A Bad Case of Indigestion: Internalizing Changes in the Right to Confrontation After Crawford v. Washington Both Nationally and in Wisconsin

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A BAD CASE OF INDIGESTION: INTERNALIZING CHANGES IN THE RIGHT TO CONFRONTATION AFTER CRAWFORD V. WASHINGTON BOTH NATIONALLY AND IN WISCONSIN

I. INTRODUCTION

In 1987, brothers David and Robert Bintz, along with a friend, went to a local bar to pick up some packaged beer. After learning he had been overcharged for the beer, David called the female bartender and threatened to blow up the bar. The bartender was found murdered a few days later. No one was charged with the crime, and the case remained open.

Twelve years later, in 1998, David was serving time in prison for an unrelated crime. His cellmate, Gary Swendby, noticed that David was having frequent nightmares and was yelling out in his sleep about killing a woman. When Swendby questioned David about the nightmares, David confessed that he and his brother, Robert, had killed the bartender and disposed of the body. Swendby told authorities, and both brothers were tried separately for party to the crime of first-degree murder.

At David's trial, Swendby testified against him. David was convicted of first-degree murder. At Robert's trial, both Robert and David refused to testify and plead the Fifth Amendment. Swendby was unavailable for testimony because he had since died in an automobile accident. The court admitted Swendby's statements under the hearsay exception; the court held

2. Id., ¶ 2, 257 Wis. 2d 177, ¶ 2, 650 N.W.2d 913, ¶ 2.
3. Id., 257 Wis. 2d 177, ¶ 2, 650 N.W.2d 913, ¶ 2.
4. Id., 257 Wis. 2d 177, ¶ 2, 650 N.W.2d 913, ¶ 2.
5. Id., ¶ 3, 257 Wis. 2d 177, ¶ 3, 650 N.W.2d 913, ¶ 3.
6. Id., 257 Wis. 2d 177, ¶ 3, 650 N.W.2d 913, ¶ 3.
7. Id., 257 Wis. 2d 177, ¶ 3, 650 N.W.2d 913, ¶ 3.
8. Id., ¶ 4, 257 Wis. 2d 177, ¶ 4, 650 N.W.2d 913, ¶ 4.
9. Id., 257 Wis. 2d 177, ¶ 4, 650 N.W.2d 913, ¶ 4.
10. Id., 257 Wis. 2d 177, ¶ 4, 650 N.W.2d 913, ¶ 4.
11. Id., ¶ 5, 257 Wis. 2d 177, ¶ 5, 650 N.W.2d 913, ¶ 5.
12. Id., ¶ 5, 257 Wis. 2d 177, ¶ 5, 650 N.W.2d 913, ¶ 5.
that, under *White v. Illinois*,\(^{13}\) Swendby was (1) unavailable and (2) Swendby's statements were reliable because David had the opportunity to cross-examine him at the preliminary hearing and at trial.\(^{14}\)

Because both brothers were charged as parties to a crime, the court held that their interests in cross-examining the cellmate were very similar.\(^{15}\) Thus, the transcripts were admissible as prior testimony.\(^{16}\) Robert was also convicted of first-degree murder, party to a crime.\(^{17}\)

*Bintz* was a leading case in the area of hearsay and the Confrontation Clause in Wisconsin jurisprudence before March 8, 2004, when the *Crawford v. Washington*\(^ {18}\) decision was released; however, the *Bintz* rationale has now been swallowed by a hungry and expanding Confrontation Clause. But does the Confrontation Clause really save the day for defendants like the Bintz brothers? And how has Wisconsin reacted to *Crawford*, hearsay, and confrontation?

Part II of this Note will discuss the history of the Confrontation Clause and hearsay in the American courts. Part III discusses the manner in which the *Crawford v. Washington* decision altered the Confrontation right. Parts IV, V, and VI explain the issues that are still being considered by lower courts in the aftermath of *Crawford*. Part VII discusses Wisconsin's current jurisprudence and the probability of future issues with regard to the Confrontation Clause. And finally, Part VIII discusses this author's conclusions about Wisconsin, hearsay, and the Confrontation Clause. This Note was intended to guide the bench and practitioners in identifying issues, dividing lines, and remedies to Confrontation Clause and hearsay problems in the context of criminal courts.

II. THE HISTORY OF THE CONFRONTATION CLAUSE AND HEARSAY EXCEPTIONS

The Sixth Amendment of the U.S. Constitution's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."\(^ {19}\) This means that a criminal defendant has the constitutionally protected right to confront at trial or in a judicial hearing any witnesses that have made statements against him.

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15. *Id.*, ¶ 17, 257 Wis. 2d 177, ¶ 17, 650 N.W.2d 913, ¶ 17.
16. *Id.*, ¶ 15, 257 Wis. 2d 177, ¶ 15, 650 N.W.2d 913, ¶ 15.
17. *Id.*, ¶ 5, 257 Wis. 2d 177, ¶ 5, 650 N.W.2d 913, ¶ 5.
19. U.S. CONST. amend. VI.
This Confrontation Clause guarantee applies at both the state and the federal level.\textsuperscript{20}

The Confrontation right is particularly relevant in the context of hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."\textsuperscript{21} Testimony may be admitted under a hearsay exception at trial as long as it does not abridge the defendant's confrontation right.\textsuperscript{22}

What it means to violate a defendant's confrontation right, however, has been argued for more than a century.\textsuperscript{23}

One of the earliest U.S. Supreme Court decisions under the Confrontation Clause, \textit{Mattox v. United States},\textsuperscript{24} began the controversy over which hearsay evidence could be admitted in criminal trials. In \textit{Mattox}, the defendant raised a Sixth Amendment Confrontation Clause challenge to the admissibility at his retrial of stenographic notes of testimony from two witnesses at the defendant's first trial.\textsuperscript{25} The witnesses had died before the retrial.\textsuperscript{26}

The Court held that admitting the testimony was necessary because the witnesses had died; the Court also held that the defendant had a prior opportunity to exercise his Sixth Amendment rights when he cross-examined the witnesses in the first trial.\textsuperscript{27}

Seventy years later, in \textit{Pointer v. Texas},\textsuperscript{28} the Court held that admitting testimony that had been taken at a preliminary hearing violated the Confrontation Clause because neither of the defendants had been represented by a lawyer at that hearing and thus lacked the ability to cross-examine the witnesses against them.\textsuperscript{29} Then, in \textit{Barber v. Page},\textsuperscript{30} a witness's prior testimony at the preliminary hearing, although it was cross-examined, was

\textsuperscript{20} \textit{Crawford}, 541 U.S. at 40-41.
\textsuperscript{21} \textit{FED. R. EVID. 801(c)}.
\textsuperscript{22} \textit{CRAWFORD, supra note 1, at 1038-39 (2003)}.
\textsuperscript{23} Although hearsay objections are closely tied to the Confrontation right, a hearsay objection technically rests on a different basis than a Confrontation Clause objection does. Warren Moise, \textit{Beyond the Bar: The Confrontations Clause and Justice Scalia: Everything Old is New Again}, 16 S.C. L\textit{AWYER 11, 11 (2004). In Bunton v. State, 136 S.W.3d 355, 368 (Tex. Crim. App. 2004), an appellate review of the Confrontation Clause violation was not required when only a hearsay objection was raised at trial. Id. Thus, an objection to either a Confrontation Clause violation or inadmissible hearsay may be inadequate to preserve an appeal on the other one. Id.}
\textsuperscript{24} 156 U.S. 237 (1895).
\textsuperscript{25} Id. at 260-61.
\textsuperscript{26} Id. at 261.
\textsuperscript{28} 380 U.S. 400 (1965); Chase, \textit{supra note 27}, at 1039.
\textsuperscript{29} Chase, \textit{supra note 27}, at 1040.
\textsuperscript{30} 390 U.S. 719 (1968).
inadmissible because the State failed to show that the witness was actually unavailable to testify.\textsuperscript{31}

Finally, the Court again considered admissibility of preliminary hearing testimony under the Confrontation Clause in \textit{California v. Green}.\textsuperscript{32} The Court established several rules concerning prior testimony hearsay evidence: (1) preliminary hearing testimony is admissible in a trial if the defendant had an opportunity to cross-examine the witness and the prosecutor shows that the witness is unavailable, and (2) the witness’s preliminary hearing testimony may be admitted at trial “if the witness is testifying at trial, concedes making the statements, and is subject to cross-examination both as to the trial testimony and the prior preliminary hearing testimony.”\textsuperscript{33}

Despite these new rules, the Court had yet to determine the underlying principles that make such rules correct. In the following years, the Court developed the theory that the Confrontation Clause and the rule against hearsay effectively protected the same interests: the right of a defendant to have face-to-face confrontation with an accuser.\textsuperscript{34} In the following cases, the Court explores this principle.

\textit{A. The Confrontation Clause Under \textit{Ohio v. Roberts}}

In \textit{Ohio v. Roberts},\textsuperscript{35} the Court established guidelines to decide when hearsay evidence against a criminal defendant violates his Confrontation Clause right.\textsuperscript{36} In \textit{Roberts}, the State’s only witness testified against the defendant in the preliminary hearing.\textsuperscript{37} The defense neither asked to have the witness declared hostile nor cross-examined her.\textsuperscript{38} Roberts was indicted.\textsuperscript{39} At trial, the witness was unavailable; the State issued five separate subpoenas, but the witness did not appear.\textsuperscript{40} The State offered the transcript from the witness’s preliminary hearing testimony.\textsuperscript{41}

The Court held that the unavailable witness’s testimony was admissible because (1) the witness was unavailable at trial (and the State had made a

\begin{itemize}
  \item \textsuperscript{31} Chase, \textit{supra} note 27, at 1040-41.
  \item \textsuperscript{32} 399 U.S. 149, 150-51 (1970); Chase, \textit{supra} note 27, at 1041.
  \item \textsuperscript{33} Chase, \textit{supra} note 27, at 1043.
  \item \textsuperscript{34} \textit{See id.}
  \item \textsuperscript{35} 448 U.S. 56 (1980); Chase, \textit{supra} note 27, at 1043.
  \item \textsuperscript{36} \textit{Roberts}, 448 U.S. at 64; Chase, \textit{supra} note 27, at 1044.
  \item \textsuperscript{37} \textit{Roberts}, 448 U.S. at 59-60; Chase, \textit{supra} note 27, at 1044.
  \item \textsuperscript{38} \textit{Roberts}, 448 U.S. at 58; Chase, \textit{supra} note 27, at 1044.
  \item \textsuperscript{39} \textit{Roberts}, 448 U.S. at 60; Chase, \textit{supra} note 27, at 1044.
  \item \textsuperscript{40} \textit{Roberts}, 448 U.S. at 59; Chase, \textit{supra} note 27, at 1044.
  \item \textsuperscript{41} \textit{Roberts}, 448 U.S. at 60; Chase, \textit{supra} note 27, at 1044.
\end{itemize}
good faith albeit fruitless effort to locate her); and (2) the witness’s testimony had "indicia of reliability" because she had been effectively (if not actually) cross-examined at the preliminary hearing. The Court concluded that this test satisfied the Founders’ objective that face-to-face confrontation with the accused is an essential right of every criminal defendant.

The Roberts test of the admissibility of hearsay under the Confrontation Clause has two prongs: necessity and reliability. The necessity prong is satisfied by showing the unavailability of the witness; the reliability prong is satisfied by showing “that the hearsay was admitted pursuant to a firmly rooted hearsay exception or that it possesses particularized guarantees of trustworthiness.”

The Roberts test became the dominant test in hearsay admissibility for the next quarter of a century. The Court further refined this test in reference to child witnesses in the following case before it finally abandoned the Roberts analysis in Crawford.

**B. The Confrontation Clause Under White v. Illinois**

In White v. Illinois, the Court concluded that the necessity and reliability prongs of the Roberts analysis were satisfied in a child witness case when the hearsay statements were given as an excited utterance or in the course of medical treatment.

In White, White was charged with the aggravated sexual assault of the then four-year-old S.G. S.G. was unable to testify at White’s trial. On two separate occasions, the State tried to call her as a witness, but S.G. “experienced emotional difficulty [en route] to the courtroom and in each instance left without testifying.” When S.G. failed to testify, “[t]he defense made no attempt to call S.G. as a witness, and the trial court neither made, nor was asked to make, a finding that S.G. was unavailable to testify.”

The State attempted to admit the testimony of S.G.’s babysitter, mother, caseworker, and medical provider as to what S.G. had told each of them about

42. Roberts, 448 U.S at 65; Chase, supra note 27, at 1044.
43. Roberts, 448 U.S at 65-66; Chase, supra note 27, at 1044.
44. Chase, supra note 27, at 1044-45.
45. Id. at 1051-52.
46. 502 U.S. 346 (1992); Chase, supra note 27, at 1052.
47. White, 502 U.S. at 350-51; Chase, supra note 27, at 1052.
48. White, 502 U.S at 350; Chase, supra note 27, at 1052.
49. White, 502 U.S at 350; Chase, supra note 27, at 1052.
50. White, 502 U.S. at 350; Chase, supra note 27, at 1052.
51. White, 502 U.S. at 350; Chase, supra note 27, at 1052-53.
the sexual assault.\textsuperscript{52} Although White objected on hearsay grounds, the trial court allowed the testimony based on Illinois hearsay exceptions for both statements made as spontaneous declarations and statements made in the course of securing medical treatment.\textsuperscript{53}

The Supreme Court upheld the admission of this hearsay testimony, concluding that excited utterances and statements made in the course of receiving medical treatment are "firmly rooted" exceptions to the hearsay rule and are therefore reliable.\textsuperscript{54}

In fact, the Court stated that "face-to-face" confrontation with the accuser during trial was probably less accurate in these special situations; in a time of emergency or medical care situation, a witness is more likely to unabashedly tell the truth either because she has not had time to think about a "statement" previously (emergency situation) or because she fears a misdiagnosis or mistreatment if she does not tell the truth (medical care).\textsuperscript{55}

Thus, the White expansion of the Roberts two-pronged necessity and reliability test included the excited utterance and statements made in the course of medical treatment exceptions to the rule against hearsay admission.

In 2004, with Crawford, the Roberts test was overruled and the White analysis is presumably still good law, although with a sometimes murky application. The next section discusses the Crawford decision.

II. CRAWFORD V. WASHINGTON: THE NEWEST GAME IN TOWN

In March 2004, the U.S. Supreme Court dramatically changed its approach to hearsay and the Confrontation Clause. In Crawford v. Washington, a 7-2 majority opinion written by Justice Scalia, the Court reassessed the history, text, and policy underlying a defendant's right to confront witnesses against him.\textsuperscript{56} The Court found the Roberts approach of necessity and reliability lacking.\textsuperscript{57} Thus, the Court held that testimonial hearsay may be used against the accused only when the declarant is unavailable and the defendant has had the opportunity to cross-examine that declarant.\textsuperscript{58}

This section discusses the Crawford decision, the new rule that the

\textsuperscript{52} White, 502 U.S. at 350; Chase, supra note 27, at 1053.
\textsuperscript{53} White, 502 U.S. at 350-51; Chase, supra note 27, at 1053.
\textsuperscript{54} White, 502 U.S. at 357; Chase, supra note 27, at 1053.
\textsuperscript{55} White, 502 U.S. at 356; Chase, supra note 27, at 1054.
\textsuperscript{56} 541 U.S. 36 (2004).
\textsuperscript{57} Id. at 52.
\textsuperscript{58} Id. at 57-61.
Supreme Court made in that decision, and the rationale that led the Court to the new Crawford rule.

A. The Case

In Crawford, Crawford was charged with assaulting a man who had allegedly attempted to rape his wife.\textsuperscript{59} Crawford claimed self-defense.\textsuperscript{60} The police interrogated Crawford's wife, who was present at the time of the conflict.\textsuperscript{61} His wife's statement generally corroborated Crawford's statement but suggested that Crawford's conflict with the "victim" may have been more than self-defense.\textsuperscript{62}

At the trial, the wife claimed marital privilege and refused to testify against her husband.\textsuperscript{63} However, the prosecution was allowed to introduce the wife's recorded statement as a statement against penal interest.\textsuperscript{64}

Crawford was convicted.\textsuperscript{65} The Washington Supreme Court upheld the conviction and found that the wife's hearsay statement fulfilled both the state's evidentiary rules and the defendant's right to confrontation.\textsuperscript{66} But the U.S. Supreme Court reversed, rethinking years of Confrontation Clause precedent and changing the landscape of criminal justice.\textsuperscript{67}

B. The New Rule

The new rule under Crawford states that testimonial hearsay may only be admitted when: (1) the declarant is unavailable to testify (after the prosecution made a good faith effort to produce the declarant) and (2) the defendant had a prior opportunity to cross-examine the declarant.\textsuperscript{68}

Furthermore, the Court differentiated between testimonial and non-testimonial hearsay under Crawford.\textsuperscript{69} The Court explained that testimony is usually "'[a] solemn declaration or affirmation made for the purpose of
establishing or proving some fact." The Court further explained, "[a]n 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." The Court defines testimonial statements as the following:

\[E\]x parte in-court testimony or its functional equivalent—
that is, material such as affidavits, custodial examinations,
prior testimony that the defendant was unable to cross-
examine, or similar pretrial statements that declarants would
reasonably expect to be used prosecutorially, . . . "statements
that were made under circumstances which would lead an
objective witness reasonably to believe that the statement
would be available for use at a later trial."  

Although the Court declined to conclusively determine all that falls under
the broad umbrella of testimonial, police interrogations certainly qualified in
Crawford. At this juncture, the Confrontation Clause "places no constraints
at all on the use of . . . [the] prior testimonial statements" of the unavailable
witness, which was unchartered territory prior to this decision.

C. The Rationale

In creating this new rule in Crawford, the Court examined an extensive
American and British practice of the Confrontation right in order to determine
the proper function of the Confrontation Clause and hearsay in the present
day. In considering the history of the Confrontation right in both America
and the United Kingdom before 1791, the Court determined that "the
principal evil at which the Confrontation Clause was directed was the civil-
law mode of criminal procedure, and particularly its use of ex parte
examinations as evidence against the accused."
Next, the Court noted that the historical record compels a second proposition: "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." In *Crawford*, the defendant never had an opportunity to cross-examine his wife; thus, the admission of her tape-recorded interrogation without cross-examination violated Crawford’s Sixth Amendment right.

Finally, the Court determined that the *Roberts* two-pronged approach of necessity and reliability is too malleable and therefore inadequate to protect the Confrontation right. First, the *Roberts* analysis is too broad because “[i]t applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony.” In addition, the *Roberts* test is also too narrow because “[i]t admits statements that do consist of *ex parte* testimony upon a mere finding of reliability.” Thus, defendants get too much protection from hearsay when the testimony is not *ex parte* and receive too little when the testimony is *ex parte*. The Court’s new approach established by *Crawford* provides more blanket protection for defendants than did the *Roberts* approach.

IV. TESTIMONIAL VERSUS NON-TESTIMONIAL STATEMENTS AFTER *CRAWFORD*

In abandoning the *Roberts* test, the *Crawford* Court analyzed the definition of testimony and concluded that testimonial statements include extrajudicial statements such as affidavits, depositions, prior testimony, confessions, and statements during police interrogations that occur in a criminal adjudication. The Court stressed that the difference is that the

79. *Id.* at 53-54.
80. *Id.* at 66-68.
81. *Id.* at 67-68.
82. *Id.* at 60.
84. *Crawford*, 541 U.S. at 50-51.
85. The *Crawford* court did not specifically address whether or not its holding applies to civil or quasi-criminal adjudications, such as parole, probation, sexual predator commitment, civil commitment, or juvenile proceedings. Moise, *supra* note 23, at 11. The *Crawford* court held only that its decision applies to criminal proceedings. *See Crawford*, 541 U.S. 36.

Technically, civil litigants do enjoy Fourteenth Amendment Due Process rights. *See* Capitol Mortgage Bankers, Inc. v. Cuomo, 222 F.3d 151, 155-56 (4th Cir. 2000). However, given the Sixth Amendment’s history and the *Crawford* court’s discussion of only criminal proceedings, it seems unlikely that *Crawford* will have any significant effect on most civil proceedings. Moise, *supra* note 23, at 11.
formal statement an accuser might make to government officials is testimonial, whereas the casual remark of a person to an acquaintance is non-testimonial. The Court, however, did not conclusively define all hearsay that is considered testimonial. In this next section, this Note explores the definitions of "testimonial" and "non-testimonial" after Crawford.

A. Testimonial Hearsay

Legal scholars see different approaches to deeming certain statements testimonial. Justice Scalia, writing for the majority in Crawford, cited favorably to two leading scholars in the area of testimonial declarations—Professor Akhil Reed Amar of Yale Law School and Professor Richard D. Friedman of Michigan Law School.

Amar defines testimonial statements as statements "'prepared by the government for in court use and . . . then used in court.'" Furthermore, Amar's approach includes "'government prepared affidavits, depositions, [and] videotapes,' as well as police-station confessions, which have 'formal

While the Confrontation right does apply to most quasi-criminal proceedings such as probation, parole, and sexual predator commitments, the Confrontation right is usually applicable in only a watered-down version under, not the Sixth Amendment, but the Fourteenth Amendment's Due Process Clause. Morrissey v. Brewer, 408 U.S. 471 (1972); Moise, supra note 23, at 11. In United States v. Barraza, 318 F. Supp. 2d 1031 (S.D. Cal. 2004), the court held that Crawford applied only to Sixth Amendment rights and was therefore inapplicable to quasi-criminal proceedings such as a supervised release revocation hearing. Likewise, in Smart v. State, 153 S.W.2d 118 (Tex. Crim. App. 2004), the court held that a community supervision revocation is not a stage of a criminal prosecution and Crawford is therefore inapplicable. Id. at 120; see Smart v. State, Beaumont Court of Appeals, 20 TX. LAW. 46 (Jan. 17, 2005). Similarly, in People v. Johnson, 18 Cal. Rptr. 3d 230 (Cal. Ct. App. 2004), the court held that the Sixth Amendment protections afforded in Crawford do not apply in a probation revocation proceeding. Criminal Practice; Defendants and Accused, Rights of, CAL. SUPREME CT. SERVICE, Oct. 8, 2004.

Juvenile proceedings are another quasi-criminal adjudicative process that does not afford the parties Confrontation rights. In an Illinois Appellate Court case, the court held that juvenile proceedings are civil, not criminal, in nature and that no Sixth Amendment Confrontation rights were therefore implicated. Civil Procedure—Hearsay; Trial Court Properly Considered Minor's Out-of-Court Statement in Case State Filed Against Parent Accused of Child Abuse, CHI. DAILY LAW BULL., Sept. 1, 2004.

86. Crawford, 541 U.S. at 50-51.
87. Id. at 66.
88. Id. at 61; see Paul Shechtman, Outside Counsel: Crawford and the Meaning of Testimonial, N.Y. LAW J., June 23, 2004, at 23; see also Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE, 125-131 (1997); Akhil Reed Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 GEO. L.J. 1045 (1998); Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 GEO. L.J. 1011 (1998); Richard D. Friedman & Bridget McCormack, Dial-in Testimony, 150 U. PA. L. REV. 1171 (2002); Professor Friedman was an author of an amicus brief for Crawford.

89. Shechtman, supra note 88, at 4 (quoting Amar).
indicia of testimony—response to precise questions, purportedly precise rendition or transcription or taping, signature and the like." In fact, Amar's approach "excludes all 'private accusations made out of court by one private person to another' from Confrontation Clause coverage."

On the other hand, Friedman defines testimonial hearsay more broadly, determining a statement is testimonial if "the declarant 'makes a statement [that] she anticipates . . . will be used in the prosecution or investigation of the crime.'"

The difference between Amar's approach and Friedman's approach is significant. Under Amar's approach, any statements made to a private citizen or that are functionally equivalent to testimony, whether they are dying declarations or 9-1-1 calls, are not testimonial and therefore not subject to the Crawford analysis. However, under Friedman's approach, a dying declaration made to a private citizen or a 9-1-1 call detailing the events of a crime would certainly be testimonial and therefore inadmissible without producing the declarant at trial. Depending on which approach the lower courts and eventually perhaps the Supreme Court adopt in future cases will significantly alter the future strength of Confrontation Clause's available protection.

In the lower courts, testimonial hearsay necessarily includes those few examples iterated by the U.S. Supreme Court. However, many lower courts have struggled to define other forms of testimonial hearsay.

Several federal appellate courts have tried to hone in on the exact definition of testimonial hearsay. In United States v. McClain, the Second Circuit noted that testimonial hearsay includes "prior testimony at a preliminary hearing or other court proceeding, as well as confessions and responses made during police interrogations[,]" and most definitely a "plea allocution by a co-conspirator." Likewise, in United States v. Lee, the court interprets testimonial hearsay to include "plea allocations, grand jury testimony, prior trial testimony, preliminary hearing testimony, and police interrogations" as testimonial statements. While lower courts continue to struggle with the definition of testimonial hearsay, some courts have also

90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. 377 F.3d 219 (2d Cir. 2004).
96. Id. at 221-22.
97. 374 F.3d 637 (8th Cir. 2004).
98. Id. at 644.
found problems in the realm of non-testimonial hearsay. The following section explains non-testimonial hearsay and its status after *Crawford*.

**B. Non-Testimonial Hearsay**

Some critics argue that it may be easier to define what is non-testimonial and therefore admissible (after undergoing a *Roberts* analysis) rather than what is testimonial (and subject to the *Crawford* analysis). For instance, legal scholar Thomas J. Reed describes a non-testimonial out-of-court statement as "one that does not directly prove the identity of the accused or an element of the offense." 99 Another critic, Robert P. Mosteller, posits that the "indicator [between testimonial and non-testimonial statements] is whether the statement is made for the purpose of accusing, or whether it is made for another purpose associated with other ordinary human activities." 100

Thus, according to many scholars, whether or not a statement is testimonial depends in large part on its relevance. 101 An out-of-court statement that directly proves the identity of a defendant or an element of the offense is testimonial. 102 On the other hand, if an out-of-court statement merely provides circumstantial proof of the identity of a defendant or an element of an offense, it is deemed non-testimonial. 103

Lower courts have also interpreted testimonial hearsay in different ways. For example, the Alabama Court of Criminal Appeals held that a coroner's protocol report showing the cause of death of a homicide victim was not testimonial. 104 Likewise, in a New York City Criminal Court decision, *People v. Mackey*, 105 the court deemed a witness’s excited utterance identifying a suspect to the police while she was in a police patrol van reporting a crime as non-testimonial. 106

Although the majority in *Crawford* has far from settled this controversy, lower courts have assumed that the *Roberts* analysis still applies to non-testimonial hearsay while the *Crawford* analysis addresses testimonial

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101. *Id*. at 549.
102. *Id*.
103. *Id*.
106. *Id*.
Once a statement has been deemed non-testimonial, the court must go through a Roberts analysis.\textsuperscript{108}

V. WHAT MAKES THE DEFENDANT’S OPPORTUNITY TO CROSS-EXAMINE THE DECLARANT ADEQUATE AND WHEN DOES IT MATTER?

The U.S. Supreme Court’s preference is that a witness testifies about his or her accusation against the defendant at trial. But how much cross-examination is enough? And sometimes, even when the witness is available but does not testify at trial, the witness’s prior statements are admitted. Although this is technically a violation of the Confrontation Clause, appellate courts presumably are able to uphold a conviction on harmless error grounds. This section explains the Supreme Court’s preference—live cross-examination; the limits on the adequacy of cross-examination; and the doctrine of harmless error.

The U.S. Supreme Court recognizes a “constitutional preference under the Confrontation Clause for present testimony” that directly addresses the accusation made against the defendant.\textsuperscript{109} In United States v. Owens,\textsuperscript{110} the Court explained that “[o]rdinarily a witness is regarded as ‘subject to cross-examination’ when he is placed on the stand [at trial], under oath, and responds willingly to questions.”\textsuperscript{111}

Furthermore, the Crawford Court preserved the holding of California v. Green\textsuperscript{112} that the Confrontation Clause is satisfied when the use of the prior statements of a witness are accompanied by that witness’s presence and cross-examination at trial.\textsuperscript{113} In Green, the Court stated, “[W]here the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem.”\textsuperscript{114} Similarly, in People v. Argomaniz-Ramirez,\textsuperscript{115} the Colorado Supreme Court ruled that videotaped testimony of witnesses was admissible because the witnesses were

\textsuperscript{107} See United States v. McClain, 377 F.3d 219, 221 n.1 (2d Cir. 2004); United States v. Saget, 377 F.3d 223 (2d Cir. 2004); but see United States v. Lee, 374 F.3d 637 (8th Cir. 2004).
\textsuperscript{108} Friedman, Adjusting, supra note 83, at 12.
\textsuperscript{109} Mosteller, supra note 100, at 580.
\textsuperscript{110} 484 U.S. 554 (1988); Mosteller, supra note 100, at 582.
\textsuperscript{111} Owens, 484 U.S. at 561; Mosteller, supra note 100, at 585.
\textsuperscript{112} 399 U.S. 149 (1970).
\textsuperscript{113} Id. at 162.
\textsuperscript{114} Id.
\textsuperscript{115} 102 P.3d 1015 (Colo. 2004).
scheduled to testify at trial and would be subjected to cross-examination.\textsuperscript{116}

However, the Court's determination of the adequacy of cross-examination lies in murkier waters.

Sometimes, the witness is clearly unavailable and the opportunity for cross-examination is clearly inadequate. In such situations as the self-incrimination privilege based on the Fifth Amendment, the marital privilege based on a state's rule of evidence, or significant judicial restrictions on cross-examination, a witness's statements may not be admitted because the witness is rendered unavailable for cross-examination.\textsuperscript{117}

Likewise, a witness's refusal to answer questions during direct examination makes him unavailable.\textsuperscript{118} On the other hand, mere evasiveness or loss of memory when testifying on the stand does not necessarily render the cross-examination of a witness inadequate.\textsuperscript{119}

Finally, courts may uphold a conviction even if hearsay has not been subjected to the crucible of cross-examination if that hearsay does affect the outcome of the cases.

Technically, the \textit{Crawford} Court was silent on the application of harmless error analysis to the Confrontation right,\textsuperscript{120} which lower courts have interpreted to mean that \textit{Crawford} leaves unchanged the rule of \textit{Delaware v. Van Arsdall},\textsuperscript{121} which held that a violation of the Confrontation right may be deemed harmless and therefore does not require reversal.\textsuperscript{122}

For example, in \textit{Lee}, the defendant contended that \textit{Crawford} overturned the "indicia of reliability" prong of \textit{Roberts} and that all non-testimonial hearsay must fall within a "firmly rooted" exception.\textsuperscript{123} Although the \textit{Lee} Court did erroneously allow hearsay testimony at trial without subjecting it to cross-examination, it deemed the error "harmless" because this error did not affect the outcome of the case.\textsuperscript{124} In other jurisdictions, courts have avoided use of the harmless error analysis until the Supreme Court rules more definitively.\textsuperscript{125}

\textsuperscript{116} Id. at 1018; \textit{Child-Witness Statement Out of Court is Admissible}, NAT'L L.J., Dec. 20, 2004, at 22.

\textsuperscript{117} Mosteller, \textit{supra} note 100, at 587.

\textsuperscript{118} Id.

\textsuperscript{119} Id. at 587-89.


\textsuperscript{121} 475 U.S. 673 (1986); Mosteller, \textit{supra} note 100, at 551.

\textsuperscript{122} \textit{Van Arsdall}, 475 U.S. at 684; Friedman, \textit{Adjusting}, \textit{supra} note 83, at 8; see \textit{Moody v. State}, 594 S.E.2d 350 (Ga. 2004).

\textsuperscript{123} United States v. Lee, 374 F.3d 637, 645 (8th Cir. 2004); Mosteller, \textit{supra} note 100, at 551.

\textsuperscript{124} \textit{Lee}, 374 F.3d at 645; Mosteller, \textit{supra} note 100, at 570.

INTERNALIZING CRAWFORD

Although the U.S. Supreme Court did not definitively resolve the issue, the rule of thumb is that trial cross-examination of a declarant is required to satisfy the Confrontation Clause.126

VI. CATEGORIES OF HEARSAY AND THEIR CURRENT STATUS POST-CRAWFORD

In this section, this Note explains the national trends in regard to the Federal Rules of Evidence, particularly, and what affect Crawford has on exceptions to the hearsay rule.

Pre-Crawford, hearsay evidence was admitted during a trial if it had some indicia of reliability.127 One way a prosecutor could prove reliability was by showing that the hearsay evidence fit into a “firmly rooted” hearsay exception.128 In this section, this Note delves into many categories of hearsay exceptions that were once admitted in trial pre-Crawford and their status as admissible hearsay post-Crawford.129 The next few sections explain the national trends with regard to hearsay exceptions—which hearsay exceptions are likely to no longer be admissible under the Confrontation Clause; which exceptions are left in limbo until the U.S. Supreme Court rules on them; and which exceptions stand comfortably outside the reach of the Confrontation Clause protections.

126. See id.

127. Ohio v. Roberts, 448 U.S. 56, 65; Chase, supra note 27, at 1044.

128. Roberts, 448 U.S. at 65-66; Chase, supra note 27, at 1051-52.

129. Most lower courts have held that Crawford does not apply retroactively; therefore, this Note focuses on what exceptions are currently being litigated. However, some critics argue that Crawford should apply retroactively because it is a “watershed” decision.

In Teague v. Lane, 489 U.S. 288 (1989), the Supreme Court held that new procedural rulings were not applicable in the collateral review of convictions that became final before those rulings were announced. Id. at 311. However, the Teague court also held that there are two exceptions to this rule: (1) “a new rule should be applied retroactively if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,’” and (2) new “watershed rules of criminal procedure” that are necessary to the fundamental fairness of the criminal proceeding should be also applied retroactively. Id.

Under the second exception, the Second U.S. Circuit Court of Appeals decided Mungo v. Duncan, 277 F. Supp. 2d 176 (E.D.N.Y. 2003), holding that the Crawford ruling is not a watershed rule under Teague and therefore does not apply retroactively. Decision of Interest: 2nd U.S. Circuit Court of Appeals; Crawford Ruling on Hearsay Not Retroactive; It Is Not a ‘Watershed’ Rule Under Teague Test, N.Y. L.J., Jan. 7, 2005, at 22.

But the story is not over yet. Some legal scholars believe that Crawford may apply under the Teague court’s second exception anyway: “There are numerous references in the majority opinion to the authors’ beliefs that cross-examination is a ‘bedrock’ principle of a fair trial and the only sure method of ensuring reliability.” Rene L. Valladares & Franny A. Forsman, Crawford v. Washington: The Confrontation Clause Gets Teeth, 12 NEV. LAW. 12, 16 (2004). It remains to be seen what position, if any, the Supreme Court will adopt on the Crawford decision’s retroactivity.
A. Common Hearsay Exceptions Likely to Be Abandoned

Although *Crawford* did not answer many questions about the ways in which the decision will impact hearsay, the following hearsay exceptions will likely no longer be recognized as valid hearsay exceptions in criminal cases under the paradigm of *Crawford*.

1. Child Witness Statements

Undoubtedly, a problem area of testimonial hearsay arises in the circumstances of child witnesses. Before *Crawford*, children, particularly in abuse cases, did not testify at trial or testified via video conferencing. But with *Crawford*, the game has changed, although it is uncertain what the new understanding of a child witness’s obligation should be under the Confrontation Clause.

Presumably, the leading case in the area of child witnesses, *Maryland v. Craig*, is preserved. The *Craig* court held that “upon a particularized showing that a child witness would be traumatized by having to testify in the presence of the accused, the child may testify in another room with the judge and counsel present by the jury and the accused connected electronically.” *Craig* requires the trial court to find “emotional distress suffered by the child witness in the presence of the defendant is more than de minimis.”

One critic opines that *Crawford* and *Craig* are able to co-exist peacefully, because while *Crawford* determines when confrontation is required, *Craig* addresses what procedures confrontation requires. However, not all critics agree. While many states have statutes allowing children’s testimony by closed circuit television, these statutes may not adequately preserve a defendant’s right to confront witnesses against him. Furthermore, it is difficult to determine which statements by child witnesses are testimonial, or made in anticipation of litigation. For

instance, a child might not understand that her "statement, if accepted, is likely to lead to adverse consequences for the person accused."\textsuperscript{136} In addition, to be testimonial, a child must be able to foresee that the statement he or she makes not only may have consequences for the accuser but may be used in a court of law.\textsuperscript{139}

In order for a child witness to understand the adverse consequences of his or her testimony against the defendant, the child must possess a certain level of maturity and foresight. In practice, though, assessing a child’s maturity level and foresight is difficult. A child’s statement to his mother, for instance, might be plausibly seen by the child as either (1) private and therefore having no possibility of being passed on or acted upon or (2) active and therefore encouraging the mother to punish the accuser or act in some way upon the statement.\textsuperscript{140}

In addition, maturity and foresight may not be reasonable criteria.\textsuperscript{141} Some legal scholars suggest that the only appropriate guide to determine whether a statement is testimonial is the perspective of a reasonable adult.\textsuperscript{142} Under such a standard, \textit{Craig} would undoubtedly fall.

The current path of Supreme Court jurisprudence is one that seems unfavorable to preserving \textit{Craig}.\textsuperscript{143} In many lower courts, all child witnesses are required to testify live and in person in order to secure the admissibility of their out-of-court statements and uphold the Confrontation right for defendants.\textsuperscript{144}

2. Domestic Violence Victims’ Statements

A close counterpart to children’s testimony is that of victim witnesses testifying in domestic abuse cases. Both child witnesses and domestic violence victim witnesses are likely to feel particularly intimidated by the defendants they accuse of abuse if those accusations are indeed truthful.

\textsuperscript{136} \textit{Id.} at 10.
\textsuperscript{139} \textit{Id.} at 10; see also Sherman J. Clark, \textit{An Accuser-Obligation Approach to the Confrontation Clause}, 81 NEB. L. REV. 1258, 1282 (2003).
\textsuperscript{140} Friedman, \textit{Adjusting}, supra note 83, at 11.
\textsuperscript{141} \textit{Id.} at 11.
Before *Crawford*, courts often admitted reliable testimony from domestic violence victims even when the witnesses were not available to testify at trial under hearsay exceptions. However, *Crawford* has changed the admissibility of domestic violence victim witness statements.

After *Crawford*, courts will likely no longer admit a victim’s statements made to the police if the victim refuses to testify at trial.\(^{145}\) For instance, in a California court case, *People v. Adams*,\(^{146}\) Adams cut the face of his pregnant girlfriend with a drinking glass and threatened her life.\(^{147}\) Adams was subsequently charged with assault and uttering a threat.\(^{148}\) His girlfriend, the victim, was “willfully unavailable” at trial.\(^{149}\) Although her statements were allowed and Adams was convicted, his conviction was later overturned as a violation of his Confrontation right.\(^{150}\)

Lower courts continue to interpret domestic violence victim’s statements similarly, rarely allowing the “excited utterance” hearsay exception to swallow testimonial statements that the victim witness later recants. In *People v. Zarazua*,\(^{151}\) a domestic violence victim allowed her testimony to be videotaped by a police officer approximately one and a half hours after an alleged rape.\(^{152}\) At trial, the court admitted the videotape even though the victim recanted her testimony and refused to testify in court.\(^{153}\) The California appellate court overturned the defendant’s conviction because his Confrontation right was violated by admitting the videotape.\(^{154}\)

After *Crawford*, domestic violence victims will be required to testify at trial in order to allow any prior, un-cross-examined testimony to be admitted.

**B. Hearsay Exceptions Left in the Gray Area**

The U.S. Supreme Court left most hearsay exceptions to be decided by the lower courts. The following is a sampling of the most hotly contested areas of hearsay exceptions and their current status. These exceptions, for the most part, remain in limbo throughout the nation.

\(^{145}\) Adomeit, *supra* note 130, at 4.
\(^{146}\) 16 Cal. Rptr. 3d 237 (Cal. Ct. App. 2004).
\(^{147}\) *Id.* at 239.
\(^{148}\) *Id.* at 238.
\(^{149}\) *Id.* at 240.
\(^{150}\) *Id.* at 238.
\(^{152}\) Mosteller, *supra* note 100, at 534.
\(^{153}\) *Id.*
\(^{154}\) *Id.*
1. Co-Conspirators’ Statements

Before Crawford, the co-conspirator exemption to the hearsay rule allowed the statements of co-conspirators to be admitted at trial even when those co-conspirators were unavailable to testify. Although the Crawford Court blanketly deemed conspirators’ statements to be non-testimonial and thus admissible, this is difficult to assure in practice.\textsuperscript{155} The Crawford Court noted that co-conspirator statements are those made “in furtherance of a conspiracy.”\textsuperscript{156} Because co-conspirator statements are similar to and usually based upon prior statements of the defendant or the defendant’s agent,\textsuperscript{157} these statements continue to be admitted under a hearsay exception (after the court finds the Roberts test of necessity and reliability is satisfied).\textsuperscript{158}

A co-conspirator’s statements to a confidential informant,\textsuperscript{159} to family members,\textsuperscript{160} and to acquaintances,\textsuperscript{161} are non-testimonial and therefore admissible.\textsuperscript{162} In United States v. Saget, the court determined that hearsay is testimonial if the declarant is reasonably aware or expects that his or her testimony may later be used at trial.\textsuperscript{163} Thus, the Saget court concluded that “a declarant’s statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of Crawford.”\textsuperscript{164} Likewise, in United States v. Lee, a co-conspirator’s

\textsuperscript{155} Reed, supra note 99, at 225.
\textsuperscript{157} Steven M. Biskupic, Hearsay and the Confrontation Clause, 77 WIS. LAW. 16, 18 (2004); see Crawford, 541 U.S. at 73-74 (Rehnquist, C.J., dissenting).
\textsuperscript{158} In the terrorism context, Crawford also has a potentially significant application. The Confrontation right as interpreted in Crawford may apply in the following way: “(1) it can dramatically restrict the type of evidence that the government can introduce against a defendant-detainee; (2) it can preclude the use of secret, ex parte evidence and proceedings; (3) it can, for detainees subject to military commissions, provide an independent, normative doctrinal foundation for the application of Confrontation Clause principles regardless whether the United States Constitution applies to a particular proceeding; and (4) it can provide a rationale for obtaining exculpatory information from persons in U.S. custody (but who are not available as witnesses), without also risking admission of inculpatory statements from those persons.” Joshua L. Dratel, The Impact of Crawford v. Washington on Terrorism Prosecutions, 28 CHAMPION 19 (2004). Although not within the scope of this Article, the Crawford decision’s implications on terrorism may significantly alter the way in which federal prosecutors go about pitting suspects against each other in order to elicit testimony. See id.
\textsuperscript{159} United States v. Saget, 377 F.3d 223, 225 (2d Cir. 2004).
\textsuperscript{160} United States v. Lee, 374 F.3d 637, 644 (8th Cir. 2004).
\textsuperscript{161} United States v. Manfre, 368 F.3d 838, 838 n.1 (8th Cir. 2004).
\textsuperscript{162} See Friedman, Adjusting, supra note 83, at 7-8.
\textsuperscript{163} Saget, 377 F.3d at 231.
\textsuperscript{164} Id. at 229.
statements to his brother and mother were not testimonial. But co-conspirator statements can be testimonial in certain circumstances and therefore inadmissible without the declarant testifying at trial. For instance, an accomplice’s redacted confession to police is testimonial and thus inadmissible. In addition, co-conspirator’s identification of a third person as a member of the conspiracy is deemed testimonial and inadmissible without the declarant testifying at trial. Furthermore, a co-conspirator’s statement that “directly proves another conspirator committed an act in furtherance of the conspiracy” is testimonial. Finally, “even if the conspirator were available as a witness because he was offered immunity from prosecution, the ‘testimonial’ statements would still be inadmissible.”

Therefore, while most co-conspirator statements are non-testimonial and therefore admissible (after going through Roberts analysis), a blanket assertion about the admissibility of co-conspirators’ statements seems impossible at this point. The U.S. Supreme Court must first give a working definition of testimonial.

2. Business Records

Under Crawford, business records are a hearsay exception that does not involve testimonial evidence and thus does not require the Sixth Amendment right of Confrontation. The Court’s reference to business records may lend “support to other existing hearsay exceptions on prior writings or recordings, such as recorded recollections, medical records, and public documents.”

In People v. Johnson, the California Supreme Court held that a laboratory report does not require the lab technician’s presence in court and testimony in order to be admitted. The lab report, the court held, is not in fact hearsay: “[a] laboratory report does not ‘bear testimony,’ or function as the
equivalent of in-court testimony." Because the laboratory report was not a substitute for live testimony, the court determined it was non-testimonial and therefore admissible under a Roberts analysis. Nevertheless, some critics believe that laboratory reports in criminal cases generally should be considered testimonial.

3. 9-1-1 Calls

Before Crawford, 9-1-1 calls were usually admissible because they held sufficient indicia of trustworthiness, which satisfied the reliability prong of the Roberts analysis. As long as the witness was unavailable, the 9-1-1 call testimony was usually admitted under this firmly rooted hearsay exception. Courts reasoned that people calling for help were not testifying, but merely trying to save their own lives.

Post-Crawford, 9-1-1 calls have been sometimes still held non-testimonial because these calls are cries for help rather than an avenue to set the scene for litigation. In Moscat, the court explained the reasoning for allowing 9-1-1 calls as non-testimonial evidence during the trial: "Typically, a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a ‘witness’ in future legal proceedings; she is usually trying simply to save her own life."

While in some cases a 9-1-1 caller is simply trying to get medical attention, not all cases repeat this scenario. In some instances, a caller’s motives may be to trigger the investigative and prosecutorial functions. Still, other callers may have both objectives—both medical attention and future criminal litigation—in mind when they place their calls and therefore may have “planned” these emergency calls. For example, in State v. Davis, the 9-1-1 caller reported to the operator that she had been beaten in her home by a man whom she had a restraining order against and that he had then left her house. Although she did not testify at trial, the caller’s 9-1-1

174. Criminal Practice; Defendants and Accused, Rights of, supra note 85.
175. Id.
176. See Friedman, Adjusting, supra note 83, at 11.
178. Id. at 880; Friedman, Adjusting, supra note 83, at 10.
179. Friedman, Adjusting, supra note 83, at 8.
180. Id.
182. Davis, 64 P.3d at 663; Friedman, Adjusting, supra note 83, at 10.
tape was admitted into evidence.\textsuperscript{183}

On the other hand, some courts will no longer admit such 9-1-1 testimony after \textit{Crawford}.\textsuperscript{184} In \textit{People v. Cortes},\textsuperscript{185} a New York appellate court held that 9-1-1 calls that "report a crime" are testimonial for confrontation purposes.\textsuperscript{186}

While a case-by-case approach seems the only real framework that \textit{Crawford} has given in the realm of 9-1-1 calls, Professors Friedman and Bridget McCormack suggest the following approach to 9-1-1 calls:

To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the truth of what they assert. If the contents of the call are probative on some ground other than to prove the truth of the caller's report of what has happened, then admissibility should be limited to such other ground. To the extent that the contents of the call are significant only as the caller's report of what has happened, such a report usually should be considered testimonial.\textsuperscript{187}

Despite Friedman's suggested framework, lower courts usually admit 9-1-1 calls only if they are in the context of getting immediate emergency help.

4. Excited Utterances

Excited utterances are related to 9-1-1 calls in that courts pre-\textit{Crawford} usually regarded a "spontaneous" statement as inherently reliable because the declarant had no opportunity to consider his or her outburst and was merely

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\textsuperscript{183} Davis, 64 P.3d at 667; Friedman, \textit{Adjusting}, \textit{supra} note 83, at 10.
\textsuperscript{184} People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004); Friedman, \textit{Adjusting}, \textit{supra} note 83, at 10.
\textsuperscript{185} Cortes, 781 N.Y.S.2d at 402; Friedman, \textit{Adjusting}, \textit{supra} note 83, at 10.
\textsuperscript{186} Cortes, 781 N.Y.S.2d at 402-03; Friedman, \textit{Adjusting}, \textit{supra} note 83, at 10.
\textsuperscript{187} Friedman & McCormack, \textit{supra} note 88, at 1243 (reprinted in Friedman, \textit{Adjusting}, \textit{supra} note 83, at 10).
\end{flushleft}
reacting to a situation. An excited utterance could be given to law enforcement, medical providers, or common citizens and still be admitted in court as reliable statements.

Post-Crawford, excited utterances are still admitted, although it is often difficult to draw a bright line between a spontaneous statement to the police and an interrogation by the police. Courts throughout the country have held that responses to police during a preliminary field investigation are non-testimonial statements under Crawford.188 However, answers to direct investigatory questions by police are usually considered testimonial.189

For example, in People v. Mackey,190 a New York trial court decision, the victim waived down a police van; the victim went inside the van and told the police her boyfriend had beaten her.191 As the victim was describing her attacker, the boyfriend passed in sight of the van; the victim yelled, “[T]here he goes!”192 The Mackey court held that these statements were non-testimonial and therefore admissible under the “excited utterance” hearsay exception.193

Generally, excited utterances are admitted as long as they do not seem to be uttered with litigation in mind or in response to direct investigatory questions by police, which a reasonable person would believe to be made in anticipation of litigation.

5. Where 9-1-1 Calls and Excited Utterances Overlap: A Supreme Solution in Sight?

On October 31, 2005, the U.S. Supreme Court granted certiorari in two cases,194 Davis v. Washington195 and Hammon v. Indiana.196 Davis was referenced in the preceding section of this Note under the admissibility of 9-1-1 calls; the case of Hammon “involves accusatory statements made to a responding officer” that were admitted as an excited utterance.197 In both

189. Id.
190. Id.
191. Id.
192. Id.
193. Id.
197. Friedman, Cert Granted, supra note 194.
cases, "the state supreme courts held that the statements at issue were non-testimonial" and convicted both defendants.\textsuperscript{198} The arguments for both cases will occur together in the spring of 2006.\textsuperscript{199} These cases give the Supreme Court the opportunity to address the definition of testimonial (at least in the context of 9-1-1 calls and excited utterance).

In \textit{Davis}, the alleged domestic violence victim called 9-1-1 in February 2001 and said that someone had just beaten her.\textsuperscript{200} The victim remained on the line; she responded to the questions of the 9-1-1 operator about the alleged crime and identified Adrian Davis (who had already left the scene) as the perpetrator.\textsuperscript{201} When police arrived, they noticed fresh injuries on the victim's forearm and face.\textsuperscript{202}

At trial, the victim was not called to testify.\textsuperscript{203} The 9-1-1 tape was admitted, however, and was the only evidence that identified Davis as the perpetrator.\textsuperscript{204}

The Washington Supreme Court held that the victim's statement was not testimonial.\textsuperscript{205} The majority's reasoning was that she had called 9-1-1 because she was in immediate danger, not to assist police in an investigation.\textsuperscript{206}

In \textit{Hammon}, police responded to a domestic abuse call from the home of Hershel and Amy Hammon.\textsuperscript{207} When the police arrived at the home, Amy denied any problem; in another room, Hershel told police there had been only an argument and things were now fine.\textsuperscript{208}

Later at the scene, Amy responded to questions about the incident and told officers that Hershel had punched her twice in the chest and thrown her to the ground.\textsuperscript{209} Amy then filled out a form affidavit, which laid out statutory

\textsuperscript{198} Id.; see also \textit{Hammon}, 829 N.E.2d 444; \textit{Davis}, 111 P.3d 844; Friedman, \textit{Cert Granted}, supra note 194.

\textsuperscript{199} Friedman, \textit{Cert Granted}, supra note 194.


\textsuperscript{201} \textit{Davis}, 111 P.3d at 847; Post, supra note 200; Friedman, \textit{Cert Granted}, supra note 194.

\textsuperscript{202} \textit{Davis}, 111 P.3d at 847; Post, supra note 200; Friedman, \textit{Cert Granted}, supra note 194.

\textsuperscript{203} \textit{Davis}, 111 P.3d at 847; Post, supra note 200; Friedman, \textit{Cert Granted}, supra note 194.

\textsuperscript{204} \textit{Davis}, 111 P.3d at 851; Post, supra note 200; Friedman, \textit{Cert Granted}, supra note 194.

\textsuperscript{205} \textit{Davis}, 111 P.3d at 851; Post, supra note 200; Friedman, \textit{Cert Granted}, supra note 194.

\textsuperscript{206} \textit{Hammon v. State}, 829 N.E.2d 444, 446 (Ind. 2005); Post, supra note 200; Friedman, \textit{Cert Granted}, supra note 194.

\textsuperscript{207} \textit{Hammon}, 829 N.E.2d at 446-47; Post, supra note 200; Friedman, \textit{Cert Granted}, supra note 194.

\textsuperscript{208} \textit{Hammon}, 829 N.E.2d at 446-47; Post, supra note 200; Friedman, \textit{Cert Granted}, supra note 194.

\textsuperscript{209} \textit{Hammon}, 829 N.E.2d at 447; Post, supra note 200; Friedman, \textit{Cert Granted}, supra note 194.
battery allegations, and wrote a specific description of the incident. The affidavit form indicated that the investigating officer would use the affidavit to establish probable cause for an arrest. Hershel was charged with battery.

At the trial, Amy was subpoenaed but did not appear. The judge allowed the officers to testify to Amy’s statements as an excited utterance exception to the hearsay rule and admitted Amy’s affidavit as a present sense impression exception to the hearsay rule. Hershel was convicted.

The U.S. Supreme Court will decide whether the state supreme courts adequately reasoned these two cases in the spring of 2006.

C. Hearsay Exceptions Likely to Remain Unchanged

While the Supreme Court has not ruled on many hearsay exceptions, some exceptions comfortably sit under both the limited Roberts analysis and the Crawford analysis. The following discussion explains the hearsay exceptions that are likely to remain unchanged after Crawford.

1. Statements Resulting from Police Interrogations

Under Crawford, in most jurisdictions, police questioning is generally considered testimonial, but must be determined on a case-by-case basis. In Crawford, the court noted that “structured police questioning qualifies [as testimonial interrogation] under any conceivable definition.” This hearsay exception is likely to remain unchanged—any statement made to a government agent in anticipation of litigation will be considered testimonial and thus subject to the Confrontation Clause.

However, initial investigatory questioning has been considered non-
testimonial in some jurisdictions, such as Indiana in *State v. Hammon*.

The rule of thumb, by which most jurisdictions abide, is that statements in the context of 9-1-1 calls and police investigation should be adjudged testimonial on a case-by-case basis.

For instance, in *Commonwealth v. Gonsalves*, an alleged domestic violence victim made statements at the scene. The court held that "questioning by law enforcement agents, whether police, prosecutors, or others acting directly on their behalf, other than to secure a volatile scene or to establish the need for or provide medical care, is interrogation in the colloquial sense," and was thus testimonial under *Crawford*. The court noted that interrogation includes "'investigatory interrogation,' such as preliminary fact gathering and assessment [of] whether a crime has taken place." The court added that a statement made in response to "questioning by law enforcement agents to secure a volatile scene or establish the need for or provide medical care" is not necessarily non-testimonial but rather should be determined through a case-by-case inquiry as to "whether a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting the crime."  

2. Statements Made in the Course of Medical Treatment

While statements to police as part of an interrogation are testimonial, generally, statements made to a medical examiner are generally non-testimonial. The reason for admitting statements made for purposes of medical treatment is that lying would provide no advantage to the declarant; a declarant's only interest, at that moment, is receiving appropriate medical attention.

218. 829 N.E.2d 444. In this case, the alleged victim of domestic violence responded to initial investigatory questions posed to her by the police. *Id.* at 447. The victim did not testify at trial, but her statements to the police were admitted as non-testimonial hearsay. *Id.* Hammon was subsequently convicted. *Id.* at 447.


220. 833 N.E.2d 549 (Mass. 2005).

221. *Id.* at 552-53.


223. *Gonsalves,* 833 N.E.2d at 556; *see also* Friedman, *Fresh Accusations,* supra note 222.


In *State v. Castilla*, a Washington appellate court decision, a rape victim's statements for purposes of medical treatment that she had been touched sexually were non-testimonial hearsay statements and therefore admissible without the declarant testifying at trial (after undergoing the *Roberts* analysis). In this case, it appears that this exception is unusually clear-cut, regardless of the *Crawford* decision.

Because most statements made to medical providers are usually confidential and made without litigation in mind, courts generally allow these statements as non-testimonial hearsay. The *Roberts* analysis is then applied to non-testimonial hearsay to determine its necessity and reliability.

3. Expert Testimony

Pre-*Crawford*, an expert may testify in court to his or her opinion and may base that opinion, at least in part, upon inadmissible hearsay statements. Sometimes, "though a statement made to the expert might appear to be testimonial in nature, because made in anticipation of prosecutorial use, the prosecution will argue that the statement is not being offered for the truth of what it asserts but only as a basis for the expert’s opinion." *Crawford* preserves the rule that hearsay in support of an expert’s opinion is generally admissible because it is not offered for the truth of the matter asserted. Thus, the expert’s opinion and the hearsay upon which it is based should be admissible at trial under *Crawford* as well.

However, some courts disagree. In *People v. Thomas*, Melvin Thomas was charged with participating in a criminal street gang. A deputy sheriff testified as an expert on gangs. The deputy sheriff testified that Thomas was a member of a gang called E.Y.C. based upon various sources, including

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227. *Castilla*, 87 P.3d at 1215; Chase, *supra* note 27, at 1053.
230. FED. R. EVID. 703.
232. Id.
233. Id.
236. *Thomas*, 30 Cal. Rptr. 3d at 583; see also Friedman, *The Expert Opinion, supra* note 231.
otherwise inadmissible hearsay sources. The court held that this testimony was admissible and convicted Thomas.

On the other hand, on December 20, 2005, the New York Court of Appeals, the highest court in the state, issued a decision with the opposite result in People v. Goldstein. In Goldstein, the defendant allegedly pushed a woman he did not know to her death in front of an approaching subway train. Goldstein raised a defense of insanity; the State responded by presenting the testimony of a forensic psychiatrist. This psychiatrist testified that in her opinion, Goldstein was sane at the time; the psychiatrist substantially relied upon otherwise inadmissible hearsay statements to arrive at this conclusion.

The court held that the Confrontation Clause required exclusion of those inadmissible hearsay statements. In so doing, the court rejected the argument that the statements were not offered for the truth of what they asserted but only in support of the psychiatrist's opinion: The court reasoned, "[T]he statements provided no support for the [psychiatrist's] opinion unless they were true. The court opined that in this instance, "The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful . . .".

The court also held that the statement was testimonial because the psychiatrist was hired by the state to testify, and the court inferred that the interviewees should reasonably have understood that she was involved in trial preparation. Finally, the court concluded that the error of admitting the psychiatrist's testimony and the hearsay statements to support the

237. Thomas, 30 Cal. Rptr. 3d at 584-85; see also Friedman, The Expert Opinion, supra note 231.

238. Thomas, 30 Cal. Rptr. 3d at 587; see also Friedman, The Expert Opinion, supra note 231.


240. Goldstein, 2005 N.Y. LEXIS 3389, at *1; Friedman, Expertise End Run, supra note 239.

241. Goldstein, 2005 N.Y. LEXIS 3389, at *1; Friedman, Expertise End Run, supra note 239.

242. Goldstein, 2005 N.Y. LEXIS 3389, at *2; Friedman, Expertise End Run, supra note 239.

243. Goldstein, 2005 N.Y. LEXIS 3389, at *21-22; Friedman, Expertise End Run, supra note 239.

244. Goldstein, 2005 N.Y. LEXIS 3389, at *12-13; Friedman, Expertise End Run, supra note 239.

245. See Goldstein, 2005 N.Y. LEXIS 3389, at *13; Friedman, Expertise End Run, supra note 239.

246. See Goldstein, 2005 N.Y. LEXIS 3389, at *15; Friedman, Expertise End Run, supra note 239.
psychiatrist's opinion was not harmless and reversed the conviction.\textsuperscript{247}

Thus, post-\textit{Crawford}, it is unclear whether an expert's testimony may be substantially based upon otherwise inadmissible hearsay evidence and when the Confrontation right is triggered. Most courts, however, still recognize that statements that are not offered for the truth of the matter asserted are admissible hearsay statements.

4. Dying Declarations

Pre-\textit{Crawford}, "dying declarations" were admitted in trial under a hearsay exception. Ostensibly, dying declarations likely still constitute an exception under \textit{Crawford}; however, some critics continue to discuss this hearsay exception as an area of possible change.\textsuperscript{248}

Although dying declarations are generally considered reliable because a dying person presumably has no reason to lie, some critics see dying declarations as a controversial area. Friedman suggests that a dying declaration should generally not be afforded a special exception under the hearsay rule.\textsuperscript{249} He explains that in the case of a dying declaration, "the purpose of the communication is presumably not merely to edify the listener, but rather to pass on to the authorities the victim's identification of the killer, and the understanding of both parties to the communication is that listener will play his or her role."\textsuperscript{250}

Regardless of Friedman's opinion, most courts admit testimony in the form of a dying declaration.\textsuperscript{251}

5. Forfeiture

Under the doctrine of forfeiture, a technically testimonial statement may be admitted because the accused forfeited the Confrontation right when he or she caused a witness's "unavailability."\textsuperscript{252} This section discusses a

\textsuperscript{247} \textit{Goldstein}, 2005 N.Y. LEXIS 3389, at *21-22; Friedman, \textit{Expertise End Run}, \textit{supra} note 239.

\textsuperscript{248} \textit{Crawford v. Washington}, 541 U.S. 36, 56 n.6 (2004); Friedman, \textit{Adjusting}, \textit{supra} note 83, at 9.

\textsuperscript{249} Friedman, \textit{Adjusting}, \textit{supra} note 83, at 9.

\textsuperscript{250} Id.

\textsuperscript{251} \textit{Crawford}, 541 U.S. at 56 n.6; \textit{see also} People v. Monterroso, 101 P.3d 956 (Cal. 2004); People v. Jiles, 122 Cal. App. 4th 504 (Cal. App. 2004); State v. Meeks, 88 P.3d 789 (Kan. 2004); State v. Martin, 695 N.W.2d 578 (Minn. 2005); Friedman, \textit{Adjusting}, \textit{supra} note 83, at 9.

\textsuperscript{252} \textit{Crawford} upholds the ruling in \textit{United States v. Owens}, 484 U.S. 554 (1988), which stated that the memory loss of a witness at trial regarding the accusation or underlying incident does not
defendant’s forfeiture of his or her Confrontation right in the event that he or she intentionally intimidated or harmed the declarant.

After *Crawford*, the forfeiture exception to hearsay statements likely still stands. One critic writes, “Although the facts in *Crawford* did not involve forfeiture by wrongdoing, the Court, in passing, made clear that when a criminal defendant wrongfully prevents witnesses from testifying, his conduct ‘extinguishes confrontation claims on essentially equitable grounds.’”  

This is not the whole story, however. Friedman suggests several pressing concerns:

If a witness is murdered shortly before he or she was scheduled to testify against the accused, what showing of the accused’s involvement does the prosecution have to make? . . . Is the mere fact that the accused benefited from the murder enough to raise a presumption at least that the accused acquiesced in it? . . . Suppose the wrongful act that allegedly rendered the witness unavailable is the same as the act with which the accused is charged. May it nevertheless cause a forfeiture of the confrontation right?

Friedman acknowledges that the *Crawford* Court did affirm a forfeiture exception to hearsay but did not address the questions he poses; nonetheless, Friedman offers a simple solution: “[I]f a defendant renders a witness unavailable by wrongful means, the accused cannot complain validly about the witness’s absence at trial.” Under the forfeiture exception to the hearsay rule, the testimony of a witness who was unavailable due to the defendant’s purposeful conduct will always be admitted.

While the U.S. Supreme Court has not ruled definitively on hearsay exceptions, lower courts have been busy interpreting the *Crawford* decision and applying the results to current cases. Only the future will resolve the gray areas of hearsay exceptions.

render that witness unavailable for cross-examination. *Id.* at 560-61. While forgetfulness, sickness, or evasive behavior will not render a witness “unavailable,” a witness’s complete refusal to answer questions can make him or her unavailable. Mosteller, *supra* note 100, at 586-87; *see also* Delaware *v.* Fensterer, 474 U.S. 15 (1985); Douglas *v.* Alabama, 380 U.S. 415 (1965).


255. *Id.*

256. *Id.*

257. *Post, supra* note 200.
VII. WISCONSIN AND THE CONFRONTATION CLAUSE

Wisconsin adheres to the Federal Rules of Evidence, codified in the Wisconsin Rules of Evidence at section 908 of the Wisconsin Statutes. Clearly, then, Crawford's significance extends directly to Wisconsin jurisprudence, and this section discusses the effect of Crawford on Wisconsin by explaining the case law that has emerged in Wisconsin since the Crawford decision and the changes that will likely happen to the evidentiary statutes.

A. The Old Rule in Wisconsin

Like the U.S. Supreme Court, Wisconsin courts have also determined the admissibility of hearsay testimony based upon a showing of the witness's unavailability and the reliability of the witness's statements. In Hickman, the court summarized the Wisconsin approach to hearsay and the Confrontation Clause:

The threshold question is whether the evidence fits with a recognized hearsay exception. If not, the evidence must be excluded. If so, the confrontation clause must be considered. There are two requisites to satisfaction of the confrontation right. First, the witness must be unavailable. Second, the evidence must bear some indicia of reliability. If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. This inference of reliability does not, however, make the evidence admissible per se. The trial court must still examine the case to determine whether there are unusual circumstances which may warrant exclusion of the evidence. If the evidence does not fall within a firmly rooted hearsay exception, it can be admitted only upon a showing of particularized guarantees of trustworthiness.

Like the federal approach, Wisconsin also followed the Roberts test of necessity and reliability. In the next section, this Article discusses how Crawford implicates Wisconsin case law.

259. 513 N.W.2d at 660 n.1.
B. Wisconsin Gets in the Game

Because Wisconsin has adopted the Federal Rules of Evidence and because the Sixth Amendment applies to the states through incorporation in the Fourteenth Amendment’s Due Process Clause, Wisconsin must also adhere to the Crawford decision. In the following sections, this Note discusses the preliminary decisions to have come from Wisconsin courts implicating Crawford.

1. A Wisconsin Case in Federal Court that Implicates Crawford

In a Wisconsin case decided ultimately on habeas corpus grounds in the federal district court, Murillo v. Frank, a Wisconsin appellate court was overruled based on Confrontation Clause analysis under Crawford.

In Murillo, an inmate claimed that his Confrontation rights were violated when the trial court admitted his brother’s un-cross-examined statement implicating him in a murder. Although his brother refused to testify at his trial, the police officer who originally had taken the brother’s statement concerning the murder testified at trial. The court admitted the statement under the social interest exception. Murillo was convicted, and the Wisconsin Court of Appeals upheld his conviction, although it noted that the “social interest exception” was not a firmly rooted hearsay exception. The Wisconsin Supreme Court denied review of the case.

The court held that the admission of the statement was not harmless error and that it did indeed violate Murillo’s Confrontation rights. Although the court held that Crawford does not apply retroactively and Murillo’s case was final before Crawford was decided, his conviction was still reversed. The court held that the brother’s testimony still violated Murillo’s Confrontation right because it did not fit into any firmly rooted hearsay exception recognized prior to Crawford.

260. 316 F. Supp. 2d 744 (E.D. Wis. 2004).
261. Id. at 746-47.
262. Id. at 747.
263. Id.
264. Id.
265. Id. at 748.
266. Id. at 756-57.
267. Id. at 749-50.
268. Id. at 757.
269. Id. at 755-56.
2. State v. Hale: The First Wisconsin State Decision to Implicate Crawford

In the first Wisconsin Supreme Court decision implicating Crawford, the court held that the testimony was inadmissible under Crawford but that the error was harmless. In State v. Hale, the court upheld a conviction for two counts of first-degree intentional homicide. Although the court held that un-cross-examined testimony in Hale violated the defendant’s Confrontation rights, the court found beyond a reasonable doubt that the error was harmless.

In a trial for his brother-in-law two months prior to the Hale trial, Hale’s brother-in-law, Jones, was convicted of first-degree double homicide, party to a crime, partly on the testimony of Hale’s longtime friend and supplier of the murder weapon, Sullivan. Sullivan was scheduled to testify at Hale’s trial two months later but was unavailable. The court admitted Sullivan’s testimony from Jones’ trial anyway because the court reasoned that Hale had similar interests to Jones in cross-examining Sullivan.

Although the State’s star witness was unable to identify Hale as the second gunman in the double homicide, the State presented a strong circumstantial case against Hale. Furthermore, Hale’s defense at trial consisted of admitting that Sullivan’s testimony about the murder weapon was true and invoking an alibi defense. On this basis, the court determined that although Hale’s right to Confrontation had been violated, the error was harmless and Hale would have been convicted anyway.

3. State v. Manuel and Excited Utterances

In State v. Manuel, the court deemed that Crawford was not applicable because the statement at issue was an excited utterance and thus non-testimonial. In Manuel, a man (Stamps) flagged down a car and watched the
defendant shoot the driver of the car. Stamps then told his girlfriend to take their kids to a hotel for a few days because he had witnessed Manuel shooting a man.

After Stamps was arrested, Stamps’ girlfriend gave a statement to police about what her boyfriend said he had witnessed. At trial, Stamps invoked his privilege against self-incrimination, and Stamps’ girlfriend claimed that she did not remember the statement when she was called to testify. The court allowed the police officer who had taken the girlfriend’s testimony to testify at trial; the court held this statement was admissible as a statement of “recent perception” under section 908.045(2) of the Wisconsin Statutes. Manuel was convicted.

The Wisconsin Court of Appeals upheld Manuel’s conviction because Stamps’ “statement to his girlfriend [was made] in good faith and not in contemplation of pending or anticipated litigation.” Furthermore, the court held that “the circumstances surrounding [the witness’s] statement to his girlfriend render it sufficiently reliable that cross-examining ... [the witness] would be of ‘marginal utility.’”

The Wisconsin Supreme Court affirmed this decision, reasoning that Stamps’ statements to his girlfriend were not testimonial under Crawford. Applying the Roberts analysis of necessity and reliability, the court found that while a statement of recent perception is not a firmly rooted hearsay exception, “Manuel’s confrontation rights were not violated because Stamps’ statements contain particularized guarantees of trustworthiness.” These guarantees of trustworthiness are that Stamps’ statements to his girlfriend were not made “in response to the instigation of a person engaged in investigating, litigating, or settling a claim;” the statements were made in

281. Id., ¶ 2-4, 275 Wis. 2d 146, ¶ 2-4, 685 N.W.2d 525, ¶ 2-4.
282. Id., ¶ 3, 275 Wis. 2d 146, ¶ 3, 685 N.W.2d 525, ¶ 3.
283. Id., ¶ 4, 275 Wis. 2d 146, ¶ 4, 685 N.W.2d 525, ¶ 4.
284. Id., ¶ 3-4, 275 Wis. 2d 146, ¶ 3-4, 685 N.W.2d 525, ¶ 3-4.
285. Id., ¶ 3, 275 Wis. 2d 146, ¶ 3, 685 N.W.2d 525, ¶ 3.
286. Id., ¶ 5, 275 Wis. 2d 146, ¶ 5, 685 N.W.2d 525, ¶ 5.
287. Id., ¶ 13, 275 Wis. 2d 146, ¶ 13, 685 N.W.2d 525, ¶ 13.
288. Id., ¶ 28, 275 Wis. 2d 146, ¶ 28, 685 N.W.2d 525, ¶ 28 (citations omitted).
289. Id., ¶ 3, 275 Wis. 2d 146, ¶ 3, 685 N.W.2d 525, ¶ 3. The Wisconsin Supreme Court recognized and adopted the three formulations of “testimonial” hearsay in Crawford: (1) “[e]x-parte in-court testimony or its functional equivalent”; (2) “[e]xtrajudicial statements ... contained in formalized testimonial materials”; and (3) “[s]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” State v. Manuel, 2005 WI 75, ¶ 37, 281 Wis. 2d 554, ¶ 37, 97 N.W.2d 811, ¶ 37 (quoting Crawford v. Washington, 541 U.S. 36, 51-52 (2004)).
290. Manuel, 2005 WI 75, ¶ 76, 281 Wis. 2d 554, ¶ 76, 697 N.W.2d 811, ¶ 76.
291. Id., ¶ 31, 281 Wis. 2d 554, ¶ 31, 697 N.W.2d 811, ¶ 31.
good faith;\textsuperscript{292} and the statements were not made in “contemplation of pending or anticipated litigation.”\textsuperscript{293}

4. \textit{State v. King} and Harmless Error

In \textit{State v King},\textsuperscript{294} King and his brother allegedly raped, beat, and robbed two women—Shelia J. and Chandra T.—on November 29, 2002, and December 7, 2002, respectively.\textsuperscript{295} King was convicted by a jury of “substantial battery of Shelia J. . . . and substantial battery and armed robbery of Chandra T.”\textsuperscript{296} Chandra T. testified at trial, but Shelia J. did not show up; Shelia J.’s preliminary hearing testimony and statements to medical providers and police were introduced through hearsay exceptions.\textsuperscript{297}

At the trial, Shelia J. was found unavailable to testify because the State attempted to serve her with a subpoena seven times.\textsuperscript{298} However, the trial court, upon a post-conviction motion, reversed the finding that Shelia was unavailable because a detective did in fact talk to Shelia prior to the trial date and merely tried to “persuade” her to attend the trial, without serving her with a subpoena.\textsuperscript{299} The trial court found, and appellate court affirmed, that “[n]ot serving Shelia J. with a subpoena when that was possible and when that step was a foreseeable potential condition to her presence at trial was not reasonable, and does not reflect the constitutionally required good-faith effort to secure King’s right to confront his accuser.”\textsuperscript{300}

Because Shelia J. was not truly “unavailable,” her statements were erroneously introduced at trial, and the trial court accordingly reversed the convictions against King that implicated Shelia J.\textsuperscript{301}

On appeal, King challenged the convictions against him that implicated Chandra T., asserting that the erroneously admitted testimony of Shelia J. tainted the jury’s convictions of the crimes against Chandra T.\textsuperscript{302} The trial court held that the error was harmless with regards to the convictions

\begin{itemize}
\item \textsuperscript{292} \textit{Id.}, ¶ 32, 281 Wis. 2d 554, ¶ 32, 697 N.W.2d 811, ¶ 32.
\item \textsuperscript{293} \textit{Id.}, 281 Wis. 2d 554, ¶ 32, 697 N.W.2d 811, ¶ 32.
\item \textsuperscript{294} 2005 WI App 224, 706 N.W.2d 181.
\item \textsuperscript{295} \textit{Id.}, ¶¶ 2-3, 706 N.W.2d 181, ¶¶ 2-3.
\item \textsuperscript{296} \textit{Id.}, ¶ 2, 706 N.W.2d 181, ¶ 2.
\item \textsuperscript{297} \textit{Id.}, ¶¶ 3-4, 706 N.W.2d 181, ¶¶ 3-4.
\item \textsuperscript{298} \textit{Id.}, ¶ 16, 706 N.W.2d 181, ¶ 16.
\item \textsuperscript{299} \textit{Id.}, 706 N.W.2d 181, ¶ 16.
\item \textsuperscript{300} \textit{Id.}, ¶ 17, 706 N.W.2d 181, ¶ 17.
\item \textsuperscript{301} \textit{Id.}, 706 N.W.2d 181, ¶ 17.
\item \textsuperscript{302} \textit{Id.}, ¶ 22, 706 N.W.2d 181, ¶ 22.
\end{itemize}
involving Chandra T. The court of appeals affirmed. In order to adduce whether the error was harmless, the court considered the following factors:

[T]he frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State’s case, and the overall strength of the State’s case.

The court of appeals found that the convictions against King were proper and that the error of admitting Shelia J.’s testimony was harmless beyond a reasonable doubt because of the following: the two attacks involved different women and occurred on different days; Chandra T. testified at trial and was subjected to full cross-examination; there was no overlap in the Shelia J. and Chandra T. evidence; the court instructed the jury to consider separately each charge against King; and there was direct physical evidence linking King and Chandra T.

5. State v. Stuart and Preliminary Hearing Testimony

In State v. Stuart, Gary Reagles was found dead in his apartment, with one bullet in his chest, in 1990. Although first ruled a suicide, Paul Stuart was charged with the first-degree intentional homicide of Reagles in 1998 based upon statements made to the police by Stuart’s brother, John Stuart. According to John Stuart, the defendant “confessed to shooting Reagles because of cocaine and because Reagles was going to say something about a recent burglary perpetrated by the two [Stuart] brothers.” John testified to this effect at the preliminary hearing and in accordance with a plea bargain he

303. Id., 706 N.W.2d 181, ¶ 22.
304. Id., ¶ 23, 706 N.W.2d 181, ¶ 23.
305. Id., ¶ 22, 706 N.W.2d 181, ¶ 22. (quoting State v. Hale, 2005 WI 7, ¶ 61, 277 Wis. 2d 593, ¶ 61, 691 N.W.2d 637, ¶ 61).
306. Id., ¶ 23, 706 N.W.2d 181, ¶ 23.
307. 2005 WI 47, 279 Wis. 2d 659, 695 N.W.2d 259.
308. Id., ¶ 4, 279 Wis. 2d 659, ¶ 4, 695 N.W.2d 259, ¶ 4.
309. Id., ¶¶ 4-5, 279 Wis. 2d 659, ¶¶ 4-5, 695 N.W.2d 259, ¶¶ 4-5.
310. Id., ¶ 6, 279 Wis. 2d 659, ¶ 6, 695 N.W.2d 259, ¶ 6.
negotiated with the State.\textsuperscript{311}

At trial, John asserted the privilege against self-incrimination and refused to testify because he believed that the State did not uphold the plea bargain he had negotiated in exchange for his testimony at trial.\textsuperscript{312} The State introduced John’s preliminary hearing testimony to the jury by reading it into evidence.\textsuperscript{313} Five other witnesses testified that Stuart told them he had killed Reagles as well.\textsuperscript{314} Stuart was convicted of first-degree intentional homicide.\textsuperscript{315}

Stuart appealed the conviction, claiming his confrontation rights were violated when John’s testimony was introduced at trial.\textsuperscript{316} The Wisconsin Supreme Court began its analysis by determining that John’s preliminary hearing testimony was per se testimonial in nature under \textit{Crawford}.\textsuperscript{317} Under \textit{Crawford}, the court then must decide whether the declarant was (1) unavailable and (2) meaningfully cross-examined previously in order to admit the testimony.\textsuperscript{318}

Next, the court determined that John was unavailable but that Stuart’s prior opportunity to cross-examine John at the preliminary hearing was “insufficient to satisfy his right to confrontation.”\textsuperscript{319} The court found that the cross-examination was insufficient because the scope of cross-examination at preliminary hearings in Wisconsin “is limited to issues of plausibility, not credibility”\textsuperscript{320} and is not intended to be a “full evidentiary trial on the issue of guilt beyond a reasonable doubt.”\textsuperscript{321} At the preliminary hearing, Stuart did not have the opportunity “to question his brother about a potential motive to testify falsely.”\textsuperscript{322} Thus, admitting John’s testimony at trial was erroneous and violated Stuart’s Confrontation right.\textsuperscript{323}

Next, the court determined whether this error was harmless—whether the

\textsuperscript{311} Id., ¶ 14, 279 Wis. 2d 659, ¶ 14, 695 N.W.2d 259, ¶ 14.
\textsuperscript{312} Id., ¶ 12, 279 Wis. 2d 659, ¶ 12, 695 N.W.2d 259, ¶ 12.
\textsuperscript{313} Id., ¶ 16, 279 Wis. 2d 659, ¶ 16, 695 N.W.2d 259, ¶ 16. Although the trial court did not at first admit John Stuart’s testimony to be read to the jury, the Wisconsin Supreme Court admitted the testimony after an interlocutory appeal. \textit{Id.}, ¶¶ 14-16, 279 Wis. 2d 659, ¶¶ 14-16, 695 N.W.2d 259, ¶¶ 14-16.
\textsuperscript{314} Id., ¶ 17, 279 Wis. 2d 659, ¶ 17, 695 N.W.2d 259, ¶ 17.
\textsuperscript{315} Id., ¶ 18, 279 Wis. 2d 659, ¶ 18, 695 N.W.2d 259, ¶ 18.
\textsuperscript{316} Id., ¶ 22, 279 Wis. 2d 659, ¶ 22, 695 N.W.2d 259, ¶ 22.
\textsuperscript{317} Id., ¶ 28, 279 Wis. 2d 659, ¶ 28, 695 N.W.2d 259, ¶ 28.
\textsuperscript{318} Id., ¶ 29, 279 Wis. 2d 659, ¶ 29, 695 N.W.2d 259, ¶ 29.
\textsuperscript{319} Id., 279 Wis. 2d 659, ¶ 29, 695 N.W.2d 259, ¶ 29.
\textsuperscript{320} Id., ¶ 30, 279 Wis. 2d 659, ¶ 30, 695 N.W.2d 259, ¶ 30.
\textsuperscript{321} Id., 279 Wis. 2d 659, ¶ 30, 695 N.W.2d 259, ¶ 30 (quoting State v. Dunn, 359 N.W.2d 151, 154 (1984)).
\textsuperscript{322} Id., ¶ 35, 279 Wis. 2d 659, ¶ 35, 695 N.W.2d 259, ¶ 35.
\textsuperscript{323} Id., ¶ 38, 279 Wis. 2d 659, ¶ 38, 695 N.W.2d 259, ¶ 38.
error, beyond a reasonable doubt, "did not contribute to the verdict obtained." 324 Like in King, 325 the harmless error doctrine requires the court to examine the following factors: the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State’s case, and overall strength of the State’s case. 326 The court found that four witnesses that corroborated John’s story were not trustworthy because of their many criminal convictions and because their testimony was contradicted by witnesses for the defense. 327 Furthermore, the court found that John’s testimony was very important to the State’s case; the State’s case was weak without John’s testimony; no other untainted evidence corroborated John’s testimony; and the nature of the defense (that Reagles committed suicide) was affected by John’s testimony. 328 Based on these factors, the court held that error of admitting John’s testimony was not harmless, and Stuart’s case was remanded for a new trial. 329

6. State v. Smith: The Danger of Opening the Door

In State v. Smith, 330 Smith and two fellow gang members, Willie Nunn and Cornelius Blair, went to the home of Andrew and Dorothy Roberts to rob the couple at the bidding of Smith’s gang leader. 331 Blair and Smith went inside while Nunn stayed outside as a look out for police. 332

According to Smith, he and Blair, armed with guns, forced both Mr. and Mrs. Roberts to floor and demanded money from Mr. Roberts. 333 Mr. Roberts gave Smith the money. 334 As Smith and Blair were leaving, Mr. Roberts grabbed the leg of Smith, causing Smith to shoot towards Mr. Roberts. 335 Smith thought that he had killed Mr. Roberts; therefore, he shot Mrs. Roberts.

326. Stuart, 2005 WI 47, ¶ 41, 279 Wis. 2d 659, ¶ 41, 695 N.W.2d 259, ¶ 41.
327. Id., ¶¶ 46-47, 279 Wis. 2d 659, ¶¶ 46-47, 695 N.W.2d 259, ¶¶ 46-47.
328. Id., ¶¶ 54-56, 279 Wis. 2d 659, ¶¶ 54-56, 695 N.W.2d 259, ¶¶ 54-56.
329. Id., ¶¶ 57-58, 279 Wis. 2d 659, ¶¶ 57-58, 695 N.W.2d 259, ¶¶ 57-58.
330. 2005 WI App 152, 284 Wis. 2d 798, 702 N.W.2d 850.
331. Id., ¶ 2, 284 Wis. 2d 798, ¶ 2, 702 N.W.2d 850, ¶ 2.
332. Id., ¶ 3, 284 Wis. 2d 798, ¶ 3, 702 N.W.2d 850, ¶ 3.
333. Id., 284 Wis. 2d 798, ¶ 3, 702 N.W.2d 850, ¶ 3.
334. Id., 284 Wis. 2d 798, ¶ 3, 702 N.W.2d 850, ¶ 3.
335. Id., 284 Wis. 2d 798, ¶ 3, 702 N.W.2d 850, ¶ 3.
in the head to be sure there were no witnesses. Mr. Roberts later survived.

At the trial for the murder of Mrs. Roberts, Smith “sought to introduce testimony from a Frederick Banks, who stated that when he was in jail, Nunn told him that he (Nunn) had shot Mrs. Roberts.” The trial court would admit the testimony “if Nunn was unavailable under the hearsay exception allowing statements against penal interest.” When Nunn was deemed unavailable (after invoking his rights under the Fifth Amendment), the court allowed Banks to testify to Nunn’s statement that Nunn, not Smith, shot Mrs. Roberts.

The State does not have a Confrontation right; however, when the defense presented Nunn’s hearsay statement to Banks at trial, the defense opened the door for the State to present Nunn’s other hearsay statements to police that contradicted Banks’ testimony. To this end, the State called a police officer to testify to the five prior statements that Nunn had given police in which he denied shooting Mrs. Roberts. Smith was convicted. The court held that “[a] defendant who introduces testimony from an unavailable declarant cannot later claim that he was harmed by his inability to cross-examine that declarant when prior inconsistent statements are introduced to impeach an out-of-court statement introduced by the defendant.”

C. Wisconsin’s Trends

Although Wisconsin has not had much opportunity to exercise the rationale of Crawford so far, this may just be the calm before the storm. So far, Wisconsin seems to be cautiously following the national trends in preserving confrontation rights of defendants in criminal trials. New decisions from the U.S. Supreme Court may change the path of confrontation in Wisconsin, especially in regards to 9-1-1 calls and excited utterances. In the meantime, this Note analyzes and predicts what will happen to

336. Id., 284 Wis. 2d 798, ¶ 3, 702 N.W.2d 850, ¶ 3.
337. Id., 284 Wis. 2d 798, ¶ 3, 702 N.W.2d 850, ¶ 3.
338. Id., ¶ 4, 284 Wis. 2d 798, ¶ 4, 702 N.W.2d 850, ¶ 4.
339. Id., ¶ 5, 284 Wis. 2d 798, ¶ 5, 702 N.W.2d 850, ¶ 5.
340. Id., ¶ 6, 284 Wis. 2d 798, ¶ 6, 702 N.W.2d 850, ¶ 6.
341. Id., ¶ 7, 284 Wis. 2d 798, ¶ 7, 702 N.W.2d 850, ¶ 7.
342. Id., 284 Wis. 2d 798, ¶ 7, 702 N.W.2d 850, ¶ 7.
343. Id., 284 Wis. 2d 798, ¶ 7, 702 N.W.2d 850, ¶ 7.
344. Id., ¶ 11, 284 Wis. 2d 798, ¶ 11, 702 N.W.2d 850, ¶ 11.
Wisconsin's evidentiary rules in criminal cases and the future of confrontation.

1. Wisconsin Statutes after Crawford

After Crawford, several Wisconsin evidentiary statutes are at risk of being invalidated in the context of criminal cases. Like many other states, Wisconsin's evidentiary rules are based on the Federal Rules of Evidence. Thus, changes seem likely in the future for many of Wisconsin's rules, like the federal rules. This next section predicts which evidentiary rules will stand, fold, or remain a battleground in Wisconsin. These predictions are based on the national trends discussed in the preceding sections.

2. Common Hearsay Exceptions Likely to be Invalidated

In an area that remains controversial, child witness statements are also likely to no longer be admitted in Wisconsin unless subject to cross-examination at trial, in person. Under section 908.08 of the Wisconsin Statutes, the videotaped statements of children are deemed an exception to the hearsay rule. After Crawford, videotaped statements of children are probably not admissible because they are not subject to cross-examination by the defendant at trial. In limited cases where the court finds that a child would be traumatized by testifying in front of a violent defendant, Wisconsin courts might allow videotaped statements of child witnesses. 346

A child victim's statements under the excited utterance exception are also currently admitted and applied liberally in cases involving a child victim declarant. 348 While excited utterances are generally admissible, courts may not apply the standard for child witnesses so liberally in the future. Courts nationally are construing the excited utterance exception more narrowly so as not to violate a defendant's Confrontation right. 349

Moreover, a child victim's statements were often admissible in Wisconsin

347. WIS. STAT. § 908.03(2) (2003-2004).
before *Crawford* under a residual hearsay exception\(^{350}\) or under medical diagnosis or treatment exception.\(^{351}\) Under the residual hearsay exception, the court can admit the statement after it determines the statement is trustworthy under the totality of the circumstances test.\(^{352}\) After *Crawford*, however, the residual hearsay exception is probably not an appropriate basis upon which to admit testimony because it does not afford the defendant an opportunity for cross-examination and confrontation.

The medical diagnosis exception is a tougher case, though. In *State v. Huntington*, statements made by a child victim’s mother to a nurse practitioner investigating alleged abuse were admitted.\(^{353}\) In some jurisdictions, such testimony may be deemed non-testimonial and thus admissible (after undergoing a Roberts analysis). However, because the nurse practitioner was investigating the abuse and the mother knew this fact, such testimony would likely be inadmissible as a violation of the defendant’s Confrontation right under *Crawford*.

Presumably, child witness statements must now be generally subject to cross-examination in order to be admitted.

Furthermore, past-recollection recorded statements\(^{354}\) and statements against penal or social interest\(^{355}\) are all currently firmly rooted exceptions to the hearsay rule. Under *Crawford*, these exceptions will likely no longer allow an unavailable witness’s testimony because the Confrontation right would not be adequately protected in such a scenario.\(^{356}\) In other jurisdictions, these hearsay exceptions are no longer deemed “reliable”; the declarant must now be subjected to cross-examination in order to admit his or her statements at trial.

3. Hearsay Exceptions Left in the Gray Area

Currently, videotaped depositions are admitted at a criminal trial and do not violate the Confrontation Clause.\(^{357}\) Such depositions are allowed into trial evidence only if the declarant has died, is out of state, is too sick to

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\(^{351}\) WIS. STAT. § 908.03(4) (2003–2004); see Huntington, 575 N.W.2d at 277.


\(^{353}\) 575 N.W.2d at 276-78.

\(^{354}\) WIS. STAT. § 908.03(5) (2003–2004).

\(^{355}\) § 908.045(4).

\(^{356}\) See also Murillo v. Frank, 316 F. Supp. 2d 744 (E.D. Wis. 2004).

\(^{357}\) WIS. STAT. § 967.04 (2003–2004).
attend, or is unreachable by subpoena. In addition, the defendant is required to attend the deposition.

Because the defendant is required to attend the deposition and presumably has then confronted the witness against him, videotaped depositions may still be admissible after Crawford. However, because the defense may not have adequate information at the time of deposition and may not have the opportunity to fully cross-examine the declarant, it is likely that a court would deem such a deposition an inadequate cross-examination and confrontation under Crawford.

Under section 908.03 of the Wisconsin Statutes, a declarant’s statements may be admitted at a criminal trial: if the declarant is unavailable and the statements concern testimony about the defendant’s then-existing mental, emotional, or physical condition; if the statement is a recorded recollection; if the statement is a record of regularly conducted activity; or if the statement is a health care provider record. These categories of hearsay likely present instances in which the statements are presumed non-testimonial; however, a case-by-case analysis is required to determine whether the statement was made in anticipation of litigation and thus testimonial.

For instance, health provider records or records of regular activity may be inadmissible hearsay because the records could have been made in anticipation of litigation and therefore be deemed testimonial by a court. Moreover, recorded recollections and testimony concerning the defendant’s then-existing condition may require the declarant’s trial testimony and the opportunity to cross-examine the declarant even if the declarant does not recall her original statements.

Furthermore, the hearsay exception of admitting the former testimony of an unavailable declarant lies in a gray area, too. In most jurisdictions, a declarant’s testimony from a preliminary hearing in which the defendant had

358. § 967.04(5)(a)1-4.
359. § 967.04(4)(a).
360. If, however, the deposition of a witness for the defense is recorded, rather than a witness for the prosecution, the prosecution has no right to confrontation and the testimony will likely be admissible without the declarant testifying at trial. See State v. Smith, 2005 WI App 152, 702 N.W.2d 850.
361. WIS. STAT. § 908.03(3) (2003–2004).
362. § 908.03(5).
363. § 908.03(6).
364. § 908.03(6m).
365. See also Mosteller, supra note 100, at 586-87.
an opportunity to cross-examine the declarant is still admissible.\textsuperscript{367} However, a declarant’s testimony from another person’s trial, like the testimony of the unavailable declarant in \textit{Hale}, is clearly inadmissible without the declarant’s presence at trial.\textsuperscript{368} In Wisconsin, because cross-examination at preliminary hearings is limited to “plausibility, not credibility,” preliminary hearing testimony is inadequate to satisfy a defendant’s Confrontation right.\textsuperscript{369}

Finally, an unavailable declarant’s statements concerning a recent perception\textsuperscript{370} may or may not be admissible. If it is similar to an excited utterance, a recent perception statement will probably be admissible; however, if it is more similar to testimony or was uttered in circumstances where litigation was foreseeable, the recent perception statement will probably be inadmissible.\textsuperscript{371}

4. Hearsay Exceptions that Likely Remain Unchanged

The Wisconsin statute allowing co-conspirator statements when the co-conspirator is unavailable still stands after \textit{Crawford}.\textsuperscript{372} Also, a declarant’s statements will probably continue to be admitted at a criminal trial if the declarant is unavailable and if the statements concern a present sense impression,\textsuperscript{373} an excited utterance,\textsuperscript{374} or a medical diagnosis or treatment.\textsuperscript{375} Similar categories of such technical hearsay have been upheld consistently across the United States since \textit{Crawford}.\textsuperscript{376}

In addition, any testimony accompanied by an opportunity at trial to cross-examine the declarant should still be admitted; and business records can still be admitted as non-testimonial evidence after undergoing a \textit{Roberts} analysis. Likewise, a defendant will still have had an adequate opportunity to cross-examine a declarant even if the declarant at trial has no memory of his past statement.\textsuperscript{377}

\begin{itemize}
\item \textsuperscript{368} See \textit{State v. Hale}, 2005 WI 7, ¶ 1, 277 Wis. 2d 593, ¶ 1, 691 N.W.2d 637, ¶ 1.
\item \textsuperscript{369} \textit{State v. Stuart}, 2005 WI 47, ¶ 30, 279 Wis. 2d 659, ¶ 30, 695 N.W.2d 259, ¶ 30.
\item \textsuperscript{370} WIS. STAT. § 908.045(2) (2003–2004).
\item \textsuperscript{371} See \textit{State v. Manuel}, 2004 WI App 111, 275 Wis. 2d 146, 685 N.W.2d 525.
\item \textsuperscript{372} WIS. STAT. §§ 908.01(4)(b)5 (2003–2004); see also \textit{State v. Jenkins}, 483 N.W.2d 262 (Wis. Ct. App. 1992) (holding that a criminal defendant has the same right to confront witnesses under federal and state constitutions).
\item \textsuperscript{373} WIS. STAT. § 908.03(1) (2003–2004).
\item \textsuperscript{374} § 908.03(2).
\item \textsuperscript{375} § 908.03(4).
\item \textsuperscript{376} Many of these issues will be decided by the U.S. Supreme Court in the cases of \textit{Davis} and \textit{Hammmon} in the spring of 2006. See \textit{supra} Part VI.B.5.
\item \textsuperscript{377} See \textit{Vogel v. State}, 291 N.W.2d 838 (Wis. 1980).
\end{itemize}
Moreover, an unavailable declarant’s dying declaration is currently considered reliable in most jurisdictions because of the belief that a dying person has no interest in lying; only the Roberts analysis need be applied.

In the end, most evidentiary rules and hearsay exceptions are no longer admissible in criminal trials after Crawford. And as lower courts continue to draw lines in the sand, the landscape of the Confrontation right in Wisconsin continues to shift and change accordingly. The most pressing and definitive issue in regards to confrontation is the definition of “testimonial,” which the U.S. Supreme Court will address in the spring of 2006.

VIII. CONCLUSION: WHY IT MATTERS

The Crawford decision matters because it changes the way criminal courts have done business under Ohio v. Roberts for nearly a quarter of a century. Crawford changes the way courts define “reliability” and has forced lower courts to draw lines in the sand concerning confusing hearsay issues. Only time will tell whether these lines are what the U.S. Supreme Court intended under a new phase of criminal law and defendants’ rights.

A. What’s Trust Got to Do with It?

In Crawford, the majority overturned the Court’s previous reliance on trustworthiness or reliability as a determining factor in the admissibility of hearsay statements. Justice Scalia wrote, “[R]eliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable . . . . By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers’] design.” He added that the Sixth Amendment’s Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”

Other legal scholars echo this concern. After all, the admissibility of evidence should not be dependent on reliability or trustworthiness; the reliability of evidence is to be determined by the fact finder. Friedman writes, “The function of the trial is to give the fact finder an opportunity to make its best assessment of the facts after considering all the evidence properly

379. Many of these issues will be decided by the U.S. Supreme Court in the cases of Davis and Hammon in the spring of 2006. See supra Part VI.B.5.
381. Id.; see also Adomeit, supra note 130, at 4.
presented to it, reliable and unreliable."  

In addition, hearsay exceptions do not even necessarily differentiate effectively between reliable and unreliable testimony.  

Professor Friedman explains that a dying declaration, for instance, is accepted as reliable because the court believes that a dying person would never lie. Of course, dying people lie, too. A court cannot let in hearsay based on whether or not it believes people are lying. That is not the court’s job. The jury or fact-finder has the job of deciding whether or not it believes witnesses by listening to direct testimony and cross-examination. In the end, whether a witness is in fact lying or is in fact reliable to a court is not really the point. Jurors and fact-finders must rely on the tools they have—the facts and the testimony presented at trial that they can judge with their own eyes and ears—in order to determine what and whom to believe.

Reliability and trustworthiness, then, are out and for good reason. A court’s determination, in short, is an unreliable way to determine admissibility of hearsay evidence.

However, if reliability is really such a terrible way to determine the worth of evidence, how can the Supreme Court continue to apply this standard for non-testimonial evidence, co-conspirator statements, business records, and the like? Professor Imwinkelried hypothesizes:

As footnotes 6 and 8 in the Crawford opinion indicate, in a given case the defense might be able to persuade the trial judge that the business or official record in question was prepared with a view to prosecution and, hence, is ‘testimonial.’ However, in other cases there will be no governmental involvement in the production of the statement, and the facts may dictate the conclusion that the report was generated for a legitimate, non-litigation reason. Yet, as several commentators have pointed out, such expert reports can nevertheless be so untrustworthy and rely on such subjective interpretive standards that it makes sense to apply the Confrontation Clause and pressure the prosecution to produce the expert as a trial witness subject to cross-examination. In that light, exempting all ‘non-testimonial’

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382. Friedman, Adjusting, supra note 83, at 5-6.
383. Id.
384. Id.
hearsay from Confrontation Clause scrutiny would be a step in the wrong direction.\textsuperscript{386}

Like many other \textit{Crawford} issues, it remains to be seen where the courts will go with reliability and testimonial evidence.

\textbf{B. Protection for Defendants?}

Obviously, defendants—and not prosecutors—seem to benefit the most from the \textit{Crawford} decision. In Wisconsin, as in the federal system, the central concern of the Confrontation Clause is to ensure reliability of evidence against criminal defendants by subjecting testimony to rigorous testing before the fact-finding body.\textsuperscript{387}

Effective cross-examination, not arbitrary reliability tests, is the only way to guarantee that the Confrontation Clause is upheld.\textsuperscript{388} \textit{Crawford} is certainly the Court's strongest stance yet against questionable prosecution practices and the admittance of untested testimony.\textsuperscript{389}

Critics continue to remind us, though, that \textit{Crawford} is not the last word on Confrontation. Professor Imwinkelried writes, "[I]t is premature to conclude that \textit{Crawford} will be an unmitigated blessing for the defense. While capitalizing on the \textit{Crawford} majority's strictures on the use of 'testimonial' hearsay, the defense must be vigilant against prosecutorial attempts to completely dismantle the Confrontation Clause restrictions on non-testimonial hearsay under \textit{Roberts}."\textsuperscript{390}

How the Supreme Court defines testimonial, however, may impact \textit{Crawford}'s usefulness for defendants. In some respects, the \textit{Crawford} decision actually more narrowly defines testimonial statements; allowing a court to merely declare a statement is non-testimonial actually could allow more hearsay statements to be admitted at trial. So, while \textit{Crawford} seems promising for defendants right now, the reality may be different after many of the post-\textit{Crawford} issues are decided.

\textsuperscript{386} \textit{Id.}


\textsuperscript{389} Imwinkelried, \textit{supra} note 385, at 18.

\textsuperscript{390} \textit{Id.}
C. Integrity and the Constitution

The Constitution has not changed since the Founders, but the way we have interpreted it as legal scholars and students has changed dramatically over the years. The *Crawford* decision restores some of the integrity to the design of the Sixth Amendment, reinvigorating the Confrontation Clause with meaning and substance. But because the Constitution is a "living" document, it is always subject to new breaths of change.

In *Crawford*, Justice Scalia declared, "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."\(^{391}\) What he meant is still up in the air. One critic comments, "[I]t is an intriguing sentence, full of suspense and anticipation. The decision represents Justice Scalia at his most serious and least conservative. Brilliantly argued and brilliantly written, the opinion represents a tour de force, the welding together of history and advocacy."\(^{392}\)

Whether history and advocacy are welded for the benefit of defendants and the integrity of all person's Constitutional rights is a topic sure to require new breadth and explanation in Wisconsin and throughout the nation in the time to come. In the meantime, we must do our best to digest this spiraling and intricate Confrontation Clause and its impact in criminal courts in Wisconsin and beyond.

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391. *Crawford*, 541 U.S. at 67-68.