by implicating another,[161] was

154. *Id*. at 853.

155. *See id.* at 851.

156. *Id*. at 853–55.

157. Lee v. Illinois, 476 U.S. 530, 546–47 (1986).

158. *See id*. at 536. The trials were severed and neither defendant testified except at hearings on their respective motions to suppress their confessions. *Id*.

159. *See id.* at 541.

160. *Id*.

161. *Id*.

certainly evident in Boeglin's statement that arguably implicated Earnest, in which Boeglin stated his interest in making a deal in return for his cooperation with authorities.[162] Yet, while the admission of Thomas's statement as substantive evidence against Lee required reversal, according to the majority, the same Court vacated Earnest's reversal, setting in motion the twenty-year history of Earnest's incarceration following the remand of the case to the state court and the consequent reinstatement of his conviction.[163]

Second, the statement made by Thomas differed significantly from Lee's, particularly in his admission that they had discussed the killing of Lee's aunt prior to the fatal attack.[164] Lee claimed that Thomas had first stabbed her aunt's friend, apparently angered by a look the friend had given them,[165] which led Lee's aunt to attack Lee. Lee claimed that she stabbed her aunt in self-defense.[166] Thomas confessed after being informed that Lee had already given a statement, and she "implored" him to share blame for the offense.[167] Thus, the circumstances under which Thomas gave his statement undermined the suggested particularized guarantees of trustworthiness required for admission of an accomplice's statement as a declaration against penal interest.[168]

In fact, the *Lee* majority pointed to those factors in rejecting reliance on her accomplice's confession to establish the degree of Lee's guilt.[169] The same factors, present in *Earnest*, undermined Justice Rehnquist's reasoning in his concurrence in *New Mexico v. Earnest*.[170] Moreover, prior to the Court's reconsideration of *Roberts* in *Crawford*, the lack of appreciation for the significance of the *Lee* factors tainted the *Roberts* rationale's application to convictions based on accomplice statements to police.

The *Lee* majority specifically held that accomplice statements do not fall within a general exception to the hearsay rule for declarations against interest

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162. *See* Earnest v. Dorsey, 87 F.3d 1123, 1134 (10th Cir. 1996).

163. *See* New Mexico v. Earnest, 477 U.S. 648 (1986). The *Lee* majority recognized not only the traditional suspicion with which accomplice statements are viewed, but also the inherently strong prejudice that attends the fact of the confession itself. 476 U.S. at 542. The *Lee* Court looked to its earlier holding in *Bruton v. United States*, 391 U.S. 123, 135–36 (1968), where it concluded that the jointly inculpatory aspect of an accomplice's confession constituted such powerful evidence that jurors could not be expected to disregard its use as evidence of the accused's guilt when admitted only against the co-defendant declarant, regardless of the strength of the trial court's admonitions that jurors not consider the confession in determining guilt. *Lee*, 476 U.S. at 542.

164. *Lee*, 476 U.S. at 534–35.

165. *Id*. at 533.

166. *See id*. at 534.

167. *Id*. at 544.

168. *Id*. at 543–44.

169. *Id*. at 544.

170. *See* 477 U.S. 648, 649 (1986) (Rehnquist, J., concurring).

but actually constituted a far narrower category.[171] Nevertheless, while Lee obtained a reversal, the majority's reiteration of the *Roberts* rationale for admissibility permitted Justice Rehnquist, in his concurrence in *New Mexico v. Earnest*, to set in motion the liberalization of admission of accomplice statements signaling that lower courts could rely on *Roberts* as a theoretical justification for admission of statements falling within the narrower class of inherently suspect statements.[172]

The *Lee* majority also rejected two additional arguments advanced for admission of the accomplice's statement without the opportunity for cross-examination at trial. First, the significant differences in the content of the two statements rebutted the claim that they were interlocking, and thus the reliability of Thomas's statement was established by references to the admissions made by Lee in her own statement.[173] Of course, the prosecution offered Thomas's statement precisely because it diverged from Lee's admissions on the factual question of whether she was truly justified in killing her aunt or, in fact, had planned the murder with Thomas. Second, because the issue at the hearing was the voluntariness of the statements rather than their accuracy, the fact that Lee's counsel was afforded an opportunity to cross-examine Thomas during the joint hearing on their motions to suppress their respective statements did not afford Lee a meaningful opportunity to cross Thomas.[174]

The vacation of Earnest's reversal by the New Mexico Supreme Court and remand for reconsideration in light of *Lee* should never have led to Earnest's continued incarceration through the substantial unsuccessful litigation prior to the state court's retroactive application of *Crawford* in his case. Lee's reversal was ordered on far less compelling facts, particularly in light of the fact that Lee herself had confessed, implicating herself in the offense, in contrast to Earnest, who never confessed to police and testified at trial—being subjected to cross-examination—that he was not involved in the offense at all.

3. Reconsidering "Penal Interest": *Williamson v. United States*

Admission of accomplice statements continued to earn the Court's focus after *Lee* and *New Mexico v. Earnest*. In *Williamson v. United States*,[175] the Court considered the admission of out-of-court statements made by non-testifying accomplices in light of the exception to the hearsay rule for

171. *Lee*, 476 U.S. at 544 n.5.
172. *Earnest*, 477 U.S. at 649 (Rehnquist J., concurring).
173. *Lee*, 476 U.S. at 546.
174. *Id*. at 546 n.6.
175. 512 U.S. 594 (1994).

statements contrary to the declarant's penal interest.[176] Later, in *Lilly v. Virginia*,[177] the majority returned to the admissibility of accomplice statements not subjected to testing by cross-examination.[178] Both decisions suggest uneasiness with the overreaching engaged in by the *Roberts* Court in adopting a model for resolution of admissibility questions in which assumptions made about the reliability of statements against penal interest supplanted the strict requirement that the accused have a meaningful opportunity for cross-examination of the declarant.[179]

Significantly, *Williamson* was not predicated on the Sixth Amendment confrontation guarantee, but the decision did suggest a retreat from the rather open-ended approach to reliability assumptions as a substitute for cross-examination in the admission of accomplice statements.[180] The majority noted that the reference to the declarant's "statement" in Federal Rule of Evidence 803(b)(3) could have both expansive and narrow meanings.[181]

The expansive reading of the accomplice's statement would provide that the entirety of a statement made by an accomplice inculpating himself would be admissible, while the narrow view would authorize admission of only those parts of a statement that were in fact self-inculpatory.[182] The majority distinguished between those portions of a statement that are truly self-inculpatory and thus might demonstrate the assumed reliability underlying the rationale of the exception to the hearsay rule and those that are not necessarily self-inculpatory, including assertions regarding the culpability of others.[183] The Court reversed based on the admission of the entirety of the statement made by Harris implicating Williamson, holding:

> [W]e cannot conclude that all that Harris said was properly admitted. Some of Harris' confession would clearly have been admissible under Rule 804(b)(3); for instance, when he said he knew there was cocaine in the suitcase, he essentially forfeited his only possible defense to a charge of cocaine possession, lack of knowledge. But other parts of his confession, especially the parts that implicated Williamson, did little to subject Harris himself to criminal liability. A

176. *Id*. at 598–605; *see* FED. R. EVID. 804(b)(3) ("statement[s] which . . . at the time of [their] making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement[s] unless believing [them] to be true").

177. 527 U.S. 116 (1999).

178. *Id*. at 127, 130–34.

179. *See id.* at 128; *Williamson*, 512 U.S. at 599–600.

180. *See Williamson*, 512 U.S. at 605.

181. *Id*. at 599.

182. *Id*.

183. *Id*. at 599–601.

> reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability, at least so far as sentencing goes.[184]

The *Williamson* Court thus drew a line based on the rule that would exclude those portions of the declarant's statement serving to inculpate an accomplice but not actually implicating the declarant himself.

This approach suggested nothing less than that the admission of portions of Boeglin's statement inculpating Earnest but not directly inculpating Boeglin or minimizing his own culpability should not have been admitted at Earnest's trial. But the Tenth Circuit rejected Earnest's reliance on the relatively recent decision in *Williamson*.[185] The circuit court observed that the lower courts had not based their conclusion that Boeglin's statement was properly admitted at trial solely on the fact that it could be characterized as a statement against Boeglin's penal interest.[186] Instead, the court agreed that Boeglin's statement against his penal interest was admissible against Earnest because the statement additionally had been found to have particularized guarantees of trustworthiness discerned in the lower courts' analyses.[187]

The Tenth Circuit noted that the magistrate judge held that Boeglin's statement demonstrated the requisite reliability for admission based on the following:

> In addition to finding that the statement was primarily against Boeglin's penal interest, the magistrate determined that the statement was reliable because: (1) Boeglin was not induced by promises by the police or district attorney to confess; (2) Boeglin had no cause to retaliate against Earnest nor would he lightly decide to be a "snitch"; (3) Boeglin was willing to undergo a lie detector test; and (4) Boeglin's emotional state was no more agitated than would be expected from one arrested on a murder charge.[188]

Yet, none of these findings demonstrated any particular reliability on Boeglin's part; rather, at best they merely reflected no affirmative facts that

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184. *Id*. at 604.

185. Earnest v. Dorsey, 87 F.3d 1123, 1133–34 (10th Cir. 1996). Earnest argued that *Williamson* provided guidance in the resolution of his constitutional confrontation claim, while recognizing that the decision had been based on construction and application of the applicable federal evidence rule, rather than on Sixth Amendment grounds. *See id*.

186. *Id*. at 1134.

187. *Id*.

188. *Id*. at 1132.

would undermine his credibility. For example, the issue of whether Boeglin lacked cause to retaliate against Earnest actually simply shows that the magistrate found no motive for retaliation, but that does not make the statement reliable; instead, a finding of an obvious motive for retaliation would have served to demonstrate its likely unreliability. In other words, the underlying theory of admissibility was simply that Boeglin inculpated himself and that there were no apparent factors compromising the integrity of his assertions to police.

This approach reflects the flaw inherent in reliability analysis because it focuses on the lack of objective factors undermining reliability rather than on positive factors supporting reliability. For instance, the "fact" that Boeglin was willing to take a lie detector test presupposes he would have passed the test. But that fact can hardly substitute for a passing score, and there is no evidence that Boeglin ever passed, or indeed took, or was even offered a polygraph test to support his statement. Had he been offered the test, taken it, and passed it, that fact might have indicated the reliability of his statement but for the typical problem posed by the general inadmissibility of polygraph examination results.

Similarly, the magistrate judge relied on the "fact" that Boeglin was not offered any kind of deal, yet his statement itself reflects that he was trying to make a deal for cooperation.[189] The court quoted from the actual statement: "I was hoping I could make some kind of deal."[190] And, in the quoted portion of his statement, Boeglin claimed that his role in the actual murder involved an attempt to cut the victim's throat, yet the knife would not cut, and someone else shot the victim.[191] Here, Boeglin's intent both to make a deal with police by cooperating and to minimize his actual participation in the murder itself reflects precisely the considerations leading the *Williamson* majority to

189. *Id*. at 1131–32.

190. *Id*. at 1134.

191. *Id*. The circuit court quoted from Boeglin's statement:

> I was setting here, [the victim] was here, Rob was here, and I was there, and uh—I opened up my door and the car slid around like that, and I fell out my . . . door, and uh—[the victim] jumped out his, and—soon as he turned, he caught it by—right between the eyes and uh—he . . . was still alive, and I had the knife with me—I went to cut his throat, but it didn't cut—and I was—cut it again and it just barely cut it, and—I just dropped the knife after that—and—I don't know who else—could it be, but uh—the gun started jamming up, and uh—I don't know how many shots he jammed on—they reloaded it, and—fired two more shots into him—uh I guess into his head, I don't know—then we jumped into the car . . . and cleaned up everything . . . .

Id.

restrict admission of out-of-court statements by accomplices.[192] But in *Williamson*, the majority found that Harris's statement had been improperly admitted based on a generic categorization of its contents as against his interest and reversed where no independent consideration of the contents and their implications for credibility had been undertaken.[193] Because the Tenth Circuit concluded that the findings of lower courts on the existence of particularized guarantees of trustworthiness supporting admissions had been made by the state court and magistrate judge, it held that *Williamson* did not require relief in *Earnest*.[194]

Williamson showed the Court's continuing concern with admission of non-testifying accomplices' statements made to police as substantive evidence against their alleged confederates at trial. The Court did not expressly overrule *Williamson* in *Crawford*. However, the admission of the accomplice's testimony statement without testing by cross-examination is clearly barred by *Crawford*, assuming defense counsel timely objects or moves to exclude the statement. However, *Williamson* retains validity with regard to admission of statements purportedly made to third persons rather than police, or not intended for use as testimony in an official proceeding or in the context of a civil trial.

4. Foreshadowing *Crawford*: *Lilly v. Virginia*

Lilly addressed similar concerns about the admission of out-of-court statements by accomplices not available for cross-examination before the trial jury.[195] But it did so in one particularly critical context; in *Lilly* the out-of-court declaration was not clearly self-inculpatory on the key issue at the defendant's trial.[196] Although the declarant, Mark Lilly, admitted that he had been drinking with his brother, Benjamin Lilly, and his co-defendant, Barker, he denied that he had participated in the capital crime at all, implicating Benjamin in the planning of the carjacking and murder of the victim.[197] Mark Lilly's statement placed him in proximity of the offense and admittedly showed him to be a willing participant in some of the less serious offenses committed by the three men during a crime spree that lasted two days.[198] He identified his brother, however, as the individual who shot the murder victim.[199]

192. Williamson v. United States, 512 U.S. 594, 604 (1994).
193. *Id*.
194. *Earnest*, 87 F.3d at 1133–34.
195. Lilly v. Virginia, 527 U.S. 116 (1999).
196. *Id*. at 121.
197. *Id*.
198. *Id*.
199. *Id*. at 120–21.

The state trial court admitted Mark Lilly's statement at his brother's trial as an admission against his penal interest.[200] Benjamin was convicted of the capital murder and sentenced to death.[201] On appeal, the state supreme court upheld the conviction, finding that Mark's statement to police was properly admitted as a declaration against his penal interest.[202] Under Virginia law, the court held that statements against penal interest constitute "'firmly rooted' exception[s] to the hearsay rule,"[203] relying on the Court's decision in *White v. Illinois*,[204] which had recognized that certain kinds of statements had traditionally been regarded as sufficiently reliable for admission at trial despite the lack of opportunity for testing by cross-examination.[205] The state court conceded that Mark Lilly's statement actually shifted blame for the capital crime to his brother but held that his apparent motivation in doing so could be considered by the trial jury in evaluating the credibility of his assertions to police.[206]

Justice Stevens, writing for Justices Souter, Ginsburg, and Breyer, led the plurality in rejecting the state court's finding that the penal interest exception constituted a "firmly rooted exception to the hearsay rule" alone justifying admission of Mark Lilly's statement without testing by cross-examination.[207] Instead, the plurality observed that this exception was simply too broad,[208] defining a class too large for analysis, as the *Lee* Court had found.[209] So for the plurality, admission of such statements would be acceptable only if the statement not only was contrary to the declarant's penal interest, but also met the *Roberts* requirement for particularized guarantees of trustworthiness.[210] In

200. *Id*. at 121–22.

201. *Id*. at 122.

202. *Id*.

203. *Id*.

204. 502 U.S. 346 (1992). In *White*, the Court seemingly retreated from its earlier holding in *Idaho v. Wright*, 497 U.S. 805 (1990), regarding admissibility of statements made by child declarants concerning abuse. In contrast to statements that were effectively the product of questioning or interrogation, as in *Wright*, 497 U.S. at 826–27, the *White* Court found that the spontaneous statements to an officer were admissible as fitting within a "firmly rooted exception to the hearsay rule," *White*, 502 U.S. at 355–56. Thus, the *White* Court concluded that "[w]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." *Id*. at 356. In *Crawford*, Justice Scalia questioned the viability of *White* in light of the fact that the question addressed there focused on the unavailability of the witness. Crawford v. Washington, 541 U.S. 36, 58 n.8 (2004).

205. *White*, 502 U.S. at 356.

206. *Lilly*, 527 U.S. at 122–23 (citing Lilly v. Commonwealth, 499 S.E.2d 522, 534 (Va. 1998)).

207. *See Lilly*, 527 U.S. at 127–34.

208. *Id*. at 127.

209. Lee v. Illinois, 476 U.S. 530, 544 n.5 (1986).

210. *Lilly*, 527 U.S. at 134–35.

so holding, however, the plurality did not reject the penal interest exception as wholly insufficient for admission of accomplice statements.[211] Rather, it simply approached their admission with the same extreme caution noted by Justice Blackmun, the author of *Ohio v. Roberts*,[212] in dissenting in *Lee*:

> [A]ccomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility—circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest—that we have viewed the accomplice's statements as "inevitably suspect."[213]

The plurality insisted that admission of Mark Lilly's statement implicating his brother in the capital murder could not rest simply on its character as a statement against his penal interest but must also satisfy the requirement for added indicia of reliability or guarantees of its trustworthiness.[214] Here, the plurality concluded that Mark's allegations in the statement failed to meet the constitutional standard for admission without testing by cross-examination.[215]

The plurality found, for instance, that the mere fact the statement accurately described the offense—that it was corroborated by other evidence at trial—was irrelevant.[216] Similarly, the plurality rejected the State's reliance on the fact that Mark's statement was made voluntarily after he had been warned of his constitutional rights, finding that "a suspect's consciousness of his *Miranda* rights has little, if any, bearing on the likelihood of truthfulness of his statements."[217] And finally, the plurality concluded that the mere fact that Mark's statement subjected him to "technical" criminal liability was insufficient to demonstrate its reliability precisely because it contained

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211. *Id*.

212. 448 U.S. 56 (1980).

213. *Lee*, 476 U.S. at 552–53 (Blackmun, J., dissenting) (citing Bruton v. United States, 391 U.S. 123, 136, 141–42 (1968) (White, J., dissenting)) ("Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.").

214. *Lilly*, 527 U.S. at 134–35.

215. *Id*. at 137.

216. *Id*. at 137–38 (relying on Idaho v. Wright, 497 U.S. 805, 822 (1990)).

217. *Id*. at 138.

material inculpating others, citing the "natural motive [for him] to attempt to exculpate *himself* as much as possible."[218]

The remainder of the Court concurred in the reversal ordered by the plurality. Justices Scalia and Thomas limited their agreement only insofar as the statement admitted constituted a statement made for purposes of official proceedings—that is, Mark Lilly's statement constituted testimonial hearsay requiring testing by cross-examination.[219] They did not join in Justice Stevens's lengthy analysis of the penal interest exception and its role vis-à-vis the confrontation guarantee, leaving open the possibility that non-testimonial hearsay would be subject to admission without the required heightened analysis the plurality would impose for statements offered as within that exception.[220] The Chief Justice, joined by Justices O'Connor and Kennedy, concurred in the result[221] but declined to hold that the penal interest exception was not traditionally recognized precisely because he found that the statement was insufficiently inculpatory as to Mark Lilly to warrant admission as a penal interest exception at all.[222] Similarly, the Chief Justice also concluded that the prosecution had failed to meet the second prong of *Roberts*, a showing of particularized guarantees of trustworthiness required for admission of accomplice statements required to meet the heightened reliability showing the plurality demanded.[223]

Thus, the Chief Justice, consistent with his earlier position in *New Mexico v. Earnest*,[224] did not assess the constitutional viability of *Ohio v. Roberts* for admission of accomplice statements. Instead of confronting the questions about whether the standards upon which the lower court had admitted the statement were themselves appropriate, he simply found that neither standard could be met in light of the state court's opinion.[225] He concurred in the disposition because Virginia had failed under either existing approach that he had previously endorsed in *Earnest*.[226]

What emerges from the split in the Court in *Lilly* is that the decision failed to resolve issues relating to admission of accomplice confessions in the

218. *Id*. at 138–39 (emphasis added).

219. *Id*. at 143 (Scalia, J., concurring); *id*. at 143–44 (Thomas, J., concurring).

220. *See id.* at 143 (Scalia, J., concurring); *id*. at 143–44 (Thomas, J., concurring).

221. *Id*. at 144, 146 (Rehnquist, C.J., concurring).

222. *Id*. at 146. The plurality concluded: "The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Id*. at 134 & n.5.

223. *Id*. at 149.

224. 477 U.S. 648 (1986).

225. *Lilly*, 527 U.S. at 145–48.

226. *Id*.

absence of cross-examination, while at the same time suggesting that the *Roberts* doctrine had simply proved unworkable in the context of the confrontation guarantee, at least with respect to the inherently suspect statements of accomplices. For instance, in post-*Lilly* cases the New Mexico Supreme Court departed from the plurality's rejection of the penal interest exception, standing alone, as warranting admission of accomplice statements without cross-examination.

In a series of cases, the New Mexico court declined to be bound by the *Lilly* plurality's view, instead carving out a state law exception to cross-examination for declarations held to be against the declarant's penal interest, much as Virginia had. In *State v. Torres*,[227] the court had held that it regarded this hearsay exception to be firmly rooted.[228] There, the out-of-court statement inculpating the defendant had been introduced at trial through a police detective who testified that it had been made by an accomplice during interrogation after the declarant denied remembering the events that were purportedly reflected in the contents of the statement.[229]

The defense argued that the court should follow the Supreme Court's analysis in *Williamson* and hold that the trial court erred in admitting the statement because it was not truly self-inculpatory and primarily contrary to the declarant's interest and, consequently, did not come within the ambit of the hearsay exception.[230] The court noted that it was not bound by the Supreme Court's construction of the Federal Rules of Evidence but chose to follow the Court's lead.[231] It also explained the New Mexico view that the penal interest exception reflects a traditionally recognized exception to the hearsay rule under state law.[232] Because the witness had provided information implicating him in the offense generally, the court concluded that the trial court did not abuse its discretion in finding that the statement was against his penal interest.[233] Although the witness claimed to be unable to recall the contents of his statement, the court pointed out that he was vigorously crossed on this failure of memory.[234] The court thus concluded that there was no

227. 971 P.2d 1267 (N.M. 1998). The court held in *Torres* that statements against penal interest function as per se exceptions to the general confrontation requirements because such statements are firmly rooted exceptions to the hearsay rule and therefore bear "adequate indicia of reliability." *Id*. at 1277–78.

228. *Id*. at 1277.

229. *Id*. at 1270.

230. *Id*. at 1271.

231. *Id*. at 1272.

232. *Id*.

233. *Id*. at 1274–75.

234. *Id*. at 1276. The court relied on *United States v. Owens*, 484 U.S. 554, 556, 560 (1988), where the Court held that confrontation was satisfied by the opportunity to cross a witness claiming memory loss because the jury was able to assess the witness's demeanor while testifying under oath.

confrontation violation where there had been opportunity to cross the declarant and where the statement arguably exposed him to prosecution for homicide.[235]

The court later affirmed its position in *Torres* in *State v. Gonzales*.[236] However, it did so in the context of testimony by a co-conspirator who reported inculpatory statements made to him by the accused.[237] On rehearing, the *Gonzales* court considered the applicability of the intervening decision in *Lilly*.[238] It explained that *Lilly* was not persuasive because the statement reviewed there would not have met the requirements for admission under the New Mexico evidence rule authorizing admission of declarations against penal interest[239] because it was not against the declarant's interest.[240] Moreover, the court distinguished *Lilly* precisely because the accomplice's statement in *Gonzales* had been made to a third person, not to police during the course of custodial interrogation.[241]

The court again rejected reliance on *Lilly* in *State v. Martinez-Rodriguez*,[242] noting that it had previously rejected the applicability of *Lilly* on rehearing in *Gonzales*.[243] Once again, the statement admitted in *Martinez-Rodriguez* was contained in a letter purportedly written by the defendant to his confederates rather than having been made during the course of police interrogation.[244]

And in *State v. Desnoyers*,[245] the court again considered the admission of out-of-court declarations against penal interest made to third persons rather than in the context of custodial interrogation by police or in testimonial statements intended for use in official proceedings.[246] The statement inculpating the accused was purportedly made by the co-defendant to another inmate while in custody, who then testified at the defendant's trial.[247] The

235. *Torres*, 971 P.2d at 1280.

236. 989 P.2d 419 (N.M. 1999), *cert. denied*, 529 U.S. 1025 (2000).

237. *Id*. at 421.

238. *Id*. at 426–27.

239. N.M. R. EVID. 11-804(B)(3).

240. *Gonzales*, 989 P.2d at 428.

241. *Id*. at 426–27.

242. 33 P.3d 267 (N.M. 2001).

243. *Id*. at 278. The state court rejected the argument that its continuing acceptance of the penal interest exception as a firmly rooted exception to the hearsay rule should be repudiated in light of *Lilly*. *Id*. Instead, it concluded: "We are unpersuaded by Defendant's argument and reaffirm that, in New Mexico, a statement against penal interest within the meaning of Rule 11-804(B)(3) is a firmly rooted exception to the hearsay rule." *Id.*

244. *Id*. at 277.

245. 55 P.3d 968 (N.M. 2002).

246. *Id*. at 974–75.

247. *Id*.

court noted that the defense had an opportunity to cross-examine the testifying witness at trial on the question of his credibility.[248] The court rejected the claim that the defendant was denied confrontation because he could not compel the co-defendant who purportedly bragged about the offense to others in jail to testify and be cross-examined about the claims made by the jailhouse informant.[249]

The New Mexico Supreme Court thus continued to apply the exception to hearsay for statements against penal interest as a firmly rooted hearsay exception well after the *Lilly* plurality had called this substitute for cross-examination into question. But the critical issue posed by *Lilly* and later *Crawford* simply was not present because no cases involved statements admitted in trial that were testimonial statements made by accomplices to police and thus susceptible to the suspicion that they represented distortions of facts designed to benefit the declarant.[250]

Not only did *Lilly* suggest the Court's movement away from the analytical framework based on assumptions of reliability as supplanting the requirement for cross-examination, at least with regard to accomplice statements to police,[251] but also it had a definite implication for Earnest. Had his claim

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248. *Id*. at 975.

249. *Id*. at 974–75.

250. In *State v. Forbes ex rel. Earnest*, 119 P.3d 144, 146 (N.M. 2005), the New Mexico Supreme Court referred to this prior line of cases before discussing *Crawford*. The court noted:

> From Earnest II up until Johnson, New Mexico courts continually applied the Roberts reliability test ("indicia of reliability") to accomplice statements, regardless of whether there had been an opportunity to cross-examine.

Forbes, 119 P.3d at 146 (citing State v. Desnoyers, 55 P.3d 968 (N.M. 2002); State v. Martinez-Rodriguez, 33 P.3d 267 (N.M. 2001); State v. Torres, 971 P.2d 1267 (N.M. 1998)). Westlaw's KeyCite feature indicates that *Forbes* abrogated the court's prior decisions in both *Martinez-Rodriguez* and *Desnoyers*, but this conclusion is in doubt because the admission of out-of-court statements made contrary to the declarant's interests in both cases did not involve an inability to challenge testimonial statements by cross-examination. Because the statements in both cases had not been made with expectation of their use in subsequent litigation—whether because they were made to co-defendants or while bragging to inmates, respectively—statements of these types likely remain admissible in a post-*Crawford* world because they are not testimonial in nature. *See* Crawford v. Washington, 541 U.S. 36, 51 (2004) ("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."); *see also* State v. Alvarez-Lopez, 98 P.3d 699, 707 (N.M. 2004) (recognizing that *Crawford* left open the possibility that non-testimonial statements would continue to be admitted under the exception).

251. But as the *Crawford* majority would note, the apparent caution urged by the Court in *Lilly* in admitting accomplice statements, Lilly v. Virginia, 527 U.S. 116, 137 (1999), was in fact not borne out in practice in the country's trial courts, *Crawford*, 541 U.S. at 63–64. The *Crawford* Court counted and cited some dozen post-*Lilly* cases in which accomplice statements had been admitted despite the absence of cross-examination and noted Professor Roger Kirst's conclusion that in twenty-five of seventy post-*Lilly* cases, trial courts had ruled uncrossed accomplice statements admissible. *Id*. at 63–64; *see* Roger W. Kirst, *Appellate Court Answers to the Confrontation*

involving admission of Boeglin's statement at trial been presented to the Court after *Lilly*, the combined reasoning of the four-Justice plurality rejecting the penal interest exception, standing alone as the basis for admissibility, with the votes of Justices Scalia and Thomas, would have formed a solid core of votes for reversal of his conviction.[252]

It would, however, take the Court's decision in *Crawford* for Earnest to seize the opportunity for relief.

B. Crawford*'s Rejection of the Flawed Rationale of* Roberts *and* Lee

Justice Scalia began his assault on *Roberts* in *Crawford* eloquently: "*Roberts*' failings were on full display in the proceedings below."[253]

The *Crawford* Court approached the question of admissibility of Sylvia's statement from a general posture favoring in-court cross-examination but did so based on the particularly important factual context of the case.[254] Because Sylvia was an accomplice in the offense,[255] regardless of potential limitations on the extent of her culpability, the opinion rests in large part upon the importance of cross-examination in testing the reliability of Sylvia as a witness and the accuracy of her assertions.[256] Instead of relying on generalizations about the reliability of her statement as against her own interest, the majority looked to the rationale supporting cross-examination as essential to the defense in this context.

The unique role of cross-examination for purposes of the confrontation guarantee is at the heart of Justice Scalia's reappraisal in *Crawford.* The historical significance of the law's concern for the right of the accused to respond to a criminal charge is evident in Justice Scalia's lengthy discussion of the origin of the confrontation right in the common law.[257] But his opinion did not reflect a novel approach in the Court;[258] in fact, in *Mattox v. United*

Questions in Lilly v. Virginia, 53 SYRACUSE L. REV. 87, 105 (2003).

252. *See* J. Thomas Sullivan, *Twice Grilled*, 5 J. APP. PRAC. & PROCESS 151, 153–55 (2003) (noting the vote in *Lilly v. Virginia*, 527 U.S. 116 (1999), supported the New Mexico Supreme Court disposition in *Earnest I*).

253. 541 U.S. at 65.

254. *Id*. at 68–69.

255. *Id*. at 65.

256. *See id.* at 66.

257. Justice Scalia's opinion for the majority includes extensive historical analysis of confrontation, focusing on English common law traditions—particularly with respect to the significance of the absence of cross-examination raised as an issue in the trial of Sir Walter Raleigh—and early American precedents. *Id*. at 43–62.

258. In fact, the *Crawford* Court had observed that the disposition in *Roberts* was consistent with its holding in other decisions, while characterizing the rationale advanced by the *Roberts* majority as overly broad. *Id*. at 60. The Court reiterated this assessment in *Whorton v. Bockting*, 127 S. Ct. 1173, 1179 (2007).

States, a similar historical analysis had been employed in justifying admission of prior testimony elicited in proceedings prior to a witness's death.[259]

The thrust of *Roberts* is that if statements are sufficiently reliable, either because they reflect firmly rooted exceptions to the hearsay rule or are marked by particularized guarantees of trustworthiness, cross-examination affords little additional protection for the defendant at trial.[260] For the criminal defendant, the importance of cross-examination lies not only in the opportunity to question the factual accuracy of assertions made in the accomplice's statement that implicate the accused, but also in requiring the accomplice to function as any other witness whose credibility is subject to assessment by the jury observing his or her testimony. The value of cross-examination is particularly important where the witness has claimed particular knowledge about the offense that is offered as credible precisely because the witness is an accomplice who has every reason to know about the particular facts of the offense and the defendant's role in its commission.[261] For the same reason, the accomplice has available the most compelling tool for manipulating the investigation and prosecution of the case to shift primary focus to the accused and away from the accomplice.

The *Roberts* Court's rationale failed to accommodate the very dangerous prospect that accomplices can manipulate the prosecution process in a way that distorts the fact-finding function to their benefit. This is evident in *Lee* when the Court admitted that those witnesses are inherently suspect yet failed to draw a line in the *Roberts* doctrine preventing the use of its "reliability" assumptions in dispensing with the need for cross-examination.[262]

Although Sylvia's status as an accomplice raised the traditional concern for the credibility of accomplices who may be seeking to implicate others in an effort to better themselves in the criminal investigation, *Crawford* does not limit the Court's requirement for cross-examination to admission of accomplice or co-defendant declarations.[263] Rather, the opinion focuses on all statements that are testimonial in nature, reflecting their intended or expected use in official proceedings so that statements made by other witnesses who are

259. *See* 156 U.S. 237, 240–42, 246–50 (1895).

260. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

261. Nevertheless, courts still consider the accomplice's ability to describe the circumstances of the offense with particularity as especially important, even though it would appear to be the very minimum that should be expected of an accomplice implicating himself and others in the commission of a crime. See, for example, the Tenth Circuit's observation in *Earnest v. Dorsey* in valuing the credibility of Boeglin's untested statement: "[W]e find the statement describes the crime at a level of detail which would be difficult to render in a fabricated admission." 87 F.3d 1123, 1134 (10th Cir. 1996).

262. *See* Lee v. Illinois, 476 U.S. 530, 546 (1986).

263. *See* 541 U.S. at 68.

not susceptible to being characterized as accomplices are also governed by the holding.[264] This has certainly been demonstrated in the post-*Crawford* history of litigation of confrontation claims.[265]

Crawford is significant precisely because the Court did not simply announce a departure from existing precedent in announcing a new rule of constitutional criminal procedure[266]—these pronouncements have been common over the past half century of the Court's review of criminal process in light of the protections afforded by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. Rather, the Court rejected the implication drawn from prior decisions that had led lower courts to conclude that admission of non-crossed statements of non-testifying co-defendants was permissible if those statements met certain criteria for credibility.[267] The Court found instead:

> Where nontestimonial hearsay is at issue, 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. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.[268]

The *Crawford* Court's decision in reversing the trend toward admission of declarants' out-of-court statements not subject to cross-examination reflects an appreciation for the historical context in which the Sixth Amendment

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264. *Id*.

265. For an interesting assessment of the extent to which *Crawford* and *Davis v. Washington*, 547 U.S. 813, 832–33 (2006) (the Court acknowledging that the cross-examination requirement will have the perverse effect of protecting perpetrators of domestic abuse whose victims are unwilling to testify in court by restricting admission of their reports of abuse to police), have actually disadvantaged certain classes of litigants, such as battered women, see generally Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 272 (2006).

266. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 301 (1989) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.").

267. *Crawford*, 541 U.S. at 67–68.

268. *Id*. at 68.

confrontation guarantee serves the interest of accurate fact-finding.[269] The decision is limited in important respects—addressing only the issue of admission of testimonial statements, that is, statements either deliberately designed for use in official proceedings or likely to result in their use for purposes of proof of fact in a judicial proceeding.[270] The Court noted that affidavits, custodial examinations, prior testimony not subjected to cross-examination, and "similar pretrial statements that declarants would reasonably expect to be used prosecutorially" fit within the context of testimonial statements typically requiring testing by cross-examination prior to admission.[271] Thus not all out-of-court statements implicate the element of cross-examination as critical to the confrontation guarantee.[272]

Significantly, *Crawford* demonstrates the willingness of some Justices to re-examine doctrine that has wandered from the traditional understanding of limitations imposed upon government through manipulation associated with more flexible approaches to constitutional interpretation.[273] Inexplicably, the Justices never alluded to or even cited the Rehnquist concurrence in *New Mexico v. Earnest* in assessing the Court's perceived error in *Roberts*.[274] In returning to historical sources when assessing the context in which the confrontation guarantee was articulated, the Court repudiated the more flexible view of the protection advanced in *Ohio v. Roberts*, one in which a general paradigm for assessing reliability had replaced the formal process of cross-examination for resolution of Sixth Amendment questions.[275] But *Crawford* represents more than a manifestation of a strict constructionist approach that defers to the historical context in which the Constitution is to be interpreted. It addresses a most troubling problem for criminal defendants—the inability to challenge allegations that are often false and almost always self-serving that have been admitted as evidence at trial under a generalized theory of their potential for reliability.

IV. *CRAWFORD* AND ITS RETROACTIVE APPLICATION IN *EARNEST*

The New Mexico Supreme Court overruled *State v. Torres*[276] in its 2004 decision in *State v. Alvarez-Lopez*,[277] based on the Supreme Court's action in

269. Justice White, writing for the majority in *California v. Green*, 399 U.S. 149, 157 n.10 (1970), also traced the historical roots of cross-examination to the trial of Sir Walter Raleigh. *See* s*upra* note 257.

270. *See Crawford*, 541 U.S. at 68–69.

271. *Id*. at 51.

272. *Id*. ("[N]ot all hearsay implicates the Sixth Amendment's core concerns.").

273. *See id.* at 68.

274. *See id.* at 62–65.

275. *See id.* at 61.

276. State v. Torres, 971 P.2d 1267 (N.M. 1998).

Crawford.[278] In so doing, Justice Minzner referred to the "splintered" opinion in *Lilly* that had invited significant comment but had effectively permitted the court to continue to hold that the penal interest exception constituted a firmly rooted exception under New Mexico law.[279] The court acknowledged that *Lilly* had questioned the continuing reliance on this exception as a basis for admission in the absence of cross-examination of accomplice statements,[280] but its continued reliance on *Lilly* demonstrates the Supreme Court's somewhat reluctant but gradual path toward renunciation of the *Roberts* rationale when applied to this category of hearsay.

The significance of *Crawford* for Earnest was both theoretical and practical. In theory, *Crawford* affirmed precisely the argument Earnest had advanced in attacking the reliability of his conviction based on Boeglin's statement to police. Boeglin's statement clearly constituted the type of testimonial statement *Crawford* addressed directly. Like Sylvia's statement, Boeglin's statement to investigating officers was the type of statement designed for use in an official proceeding for proof of a fact.[281]

Without the opportunity to cross-examine Boeglin before the jury, Earnest was denied the only meaningful opportunity to test the credibility of Boeglin's factual disclosures to the police or to question his motivation for implicating Earnest before the trial jury, which would have been in the best position to assess Boeglin's personal credibility and the reliability of his claims.

Practically, *Crawford* gave Earnest another opportunity to litigate. But the litigation option was limited to New Mexico state court proceedings under Rule 5-802, which authorizes state post-conviction litigation challenging the legality of conviction.[282] The New Mexico procedure does not limit applications for post-conviction relief, affording Earnest the option of filing a second petition for habeas relief even though he had previously raised his alternative state constitutional argument in a first petition for habeas corpus.[283]

Ironically, even though Earnest was relying on the interpretation of a federal constitutional protection in an intervening decision of the United States Supreme Court, he would not have been permitted to raise the claim based on *Crawford* in a federal habeas action for at least three reasons. First, the federal statute imposes a one-year statute of limitations on federal habeas

277. State v. Alvarez-Lopez, 98 P.3d 699 (N.M. 2004).

278. *Id*. at 706–07.

279. *Id*. at 706.

280. *Id*.

281. Crawford v. Washington, 541 U.S. 36, 51 (2004) ("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.").

282. N.M. R. CRIM. P. FOR THE DIST. CTS. 5-802.

283. *See id.*

claims[284]—long passed for Earnest—in contrast to the New Mexico procedure, which includes no limitations period.[285] Second, the application of the *Teague* new rules doctrine prevented the application of *Crawford* in the federal habeas process until such time as the Supreme Court announced that the new rule was to be applied retroactively.[286] And third, even had *Crawford* been afforded retrospective application at the time it was announced, the *federal* habeas statute specifically excludes application of the newly announced retroactive rule to a litigant whose claim was previously asserted in a federal habeas proceeding.[287]

Because of the latitude recognized by Rule 5-802 governing state post-conviction proceedings, the Court's reversal of the *Ohio v. Roberts* reliability doctrine in *Crawford* opened the door for reconsideration of the constitutional legality of Earnest's conviction. The state court had already determined that admission of Boeglin's statement was critical to conviction.[288] Thus, the only issue to be addressed in Earnest's second state post-conviction proceeding was whether *Crawford* should be applied to afford Earnest relief from his conviction.

A. Crawford *and Retroactivity*

Retroactive application of *Crawford* proved an immediate issue for litigation for Earnest and other defendants whose convictions rested on the

284. 28 U.S.C. § 2244(d)(1) (2000).

285. N.M. R. CRIM. P. FOR THE DIST. CTS. 5-802.

286. *E.g.*, Caspari v. Bohlen, 510 U.S. 383, 389 (1994) ("The nonretroactivity principle *prevents* a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final.").

287. *See* 28 U.S.C. § 2244(b)(1), (b)(2)(A) (2000). Subsection (b)(1) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Subsection (b)(2)(A) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . . .

Thus, it appears that a litigant who correctly anticipated a change in the law in arguing his claim in a prior federal habeas action is denied the benefit of a new rule subsequently recognized by the Supreme Court and given retroactive application. In light of the specific language of subsection (b), had *Crawford* been afforded retroactive application, Earnest would not have been entitled to rely on that retroactive application precisely because he had challenged his conviction in an earlier petition. *See* Earnest v. Dorsey, 87 F.3d 1123, 1130–34 (10th Cir. 1996) (asserting the same argument ultimately resulting in the change in the law announced later in *Crawford*).

288. State v. Earnest (*Earnest I*), 703 P.2d 872, 876 (N.M. 1985) (terming admission of Boeglin's statement "highly prejudicial").

admission of inculpatory statements made by accomplices not subjected to cross-examination.

1. Retroactive Application as an Exception to *Teague*'s New Rules Doctrine

A number of circuits considered the question of retroactivity in light of the principles set out in *Teague v. Lane*,[289] with typically unsuccessful results for litigants seeking to reopen convictions based upon the prosecution's use of uncrossed accomplice testimony. The Tenth Circuit rejected retroactive application in *Brown v. Uphoff*,[290] as did the Second Circuit in *Mungo v. Duncan*.[291] An Eighth Circuit panel opined in dicta that *Crawford* would not apply retroactively,[292] while the First Circuit declined to reach the issue.[293] Only the Ninth Circuit, in *Bockting v. Bayer*,[294] held that *Crawford* should be applied retroactively prior to the New Mexico Supreme Court's disposition.[295] At the point at which certiorari had been granted by the Supreme Court in *Bockting*,[296] the Nevada attorney general could point to substantial authority rejecting retroactive application of *Crawford* in the federal circuits and state appellate courts.[297]

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289. 489 U.S. 288 (1989).

290. 381 F.3d 1219, 1225–27 (10th Cir. 2004).

291. 393 F.3d 327, 336 (2d Cir. 2004).

292. Evans v. Luebbers, 371 F.3d 438, 444–45 (8th Cir. 2004).

293. Horton v. Allen, 370 F.3d 75, 83 (1st Cir. 2004).

294. 399 F.3d 1010 (9th Cir. 2005). The Ninth Circuit panel opinion was issued on February 22, 2005. The petition for rehearing, en banc, was denied by that court on August 11, 2005. 418 F.3d 1055 (9th Cir. 2005). *State v. Forbes ex rel. Earnest* was argued in the New Mexico Supreme Court on May 11, 2005.

295. *Bockting*, 399 F.3d at 1012–13.

296. Whorton v. Bockting, 547 U.S. 1127 (2006) (granting petition for writ of certiorari). In an unusual irony, Bockting successfully petitioned the Court for certiorari following affirmance of his conviction on direct appeal in the Nevada Supreme Court. Bockting v. Bayer, 497 U.S. 1021 (1990). The Court vacated and remanded for reconsideration in light of *Idaho v. Wright*, 497 U.S. 805, 826–27 (1990), in which the Court had held that admission of certain statements made by children relating to sexual abuse violated the Confrontation Clause where the statements were made in response to questioning and offered as an exception to the hearsay rule. Whorton v. Bockting, 127 S. Ct. 1173, 1178 n.2 (2007). On remand, the state supreme court found no violation under *Wright*, again affirming. Bockting v. State, 847 P.2d 1364, 1369 (Nev. 1993). Once Bockting was forced to litigate the claim in federal habeas corpus, the *Teague* prohibition on the announcement of new rules in that process barred the lower federal courts from affording relief in the absence of a declaration of retroactive application for *Crawford* which was issued years later, in 2004. *See Bockting*, 127 S. Ct. at 1178 n.2.

297. *See* Petitioner's Brief on the Merits at 15, *Bockting*, 127 S. Ct. 1173 (No. 05-595), 2006 WL 2066492.

> [A] growing number of circuit courts of appeal, now numbering six, have held that *Crawford* is not retroactive. *Lave v. Dretke*, 444 F.3d 333 (5th Cir. 2006); *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004); *Bintz v. Bertrand*, 403 F.3d

The argument that *Crawford* addressed an issue to which the *Teague* retroactivity limitation should not apply was predicated on the significance attached to the cross-examination right in the guilt or innocence determination.[298] In *Teague v. Lane*, the Court recognized two classes of exceptions to the usual operation of the non-retroactivity principle generally attending articulation of new rules of constitutional criminal procedure.[299] The first accords retroactive application to new rules that restrict the authority of government to proscribe particular types of conduct.[300] For instance, the Court's rulings that certain mentally retarded individuals[301] and juveniles under the age of eighteen at the time of the offense[302] cannot be executed consistent with Eighth Amendment commands fit this exception and require retroactive application.

The second exception provides for retroactive application of new rules that are said to be "implicit in the concept of ordered liberty."[303] The Court explained that the class of rules fitting within this exception is that which ensures fundamental fairness and accuracy in the fact-finding process.[304] The *Teague* Court had recognized the possibility that a newly articulated rule of constitutional criminal procedure could be deemed so fundamental to the

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859 (7th Cir. 2005); *Dorchy v. Jones*, 398 F.3d 783 (6th Cir. 2005); *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004); *Espy v. Massac*, 443 F.3d 1362 (11th Cir. 2006).[2] The two circuit courts that considered the retroactivity of *Crawford* after the Ninth Circuit's *Bockting* decision explicitly rejected that court's holding. *Espy*, 443 F.3d at 1367; *Lave*, 444 F.3d. at 336. "The two judge *Bockting* majority thus stands alone in its conviction that *Crawford* applied retroactively." JA 223 (O'Scannlain, J. dissenting).

2. In addition, an ever expanding number of State appellate courts have held that *Crawford* is not retroactive to cases on collateral review: *Drach v. Bruce*, [136] P. 3d [390], (Kan. 2006); *Edwards v. People*, 129 P.3d 977 (Colo. 2006); *Chandler v. Crosby*, 916 So. 2d 728 (Fla. 2005); *In re Moore*, [34] Cal. Rptr. [3d 605], (Cal. App., 4th Dist., Div. 1 2005); *Danforth v. State*, 700 N.W. 2d 530 (Minn. App. 2005); *In re Markel*, 154 Wash. 2d 262, 111 P.3d 249 (2005); *State v. Williams*, 695 N.W.2d 23 (Iowa 2005); *People v. Edwards*, 101 P.3d 1118 (Colo. App. 2004); *but see*, *State v. Forbes*, 119 P.3d 144 (N.M. 2005) (retroactive under "unique facts and procedural posture").

Id.

298. Teague v. Lane, 489 U.S. 288, 307 (1989).

299. *Id*. at 311.

300. *Id*.

301. Atkins v. Virginia, 536 U.S. 304, 316 (2002).

302. Roper v. Simmons, 543 U.S. 551, 578 (2005).

303. *Teague*, 489 U.S. at 311 (internal quotation marks omitted).

304. *Id*. at 312–13.

accuracy of fact-finding in the trial process that it represents a "watershed" rule of criminal process.[305]

In arguing that *Crawford* constituted such a watershed rule, proponents of retroactive application could point to Justice Scalia's characterization of the fundamental purpose of the cross-examination right as implicit in the confrontation guarantee:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it 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.[306]

If cross-examination is essential to the process by which the determination of reliability is to be made, then, arguably, *Crawford* constituted a watershed rule of criminal procedure, unlike rules merely prophylactic in nature. For example, in a case in which retroactivity might have been assumed, *Ring v. Arizona*,[307] involving the role of the jury in finding the existence of aggravating circumstances warranting consideration or imposition of a death sentence,[308] the underlying principle did not require retroactive application.[309] But subsequently in *Schriro v. Summerlin*,[310] the Court rejected retroactive application of *Ring* to vacate death sentences imposed under sentencing schemes comparable to those rejected in *Ring*.[311] The Court's reasoning was that the actual sentencing procedure used, where a trial judge, rather than the jury, found aggravating factors necessary for imposition of the death penalty, did not necessarily implicate the accuracy of the fact-finding process.[312] The *Apprendi-Ring* rationale, itself grounded in Sixth Amendment protections, did

305. *E.g.*, Saffle v. Parks, 494 U.S. 484, 495 (1990) (noting a "watershed" rule implicates "the fundamental fairness and accuracy of the criminal proceeding").

306. Crawford v. Washington, 541 U.S. 36, 61 (2004).

307. 536 U.S. 584 (2002).

308. *Id*. at 589.

309. Apprendi v. New Jersey, 530 U.S. 466, 483 (2000).

310. 542 U.S. 348 (2004).

311. *Id*. at 358.

312. *Id*. at 355–56.

not meet the requirement for a watershed rule as contemplated by *Teague*'s second exception.[313]

In contrast, the cross-examination right bears directly on the accuracy of fact-finding, particularly by jurors who will assess the credibility of a witness's testimony in part, at least, by observing the witness's demeanor while testifying. Observation of the witness is a factor used by jurors in determining the weight given to the witness's testimony that cannot be provided by reference to probable reliability based upon factors indicating the likely credibility of a declarant's out-of-court statements.

This reasoning was sufficiently convincing to generate limited support in the federal courts considering the question of retroactive application of *Crawford*. Judge Clay of the Sixth Circuit,[314] Judge DeMoss of the Fifth,[315] and Judge McKeown of the Ninth[316] all issued separate opinions accepting the argument that *Crawford* had announced not only a new rule, but also one of watershed character that warranted retroactive application. Judge DeMoss concluded, "Without confrontation in such cases, the likelihood of an accurate conviction is seriously diminished."[317] Judge McKeown similarly observed that "the *Crawford* rule is one without which the likelihood of accurate conviction is seriously diminished."[318]

Unfortunately for litigants relying on retroactive application of *Crawford* as a basis for post-conviction relief, the argument that its rule was of watershed dimension and thus entitled to retroactive application would fail to persuade the Supreme Court.

2. *Crawford* as a Restorative Decision Rather than a New Rules Decision

The difficulty imposed by the narrow second *Teague* exception to the retroactivity bar suggested an alternative view of *Crawford*, one in which the decision does not constitute a *new* rule at all. Rather, because the Court characterized its previous decisions straying from the strict protections afforded by the Confrontation Clause as having been reached in error, Earnest argued that rather than a new rule, *Crawford* actually represented a restoration of the prior precedent in *Douglas v. Alabama* to pre-eminence in questions

313. *Id*. at 355–58.

314. Fulcher v. Motley, 444 F.3d 791, 811 (6th Cir. 2006) (Clay, J., concurring). The panel applied pre-*Crawford* confrontation law to grant relief. *Id*. at 811 (noting that a prior panel had rejected the *Crawford* retroactivity argument in *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005)).

315. Lave v. Dretke, 444 F.3d 333, 336 (5th Cir. 2006) (DeMoss, J., dissenting).

316. Bockting v. Bayer, 399 F.3d 1010, 1020–21 (9th Cir. 2005), *petition for reh'g en banc denied*, 418 F.3d 1055, *rev'd*, Whorton v. Bockting, 127 S. Ct. 1173 (2007).

317. *Lave*, 444 F.3d at 337 (DeMoss, J., dissenting) (internal quotations and emphasis omitted).

318. *Bockting*, 399 F.3d at 1021.

pertaining to accomplice statements.[319] In this sense, the Court simply re-imposed a rule dictated by precedent. Under *Teague*, rules dictated by precedent are not *new* and thus not subject to its restrictive retroactivity doctrine.[320]

Earnest argued that *Crawford* actually involved the affirmation of long-standing constitutional doctrine, as reflected in the majority's characterization: "We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability."[321] The majority then applied this conclusion to reach the core of its holding: "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."[322] This language suggests anything but that the rule articulated in *Crawford* was *new*, and its significance is ultimately suggested by the New Mexico Supreme Court's decision granting Earnest relief.[323] The New Mexico court treated *Crawford* as not announcing a new rule of constitutional criminal procedure: "Applying the *Teague* analysis to this case, we conclude that as to the unique facts and procedural posture of Earnest's case, *Crawford* does not announce a new rule because the result was 'dictated by precedent existing at the time' we [initially] decided *Earnest*."[324]

But this argument found little support elsewhere.[325] Only Judge Noonan, concurring in *Bockting v. Bayer* in the Ninth Circuit,[326] would adopt this rationale to find that the *Crawford* holding was entitled to retroactive application.[327]

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319. *See* State v. Forbes *ex rel.* Earnest, 119 P.3d 144, 147 (N.M. 2005).

320. Teague v. Lane, 489 U.S. 288, 301 (1989).

321. Crawford v. Washington, 541 U.S. 36, 55–56 (2004).

322. *Id*. at 59.

323. *Forbes*, 119 P.3d at 147–49.

324. *Id*. at 147.

325. A similar argument was made by the habeas petitioner in *People v. Flowers*, 561 N.E.2d 674, 683 (Ill. 1990), in arguing that the state court had not announced a new rule but simply reinterpreted an existing provision of law, essentially correcting an erroneous view. The court rejected this argument, finding that it had, in fact, announced a new rule governing the proper burden of proof when a jury is instructed on a lesser-included offense of manslaughter in a murder prosecution in *People v. Reddick*, 526 N.E.2d 141 (Ill. 1988). *Flowers*, 561 N.E.2d at 680–83.

326. Bockting v. Bayer, 399 F.3d 1010, 1022 (9th Cir. 2005) (Noonan, J., concurring).

327. *Id*. at 1023. Judge Noonan concluded: "*Crawford*, therefore, does not announce a new rule. Retroactivity is not an issue." *Id*.

B. The Application of Crawford *in* Earnest

In *Crawford*, the Court ultimately addressed precisely the issue argued in *New Mexico v. Earnest* and addressed by Justice Rehnquist in his concurring opinion,[328] in which he asserted that the Court's reasoning in *Ohio v. Roberts* and holding in *Lee* had effectively overruled *Douglas v. Alabama* by implication.[329] Despite the fact that *Crawford* revisited the issue in *Earnest*, the petitioner's brief in *Crawford* did not mention the Court's disposition in *Earnest* or Justice Rehnquist's influential concurrence.[330] Nor did petitioner's brief[331] mention *Williamson v. United States*,[332] in which the Court held that Federal Rule of Evidence 804(b)(3), which permits the admission of hearsay statements against the declarant's penal interest, "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."[333] Similarly, an amicus brief filed on behalf of law professors did not mention *New Mexico v. Earnest*[334] but did cite *Williamson*,[335] noting the ability to restrict admission of accomplice statements on evidentiary grounds without reaching the constitutional issue.[336] Neither the ACLU's amicus brief[337] nor the Solicitor General's brief[338] mentioned *Earnest* or discussed Justice Rehnquist's concurrence.

1. Earnest's Retroactivity Argument

In the *Earnest* litigation, the State argued vigorously that the state's courts were bound to apply *Crawford* only in conformity with *Teague* retroactivity.[339] Relying on federal circuit decisions holding that *Crawford* should not be applied retroactively—decisions correctly anticipating the

328. *See generally* Crawford v. Washington, 541 U.S. 36 (2004).

329. New Mexico v. Earnest, 477 U.S. 648, 649–50 (1986) (Rehnquist, J., concurring).

330. Brief for Petitioner at iv–v, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21939940.

331. *Id*. at vii.

332. 512 U.S. 594 (1994).

333. *Id*. at 600–01.

334. Motion for Leave to File and Brief Amicus Curiae of Law Professors Sherman J. Clark et al. in Support of Petitioner at iv, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21754958.

335. *Id*. at 29 n.18.

336. *Id*.

337. Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae Nat'l Ass'n of Criminal Def. Lawyers, the ACLU and the ACLU of Wash. in Support of Petitioner at iv, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21754961.

338. Brief for the United States as Amicus Curiae at v, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 22228005.

339. Response to Petition for a Writ of Habeas Corpus at 1–5, State v. Earnest, No. CR-82-54 (N.M. 5th Jud. Dist. Ct. Dec. 1, 2004).

Supreme Court's determination in *Whorton v. Bockting*—the State argued that Earnest could not be afforded the benefit of *Crawford* retrospectively.[340]

Earnest argued that regardless of whether the United States Supreme Court ultimately ruled favorably with regard to his reliance on *Crawford* on the retroactivity issue or the new rule issue, the New Mexico Supreme Court was entitled to apply state law retroactivity principles in deciding whether he should benefit from *Crawford*.[341] Earnest argued that New Mexico law, however, required retroactive application of *Crawford* as a matter of state law.[342]

In this latter respect Earnest relied on state retroactivity principles in arguing for application of *Crawford* on the facts of his case and conviction.[343] New Mexico had adopted a broad approach to retroactive application of decisions recognizing new causes of action or procedural rights in *Beavers v. Johnson Controls World Services*.[344] There, the New Mexico Supreme Court had applied the broadest approach to retroactivity in recognizing a new cause of action sounding in tort for discriminatory practices in employment.[345] The court held that the right to bring an action would apply retroactively even to acts that occurred prior to recognition of the cause of action.[346]

Earnest argued that retroactivity of criminal decisions should be co-extensive with that afforded in civil matters and persist in that position.[347] On the federal level, civil and criminal retroactivity doctrines are comparable. In *Harper v. Virginia Department of Taxation*,[348] the Supreme Court harmonized the retroactivity doctrine applicable in civil litigation with that already in place for criminal litigation in *Griffith v. Kentucky*.[349] *Griffith* drew a bright line for retroactivity analysis, holding that new rules of constitutional criminal procedure would apply to all cases pending on direct appeal in which the question had been preserved for appellate review when the new rule is announced by the Court.[350] *Harper* applied this same general principle to

340. State of New Mexico's Verified Petition for Stay of Order Granting Petition for Writ of Habeas Corpus, State v. Earnest, No. 29,111 (N.M. Feb. 28, 2005).

341. Petition for Writ of Habeas Corpus, *supra* note 29, at 18–19.

342. *Id*.

343. *Id*.

344. 881 P.2d 1376, 1377 n.1, 1386–87 (1994).

345. *Id*. at 1386–87.

346. *Id*.

347. Petition for Writ of Habeas Corpus, *supra* note 29, at 18–19; *see* Jackson v. State, 925 P.2d 1195, 1196 (N.M. 1996).

348. 509 U.S. 86 (1993).

349. 479 U.S. 314, 323 (1987).

350. *Id*.

civil matters[351] and in so doing, set the constitutional floor for application of new rules of law as a matter of due process.

Earnest argued that the same principle of symmetry should be formally applied with respect to civil and criminal retroactivity principles under New Mexico law. Because New Mexico had already recognized that *Crawford* applies to New Mexico prosecutions as a matter of federal constitutional law,[352] he argued that the retroactivity issue was properly presented to the trial court in Earnest's petition for habeas relief.

2. The Unique Procedural Posture of *Earnest*

The state supreme court's disposition of Earnest's post-conviction claim was itself somewhat rare. Earnest initially filed for post-conviction relief directly in the high court,[353] arguing that all factual issues necessary for resolution of the legal issues had already been resolved in the direct appeal litigation in *Earnest I*[354] and *II*.[355] The supreme court remanded the cause to the district court of conviction.[356] The trial court issued its decision[357] and entered an order granting the writ of habeas corpus.[358] When the State filed for a stay of the trial court's order,[359] the supreme court ordered Earnest to file a response to the State's petition, restyling the petition for stay as a petition for writ of superintending control sua sponte.[360] Consequently, Earnest's case was styled *State v. Forbes*[361] *ex rel. Earnest*,[362] rather than *State v. Earnest.*

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351. *Harper*, 509 U.S. at 97.

352. *See generally* State v. Johnson, 98 P.3d 998 (N.M. 2004).

353. Earnest v. State, No. 28,864 (N.M. Aug. 24, 2004) (order granting motion for leave to file petition for writ of habeas corpus); *see* N.M. R. CRIM. P. FOR THE DIST. CTS. 5-802.

354. *See* 703 P.2d 872 (N.M. 1985).

355. *See* 744 P.2d 539 (N.M. 1987).

356. Earnest v. State, No. 28,864 (N.M. Sept. 29, 2004).

357. State v. Earnest, No. CR-82-54 (N.M. 5th Jud. Dist Ct. Jan. 11, 2005) (deciding the writ of habeas corpus should be granted).

358. State v. Earnest, No. CR-82-54 (N.M. 5th Jud. Dist. Ct. Feb. 15, 2005) (order granting the writ of habeas corpus); *see* State v. Forbes *ex rel.* Earnest, 119 P.3d 144, 145 (N.M. 2005). The trial court specifically recognized the State's right to appeal from this order: "10. The Writ of Habeas Corpus should be granted. The State of New Mexico is allowed 15 days to file their Requested Findings of Fact and Conclusions of Law and in 30 days be permitted to Appeal this Court's Decision." State v. Earnest, No. CR-82-54, slip op. at 10 (N.M. 5th Jud. Dist. Ct. Jan. 11, 2005). The State failed to file a timely notice of appeal, however, as its notice of appeal was not filed until March 15, 2005, beyond the thirty days permitted for the filing of the notice of appeal under Rule 12-201E of the New Mexico Rules of Appellate Procedure.

359. State of New Mexico's Verified Petition for Stay of Order Granting Petition for Writ of Habeas Corpus, *supra* note 340.

360. State v. Forbes, No. 29,111 (N.M. Mar. 2, 2005) (order granting request for stay); State v. Forbes, No. 29,111 (N.M. Mar. 2, 2005) (order granting motion to request a response to the petition for writ of superintending control). The writ of superintending control is the device by which the New Mexico Supreme Court regulates practice in the district courts. Dist. Ct. for the 2d Jud. Dist. v.

3. The *Earnest* Court's Resolution of the Retroactivity Question

In ordering relief on Earnest's state habeas corpus claim, the New Mexico Supreme Court fashioned a remedy designed to afford him the retroactive benefit of *Crawford*'s changed view of confrontation—whether that change is characterized as a matter of error correction or the announcement of a new rule—but designed to limit its retroactive application only to Earnest. The court was very careful in its explanation of its holding, saying:

> Granting Earnest a new trial is consistent with our responsibility "to do justice to each litigant on the merits of his own case." Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then. Accordingly, we affirm the district court, lift the stay, and remand for execution of the Writ of Habeas Corpus, affording the State the opportunity to retry Earnest.[363]

The decision rests on principles implicated, but never directly addressed, in the *Crawford* and *Bockting* litigation, including the issue of whether states

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McKenna, 881 P.2d 1387, 1390 (1994). The court has described its power to issue the writ in broad terms:

> The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. *It is unlimited, being bounded only by the exigencies which call for its exercise.*

State v. Roy, 60 P.2d 646, 662 (N.M. 1936) (emphasis added). The court has looked to five criteria in determining whether the writ of superintending control is appropriate:

> It is the settled law of this jurisdiction that the writ of supervisory control will issue only when a ruling, order, or decision of an inferior court, within its jurisdiction, (1) is erroneous; (2) is arbitrary or tyrannical; (3) does gross injustice to the petitioner; (4) may result in irreparable injury to the petitioner; (5) and there is no plain, speedy, and adequate remedy other than by issuance of the writ.

Albuquerque Gas & Elec. Co. v. Curtis, 89 P.2d 615, 619 (N.M. 1936).

361. The Honorable Jay W. Forbes, District Judge, Fifth Judicial District.

362. *See* State v. Forbes, No. 29,111 (N.M. Mar. 21, 2005) (order granting motion to request a reply to the response to the petition for writ of superintending control); *see also Forbes*, 119 P.3d 144.

363. *Forbes*, 119 P.3d at 148–49 (quoting Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting)) (citation omitted).

were limited by the parameters of *Teague* in affording retroactive application to decisions rendered by the United States Supreme Court announcing new rules of constitutional criminal procedure.[364]

First, while the New Mexico Supreme Court recognized the significance of the Supreme Court's decision in *Teague*,[365] it did not conclude that *Teague* was controlling on the question of the court's consideration of *Crawford* in terms of Earnest's claim for relief.[366] Instead, the state court essentially adopted Earnest's argument that *Crawford* did not announce a new rule of constitutional criminal procedure at all.[367] Rather, it concluded that *Crawford* simply restored the principle of *Douglas v. Alabama*.[368] The court reached this conclusion by noting that neither the *Crawford* majority nor it, in its prior decision *State v. Johnson*[369] recognizing and applying *Crawford* in New Mexico prosecutions, had made an explicit determination that the holding in *Crawford* constituted a new rule.[370]

Once the supreme court concluded that *Crawford* did not announce a new rule, it was positioned to afford Earnest relief from his conviction without addressing the question of retroactivity broadly. In this sense, the decision leaves open the very important question of whether other litigants are entitled to the benefit of an application that restores the precedential power of a prior decision, rather than representing the true break with precedent that the federal doctrine uses to describe new rules. But *Forbes* did not address the retroactivity, generally, of a decision that changes the law but does so by restoring improperly neglected or avoided precedent.

Because the case arose in the context of an extraordinary proceeding, however, the court likely reserved to itself the option of determining which other litigants, if any, could demonstrate the factual scenario warranting the exercise of the court's authority to grant relief. Thus, rather than adopting a broad policy of retroactivity under New Mexico law or in not applying any policy of retroactivity that would have general application in state

364. *See generally* Crawford v. Washington, 541 U.S. 36 (2004); Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005).

365. *See Forbes*, 119 P.3d at 146–47. The court cited *State v. Mascarenas*, 4 P.3d 1221, 1228 (N.M. 2000), which had cited *Teague*, for the proposition that the determination of whether a new rule should be applied retroactively initially required consideration of whether the rule announced was in fact new.

366. *See Forbes*, 119 P.3d at 147.

367. *Id*.

368. *Id*. (referring to 380 U.S. 415 (1965)).

369. *See generally* 98 P.3d 998 (N.M. 2004).

370. *Forbes*, 119 P.3d at 146–47.

proceedings, the court ordered relief based on "the unique facts and procedural circumstances of this case."[371]

But the court's reliance on *State v. Ulibarri*[372] suggests that it did not consider itself bound by *Teague* as a limiting rule on the potential extension of retroactive benefit from a Supreme Court decision as a matter of state retroactivity doctrine.[373] In *Ulibarri*, the New Mexico Court of Appeals explained its exercise of the option to apply decisions retroactively or prospectively only[374] within the framework of *Linkletter v. Walker*.[375] In *Linkletter*, the United States Supreme Court had advanced a test for flexibility in the retroactivity determination, requiring the issuing court to determine both the policy and practice implications involved in extending the retroactive benefit of new rules to defendants whose cases had been litigated under previous rules.[376] The court of appeals had determined that a new rule of procedure governing grand jury practice would apply to all cases then pending in the state's grand juries or untried on grand jury indictments, which had not been obtained in compliance with the rule.[377] The supreme court affirmed the prospective application of the rule on certiorari.[378]

The court of appeals opinion in *Ulibarri* discloses, however, uncertainty about the continuing viability of *Linkletter* analysis as a retroactivity doctrine under state law.[379] But the court noted that the supreme court in *Santillanes v. State*[380] continued to invoke *Linkletter*, even after that approach had been abandoned by the plurality in *Teague*.[381] The court's observation may identify a lingering uncertainty about the extent to which state retroactivity doctrine should or must reflect federal principles, or simply track the supreme court's determination to apply retroactivity principles in a manner consistent with the court's concern for pursuit of justice in individual cases. This latter approach may also be seen in *Jackson v. State*,[382] where the court quoted with approval the following language from a Pennsylvania case, *Commonwealth v.*

371. *Id*. at 149.

372. 994 P.2d 1164 (N.M. Ct. App. 1999).

373. *See Forbes*, 119 P.3d at 146–47.

374. *See Ulibarri*, 994 P.2d at 1171–72 ("Our understanding of these cases is that reviewing courts should carefully weigh the effects of their rulings in light of the three factors recognized in *Linkletter*.").

375. 381 U.S. 618 (1965).

376. *See id.* at 627.

377. *Ulibarri*, 994 P.2d at 1172.

378. State v. Ulibarri, 997 P.2d 818, 819 (N.M. 2000).

379. *See Ulibarri*, 994 P.2d at 1171.

380. 849 P.2d 358, 367 (N.M. 1993) (noting that courts have inherent power to give their rulings prospective or retroactive application).

381. Teague v. Lane, 489 U.S. 288, 310 (1989).

382. 925 P.2d 1195 (N.M. 1996).

Harper:[383] "Generally, where the purpose of a new constitutional doctrine is to cure a defect in the criminal procedure which impairs the truth finding function, and thus raises doubt as to the validity of the guilty verdict, the rule will be given full retroactive effect."[384]

In *Earnest*, the court rejected reliance on authority permitting admission of a testimonial statement made by an accomplice without the defendant being afforded an opportunity to test the reliability of the statement by cross-examination.[385] Because such statements have historically been characterized as presumptively unreliable as a result of the accomplice's motive to shift blame or negotiate favorable treatment in return for the statement, convictions resting on these statements implicitly raise issues of the accuracy of the fact-finding function and reliability of the verdict.[386] *Crawford* corrected that error in the Court's confrontation jurisprudence; in *Forbes*, the court applied the correction for Earnest's benefit.

Within the factual context of *Earnest II*, the supreme court's understanding of what constitutes a new rule proved to be particularly important. In *Mascarenas*, the court had observed: "'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.'"[387] The *Forbes* majority focused on the rules applicable at the time of Earnest's trial in holding that the court had been correct in *Earnest I* in applying *Douglas* as the basis for reversal of the conviction.[388] Finding that the *Earnest I* court had essentially been vindicated by *Crawford*, the *Forbes* majority concluded that *Crawford* had not announced a new rule at all but merely restored *Douglas* to its controlling position as authority regarding admissibility of uncrossed accomplice statements.[389] The *Forbes* majority noted: "The New Mexico Supreme Court was correct to follow *Douglas*, which we believe the analysis in *Crawford* now confirms."[390]

Justice Serna, in dissent, focused on the finality of the conviction at the time of the change in law.[391] For him, and consistent with the Court's

383. 516 A.2d 319 (Pa. 1986).

384. *Jackson*, 925 P.2d at 1196 (quoting *Harper*, 516 A.2d at 323).

385. *See* State v. Earnest (*Earnest II*), 744 P.2d 539, 539–40 (N.M. 1987).

386. *Id*. at 540.

387. State v. Mascarenas, 4 P.3d 1221, 1229 (N.M. 2000) (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

388. State v. Forbes *ex rel.* Earnest, 119 P.3d 144, 147 (N.M. 2005).

389. *Id*. ("In any event, it cannot be disputed that *Douglas*, which held that an accomplice statement was inadmissible unless the defendant had a right to cross-examine, was good law at the time we decided *Earnest I*.") (citations omitted).

390. *Id*. (referring to Douglas v. Alabama, 380 U.S. 415 (1965), and Crawford v. Washington, 541 U.S. 36 (2004)).

391. *Id*. at 150 (Serna, J., dissenting).

characterization of the "direct appeal" as concluding with certiorari proceedings, Earnest's conviction was not actually final until the court's reversal was vacated in *New Mexico v. Earnest*.[392] Thus, he found no unfairness in the fact that Earnest was tried under a different rule than that ultimately applied following remand by the Supreme Court.[393] But for the *Forbes* majority, this change in the rules of admissibility for confrontation purposes after the fact of Earnest's trial was not acceptable. The majority stressed the fact that Earnest had asserted reliance on his right to cross-examine Boeglin, consistent with *Douglas*, throughout the litigation.[394]

Thus, the disposition in *Forbes* rests less on doctrinal analysis or concern for development of retroactivity principles assuring uniformity in application and more on the court's perception of the particular unfairness in Earnest's conviction. The court carefully maintained its discretion not to announce a general doctrinal position on retroactivity with respect to the *Crawford* rule in resolving the precise issue Earnest brought before it. Moreover, the majority opinion clearly suggests that the court believed the Supreme Court had, in fact, gotten it wrong in *New Mexico v. Earnest* in vacating the state court's reversal of Earnest's conviction. This is evident in the majority's conclusion: "Our decision is limited to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then."[395]

In fact, however, the New Mexico Supreme Court's characterization of *Crawford* as involving restoration of the pre-existing precedent of *Douglas v. Alabama*, rather than announcing a new rule within the *Teague* framework, also proved to be incorrect.

The New Mexico court did not apply the retroactivity analysis that would be expected had *Crawford* not announced a new rule of constitutional criminal procedure. Had the result in *Crawford* been dictated by existing precedent consistent with the *Teague* analytical framework,[396] it would have been afforded full retroactive benefit.[397] The consequence would have been

392. *Id*.

393. *Id*. at 150–51.

394. *Id*. at 147 (majority opinion).

395. *Id*. at 148–49.

396. Teague v. Lane, 489 U.S. 288, 301 (1989) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction was final.").

397. For example, in *Stringer v. Black*, 503 U.S. 222 (1992), the Court applied the *Teague* approach in concluding that a rule previously applied in *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Clemons v. Mississippi*, 494 U.S. 738 (1990), was dictated by existing precedent holding that imposition of the death penalty based, in part, on a finding that the capital murder was committed in an "especially heinous, atrocious, or cruel" manner was impermissible because of the lack of definition for this characterization that would permit jurors to differentiate rationally between

dramatic for the criminal justice system because, presumably, all convictions resting on admission of uncrossed testimonial statements would have been subject to vacation and the cases remanded for new trials. Of course, this presupposes that in each individual case, the defense had preserved error by objection to the admission of the statement, and its admission of uncrossed statements would have been prejudicial to the defense under the *Chapman v. California*[398] harmlessness standard. Under *Chapman*, the burden is placed on the prosecution to demonstrate that constitutional trial error was harmless beyond a reasonable doubt in order to avoid reversal.[399]

The Court's view of whether decisions are dictated by existing precedent is narrow, and must be, in order to avoid the prospect that all new applications of constitutional protections would require review of all prior convictions or sentences in which a similar issue had been raised, requiring then a preservation and prejudice analysis in each case. With regard to *Crawford* error, however, the actual number of cases in which relief might ultimately be granted would likely be small, if only suggested by the sampling of decisions referred to by Justice Scalia in which convictions had been obtained based on admission of uncrossed accomplice statements.[400]

Consequently, the New Mexico court's approach is not clearly one of new or existing rules analysis based on *Teague* precisely because the court did not hold that its retroactive application of *Crawford* in Earnest's case represented a general grant of retroactivity.[401] Instead, the court tempered its initial finding with its second concern—that at the time of Earnest's trial, existing precedent did preclude admission of Boeglin's uncrossed statement to police, as it had held in *Earnest I*, relying on *Douglas v. Alabama*.[402]

In this very important sense, the court's decision in *Forbes* is not so much about the retroactivity implications of *Crawford*, but about the fundamental fairness of the trial process being compromised by a post-trial decision essentially changing the rules of trial in a way that neither Earnest nor trial counsel could have reasonably expected when the case was tried.

A reading of the limited holding in *Forbes* suggests, therefore, that New Mexico defendants tried after the Supreme Court's remand in *New Mexico v. Earnest* and the state supreme court's application of *Ohio v. Roberts* in *Earnest II* to uphold the conviction, were not unfairly prejudiced by the

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those capital offenses that were committed in such a fashion and other capital offenses that would not qualify for imposition of the death penalty. *Stringer*, 503 U.S. at 228, 237 (citation omitted).

398. 386 U.S. 18 (1967).

399. *Id*. at 24.

400. Crawford v. Washington, 541 U.S. 36, 63–65 (2004) (noting a dozen or so cases); *see* Kirst, *supra* note 251, at 104–06 (documenting *Lilly*-based confession claims).

401. *See* State v. Forbes *ex rel.* Earnest, 119 P.3d 144, 148–49 (N.M. 2005).

402. *Id*. at 147.

Supreme Court's temporary abandonment of *Douglas*. Instead, they were on notice that uncrossed accomplice statements would be admissible if found to possess sufficient indications of reliability—the chief indicator being that they were made against the accomplice's penal interest—and thus defense counsel had the opportunity to creatively challenge the reliability analysis or consider other tactical options. Of course, these options were likely proved to be futile against the overwhelming power of the admissions made by accomplices implicating the defendants on trial.

V. *BOCKTING* AND *DANFORTH*: RESOLUTION OF *CRAWFORD*-RELATED RETROACTIVITY QUESTIONS

The resolution of the question of retroactive application of *Crawford* by the United States Supreme Court not only affected litigants raising *Crawford*-based confrontation claims, but also generated an additional and far broader issue: whether states not only are required to apply retroactive federal constitutional rules to benefit state court litigants, but also are bound to afford no greater retroactive application than that announced by the Supreme Court.

A. The Rejection of Crawford *Retroactivity:* Whorton v. Bockting

A unanimous Supreme Court declined to afford *Crawford* retroactive application in addressing the issue squarely in *Whorton v. Bockting*.[403] As a threshold matter, the Court rejected the position taken by the New Mexico Supreme Court that viewed *Crawford* as a decision restoring a previous rule rather than a new rule of constitutional criminal procedure.[404] Bockting had argued in the alternative, relying on both the McKeown[405] and Noonan opinions[406] in his Ninth Circuit victory.[407] The Court rejected the restoration argument, premised on the argument that *Crawford* was dictated by precedent, first defining its terms: "A new rule is defined as 'a rule that . . . was not *dictated* by precedent existing at the time the defendant's conviction became final.'"[408] Concluding that *Ohio v. Roberts* was the existing precedent, it

403. 127 S. Ct. 1173 (2007).

404. *Id*. at 1181.

405. Bockting v. Bayer, 399 F.3d 1010, 1014–16 (9th Cir. 2005) (McKeown, J.), *rev'd sub nom*, Whorton v. Bockting, 127 S. Ct. 1173 (2007). Judge Wallace, concurring and dissenting, agreed with Judge McKeown that *Crawford* announced a new rule but disagreed that it represented a watershed rule warranting retroactive application. *Bockting*, 399 F.3d at 1024, 1028–29 (Wallace, J., concurring and dissenting).

406. *Id*. at 1022–24 (Noonan, J., concurring).

407. *Id*. at 1020–23 (majority opinion).

408. *Bockting*, 127 S. Ct. at 1181 (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990) (internal citations and quotation omitted)).

concluded that *Crawford* was "flatly inconsistent" with *Roberts* and, thus, could not be dictated by *Roberts*.[409]

The Court was certainly correct in this conclusion, but the argument advanced by Bockting and Judge Noonan of the Ninth Circuit was slightly different than that argued by Earnest and adopted by the New Mexico court in *Forbes*. In the *Earnest* litigation, *Crawford* is viewed as a corrective ruling dictated by the precedent of *Douglas v. Alabama*.[410] Justice Scalia's own admission of error on the part of the Court in departing from the *Douglas* principle in *Roberts* changed the retroactivity question because, in fact, *Crawford* was dictated by *Douglas*, *Roberts* being in error.[411] Moreover, neither *Roberts* nor certainly *Lee v. Illinois*[412] expressly overruled *Douglas* in the process of the erroneous development of confrontation doctrine,[413] such that it is simplistic to say that *Roberts* was actually the controlling precedent for Crawford's claim at all.

In *Crawford*, Justice Scalia observed that the Court had consistently looked to cross-examination in the admissibility analysis for out-of-court statements, pointing out the Court's exclusion of uncrossed accomplice confessions:

> We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. *See Roberts v. Russell*, 392 U.S. 293, 294–295 (1968) (*per curiam*); *Bruton v. United States*, 391 U.S. 123, 126–128 (1968); *Douglas v. Alabama*, 380 U.S. 415, 418–420 (1965). In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial.[414]

In fact, the Court had never expressly approved the admission of a non-testifying accomplice's confession as direct evidence against the accused without some opportunity for cross-examination. In *Roberts*, the testimony was given by a witness, not an accomplice, in a preliminary hearing where she had been subjected to cross-examination;[415] in *Lee*, the conviction was reversed based on the improper admission of the accomplice's statement.[416]

409. *Id*.
410. *See* State v. Forbes *ex rel.* Earnest, 119 P.3d 144, 147 (N.M. 2005).
411. *See* Crawford v. Washington, 541 U.S. 36, 60–63 (2004).
412. 476 U.S. 530 (1985).
413. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).
414. *Crawford*, 541 U.S. at 57.
415. *Roberts*, 448 U.S. at 58.
416. *Lee*, 476 U.S. at 538–39.

Only in *Tennessee v. Street*[417] had the uncrossed statement been properly admitted according to the Court, and then only for purposes of impeachment of the defendant's trial testimony, which included his claim that his own confession had been coerced.[418] The majority distinguished prior decisions that had addressed admissibility of uncrossed statements as substantive evidence.[419] The Court held that the use of the accomplice's statement to rebut the accused's claim that his own confession had been coerced did not violate Street's right to confrontation because the defense was able to cross-examine the sheriff who had elicited his statement[420] and jurors were instructed as to the limited purpose for which the statement had been admitted.[421]

Of particular significance in the new rule analysis is the fact that *Crawford* involved admission of an accomplice's statement, traditionally viewed with suspicion,[422] while *Bockting* involved the admission of a child's report of abuse, the kind of statement that the Court has not traditionally viewed as inherently suspect.[423]

Consequently, a conclusion that *Crawford* was dictated by precedent would have had dramatic consequences because it would have reopened for review all state and federal convictions obtained by prosecutors offering uncrossed testimonial statements. This would have not only included those statements made to police by accomplices, but also, as the litigation history

417. 471 U.S. 409 (1985).

418. *Id*. at 417. However, the accomplice's confession was clearly inculpatory as to the accused, referring to him as an actual participant in the hanging of the victim, which the accused denied. *Id*. at 412. The trial court instructed the jury that it could only consider the statement as rebuttal to the defendant's denial of participation in the offense, *id*., but the state court had concluded that its admission violated Street's right to confrontation, State v. Street, 674 S.W.2d 741, 746–47 (Tenn. Crim. App. 1984). It found that it was likely the jurors would consider the accomplice's statement as substantive evidence of the actual events surrounding the murder. *Id*.

419. *Street*, 471 U.S. at 413.

420. *Id*. at 414.

421. *Id*. at 414–15. The Court also noted the difficulty in proving that the confession was not coerced without reliance on the confession given by the accomplice. *Id*. at 415. The prosecutor used the accomplice's confession essentially to corroborate admissions made in the defendant's own confession and then pointed to additional facts included in the defendant's confession that arguably could only have been known by someone participating in the murder. *Id*. at 411–12. The Court did not discuss the traditionally "suspect" nature of accomplice statements, which might have required consideration of whether the accomplice had reason to implicate the defendant, inducing him to confess. The defendant claimed the sheriff read the contents of the accomplice's statement to him and then pressured him to confess, but the sheriff denied having done so. *Id*. at 411. The accomplice's possible motive in identifying Street in the commission of the murder, however, could have related to his own interest in minimizing his involvement in the crime, warranting concern that it was suspect for that reason.

422. *See supra* note 81 and accompanying text.

423. *See, e.g.*, White v. Illinois, 502 U.S. 346, 357–58 (1992).

following *Crawford* demonstrates, the entire range of statements admitted as exceptions to the hearsay rule that could be fairly characterized as testimonial in nature.[424]

The *Bockting* Court could have fashioned a rule affording retroactive application to *Crawford* cases based upon the admission of accomplice statements and their traditional characterization as unreliable, but it could not fashion a general rule based upon *Crawford*'s rejection of *Ohio v. Roberts* with regard to testimonial statements without affording broader relief than the facts in *Crawford* would have required. Had the *Crawford* Court recognized that its rule was dictated by the precedent of *Douglas v. Alabama*, it could have achieved this result without disturbing convictions resting on non-accomplice testimonial statements admitted without opportunity for cross-examination. But the text of *Crawford* is not strictly limited to the consideration of accomplice statements, the narrow constitutional context presented by *Crawford*'s fact scenario.[425] Rather, Justice Scalia was interested in discrediting the doctrinal approach of *Ohio v. Roberts*, and, in so doing, those individuals convicted on the uncrossed statements of accomplices, traditionally recognized as inherently suspect, were eventually denied relief when the issue of retroactivity came before the Court in *Bockting*.[426]

Having rejected the argument that *Crawford* was dictated by precedent and thus did not announce a new rule, the Court avoided the sweeping retroactivity application that would have required extensive review of probably hundreds, if not thousands, of convictions. The *Bockting* Court was left to decide whether *Crawford* should be applied retroactively based on the second *Teague* exception to its rule of non-retroactivity.[427] The *Teague* Court had explained that the class of rules fitting within the second exception is that which ensures fundamental fairness and accuracy in the fact-finding process.[428]

The *Bockting* Court did not find that *Crawford* represented the kind of rule that is central to the accuracy of the fact-finding function.[429] Justice Alito noted language from *Crawford* describing the confrontation guarantee: "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands not that evidence

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424. *See, e.g.*, Davis v. Washington, 547 U.S. 813 (2006) (discussing the admissibility of 911 emergency call messages); *see also supra* note 7 and accompanying text (citing cases suggesting the range of testimonial statements).

425. *See* Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

426. *See* Whorton v. Bockting, 127 S. Ct. 1173, 1184 (2007).

427. *Id*. at 1181.

428. Teague v. Lane, 489 U.S. 288, 311–12 (1989).

429. *Bockting*, 127 S. Ct. at 1183.

be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.'"[430] The second *Teague* exception does not exclude procedural rules, of course; rather, it embraces process instead of substance.[431] That *Crawford* involved a procedural rule, a mechanism implicating the fairness of the trial process, should not have doomed it to non-retroactivity under the second exception at all.

In considering the impact of *Crawford* in light of the watershed rule exception, the Court relied on its prior view that this type of rule is extremely rare[432] and unlikely to be discerned.[433] In fact, the Court noted: "[I]n the years since *Teague*, we have *rejected every claim* that a new rule satisfied the requirements for watershed status.'"[434] Given the Court's admitted history, it was hardly surprising that it would find that *Crawford* did not meet the requirements for a watershed rule under the second *Teague* exception.

The Court then explained that the watershed rule exception must meet two requirements,[435] applying its analysis in *Schriro v. Summerlin*,[436] where it had declined to apply *Ring v. Arizona*[437] retroactively. Even though *Ring* required that a jury determination of aggravating circumstances is necessary for the imposition of a death sentence retroactively to death sentences obtained on findings made by trial judges, instead of capital sentencing juries,[438] the *Summerlin* Court rejected the argument that capital sentencing fact-finding by judges, rather than jurors, did not compromise the integrity of the sentences imposed.[439] First, it must address a procedure that carries with it an "impermissibly large risk" of an inaccurate conviction.[440] Second, it must "'alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.'"[441]

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430. *Id*. at 1179 (citing *Crawford*, 541 U.S. at 61).

431. *Teague*, 489 U.S. at 311–12.

432. Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (stating that the exception is "extremely narrow").

433. *Id*. (citing Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001)).

434. *Bockting*, 127 S. Ct. at 1181–82 (emphasis added).

435. *Id*. at 1182.

436. 542 U.S. 348 (2004).

437. 536 U.S. 584 (2002).

438. *Id*.

439. *Summerlin*, 542 U.S. at 356. The *Summerlin* Court held that capital sentences imposed upon judicial finding of aggravating circumstances do not carry an "impermissibly large risk" of an inaccurate conviction. *Id*.

440. *See id.* (internal quotations omitted).

441. Whorton v. Bockting, 127 S. Ct. 1173, 1183 (2007) (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)).

The Court then explained that its notion of a watershed rule is the type of rule announced in *Gideon v. Wainwright*,[442] which required the provision of counsel for indigent criminal defendants and which, the Court admitted, has repeatedly been relied on by the Court to supply guidance in its analysis of rules claimed to satisfy the requirements of the second *Teague* exception.[443] Of course, virtually no rule could meet the profound implications of *Gideon* for the criminal justice system, and that reality dominates the *Bockting* Court's conclusion: "The *Crawford* rule is in no way comparable to the *Gideon* rule. The *Crawford* rule is much more limited in scope, and the relationship of that rule to the accuracy of the fact finding process is far less direct and profound."[444] But in its insistence on minimizing the import of *Crawford* for the fact-finding process, the Court made an unreasonable leap of faith, misinterpreting the meaning of its holding in *Crawford*.

Justice Alito characterized *Crawford* as involving a rejection of doctrinal analysis in *Ohio v. Roberts* based on its theoretical inconsistency with historical notions of cross-examination as central to the confrontation right.[445] That characterization is no doubt correct, but only in part. To the extent that *Crawford* revitalized *Douglas* and the similarly sound traditional view that accomplice statements are inherently suspect and thus not inherently trustworthy, that aspect of *Crawford* addresses the very heart of accuracy in the fact-finding process. But in viewing *Crawford* as essentially doctrinally correct, Justice Alito misses this aspect of the significance of the holding based on the precise facts of *Crawford*. Justice Alito notes: "Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess."[446] When one looks to the fact that *Crawford* involved admission of an uncrossed accomplice statement, it is apparent that the difficulty in assessing the "overall effect of *Crawford* with regard to the accuracy of fact-finding" is not simply the result of admission without cross-examination, but rather, the unreliability of the statements of accomplices.[447]

With regard to these inherently suspect and presumably untrustworthy statements, the threat to the accuracy of fact-finding is implicit in their admission without testing by cross-examination and, preferably, before the jury. In contrast, the general doctrinal change accomplished by *Crawford* does not so readily suggest impairment of fact-finding precisely because

442. 372 U.S. 335 (1963).
443. *Bockting*, 127 S. Ct. at 1182.
444. *Id*.
445. *Id*. at 1179.
446. *Id*. at 1183.
447. *Id*.

hearsay statements made by witnesses who are not accomplices are not inherently suspect. Because they are often admitted based upon long-standing appreciation for their likely reliability and trustworthiness, admission of these statements without the opportunity for cross-examination may often suggest no compromise of the integrity of the fact-finding process.

Justice Alito concluded, however, that because no uncrossed statements would have been admissible under the *Roberts* framework without a reliability determination, there is little chance that *Crawford* actually contributes to reliability at all.[448] This is quite logical and probably correct with respect to all statements except those of accomplices for which the reliability assessment was based upon the fact that these statements were against the penal interests of the declarants. The status of the declarant as an accomplice, however, suggests that all statements implicating others in the commission of the offense may be the product of some instinct or plan to shift blame or better the position of the declarant through controlled and limited cooperation with the authorities.[449]

Returning to *Gideon*, Justice Alito then concluded that while *Crawford* is important, it certainly does not have similar character in terms of a "bedrock procedural element[] that is essential to the fairness of a proceeding."[450] Of course, using *Gideon* as the benchmark for assessment does place virtually every other procedural rule beyond the scope of watershed status precisely because *Gideon* affects every criminal prosecution in which felony punishment may be imposed. But it does not necessarily contribute at all to the accuracy of the fact-finding process in even a majority of cases tried; assistance of a lawyer does not guarantee a more accurate verdict in those cases because defendants are overwhelmingly convicted at trial even when represented by lawyers. In contrast, however, admission of accomplice statements untested by cross-examination threatens the reliability of fact-finding in all but those cases in which the evidence is overwhelming.

The Court was certainly correct in finding that *Crawford* does not carry the same implications as *Gideon* in terms of our overall understanding of fundamental fairness in the conduct of the criminal trial.[451] And it is also correct in its reasoning that it is unlikely that comparable "rights" remain to be discerned that will command retroactive application under the second *Teague* exception.[452]

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448. *Id*.

449. *See* Lilly v. Virginia, 527 U.S. 116, 137 (1999) (plurality opinion).

450. *Bockting*, 127 S. Ct. at 1183 (internal quotations omitted).

451. *See id.* at 1183–84.

452. *See id.* at 1181.

But the factual context of *Crawford* cannot be ignored, particularly in contrast to the broader range of hearsay implicated by *Bockting*. With regard to the specific hearsay admitted at trial in the latter—and certainly the broader range of non-testimonial hearsay routinely admitted under "firmly rooted exceptions to the hearsay rule"—the Court's analysis is undoubtedly correct.[453] This analysis, however, ignores the very difficult subset of testimonial hearsay that involves uncrossed accomplice statements to police.

Thus, it is somewhat unfortunate for proponents of retroactivity that the determination as to *Crawford* was made on the basis of far less threatening hearsay of the type considered in *Bockting*, rather than in the context of a comparable fact situation in which the hearsay involved an accomplice's confession to police. In this respect, the New Mexico court's approach in *Forbes* serves the interests of justice far better than might have been anticipated because it affords relief based upon the dual considerations of fair notice as to the rules of admission of evidence at the time of trial and the actual prejudice to a defendant whose conviction rests on evidence ultimately repudiated by the Supreme Court. However, *Forbes* was never addressed by the *Bockting* Court at all,[454] perhaps because it represented creative judicial decision making not accommodated by the *Teague* framework. Ironically, *Teague* has come to dominate this central aspect of the Court's constitutional criminal jurisprudence while resting only on a plurality opinion.[455]

In explaining the grant of certiorari, Justice Alito looked to the conflicting positions taken by the Ninth Circuit and "every other Court of Appeals and State Supreme Court that has addressed this issue."[456] The Court inexplicably ignored the New Mexico Supreme Court's decision in *Forbes*, in which *Crawford* was afforded retroactive effect.[457] This omission may well have been inadvertent, but the fact that the decision in *Forbes* was published and that the New Mexico attorney general applied for certiorari to review the state court's decision[458] would suggest that the omission was, in fact, deliberate.

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453. *See Lilly*, 527 U.S. at 134.

454. *See generally Bockting*, 127 S. Ct. 1173.

455. *See supra* note 13 and accompanying text. Justice O'Connor wrote the Court's opinion, which was joined by only three other Justices.

456. *Bockting*, 127 S. Ct. at 1180 n.4.

457. In a similar vein of irony, the *Crawford* Court never addressed the order vacating Earnest's conviction in *New Mexico v. Earnest* nor Justice Rehnquist's concurring statement in that case. New Mexicans frequently complain that the state is often not recognized as a part of the United States, and *New Mexico Magazine* has carried a column titled "One of Our Fifty is Missing" for years. *See generally One of Our 50 Is Missing*, N.M. MAGAZINE, *available at* http://www.nmmagazine.com/50missing.php. Perhaps this explains the Court's lack of recognition of the *Earnest* litigation.

458. *See* New Mexico v. Forbes, 127 S. Ct. 1482 (2007) (denying New Mexico's petition for writ of certiorari). The case was circulated within the U.S. Supreme Court for conference three times

Moreover, the State's petition was not disposed of in routine fashion; instead, the case was carried on the docket until the Court issued its decision in *Bockting*, despite the fact that the issue presented had been rendered moot[459] when the charges against Earnest were dismissed in September 2006.[460]

The Court's treatment of the attorney general's petition in *Forbes* suggests that the state supreme court's judgment would have been vacated and the case remanded for reconsideration in light of *Whorton v. Bockting* once the decision in *Bockting* had been entered. Earnest escaped this possible result, which would have been the second time the Supreme Court would have vacated relief afforded him by the New Mexico Supreme Court, by successfully objecting to the State's motion to recall the mandate.[461] When that court declined to recall its mandate,[462] the case was returned to the district court's trial docket.[463] Later, when the case was called for trial—before the Supreme Court acted on the pending certiorari petition—the State was unable to announce ready for trial because Boeglin refused to testify, accepting a contempt finding by the trial court rather than taking the stand.[464]

B. Danforth v. Minnesota *and the Final Piece of the Retroactivity Puzzle: Recognition of State Court Discretion in Expanding upon* Teague *in Retroactive Application of New Rules*

Bockting declared that *Crawford* constituted a new rule not retroactively applicable to benefit defendants in either state or federal proceedings whose trials had included prosecution reliance on uncrossed, testimonial statements.[465] But the question left unresolved there has now been answered in *Danforth v. Minnesota*.[466] Following *Danforth*, state courts are free to give retroactive effect to *Crawford* and other decisions of the Court announcing

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after Earnest filed his Brief in Opposition.

459. Earnest filed a Suggestion of Mootness on October 17, 2006, based on dismissal of the charges that were pending on remand from the state supreme court as a result of its decision granting relief from his conviction. Nevertheless, the case was carried on the Court's docket until the State's petition was denied on March 5, 2007, after the case was again distributed for the Court's March 2nd conference. Order List of Summary Dispositions (Mar. 5, 2007), *available at* http://www.supremecourtus.gov/orders/courtorders/030507pzor.pdf (last visited Jan. 26, 2009). The Court issued its opinion in *Bockting* on February 28, 2007. *Bockting*, 127 S. Ct. at 1173.

460. Audio tape: Pre-Trial Proceedings, State v. Earnest, No. CR-82-54 (N.M. 5th Jud. Dist. Ct. Sept. 5, 2006) (on file with author).

461. New Mexico v. Forbes, No. 29,111 (N.M. Sept. 21, 2005) (order denying motion to recall mandate); Mandate No. 29,111 (N.M. Aug. 26, 2005).

462. New Mexico v. Forbes, No. 29,111 (N.M. Nov. 22, 2005) (order denying renewed motion to recall mandate).

463. Mandate No. 29,111 (N.M. Aug. 26, 2005).

464. Audio tape: Pre-Trial Proceedings, *supra* note 460.

465. *See* Whorton v. Bockting, 127 S. Ct. 1173, 1181–84 (2007).

466. 128 S. Ct. 1029 (2008).

new rules of federal constitutional criminal procedure, consistent with their own retroactivity doctrines.[467]

Justice Stevens, writing for the majority in *Danforth*, put the question succinctly and then answered it directly: "The question in this case is whether *Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We have never suggested that it does, and now hold that it does not."[468] Thus, the *Teague* new rules doctrine does not reach beyond basic principles of federalism to bar states from determining that federal constitutional protections should be applied retroactively, consistent with state law principles.[469]

1. Danforth's Claim in the State Courts

Danforth argued in his post-conviction claim in the Minnesota courts that *Crawford* should be applied retroactively to afford him relief from his conviction obtained, in part, on the admission of a videotaped interview of the complainant in a child sexual assault case.[470] The taped interview included a description of the assault by the complainant, a six-year-old boy found incompetent to testify by the trial court due to his inability to respond to questioning, as well as his five-year-old sister, whom the court did find competent to testify to events involving her brother and the accused.[471]

The trial court admitted the videotape, finding that it bore sufficient indicia of reliability to warrant admission, including the fact that the child's statements "appeared spontaneous and largely unsolicited by leading questions" and that the complainant "lacked any apparent motivation to fabricate the accusation."[472] The appellate court agreed with this assessment, noting that Minnesota applied the *Idaho v. Wright* formula for determining reliability—a showing of "particularized guarantees of trustworthiness"[473]—when determining whether an out-of-court statement is admissible in the absence of cross-examination.[474] Of course, this is the same test articulated in *Ohio v. Roberts*.[475]

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467. *See id.* at 1033.

468. *Id*.

469. The majority rejected the position taken by the dissent that the articulation of principles of federal constitutional criminal procedure is a matter of the Court's discretion, binding on the states through the Supremacy Clause. *Id*. at 1048 (Roberts, C.J., joined by Kennedy, J., dissenting).

470. Danforth v. State, 700 N.W.2d 530, 530–31 (Minn. Ct. App. 2005).

471. State v. Danforth, 573 N.W.2d 369, 372 (Minn. Ct. App. 1997).

472. *Id*.

473. Idaho v. Wright, 497 U.S. 805, 815 (1990).

474. *Danforth*, 573 N.W.2d at 375.

475. 448 U.S. 56, 66 (1980).

Danforth could have logically argued that *Crawford* had repudiated the application of the "particularlized guarantees of trustworthiness" test for admission of the videotaped interview, rather than deposition, of his child accuser in the sense that the interview itself was made with a clear eye toward its use in litigation. In fact, the recorded interview was made in accordance with a Minnesota statute expressly authorizing the admission of this type of interview in evidence,[476] as the court itself noted.[477] The state supreme court denied review,[478] and Danforth's initial round of post-conviction litigation was unsuccessful.

However, after the Court issued its decision in *Crawford*, Danforth again applied for state post-conviction relief, arguing retroactive application of *Crawford* as a basis for setting aside his conviction.[479] The Minnesota Court of Appeals denied relief, holding that *Crawford* announced a new rule and one not subject to *Teague*'s exceptions to the general rule of non-retroactivity.[480] That court also concluded that the approaches taken by all federal circuits other than the Ninth in *Bockting v. Bayer* were more persuasive on the question of whether *Crawford* fit within one of the *Teague* exceptions.[481]

The Minnesota Supreme Court then addressed the issue of *Crawford* retroactivity decided adversely to Danforth by the intermediate court.[482] Danforth argued that regardless of whether *Crawford* applied retroactively as a matter of due process because it announced a new rule fitting within either of the *Teague* exceptions to non-retroactivity, the state courts were free to apply Supreme Court precedent retroactively.[483] The supreme court rejected Danforth's argument,[484] relying on its decision in *State v. Houston*[485] where the court had held that the Supreme Court's decision in *Blakely v. Washington*[486] could not be applied retroactively absent an express declaration requiring retroactive application by the United States Supreme Court.[487] The

476. MINN. STAT. § 595.02(3) (2008).

477. *Danforth*, 573 N.W.2d at 375.

478. *Id*. at 369 (noting review denied by Minnesota Supreme Court on February 19, 1998).

479. Danforth v. State, 700 N.W.2d 530, 531 (Minn. Ct. App. 2005).

480. *Id*. at 532.

481. *Id*.

482. *See* Danforth v. State, 718 N.W.2d 451, 455 (Minn. 2006).

483. *Id*. at 455. The court observed that *Danforth* raised the question of the state court's authority to apply *Crawford* retroactively despite the fact that it would not qualify for retroactive application under *Teague* for the first time in his appeal to the state supreme court. *Id*. Nevertheless, the court addressed the issue "in the interests of justice." *Id.*

484. *Id*.

485. 702 N.W.2d 268 (Minn. 2005).

486. 542 U.S. 296 (2004).

487. *See Houston*, 702 N.W.2d at 274.

Houston court, however, did not hold that *Teague* forbids retroactive application of federal constitutional new rules by state courts.[488] Instead, the court rejected the arguments that the limitations imposed upon sentencing discretion by *Blakely*[489] fit within *Teague*'s exceptions.[490]

The Minnesota Supreme Court in *O'Meara v. State* had articulated its understanding of the mandatory nature of *Teague* when dealing with the duty to apply federal constitutional new rules announced by the United States Supreme Court.[491] But the court there did not address the question ultimately raised by *Danforth*: whether Minnesota courts *could* apply a new rule retroactively as a matter of state law or policy when the Supreme Court did not expressly provide for retroactive application as a matter of federal due process.[492] It did, however, hold that because O'Meara's case was not final when the Court's decision in *Apprendi v. New Jersey*[493] was announced, he would be entitled to the benefit of that holding based on the requirement that even new rules are applicable to issues raised in pending litigation not final at the time the Court announces its decision.[494] It also made an interesting observation that would later prove somewhat ironic in the context of *Danforth*: "It is axiomatic that as Minnesota's highest court we determine whether our decisions on *state law* are given retroactive or prospective effect."[495] It did so, explaining its own doctrine of retroactivity for state law decisions that parallels the approach taken by the Supreme Court in *Griffith v. Kentucky*.[496]

What is clear is that the Minnesota Supreme Court could have based its rejection of Danforth's claim by electing to apply a state retroactivity rule paralleling *Teague*. In fact, a substantial number of jurisdictions had done precisely that, adopting *Teague* as the formula for retroactivity analysis under state law, although apparently conceding that *Teague* is not mandatory.[497]

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488. *See id.* at 271–74.

489. *Blakely* held that enhanced sentences based upon particular circumstances require pleading and proof of those factors warranting increased sentences by the trier of fact, applying the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), to certain sentencing discretion traditionally exercised by trial judges within statutory frameworks. *Blakely*, 542 U.S. at 303.

490. *Houston*, 702 N.W.2d at 271–74.

491. 679 N.W.2d 334, 339–40 (Minn. 2004).

492. *See id.* at 338–40.

493. 530 U.S. at 490.

494. *O'Meara,* 679 N.W.2d at 340.

495. *Id*. at 338.

496. *See id.* at 338–39 (referring to Griffith v. Kentucky, 479 U.S. 314 (1987)).

497. *See, e.g.*, Edwards v. People, 129 P.3d 977, 981–82 (Colo. 2006) (recognizing the possibility that *Teague* does not bind the states, then circumventing the problem by deciding as a matter of state law to apply the *Teague* rule); People v. Flowers, 561 N.E.2d 674, 682 (Ill. 1990) (adopting *Teague* as a matter of state law); Brewer v. State, 444 N.W.2d 77, 81–82 (Iowa 1989) (same); State v. Tallard, 816 A.2d 977, 979–81 (N.H. 2003) (also recognizing the possibility that

Had the court taken this approach, Danforth's petition would not have raised a federal constitutional claim warranting review by the Court.

Instead, however, the Minnesota court framed its decision in terms of limitation on its own authority,[498] squarely raising an issue of federalism. The court's approach was consistent with the position taken by other state courts holding that they were bound by *Teague*'s retroactivity principles and barred from affording relief to state court inmates whose convictions were final based on Supreme Court decisions announcing new rules of constitutional criminal procedure[499] or that have deferred to *Teague* as controlling.[500] The *Danforth* Court noted, however, that other state courts had not considered state retroactivity principles to be controlled by *Teague*.[501]

2. The Supreme Court's Disposition of Danforth's Claim

The Supreme Court rejected the state supreme court's analysis in providing Danforth with an initial victory in his pursuit of relief from conviction through retroactive application of *Crawford*'s restored commitment to cross-examination.[502] Instead, the majority rejected the argument that federal due process requires a nationally consistent application

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Teague does not bind the states, then circumventing the problem by deciding as a matter of state law to apply the *Teague* rule).

498. *See* Danforth v. State, 718 N.W.2d 451, 455–56 (Minn. 2006).

499. *E.g.*, State v. Egelhoff, 900 P.2d 260, 267 (Mont. 1995); Page v. Palmateer, 84 P.3d 133, 137–38 (Or. 2004) (holding state court was not "free to determine the degree to which a new rule of federal constitutional law should be applied retroactively"); State v. Gómez, 163 S.W.3d 632, 650–51 (Tenn. 2005), *vacated on other grounds*, 127 S. Ct. 1209 (2007).

500. *E.g.*, Johnson v. Warden, 591 A.2d 407, 410 (Conn. 1991); Whisler v. State, 36 P.3d 290, 296 (Kan. 2001); People v. Eastman, 648 N.E.2d 459, 464–65 (N.Y. 1995); Agee v. Russell, 751 N.E.2d 1043, 1046–47 (Ohio 2001); Thomas v. State, 888 P.2d 522, 527 (Okla. Crim. App. 1994); Commonwealth v. Hughes, 865 A.2d 761, 780 (Pa. 2004); Taylor v. State, 10 S.W.3d 673, 679 (Tex. Crim. App. 2000).

501. Danforth v. Minnesota, 128 S. Ct. 1029, 1041 (2008) (citing State v. Preciose, 609 A.2d 1280, 1292 (N.J. 1992) (explaining that comity and federalism concerns "simply do not apply when this Court reviews procedural rulings by our lower courts")); *id.* at 1042 (stating that "for many years following *Teague*, state courts almost universally understood the *Teague* rule as binding only federal habeas courts, not state courts") (citing *Preciose*, 609 A.2d 1280; Cowell v. Leapley, 458 N.W.2d 514 (S.D. 1990); State v. Murphy, 548 N.W.2d 45, 49 (Wis. 1996) (choosing of its own volition to adopt *Teague*)). The Court also noted commentary arguing that *Teague* should not be considered binding on state retroactivity doctrines. *Danforth*, 128 S. Ct. at 1042 (citing Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 422–24 (1993)). Professor Hutton argued that "*Teague*'s foundation is statutory and prudential; it is not constitutional. Moreover, its restrictions apply only to federal habeas cases, leaving states the opportunity to follow *Teague* or to develop an approach to retroactivity which enables them to fulfill the requirements of their state constitutions, statutes, and case law." Hutton, *supra*, at 423–24 (footnotes omitted). Professor Hutton's perceptive analysis was affirmed by the Court's disposition and reasoning fifteen years later in *Danforth*. *See generally Danforth*, 128 S. Ct. 1029.

502. *See Danforth*, 128 S. Ct. at 1046–47.

of retroactivity principles with regard to newly announced interpretations of constitutional protections.[503] However, the Court certainly did not ensure that Minnesota would adopt the broader doctrine of retroactivity for its decisions that its holding in *Danforth* permits, precisely because the majority's holding affords Minnesota and all other states the option of formulating or applying retroactivity doctrines that deviate from the Court's retroactivity doctrine articulated in *Teague*.

Thus, having freed state courts from the constraint of mandatory application of the *Teague* retroactivity principle as a rule binding on states and applied to limit their discretion to afford broader retroactivity than that ordered by the Court when appropriate under the *Teague* exceptions, the issue facing state courts following *Danforth* is twofold. First, state courts remain free to fashion their retroactivity doctrines to conform strictly to *Teague* and may now elect to do so. And second, if they elect to do so, they must decide what principles may guide them in the exercise of the discretion afforded by *Danforth*.

The *Danforth* Court's rejection of the Minnesota court's conclusion that *Teague* limited its authority to apply *Crawford* retroactively effectively opens the door for state courts to determine when state inmates whose convictions are final may benefit from newly announced rules of constitutional criminal procedure.[504] It also permits state courts to fashion retroactivity doctrines that may recognize limited retroactivity based on factors viewed as critical in the determination of whether retroactive application of a new rule is necessary to achieve justice, much as the New Mexico Supreme Court did in affording Earnest relief in *Forbes*.[505]

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503. *See id.* at 1033.

504. This result in *Danforth* is consistent with the position advocated by a number of states joining in the filing of an amicus brief in the case. *See* Brief of Kansas and the Amici States in Support of Neither Party at 3, *Danforth*, 128 S. Ct. 1029 (No. 06-8273), 2007 WL 2088650, where their attorneys general took the position that *Teague* does not control state retroactivity doctrine:

> There is no constitutional command that the States follow federal habeas corpus doctrines such as the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989). Nor is there a constitutional bar to the States developing their own retroactivity doctrines for state post-conviction proceedings, whether those doctrines are broader or stricter than a federal habeas counterpart such as *Teague*. So long as state courts make that decision as a matter of state law, there is no federal interest nor federal constitutional principle at stake (italics added).

505. See *supra* Part IV.B.3 for a discussion of the New Mexico Supreme Court's retroactivity analysis applied in *State v. Forbes ex rel. Earnest*, 119 P.3d 144 (N.M. 2005).

3. The New Mexico Supreme Court's Approach in *Earnest*

While the New Mexico Supreme Court afforded Earnest relief based on its reading of the confrontation principle affirmed in *Crawford*, it did not adopt a general retroactive application approach to *Crawford* claims in state cases.[506] Instead, it fashioned a ruling based upon limited retroactivity, rather than formulating a general rule applicable to all *Crawford* claims.[507] Arguably, in doing so, the court intended that only Earnest among all New Mexico litigants would ever benefit from this ruling. Of course, the holding itself left the court the option of extending the benefit of this approach to any other similarly situated state defendant. Thus, another New Mexico defendant who is able to show that counsel had relied on *Douglas v. Alabama* at trial in objecting to the admission of a non-testifying accomplice's confession never subjected to testing by cross-examination would presumably be permitted to claim *Forbes* as precedent in a state post-conviction action. However, there may simply be no similarly situated defendant for whom relief would be available.

Danforth leaves open the option for state courts to fashion limited, rather than general, rules of retroactivity. For example, a state court might hold that only certain classes of statements, such as accomplice confessions, would be considered for retroactive application of *Crawford* because other hearsay declarations do not pose such a serious potential for falsity based upon the declarant's self-interest. Similarly, even if a class of statements might be subject to retroactive application of *Crawford*'s cross-examination requirement, a state court might elect to limit those circumstances in which relief is granted, as most claims of constitutional error are subject to harm analysis.[508]

A number of circumstances defined the New Mexico court's approach in applying *Crawford* retroactively for Earnest's benefit. First, the court did not elect to apply *Crawford* retroactively in all cases in which "testimonial

506. *See Forbes*, 119 P.3d at 148.

507. *See id.*

508. Some constitutional claims involve matters of structural error that cannot be subjected to analysis for harm precisely because harm cannot be assessed in light of the trial record. For instance, claims of improper exclusion of jurors based on ethnicity, *see generally* Batson v. Kentucky, 476 U.S. 79 (1986), or attitudes toward capital punishment, *see generally* Witherspoon v. Illinois, 391 U.S. 510 (1968), are not susceptible to prejudice analysis because it is impossible to accurately assess the behavior of a jury had the excluded juror been seated and served. Similarly, in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Court held that a constitutionally defective jury instruction that impermissibly altered the burden of proof imposed upon the prosecution in a criminal case constituted "structural error" not amenable to prejudice analysis. Any attempt to assess harm would require speculation on consequences of the error that would be "unquantifiable and indeterminate." *Id*. at 281–82. Trial error claims, or those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," are evaluated in terms of prejudice to the accused. Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991).

hearsay" had been admitted without cross-examination, restricting its application to Earnest's case.[509] A state court could clearly fashion relief in this way, or by affording retroactive application only to convictions resting on inherently suspect testimonial statements given by accomplices. Second, the claimed confrontation violation in the denial of cross-examination was clearly asserted at trial and in all subsequent proceedings in the state and federal courts.[510] And third, as the state supreme court concluded in its initial decision reversing the conviction, Boeglin's statement was prejudicial, particularly because it was the only evidence the prosecution had linking Earnest to the Eastman murder.[511]

The analysis in *Earnest* thus fits within reasonable parameters for retroactive application of *Crawford*. Where the conviction itself rests on evidence that would be excluded were the new rule articulated in a decision of the Supreme Court, as in *Earnest*, a state court could reasonably fashion a limited remedy designed to correct the manifest injustice inherent in the conviction as a matter of state law. That formulation would be insulated from federal constitutional attack in light of *Danforth*.

In *Forbes*, the New Mexico court noted two compelling considerations supporting its decision to afford Earnest the retroactive benefit of *Crawford*. First, the court had already determined that the admission of Boeglin's confession had been found to be prejudicial in the original direct appeal.[512] Second, the court found the fact that at the time of Earnest's trial, *Douglas v. Alabama* was the controlling Supreme Court precedent, relied upon by Earnest's trial counsel and on his direct appeal.[513] Only when the Supreme Court vacated the state court's reversal of Earnest's conviction was that rule governing admission of co-defendant confessions undermined, influenced strongly by Justice Rehnquist's concurring opinion.[514] Thus, the rules for trial changed after the fact and without any possibility for trial counsel to have advised Earnest and represented him at trial with reasonable knowledge that he could not rely on *Douglas* in the preparation of the defense.

The decision in *Forbes* represents a reasonable alternative for state courts concerned that new constitutional doctrine undermines the credibility of state court convictions obtained under now-discarded precedent. Where the conviction itself appears to have been undermined by the recognition of a new

509. *Forbes*, 119 P.3d at 145.

510. The *Forbes* court noted: "To aid our analysis, it is significant that Earnest preserved his argument that admission of the accomplice statement to police officers without him having the benefit of cross-examination violated his constitutional right to confront his accusers." *Id*. at 147.

511. State v. Earnest (*Earnest I*), 703 P.2d 872, 876 (N.M. 1985).

512. *Forbes*, 119 P.3d at 146 (citing *Earnest I*, 703 P.2d at 876).

513. *Id*. at 147.

514. *Id*.

rule articulated by the Supreme Court, nothing would appear to bar a state court from granting relief for those defendants for whom relief is deemed appropriate, regardless of whether the state is free to apply federal constitutional decisions retroactively. In fact, given the choice between an absolute policy of nonretroactivity or the freedom to fashion retroactivity doctrine that would require uniform retroactive application of new rules as a matter of state process, state courts might well prefer the New Mexico approach. Review of prior convictions called into question by new rules of federal constitutional criminal procedure and a prejudice or harm assessment of the implication of the new rule for the underlying conviction itself would afford state courts the freedom to "do justice to each litigant on the merits of his own case."[515]

VI. CONCLUSION: THE IMPORTANCE OF BEING EARNEST

In one of the earliest post-*Douglas* decisions of the Court addressing the confrontation right, *California v. Green*,[516] Justice White succinctly described the significance of cross-examination in the context of admission of a declarant's out-of-court statements for purposes of impeachment:

> Viewed historically, then, there 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 as a witness and subject to full and effective cross-examination.
>
> This conclusion is supported by comparing the purposes of confrontation with the alleged dangers in admitting an out-of-court statement. Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[517]

This endorsement of cross-examination as the primary tool available to the accused to test the prosecution's case in the course of trial underlies the

515. Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

516. 399 U.S. 149 (1970).

517. *Id*. at 158 (footnote omitted).

Crawford Court's recommitment to the "greatest legal engine ever invented for the discovery of truth," in the words of Dean Wigmore,[518] quoted by Justice White.[519]

Earnest's relief from his twenty-four-year-old murder conviction is something of a testament to the inherent value of judicial review as a means of correcting error in interpretation and application of law. On the other hand, he spent a considerable period of his life waiting for the vindication that ultimately came with the New Mexico Supreme Court's willingness to fashion a rule drawing from both the Supreme Court's reasoning in *Crawford* and its own innate concern for fundamental fairness.[520]

Danforth confirms the New Mexico court's exercise of discretion as valid in constitutional terms in applying *Crawford* retroactively as a matter of state retroactivity doctrine or policy. Other state courts may well decide to follow the lead of the *Forbes* court in light of *Danforth*, but it is far from clear that many state defendants will actually benefit from the liberality of the Court's affirmation of judicial federalism in *Danforth*. The Minnesota Supreme Court may opt to apply *Teague*'s retroactivity approach on remand as the *Danforth* Court itself noted in remanding: "[T]he Minnesota Court is free to reinstate its judgment disposing of the petition for state postconviction relief."[521]

Clearly, in the wake of *Danforth*, state courts will address applications for post-conviction relief arguing for retroactive application of *Crawford* and other favorable decisions of the United States Supreme Court announcing new, but not retroactive, rules of constitutional criminal procedure. Although the Court's holding in *Danforth* will necessarily make assertion of claims based on those attractive to state inmates, it is not unreasonable to assume that state courts will generally be unresponsive, or at least cautious, about expanding the scope of post-conviction litigation. The New Mexico court's approach in the *Earnest* litigation will likely prove instructive. The state court did not apply *Crawford* retroactively for the benefit of New Mexico

518. 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (rev. ed. 1974).

519. *Green*, 399 U.S. at 158.

520. The state supreme court's clear perception of its role in advancing the interest of justice has been demonstrated in the development of state law doctrines that recognize the authority of the court to exercise flexibility in discretion in fashioning relief when warranted by the facts of individual cases. *See, e.g.*, State v. Breit, 930 P.2d 792, 797 (N.M. 1996) (asserting authority to impose bar to successive prosecutions necessitated by prosecutorial misconduct). Similarly, the New Mexico courts have evidenced a willingness to adopt broader interpretations of rights accorded as a matter of state constitutional law than those afforded by federal protections. *See generally* State v. Gomez, 932 P.2d 1 (N.M. 1997) (construing search and seizure rights under the New Mexico Constitution). New Mexico also recognizes fundamental and plain error doctrines. *See* State v. Orosco, 833 P.2d 1146, 1150 (N.M. 1992).

521. Danforth v. Minnesota, 128 S. Ct. 1029, 1047 (2008).

defendants.[522] Rather, it grounded its holding in the concept of fairness in terms of notice of controlling law at the time of trial.[523] Thus far, apparently

522. *See* State v. Forbes *ex rel.* Earnest, 119 P.3d 144, 148 (N.M. 2005).
523. *See id.* at 147–49.

only Earnest, whose lawyers had preserved error at trial and consistently argued for cross-examination in the appellate and post-conviction processes, has received the benefit of *Crawford* for relief from his state court conviction.

And, it is not unlikely that he alone will ever be afforded such relief.