Confronting *Crawford*

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In Shakespearean tragedy, horrific acts create a break in the great chain of being, a tear in the cosmic fabric that must be set right. Certain events are marred by such flagrant and gross injustice that they are seared into the collective memory. Our historical conscience impels us to prevent their recurrence. To the Framers of the Constitution, such an event was the case of Sir Walter Raleigh. Raleigh was tried at Winchester, in 1603, on charges of conspiring with a certain Lord Cobham to unseat King James I. While he languished in the Tower of London, Cobham signed a confession in which he implicated Sir Walter. Cobham promptly retracted, so the Crown dared not produce him at trial. Instead, their chief piece of evidence was the written confession. Raleigh bitterly protested the introduction of this dubious but damning confession absent opportunity to question its author. His plea was rebuffed. Raleigh was convicted and beheaded.

One hundred and eighty-six years later in the sweltering summer heat of New York City, the First Congress drafted the Sixth Amendment which requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." It was ratified in 1791. The exact requirements of this provision and its interplay with the common law hearsay exceptions
have long been the subject of litigation. For years, the controlling Supreme Court precedent on the question was Ohio v. Roberts, under which courts could admit any hearsay they deemed reliable.\(^2\) But in the spring of 2004, the Court upset the equilibrium with its bold decree that regardless of reliability, testimonial hearsay is only admissible if the witness is unavailable and there was prior opportunity for cross-examination.\(^3\) Not surprisingly, the pronouncement raised more questions than it answered, and the Court left it to the lower courts to sort out ambiguities and fill the gaps. This Article examines the Crawford decision and its aftermath, looking at the problems Crawford raised and the solutions lower courts have found.

A central argument of this Article is that the logic of the Crawford decision flows directly into an analytical framework for resolving the difficult issues the decision raises. The Crawford doctrine protects less (i.e., only testimonial evidence), but is more rigorous as to that which is protected (i.e., it disapproves of Roberts's reliability exception). Following this approach, where proffered evidence is testimonial, doubts surrounding admissibility must be resolved in the defendant's favor. For example, the standard of evidence necessary to extinguish a confrontation claim on the grounds of forfeiture by wrongdoing should be clear and convincing rather than a preponderance. However, when the evidence is nontestimonial, doubts surrounding it should be resolved in favor of the government. Thus, nontestimonial hearsay should not trigger Confrontation Clause scrutiny at all, instead of a residual, Roberts-like reliability test courts continue to apply.

Following the introduction, Part II reviews the historical precedents leading up to the Crawford decision, the facts of the case itself, and the reasoning. Part III examines what constitutes testimonial hearsay. Part IV examines the definition of unavailability and the question of what rule controls nontestimonial hearsay. Part V examines unavailability and the limits of a confrontation right forfeiture by wrongdoing. Part VI canvasses the contours of adequate opportunity for cross-examination. Part VII concerns the extent to which the decision applies retroactively. Part VIII, like Rule 807 of the Federal Rules of Evidence, is a residual. It probes the confrontation right in civil cases.

I. INTRODUCTION

At the outset, it is imperative to understand the distinction between the Confrontation Clause and rules of evidence. The hearsay

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evidence rules are layered on top of whatever constitutional requirements the Confrontation Clause imposes. Both may protect the same interests, but the Confrontation Clause represents the minimum safeguards of fairness for the defendant. States are free to be more defendant-friendly, but they cannot be less.

It is also easy to assume that the way things are is the way they had to be. That the accused has a right to confront his accusers seems a proposition almost too obvious to state. But there is logic to the other view. At Raleigh's trial, the judges justified their decision as follows:

[Where no circumstances do concur to make a matter probable, then an accuser may be heard; but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced; for having first confessed against himself voluntarily, and so charged another person, if we shall now hear him again in person, he may for favour or fear retract what formerly he hath said, and the jury may, by that means, be inveigled.]

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Theirs is not a frivolous concern. Codefendants routinely confess initially only to later repudiate their testimony at trial. It is this phenomenon which drives the Bruton line of cases dealing with when and under what circumstances courts can admit a codefendant's confession at a joint trial.5 The difficulties only arise because the codefendant has repudiated the confession. The Raleigh court insists that where there is corroborating evidence of guilt, it is not unreasonable to read in the confession without producing the witness, who would only deny the affair entirely. If this reasoning strikes one as circular, consider Rule 801(d)(2)(E) of the Federal Rules of Evidence, which admits a coconspirator's statement made in furtherance of the conspiracy provided the court find by the preponderance of the other evidence that a conspiracy exists.6 Both cases purport to admit codefendant statements where there is corroborating evidence of wrongdoing, on the theory that the standard to admit evidence should not be as high as the standard of proof for conviction. It is, however, far too late in the day for this argument. The choice of the Framers is made.

II. THE PRECEDENT, THE FACTS, AND THE REASONING

In 1965, the Confrontation Clause was made applicable to the states through the Due Process Clause of the Fourteenth Amendment.7 In a series of subsequent cases, the Court articulated just what that right entailed. For years, the controlling Supreme Court precedent on the question was Ohio v. Roberts, under which courts

4. 1 CRIMINAL TRIALS 427 (David Jardine ed., 1850) (emphasis added).
could admit any hearsay they deemed reliable. The *Roberts* doctrine starts from the premise that any hearsay statement offered against a criminal defendant must be analyzed under the Confrontation Clause. However, where the out-of-court declarant is unavailable, the confrontation right is satisfied without actual cross-examination as long as the statement bears "indicia of reliability." The measure of reliability is of two forms. The statement must either fall within a firmly rooted hearsay exception, such as a dying declaration, or it must exhibit "particularized guarantees of trustworthiness."

The *Roberts* requirement of unavailability was initially straightforward. "[W]hen a hearsay declarant is not present for the cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." Mere absence is insufficient. Courts do not want the state shielding witnesses from a defendant's probing questions. But six years later, the Court limited the requirement when it found in *United States v. Inadi* that a showing of unavailability was not a prerequisite for admitting coconspirator statements made in the course of the conspiracy. The Court reasoned that coconspirator statements are inherently more reliable and do not present the same problems as the hearsay statements the Court dealt with in *Roberts*. "*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged . . . statements were made in the course of a prior judicial proceeding."

Under *Roberts*, statements falling within firmly rooted hearsay exceptions were automatically admissible regardless of the particular facts of the situation. These included statements made by a coconspirator during and in furtherance of the conspiracy, as well as other narrowly defined hearsay exceptions, such as excited utterances, recorded recollections, business records, and dying declarations. Notably absent was the exception for declarations against penal interest, a category the Court thought too broad to claim firmly rooted status.

9. *Id.* at 65.
10. *Id.* at 66–66.
11. *Id.* at 66. Note that except for the unavailability requirement, this approach—under which reliability excuses confrontation—is quite similar to that of the much maligned Raleigh court: "[S]o many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced . . . ." *Criminal Trials*, supra note 4, at 427.
17. *Id.* at 183.
Irrespective of pedigree, hearsay was also admissible if the circumstances surrounding the hearsay declaration lent it particularized guarantees of trustworthiness. However, the Court made clear in *Lee v. Illinois*\(^\text{18}\) that interlocking confessions are presumptively unreliable. Statements made once in custody, in contrast to statements made in furtherance of a conspiracy, are offered at a stage when each defendant has incentive to shift blame to his partner while minimizing his own responsibility.

In sum, *Roberts* interprets the Confrontation Clause as a substantive guarantee of fairness rather than a procedural one. If the evidence is reliable, the clause is satisfied. Confrontation is merely a potent means to that end. As Wigmore famously observed, "[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth."\(^\text{19}\) This framework was workable but problematic. The doctrine was criticized as both overbroad and underinclusive. Because it treated all hearsay offered against a criminal defendant as subject to its Confrontation Clause analysis, it excluded hearsay statements that did not plausibly threaten the litigant's right to confront the witnesses against him. At the same time, it would admit unreliable evidence provided it fit within a firmly rooted hearsay exception.\(^\text{20}\) The growing discontent was echoed by concurrences and dissents in later Supreme Court cases on confrontation, notably *White v. Illinois*\(^\text{21}\) and *Lilly v. Virginia.*\(^\text{22}\)

The Court addressed the critics with its 2004 decision, *Crawford v. Washington.* Michael Crawford was charged with the attempted murder of Kenneth Lee. At trial, he pled self-defense. According to Crawford, he and his wife Sylvia confronted Lee at his apartment over a report of Lee's attempt to rape Crawford's wife. A fight ensued, Crawford's hand was cut, and he stabbed Lee in self-defense. Crawford and Sylvia were taken into custody where both made statements to the police. Crawford insisted that Lee appeared to have a weapon. Sylvia

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18. 476 U.S. 530 (1986). Interlocking confessions are confessions by two or more suspects whose statements are substantially the same and consistent concerning the elements of the crime. *Black's Law Dictionary* 317 (8th ed. 2004).


20. Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 Cato Sup. Ct. Rev. 439. Mr. Friedman gives as an example of this underinclusiveness the dying-declaration exception, which he calls laughable in today's world. I am not sure I share his pessimism on religious conviction. Moreover, to sway a jury the statement would have to be consistent with the other evidence. While near death, it is not so easy to concoct a story implicating someone that fits well with the other evidence.


was not so sure and her account differed on various points. In particular, she did not recall seeing a knife or anything else in Lee's hand.\textsuperscript{23}

At trial, Crawford's wife did not testify by reason of Washington's marital privilege, which bars the testimony of a spouse without the other spouse's consent.\textsuperscript{24} Importantly, Washington's privilege does not bar prior statements of a nontestifying spouse if they fall within a hearsay exception.\textsuperscript{25} Sylvia led her husband to Lee's apartment, which in the state's view made her an accomplice to any crime committed there. Thus her account of the fight, inasmuch as it undermined Crawford's defense, was also a statement against her penal interest and admissible under that exception.\textsuperscript{26} The trial court agreed and admitted the tape of her interrogation. At closing argument, the prosecutor made much of the tape, charging that Sylvia's account "completely refutes [petitioner's] claim of self-defense."\textsuperscript{27} Crawford was convicted, but the Washington Court of Appeals reversed. It followed Roberts's functional approach, and applied a nine-factor test to determine whether Sylvia's confession bore particularized guarantees of trustworthiness, concluding it did not. The state urged that since husband and wife presented substantially similar accounts, their confessions interlocked, making Sylvia's version trustworthy. But the appeals court was unconvincing. That Sylvia's account differed substantially on a crucial defense issue—whether Lee appeared to have a weapon—meant her testimony was unreliable and therefore barred.\textsuperscript{28} The Washington Supreme Court reinstated the verdict, finding the two versions were similar on most points and not in direct conflict even on the weapon issue: "'[N]either Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable.'"\textsuperscript{29}

Oddly, the Washington Supreme Court was untroubled by the government's inconsistent pleadings. The state argued that because the two accounts were similar on most points and not in direct conflict even on the weapon issue, their confessions interlocked, making Sylvia's version admissible. But to the jury they crooned not only is Syl-

\begin{footnotes}
\item[24] WASH. REV. CODE § 5.60.060(1) (1994).
\item[25] Crawford, 541 U.S. at 40 (citing State v. Burden, 841 P.2d 758, 761 (1992)).
\item[26] WASH. R. EVID. 804(b)(3).
\item[27] Crawford, 541 U.S. at 40–41 (internal quotation omitted).
\item[28] Id. at 41.
\end{footnotes}
via's version contradictory to Crawford's but it "completely refutes [his] claim of self-defense."30

In any event, the Supreme Court granted certiorari to determine whether the state's use of Sylvia's statement violated the Confrontation Clause.31 Justice Scalia's opinion for the court began with an exhaustive survey of the history underlying the confrontation right.32 He traced its development from Roman times, through the notorious case of Sir Walter Raleigh and the practice of the American Colonies, to the adoption of the Federal Constitution. He concluded that the history supports two inferences about the Confrontation Clause.

"First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused."33 This is reflected in the wording of the Sixth Amendment which grants a right to confront witnesses—that is, those who bear testimony as by making a formal statement to government officers. The constitutional text and the history of the common law right of confrontation are addressed primarily to this core class of testimonial statements.34

Second, the Framers would not permit courts to admit these testimonial statements unless the declarant was unavailable and the accused had prior opportunity for cross-examination.35 As the Court explains, the wording of the Sixth Amendment is most naturally read as a reference to the common law right of confrontation as understood and with only such exceptions as established at the time of the founding. The English historical record reveals that under the common law of 1791, prior testimony of an absent witness was inadmissible unless the witness was unavailable and the accused had prior opportunity to cross-examine.

With this foundation in history, the Court turned a critical eye to Roberts. Its reliability standard was amorphous and difficult to manage.36 "The unpardonable vice of the Roberts test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."37 By way of example, the Court referred to accomplice confessions implicating the accused. Although the Court in Lilly had warned that such confessions should rarely pass the Roberts reliabil-

30. Crawford, 541 U.S. at 40–41 (quoting Transcript of Record at 468, Crawford, 2001 WL 850119 (No. 99-1-01205-8)).
32. Crawford, 541 U.S. at 43–45.
33. Id. at 50.
34. Id. at 51.
35. Id.
36. Id. at 61.
37. Id. at 63.
ity test, a study revealed that appellate courts routinely admitted them.\footnote{38}

More broadly, "the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee."\footnote{39} The Court warned that replacing categorical constitutional guarantees with open-ended balancing tests does violence to the Founders' design. Therefore the Court adjusted the doctrine to more accurately reflect the original understanding of the clause and to implement its procedural guarantee with a formal rather than functional analysis: As regards testimonial statements, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."\footnote{40} In sum, the Court declared, "[W]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."\footnote{41}

Sylvia's considered statement to police while in custody was testimonial.\footnote{42} The trial court admitted it despite the fact that her husband had no opportunity to cross-examine her, in plain violation of the Sixth Amendment.\footnote{43} Accordingly, the decision of the Washington Supreme Court sustaining the trial court was reversed.\footnote{44}

III. WHAT IS TESTIMONIAL HEARSAY?

In his concurring opinion, Chief Justice Rehnquist chastised the majority for its failure to give a comprehensive definition of a testimonial statement.\footnote{45} Instead the Court taught by example and identified certain statements as clearly testimonial and others as certainly not. "[T]estimony, at a preliminary hearing, before a grand jury, or at a formal trial[,] and [statements in response] to police interrogations" are certainly testimonial.\footnote{46} Business records or statements in furtherance of a conspiracy are clearly nontestimonial.\footnote{47} Thus, Sylvia's statement "knowingly given in response to structured police question-
ing, qualifies [as testimonial] under any conceivable definition." The Court also offered some general guidance stating that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." However, the lower courts were left to further refine the concept.

One approach courts take is to focus on the intent of the declarant when he or she made the statement. Was it pursuant to a request for immediate assistance or was it in contemplation of a future prosecution? In *People v. Moscat*, a New York court applied this approach to a recorded 911 call. Such calls are often an important piece of evidence in prosecuting crimes. However, callers rarely leave their names. In other cases, particularly those involving domestic violence, the complaining party is known but refuses to cooperate with police. Either way, the caller does not appear at trial and the tape is hearsay. *Moscat* was a domestic violence case. The court admitted the recording because the call was not initiated by the police. The victim initiated contact looking not to give testimony, but to seek relief from "immediate peril."

In *People v. Conyers*, a man witnessing a street fight phoned 911 with the details. The court admitted the recording, reasoning that he was calling for immediate help and to end the violence, not in contemplation of future prosecution. The Minnesota Supreme Court stretched the rationale even further. It held that a victim's call to 911 operators seeking help immediately after an assault, as well as his on-the-scene statements to police officers, were not testimonial under *Crawford* because the victim's purpose in both instances was to seek protection, not to bear witness.

An inquiry into the intent of the declarant is of course useful in other settings as well. *People v. Rivera* classified as not testimonial a victim's hysterical call to her sister in which she identified her assailant between tears and screams. *Brooks v. State* involved a case of double hearsay. The accused confessed the killing to his mother, who repeated it to the defendant's half-sister. At trial, the court admitted the half-sister's second-hand report of her brother's confession. The

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48. *Id.* at 53 n.4.
49. *Id.* at 56 n.7.
51. *Id.* at 879.
53. *State v. Wright*, 701 N.W.2d 802 (Minn. 2005).
Mississippi Court of Appeals failed to see how this statement to the sister could be viewed as testimonial and affirmed.\(^5\)  

Other courts prefer a more objective inquiry into the circumstances. Like Moscat, \textit{People v. Cortes}\(^5\)\(^6\) is a New York case involving a 911 call, but the Cortes court reached the opposite conclusion. It held that a 911 call reporting the details of a murder was testimonial regardless of the caller's intent, because the system is designed specifically to gather information which will assist police officers in their investigations. Operators at call centers are trained to ask particular questions and to request specialized facts. "[T]he purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes."\(^5\)\(^7\) Thus, an exchange with a 911 operator is essentially an interrogation on behalf of law enforcement.\(^5\)\(^8\)  

In the spring of 2006, the Supreme Court endorsed the objective-inquiry approach with its decision in \textit{Davis v. Washington}:\(^5\)\(^9\) Nontestimonial statements are those made "in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."\(^6\)\(^0\) In contrast, statements are testimonial when the "circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."\(^6\)\(^1\)  

Having announced the rule, the Court applied the law to the facts. The hearsay at issue in \textit{Davis} was the transcript of a 911 domestic disturbance call.\(^6\)\(^2\) The operator quickly obtained basic information on the nature of the caller's emergency, including her name and address. The victim explained that her attacker had fled by car. She tried to continue, but the operator admonished her to "stop talking and answer my questions."\(^6\)\(^3\) The operator proceeded with a battery of inquiries, gathering data including the attacker's birthday as well as the broader context of the assault. The Court explained that the transcript was nontestimonial because the caller, facing "an ongoing emer-

\(^{55}\) Brooks v. State, 905 So. 2d 678, 685 (Miss. Ct. App. 2004), rev'd on other grounds, 903 So. 2d. 691 (Miss. 2005).  
\(^{56}\) 781 N.Y.S.2d 401 (Sup. Ct. 2004).  
\(^{57}\) \textit{Id.} at 415.  
\(^{58}\) \textit{Id.} \(^{59}\) \textit{Id. at 2266 (2006).}  
\(^{60}\) \textit{Id.} at 2273 (emphasis added).  
\(^{61}\) \textit{Id.} at 2273–74.  
\(^{62}\) The Court considers 911 operators agents of law enforcement and their acts to be those of the police. \textit{Id. at 2274 n.2.}  
\(^{63}\) \textit{Id.} at 2271.
gency," described events "as they were actually happening" as part of a "call for help against a bona fide physical threat."\(^6^4\)

The Court reached the opposite conclusion in the companion case *Hammon v. Indiana*.\(^6^5\) At issue there was a victim's statement to police on the scene of a domestic dispute. When the authorities arrived the victim told them "things were fine."\(^6^6\) They witnessed neither fighting nor violence of any kind. Instead, they brought the wife into a separate room for questioning. Objectively viewed, the Court concluded, "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime."\(^6^7\) They sought to establish not what "was happening," but rather "what had [already] happened."\(^6^8\) The statement should have been excluded as testimonial hearsay.

The partial dissent of Justice Thomas criticized the majority's "primary purpose" test as "unpredictable" and unworkable.\(^6^9\) Police interrogations serve multiple ends, aiding the police response to an ongoing emergency as well as establishing facts relevant to a future prosecution. A hierarchy of motives may not exist, and even if it does, exposing that ranking may be impossible. The Court saw an ongoing emergency in *Davis* but dismissed the *Hammon* interrogation as a mere inquiry into what had happened. Yet, as Justice Thomas points out, "[T]he police [in *Hammon*] may have been inquiring about past conduct primarily to assess whether he posed a continuing danger, requiring further police action . . . [t]ransforming what the court dismissed as past conduct into an ongoing emergency."\(^7^0\)

The dissent has a point. Compare the result in *Davis* with that in *People v. Cortes* presented above. Both cases considered whether 911 calls are admissible. Both courts claimed to conduct objective analyses of the circumstances, yet reached opposite conclusions on similar questions. The *Davis* Court admitted the 911 transcripts as nontestimonial while the New York court would exclude all 911 calls as testimonial hearsay.\(^7^1\)

Unfortunately, the dissent's solution is not much better. Justice Thomas distinguishes between formal and informal questioning, and labels statements in response to the former testimonial. But as the majority points out, later in his opinion he is forced to "qualify that vague distinction by acknowledging that the Confrontation Clause

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\(^6^4\) Id. at 2276 (emphasis omitted).

\(^6^5\) 126 S. Ct. 2266, 2280 (2006).

\(^6^6\) Id. at 2278.

\(^6^7\) Id.

\(^6^8\) Id.

\(^6^9\) Id. at 2280, 2285.

\(^7^0\) Id. at 2284–85.

\(^7^1\) People v. Cortes, 781 N.Y.S.2d 401, 415 (Sup. Ct. 2004).
'also reaches the use of technically informal statements when used to evade the formalized process.' In such a case, courts could fairly apply "the Confrontation Clause to exclude the hearsay statements." If qualifiers are a fault, the majority is guilty too. Justice Scalia's opinion for the Court acknowledges that nontestimonial responses to interrogation may evolve into testimonial statements. What starts out as a conversation to assist police in meeting an ongoing emergency may transform into testimony in aid of future prosecution. Nevertheless, the Court assures us, "trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial . . . [and] redact or exclude [those] portions." Like the dissent did when faced with the potential evasion of the formalized process the majority shifts the burden to the lower courts just as the problem gets complicated. In the end, neither the majority nor the dissent is entirely satisfying. But in a sense they are not to blame. Both struggle to transform an inherently subjective problem into an objective one. Determining whether a statement is testimonial is a highly fact-dependent exercise. A close case has no right answer. Thus, definitive classification of all possible statements is impossible in both an intellectual and a practical sense. We can thus expect a spate of rulings agonizing over whether particular facts more closely resemble those of Davis or Hammond. What we cannot expect is a perfect solution. IV. UNAVAILABILITY AND NONTIMESTIMONIAL HEARSAY The testimonial statement of a nonappearing witness is only admissible if the witness is unavailable and there was prior opportunity to cross-examine him. Rule 804(a) of the Federal Rules of Evidence sets out the definition of unavailability for purposes of the evidence rules. Under that provision, an unavailable witness is a witness who is exempted on grounds of privilege, refuses to testify despite a court order to do so, testifies to a lack of memory, is unable to be present due to death or physical or mental illness, or whose presence the proponent of the statement could not procure by process or other reasonable means. State rules track the federal definition except in the case of a witness outside their jurisdiction. In that case, the states deem the witness beyond the reach of process and unavailable. The federal system, however, requires a showing that other "reasonable
means,” such as persuasion or efforts to take a deposition, were unsuccessful. 77

Unavailability for constitutional purposes is similar but not identical. The “reasonable means” requirement dictates that “a witness is not ‘unavailable’ for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” 78 Thus when a state seeks to introduce hearsay testimony, absence from the jurisdiction is insufficient to establish unavailability for constitutional purposes. The state must demonstrate that attendance could not be procured through other reasonable means such as persuasion. 79 The good-faith standard does not, however, require the state to pursue avenues that are extremely unlikely to succeed:

The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness’ intervening death), “good faith” demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. 80

In Roberts, for example, the state’s failure to contact a social worker in an effort to track down a witness did not breach its duty of good faith because of the great improbability that making contact would have resulted in location and production of the witness. 81

All this is of diminished relevance after Crawford. Under Roberts, testimonial hearsay was admissible if the witness was unavailable, provided it bore indicia of reliability. Under Crawford, testimonial statements of unavailable witnesses are barred unless there was prior opportunity for cross-examination. Since in most cases the defense will not have prior opportunity for cross-examination, prosecutors will have to actually produce the witness. Reasonable, good-faith efforts get the prosecutor nowhere so its precise contours are of little relevance.

To the extent the Roberts test has any vitality, unavailability remains important. One of the many questions courts face in Crawford’s wake is what rule governs the admission of nontestimonial hearsay. There are two possibilities. One possibility is that Crawford and Roberts work in tandem, the former controlling testimonial state-

77. STEVEN EMAANUEL, EMAANUEL LAW OUTLINES: EVIDENCE 222 (1st ed. 1988).
78. Barber v. Page, 390 U.S. 719, 724–25 (1967). But see Dutton v. Evans, 400 U.S. 74, 95–96 (1970) (Harlan, J., concurring) (stating that where utility of confrontation is remote, prosecution is not required to call even seemingly available witness). With regard to testimonial statements, this cannot be true in light of Crawford’s focus on confrontation as an inviolable procedural guarantee of fairness.
81. Id. at 75–76.
ments, and the latter nontestimonial hearsay. Alternatively, Crawford may have entirely overruled Roberts; nontestimonial hearsay presents no constitutional problem under the Confrontation Clause, whether or not the statement is reliable or finds its place in a firmly rooted hearsay exception.

The Supreme Court left the question open. “In White, we considered the . . . proposal [that the Confrontation Clause applies only to testimonial statements leaving the remainder to hearsay law] and rejected it. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today.”82 The Second Circuit noted in a footnote that the Sixth Amendment might one day be construed to reach only testimonial hearsay.83 Nevertheless, as yet, no court has taken that view. Instead, upon finding a statement nontestimonial, courts have run through the Roberts test only to find the statement reliable.84

Courts seem reluctant to jettison Roberts out of an abundance of caution and a fear of reversal. As Chief Justice Rehnquist pointed out in his concurrence in Crawford, never before has the Court drawn a distinction between testimonial and nontestimonial statements.85 The Chief Justice also chastised the Court for failing to lay out a comprehensive definition of testimonial.86 Courts are understandably skittish about withholding all constitutional scrutiny based solely upon their own uncertain finding that the contested hearsay falls on the nontestimonial side of a novel and ill-defined line.87 A recent Third Circuit opinion captures the mood: “Some commentators have interpreted [Crawford] as suggesting that in the future the Court may abrogate completely the Roberts holding and exclude nontestimonial statements entirely from the ambit of the Confrontation Clause. Such a development in Sixth Amendment jurisprudence is beyond the province of this court.”88

Though no lower court has declared the Roberts test dead and buried, some saw the Supreme Court moving in that direction. As Professor Imwinkelried wrote, “The majority’s harsh criticism of Roberts reliability standard makes it even more likely that the Court will eventually relax the standard for admitting non-testimonial hearsay.”

83. Mungo v. Duncan, 393 F.3d 327, 336, n.7 (2d Cir. 2004).
84. Friedman, supra note 20, at 467; see also William Hood & Lucia Padilla, The Right to Confront Witnesses After Crawford v. Washington, COLO. LAW., Sept. 2004, at 83, 84 (citing State v. Rivera, 844 A.2d 191, 201–02 (Conn. 2004); Demons v. State, 595 S.E.2d 76, 80 (Ga. 2004)).
85. Crawford, 541 U.S. at 72 (Rehnquist, C.J., concurring).
86. Id. at 74.
87. Rivera, 844 A.2d at 201 n.13.
But, he warned, because certain expert reports, though nontestimonial, are untrustworthy and merit cross-examination, "exempting all 'non-testimonial' hearsay from Confrontation Clause scrutiny would be a step in the wrong direction."89

Imwinkelreid is clearly correct that the Court seriously contemplates exempting hearsay from Sixth Amendment scrutiny altogether. Justice Scalia wrote that, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."90 The Court's opinion is a clear sanction of, if not an invitation for, the latter approach. Nor should the concerns raised by some lower courts and Professor Imwinkelried discourage the move. True, the Court has never explicitly demarked a line between testimonial and nontestimonial statements. However as Justice Scalia explains, this distinction, though unarticulated, was always there in the sense that it "interlocks" well with the precedent: "If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached."91

Nor is there substance to the second charge that Roberts is a necessary failsafe in the event that a court mistakenly deems a testimonial statement nontestimonial, which is a likely event without a comprehensive definition of testimonial hearsay. The logical error here is that it presupposes a clear line exists between the two types of statements which the courts simply need to discover. This line does not exist. Each class has its core elements; prior testimony at a preliminary hearing is testimonial, whereas business records are not.92 But the close questions have no right answer. They are whatever the courts say they are, and if the decision of a lower court on these close questions is overturned on appeal, it is because the disagreeing court is superior, not because it is correct in some absolute sense. The scenario the Roberts supporters contemplate cannot arise unless one takes the discredited view that law floats in the ether waiting to be divined by the sages on the bench. In a close case, the hearsay statement has no intrinsic characterization. It is whatever the courts make it, so it can never be mistakenly deemed nontestimonial. There is no

90. Crawford, 541 U.S. at 68.
91. Id. at 59 n.9. Later it is noted that courts tend to finesse the precedent to lend the appearance of continuity and consistency. Even if that is the case here and this is a novel distinction unsupported by the precedent, it commands a strong majority of seven Justices who find it well grounded in history if not case law.
92. Id. at 56, 68.
need then for a failsafe because by the nature of the system, no mistake can be made.\textsuperscript{93}

Finally, Professor Imwinkelried and those for the preservation of \textit{Roberts} argue that because certain nontestimonial expert reports are so untrustworthy, "it makes sense to apply the Confrontation Clause and pressure the prosecution to produce the expert as a trial witness subject to cross-examination."\textsuperscript{94} But this argument forgets the lesson of \textit{Crawford}. The \textit{Crawford} Court recognized that the ultimate goal of the Confrontation Clause "is to ensure reliability of evidence . . . but it is a procedural rather than a substantive guarantee."\textsuperscript{95} The clause "reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined."\textsuperscript{96} Imwinkelried is trying to shift the focus back to the substantive question of reliability. But that was the vice of \textit{Roberts}. It replaced "the constitutionally prescribed method of assessing reliability with a wholly foreign one."\textsuperscript{97}

Moreover, Imwinkelried confuses the desirable with the constitutionally required. The unreliability of certain evidence is a fine reason to alter state or federal hearsay law so as to bar it, but it is not an argument to apply the Sixth Amendment to a case it does not cover. According to \textit{Crawford}, the Confrontation Clause set out a procedural guarantee of fairness. To the extent that it may not achieve its goals in a particular instance there are state and federal evidence rules to pick up the slack. Inasmuch as Imwinkelried is correct, and these rules are inadequate to the task, his appeal lies to the legislature, not the Constitution.

The Supreme Court ended the debate at the close of its 2005 Term. In a rebuke to the view espoused by Professor Imwinkelreid and like-minded judges, the Court in \textit{Davis v. Washington} confirmed that the Sixth Amendment applies solely to testimonial hearsay: "A limitation [to testimonial statements] so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter."\textsuperscript{98}

\textsuperscript{93} Of course a mistake is possible in the following case: The court could theoretically characterize as nontestimonial a statement which \textit{Crawford} teaches is core testimonial (e.g., statements before a grand jury). In this case of clear error, \textit{Roberts} is still useless as a failsafe, because if the court can mischaracterize the testimony it can just as easily find unreliable evidence reliable. Thus, there is no increased protection; you have simply shifted the stage at which the error is made.

\textsuperscript{94} Imwinkelried, \textit{supra} note 89, at 19.

\textsuperscript{95} \textit{Crawford}, 541 U.S. at 61.

\textsuperscript{96} \textit{Id}.

\textsuperscript{97} \textit{Id}. at 62.

V. UNAVAILABILITY AND THE FORFEITURE DOCTRINE

Suppose a witnesses' unavailability is wrongfully procured by the defendant. It is a settled principle of the law that no man shall profit from his own wrongdoing. Over one hundred years ago, a Mormon charged with bigamy hid his second wife from authorities in an effort to avoid conviction. At trial, the government presented prior statements of the unavailable second wife and the defendant was convicted. On appeal, he argued his confrontation rights were violated. The Supreme Court was unimpressed: "[I]f he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

By 1997, when the idea that one's confrontation right could be waived by misconduct was codified in the Federal Rules of Evidence, most circuits had already adopted a common law version of it. Rule 804(b)(6) lists as a hearsay exception, "A statement offered against a party that has engaged . . . in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Even as it repudiated a reliability exception to the confrontation right, the Crawford Court emphatically affirmed the ongoing viability of forfeiture. "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds . . . ."

A question remains though as to the standard of proof. Prior to the 1997 amendment codifying forfeiture by wrongdoing, the evidentiary standard for determining equitable forfeiture was disputed. The Fifth Circuit concluded that "because confrontation rights are so integral to the accuracy of the fact-finding process and the search for truth, in contrast to the exclusionary rule," clear and convincing is the proper standard to find a waiver of the confrontation right. However, most courts adopted the usual preponderance-of

100. Id. at 158.
102. FED. R. EVID. 804(b)(6).
104. In its latest pronouncement on the confrontation clause, the Court once again left the question open: "We take no position on the standards necessary to demonstrate such forfeiture." Davis v. Washington, 126 S. Ct. 2266, 2280 (2006).
105. United States v. Thevis, 665 F.2d 616, 631 (5th Cir. 1982).
the-evidence standard of Rule 104(a),106 and the drafters of Rule 804(b)(6)107 followed suit. The advisory committee notes to this 1997 amendment explain that they adopted the lighter preponderance-of-the-evidence standard to further discourage unscrupulous behavior.108

After *Crawford*, one wonders if the Fifth Circuit does not have the better of the argument. The Supreme Court describes forfeiture by wrongdoing as an exception which makes no claim to be a surrogate means of assessing reliability, and therefore, as very different from the latter type of exceptions which the Court rejects.109 Nevertheless, the Court recognizes the forfeiture exception, only as an equitable principle which is not the same as subscribing to it as codified in the *Federal Rules of Evidence* with a preponderance-of-the-evidence standard. The *Crawford* Court is also adamant that the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."110 Its reticence to admit any exceptions at all suggests that while the Court recognizes the forfeiture exception as punitive and therefore different, it may well one day require heightened proof before it deprives a defendant of the confrontation right it so reveres.111

In any event, under Rule 804(b)(6), a party forfeits confrontation rights only if the party acted wrongfully with the intent of making the witness unavailable. Procuring the witness' absence need not be the defendant's sole motivation so long as "[the party] 'was motivated *in part* by a desire to silence the witness.'"112 Some states depart from federal practice on this point and do not require intent at all.113

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106. *Hale*, 691 N.W.2d at 653 (Prosser, J., concurring) (citing United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992); United States v. Potamitis, 739 F.2d 784, 789 (2d Cir. 1984); Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979); United States v. Carlson, 547 F.2d 1346, 1358–59 (8th Cir. 1976)). Rule 104(a)–(b) of the *Federal Rules of Evidence* states that:

> Preliminary questions concerning ... the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b). ... When the relevancy of evidence depends upon the fulfillment of a condition ... the court shall admit it upon ... the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

107. FED. R. EVID. 804(b)(6).
108. Id. advisory committee's note.
110. Id. at 54 (emphasis added).
111. Id. at 62.
112. United States v. Dhinsa, 243 F.3d 635, 654 (2d Cir. 2001) (quoting United States v. Houlihan, 92 F.3d 1271, 1279 (1st Cir. 1996)).
113. Gonzalez v. State, 155 S.W.3d 603, 610–11 (Tex. App. 2004) ("Although *United States v. Houlihan* suggests that the procurement of the witness's absence must be motivated by a desire to silence the victim for the forfeiture by wrongdoing
Again, one wonders if after *Crawford*, the Court will adjudge intent to be a constitutional prerequisite to a forfeiture finding.

A thorny problem arises where the defendant is charged with the very act that rendered the witness unavailable. Several courts have applied the forfeiture doctrine even where the defendant is charged with the homicide that rendered the witness unavailable. They reason by analogy to the hearsay exception for coconspirator statements which are admissible subject to a demonstration, by the preponderance of the evidence, that a conspiracy exists. This is the rule even where the defendant is charged with a conspiracy whose existence is an ultimate fact for trial. "A court is not precluded from determining the preliminary facts necessary for an evidentiary ruling merely because they coincide with an ultimate issue in the case."

This argument, however, is entirely refuted by the existence of the dying-declaration exception. If a forfeiture argument was available in homicide cases to admit the victim's prior statements, the narrower dying-declaration exception would not be needed. Death-bed statements, as well as any prior testimonial statements, would already be admitted at trial on the forfeiture theory. The existence of the former refutes the possibility of the latter.

Its dubious reasoning notwithstanding, efforts are afoot to expand what one might term this "aggressive strain of forfeiture jurisprudence" beyond homicide cases. These developments should be of keen interest to prosecutors after *Crawford*. Testimonial evidence, otherwise inadmissible save in the unlikely event of prior opportunity for cross-examination, may come in under a forfeiture theory if the witness' unavailability is somehow related to the charged crime. The possibility is particularly alluring in the realm of domestic violence and child abuse where victims are often unwilling or unable to cooperate. In domestic violence cases, the victims are hesitant to assist prosecutors, either for fear of reprisal or because they have reunited with their abusers. Victims of child abuse are typically unavailable either because they are not mentally mature enough to testify, or be-

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116. Giles, 19 Cal. Rptr. 3d at 849.
cause the abuser’s mere presence in the courtroom leaves them “emotionally unavailable.” At the same time, their testimony is often the most damning. In the past, prosecutors made good use of the Roberts reliability analysis, but Crawford puts this whole world in jeopardy. The solution according to some commentators is to educate the judiciary and the public that “domestic violence almost always involves forfeiture.” The claim is that systematic abuse has profound psychological effects which leave the victim unavailable to testify. “Whether the reason is fear of retaliation, physical terror of seeing the abuser, or a desire to please and remain with the abuser, the cause of a victim’s unavailability is the same—procurement by the abuser through the abuse itself.”

One appreciates that prosecutors are hard hit by the strictures of Crawford, but in addition to the grave logical flaws in the homicide context, pursuing an “aggressive strain of forfeiture jurisprudence” presents substantial bootstrapping problems, which are not resolved by analogy to the coconspirator exception. The testimony prosecutors propose to offer under the forfeiture exception is testimonial. In contrast, the Crawford Court explicitly identifies statements of coconspirators in furtherance of the conspiracy as nontestimonial. The Crawford Court could not be clearer about the deep distinction between the two types of hearsay so a cross-type analogy from nontestimonial statements to testimonial ones must be rejected. That a bootstrap argument suffices to admit a nontestimonial coconspirator’s statement does nothing to make it acceptable practice in dealing with the testimonial hearsay of a victim. The fact that a practice is permissible in the former case, where the Sixth Amendment may have no reach, is no argument to allow it in the latter where core Sixth Amendment concerns abide. It is certainly unsettling that Crawford may cripple child and spousal abuse prosecutions, but that is the natural consequence of the defendant friendly Anglo-American legal system. It operates on the premise that better ten guilty persons go free than a single innocent one be unjustly imprisoned. Society has to live with the consequences.

A final forfeiture-related question is suggested by the facts of the Crawford case. Sylvia was unavailable only because her husband exercised his marital privilege to bar her appearance. It is unclear why he should be permitted to raise a confrontation claim when he is the

120. Id. at 22.
121. Krischer, supra note 118, at 14.
122. Id. at 16.
123. See supra pp. 433–36. Where the defendant is charged with the very act that rendered the witness unavailable, prosecutors cannot demonstrate forfeiture without proving the charge. As noted above, some courts reason by analogy to the coconspirator’s statement in an attempt to solve this problem.
124. Crawford, 541 U.S. at 56.
The husband committed no wrongdoing within the meaning of Rule 804(b)(6), but from the common sense point of view he is being allowed to have it both ways. If he wants to cross-examine her because he thinks her testimony is untrue, let him permit her to testify. Apparently, Washington raised just such a waiver argument at the appellate level, but the court rejected it because "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." \(^{125}\)

In a footnote, the Supreme Court noted that the state did not challenge the appellate court's conclusion. Perhaps it should have. The Washington Supreme Court's argument seems incorrect. If a plea bargain does not put the defendant to a Hobson's choice it is difficult to see how this does. To permit a defendant to string together the spousal privilege and the confrontation right is to give him more protection than either was intended to confer.

VI. PRIOR OPPORTUNITY FOR CROSS-EXAMINATION

The final ingredient in Crawford's recipe for admissible testimonial hearsay is prior opportunity to cross-examine the now unavailable witness. "Prior opportunity" is a phrase familiar to evidence law and is well developed in the precedent.\(^{126}\)

Crawford teaches that testimonial statements consist of "prior testimony at a preliminary hearing, before a grand jury, or at a former trial."\(^{127}\) The defendant has no right to attend or question witnesses before a grand jury so there can be no prior opportunity in that setting.\(^{128}\) In contrast, prior opportunity was plainly had where the testimony to be admitted was given at a former trial, assuming it was not infected with any constitutional error.\(^{129}\)

Testimony at a preliminary hearing is a closer question. Technically both sides have the opportunity to offer evidence and cross-ex-

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126. For example, Rule 804(b)(1) of the Federal Rules of Evidence lists as a hearsay exception: "Testimony given as a witness at another... proceeding, or in a deposition... if the party against whom the testimony is now offered... had an opportunity and similar motive to develop the testimony by [cross-examination]." See generally Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 8.68 (3d. ed. 2003).
127. The Court also lists as statements made in response to police interrogations as core testimonial statements. That example is purposely omitted, as is consideration of statements whose testimonial character is doubtful. Such statements are offered in a nonadversarial context; no opportunity for cross-examination exists so the question of the adequacy of the opportunity does not arise.
128. Mueller & Kirkpatrick, supra note 126, at 1024.
129. Id. at 1301 (citing Pointer v. Texas, 380 U.S. 400 (1965)). In Pointer, the Court held that the defendant's rights were violated by trial use of preliminary hearing testimony where defendant was not represented at the hearing by counsel. Pointer, 380 U.S. at 407-08.
amine witnesses, but in practice, "[f]or defendants, usually the best strategy at a preliminary hearing is not to engage in searching cross-examination."130 For one, witness credibility is considered a trial issue so efforts to impeach will meet with little success. Moreover, even a persuasive rebuttal is unlikely to preclude a finding of probable cause. "Usually the wiser strategy is to hold back, and avoid preparing witnesses and government lawyers for what is to come . . . ."131 Thus, it seems incorrect to admit at trial testimony adduced at a preliminary hearing on the theory that its reliability was established by the crucible of cross-examination in accordance with the intent of the Framers. Cross-examination is a great engine of truth at an adversarial trial. But at a pretrial hearing, where different strategic calculations dull the motive to cross-examine, even the Framers would agree that it is an ineffective tool of ensuring reliability.

Some courts agree that pretrial hearings do not offer a real prior opportunity to cross-examine the witnesses.132 Others adopt a case-by-case approach to whether there was both motive and opportunity to cross-examine.133 The weight of the authority, though, admits testimony adduced at a preliminary hearing even though in practice defendants are not motivated to rigorously cross-examine the witnesses.134

Twice the Supreme Court has rejected constitutional challenges to this practice. In California v. Green, the government’s witness proved forgetful and difficult at trial so the prosecution read in his testimony from the preliminary hearing. The Court found no violation, stating the testimony had been given under circumstances closely approximating those of a trial, including representation by counsel who had every opportunity to cross-examine the witness.135 These circumstances furnished all the Sixth Amendment demands, which is “substantial compliance with the purposes behind the confrontation requirement.”136

The Court reached the same result in Ohio v. Roberts, in which the government sought to introduce at trial unexpected, damaging testimony elicited by the defense on direct examination of its own witness at the preliminary hearing.137 The Court was unimpressed with appellants’ distinction between direct and cross-examination. “Counsel’s questioning clearly partook of cross-examination as a matter of

130. MUELLER & KIRKPATRICK, supra note 126, at 1025.
131. Id.
132. Id. (citing People v. Elisondo, 757 P.2d 675 (Idaho 1988); People v. Smith, 597 P.2d 204, 206–08 (Colo. 1979)).
133. Id. at 1025 (citing King v. State, 780 P.2d. 943, 955–56 (Wyo. 1989)).
134. Id.
136. Id. at 166.
form. . . . However state law might formally characterize the questioning of [the witness], it afforded 'substantial compliance with the purposes behind the confrontation requirement.'

These prior cases dealt with situations in which some examination of the witness occurred, and the question was whether that was adequate. A tougher issue arises when the declarant was not cross-examined at all at the preliminary hearing, despite opportunity to do so. The Court in Roberts acknowledged language in Green suggesting it is the opportunity to cross-examine rather than the actual cross-examination that satisfies the Confrontation Clause, but the question remains an open one.

This precedent must be reconsidered in light of the underlying methodology of Crawford. Compared to Roberts, Crawford is both stricter and more lenient. It confines confrontation rights to testimonial hearsay only but it also eliminates the reliability exception. The result is a doctrine which encompasses less, but which is more rigorous as to that which is protected. This observation suggests an approach to all Crawford problems after determining the threshold issue of whether a statement is testimonial. Where nontestimonial hearsay is at issue, any doubt should be resolved in favor of the lenient position—that is, the government's position that there is no constitutional issue. However, where testimonial hearsay is at issue, doubt must be resolved in favor of the strict position—that is, the defendant's position that constitutional rights are implicated.

Following that analysis here, it is apparent that the jurisprudence on preliminary hearing testimony is in jeopardy. Green and Roberts admit testimony adduced at a preliminary hearing even though in practice defendants are not motivated to rigorously cross-examine the witnesses. Their reasoning that "preliminary hearings afford substantial compliance with the purposes" of the Sixth Amendment jibes well with their view of the confrontation right as functional rather than formal. But Crawford takes a formal two-fold approach. It protects less, but it protects it better. Therefore, the documented doubt with respect to the adequacy of the prior opportunity for cross-examination must be resolved in the defendant's favor where, as here, bona fide testimonial statements are at issue.

VII. RETROACTIVITY

Crawford ushered in a new era in Sixth Amendment jurisprudence and a flood of appeals is to be expected. An important question is the retroactive reach of the decision. Generally, the Constitution neither

138. Id. at 70–72 (quoting Green, 399 U.S. at 166).
139. Id. at 70.
commands nor forbids courts to apply new doctrine retroactively.140 "[N]ew rule[s] for the conduct of criminal prosecutions [however, must] be applied retroactively to all cases, state or federal, pending on direct review or not yet final."141

Cases on collateral review present a more difficult question.142 Ordinarily, in such cases, even new rules have no retroactive effect. A new rule will apply retroactively, however, if either of two conditions is met:143 The rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal-law making authority to proscribe,'"144 or the new rule "requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"145 This rather nebulous second condition evolved out of Justice Harlan's opinion in Mackey v. United States:146 "[I]n some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."147

Based upon this, the Court in Teague v. Lane concluded that the second exception to the ordinary rule of nonretroactivity is "reserved for watershed rules of criminal procedure . . . without which the likelihood of an accurate conviction is seriously diminished."148 Recently, the Court reaffirmed Teague with a word of caution. In order to apply retroactively, "[i]nfringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,' and the rule must 'alter our understanding of the bedrock procedural elements' essential to the

142. One can imagine a situation in which there is a dispute as to whether a case should be characterized as direct or collateral. There are cases on this question. For purposes of this discussion, consider a bonafide collateral attack such as a petition for habeas relief.
145. Id.
146. Id. at 312.
147. Id. at 311 (emphasis omitted) (quoting Mackey, 401 U.S. at 693–94 (Harlan, J., concurring)).
148. Id. at 311, 313.
fairness of a proceeding."\textsuperscript{149} But, "[t]his class of rules is extremely narrow, and it is unlikely that any . . . ha[s] yet to emerge."\textsuperscript{150}

Armed with this understanding, consider the \textit{Crawford} decision. The threshold question is whether the Court announced a "new rule." A new rule is one which "breaks new ground or imposes a new obligation on the States or the Federal Government."\textsuperscript{151} The Tenth Circuit held it was new and the Ninth Circuit agreed,\textsuperscript{152} but not before filling up pages of the federal reports agonizing over the statement in \textit{Crawford} that "[a]lthough the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."\textsuperscript{153} "The puzzler," said the Ninth Circuit, "is whether the 'results of [the Supreme Court] decisions' are co-extensive with the rules of those decisions. If so, then the \textit{Crawford} pronouncement could be legitimately viewed [not as a new rule,] but as a continuation of Supreme Court jurisprudence."\textsuperscript{154} After "careful scrutiny" it concluded to no one's real surprise that \textit{Crawford} had in fact announced a new rule because "(1) \textit{Crawford} deviates from the test announced in \textit{Ohio v. Roberts}, and (2) simply reaching the right 'result' does not mean that the result flowed from a constant rule."\textsuperscript{155}

The Ninth Circuit's analysis is needlessly complex. For one thing, it reads too much into the Court's pronouncement that its results have been faithful to the original meaning of the Confrontation Clause. That may be little more than part of the judiciary's time honored tradition of "airbrushing" the precedent to lend the appearance of continuity. More importantly, the court confuses the "watershed rule" inquiry with the "new rule" inquiry. That a decision continues existing jurisprudence may well mean it is not a watershed development, but it does not make it any less new. When a road crew constructing a long highway lays down another mile of asphalt it is not \textit{newsworthy} but it is \textit{new}. Similarly, decisions of the Supreme Court are rarely watershed within the meaning of \textit{Teague}, but they are almost always new. The \textit{Crawford} decision simply generated too much discussion to be dismissed as adding nothing.

The Tenth Circuit put it much more succinctly. \textit{Crawford} clearly "imposes new obligations" on the government to either produce its witnesses for cross-examination or forgo their testimony. Inasmuch as

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{150} Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (quoting Tyler, 533 U.S. at 667 n.7).
\item \textsuperscript{151} \textit{Teague}, 489 U.S. at 301.
\item \textsuperscript{152} Bockting v. Bayer, 399 F.3d 1010, 1012 (9th Cir. 2005); Brown v. Uphoff, 381 F.3d 1219, 1226 (10th Cir. 2004).
\item \textsuperscript{153} Crawford v. Washington, 541 U.S. 36, 60 (2004).
\item \textsuperscript{154} Bockting, 399 F.3d at 1014–15.
\item \textsuperscript{155} \textit{Id.} at 1015 (citation omitted).
\end{itemize}
\end{footnotesize}
this framework to determine whether hearsay is admissible differs from that of Roberts, it constitutes a new rule.

It is not that simple though, argues Judge Noonan in Bockting v. Bayer. A return to original understanding is by definition not new. He characterizes Crawford as “correct[ing] [] a misinterpretation” not “announc[ing] a new rule.” The Court acknowledges as much when it recognizes “a fundamental failure on [its] part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.”

Certainly, the focus in Crawford on history and original understanding supports Judge Noonan’s position, but consider the perverse consequences his argument produces. Reluctance to announce a new rule is not as blameworthy as a misinterpretation. In the first case the Court is risk averse and cautious, in the second it should have known better—it made a mistake. It had all the information it needed, it just did not process it properly. The victim of the Court’s error then has the stronger claim for collateral relief. Yet, Judge Noonan’s approach has precisely the opposite effect. If by correcting its mistake, the Court does not announce a new rule, the correction is not retrospective under Teague, and the victim is left with no remedy for the Court’s error.

As a new rule of criminal procedure, Crawford should apply “‘retroactively to all cases, state or federal, . . . [pending on direct review or] not yet final.’” As for a collateral attack, the decision does not implicate private primary conduct. If it is to escape the usual rule of nonretroactivity, it will be by way of the second exception for “watershed rules.” On this issue the circuits split.

In the Second Circuit, Crawford is not a watershed rule. Before it reached this result, the court noted, but did not resolve, an additional wrinkle in the problem. The Antiterrorism and Effective Death Penalty Act (AEDPA) commands that

[an application for a writ of habeus corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to,

156. Brown, 381 F.3d at 1226.
157. Bockting, 399 F.3d at 1023 (Noonan, J., concurring) (rejecting retroactivity, but concurring on other grounds that the Sixth Amendment was violated).
159. Id. at 60 (“Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause.”).
161. Mungo v. Duncan, 393 F.3d 327, 336 (2d Cir. 2004) (declining to apply Crawford retroactively on collateral attack).
or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . . 162

According to the Supreme Court, this statute commands federal courts to decide cases on collateral review not with reference to current Supreme Court jurisprudence, but with reference to the law as understood either at the time of the adjudication in state court on the merits, or at the time the judgment became final.163 Nor does the Act explicitly exempt watershed rules. Unless such an exception is implied, even rules retroactive under Teague will not apply retroactively by force of the AEDPA.164

The Second Circuit in Mungo v. Duncan did not reach this question because it determined that Crawford was not even retroactive under Teague,165 concluding that a new rule of criminal procedure is only “watershed” if it enhances trial accuracy.166 Inevitably, some hearsay admissible under Roberts is in fact unreliable. To the extent Crawford screens it out, accuracy is enhanced. But the tradeoff is an increased risk of “false negatives.” Its near absolute bar on testimonial hearsay will also screen out highly reliable evidence and frustrate otherwise “well-deserved convictions.”167 The court likely had in mind the facts of the case before it in which the homicide victim clearly identified his killers minutes before he expired. “Because Teague’s test of a watershed rule requires improvement in the accuracy of the trial process overall, [this court] conclude[s] that Crawford is not a watershed rule . . . . [and] should not be applied retroactively on collateral review.”168

The Tenth Circuit reached the same result in Brown v. Uphoff, but it focused on whether Crawford is a bedrock procedural rule rather than its effect on the accuracy of the proceeding. “Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial. It would, therefore, be difficult to conclude that the rule in Crawford alters

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164. See Bockting v. Bayer, 399 F.3d 1010, 1021 (9th Cir. 2005) (holding that AEDPA should be read to incorporate Teague exceptions in order to avoid serious constitutional questions inherent in depriving defendant of fundamental due process).
165. Mungo, 393 F.3d at 352.
167. Mungo, 393 F.3d at 335.
168. Id. at 336.
rights fundamental to due process."169 Numerous courts using both circuits' rationales arrived at the same conclusion.170

But the Ninth Circuit disagreed. *Bockting v. Bayer* held that *Crawford* is a watershed opinion entitled to retroactive effect under *Teague*.171 It then proceeded to resolve the question the Second Circuit left open in *Duncan* on the construction of the AEDPA: "[T]he constitutional doubt canon of construction mandates that we read the statute to incorporate the *Teague* exceptions to avoid the serious constitutional problem raised by depriving individuals of bedrock principles of Due Process."172

According to the Ninth Circuit, Justice Scalia's exhaustive survey of the history confirms that the Confrontation Clause is a "bedrock procedural guarantee" fundamental to the American justice system.173 Furthermore, *Crawford*’s new rule enhances trial accuracy just as required under *Schriro v. Summerlin*: "[T]he evidence that cross-examination seriously decreases the possibility of inaccurate conviction is unequivocal. The Supreme Court has repeatedly and without deviation held that the purpose of the Confrontation Clause is to promote accuracy."174 In contrast, the Ninth Circuit, quoting *Crawford*, stated: "[T]he [general reliability] test [of *Ohio v. Roberts*] is inherently, and therefore permanently, unpredictable."175

The court rejected decisions to the contrary from the Tenth and Second Circuits. The Tenth Circuit was impressed by the argument that a right whose violation triggers merely harmless-error review can hardly be characterized as fundamental or bedrock.176 The error of this contention, explains the *Bayer* court, is that the harmless-error and bedrock-principle inquiries ask two different questions. "Whether

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169. Brown v. Uphoff, 381 F.3d 1219, 1226–27 (10th Cir. 2004) (citation omitted). But see *Bockting*, 399 F.3d at 1020 (rejecting the reasoning in *Brown v. Uphoff* and noting that "whether a rule of constitutional law is subject to harmless error review does not answer the question whether it is a bedrock rule of procedure").

170. Hiracheta v. Att'y Gen., 105 F. App’x 937, 938 (9th Cir. 2004) ("[T]he new rule articulated in *Crawford* is procedural in nature and does not apply retroactively to Petitioner’s collateral attack on his conviction."); Evans v. Luebbers, 371 F.3d 438, 444 (8th Cir. 2004) ("[T]he *Crawford* Court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to *Teague v. Lane*’s non-retroactivity doctrine."); People v. Kahn, No. 499-90, 2004 WL 1463027, at *4 (N.Y. Sup. Ct. June 23, 2004) (declining to apply *Crawford* retroactively because although Confrontation Clause is a bedrock principle, *Crawford* does not change that; it simply "provides a test for the admissibility of hearsay statements to courts so they can properly apply this bedrock principle").

171. *Bockting*, 399 F.3d at 1020–21.

172. *Id.* at 1021.

173. *Id.* at 1020 (citing *Crawford v. Washington*, 541 U.S. 36, 42 (2004)).

174. *Id.* at 1017 (citing numerous Supreme Court cases).

175. *Id.* at 1018.

a rule is a bedrock rule of procedure depends on whether it increases the likelihood of accurate conviction. Whether a rule is subject to harmless error analysis depends on whether the impact of the error can be measured. A rule may well be bedrock, but if its impact is easily quantifiable it is subject to harmless-error inquiry. So one finding is independent of the other.

Brown also argued that Crawford is not watershed because it "does not 'alter[] our understanding of what constitutes basic due process,' [it] merely sets out new standards for the admission of certain kinds of hearsay." The Ninth Circuit retorted that Crawford is not a mere tweaking of the doctrine. It entirely bars testimonial hearsay absent an opportunity to cross-examine the declarant. So crucial is Crawford and so inadequate is Roberts that the Supreme Court faults itself for not enunciating the rule earlier, stating that "it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion."

Nor was the Bayer court taken with the Second Circuit's finding that while the Crawford decision "improve[s] accuracy in some circumstances [it] diminish[es] it in others" and therefore does not improve overall trial accuracy. "[T]he Second Circuit has substituted its judgment of whether the Crawford rule is one without which the accuracy of conviction is seriously diminished, for the Supreme Court's considered judgment . . . . that the purpose of the Confrontation Clause is to promote accuracy . . . ." Interestingly, the Second Circuit could have rested its decision on other grounds and avoided all this criticism. The facts of Duncan are important. Police on patrol in Brooklyn heard shots fired and hurried to investigate. As they approached, Brent Arthur, the victim, flagged them down and identified as his assailants two black men in light hoods fleeing the scene. With Arthur in tow, the police sped off after them. On Arthur's advice, the officers headed toward the projects, where Arthur spotted them in a driveway. The police apprehended the two and brought them before Arthur who confirmed them as the perpetrators. The officers said they needed to know who actually fired the gun and the victim identified one as the triggerman. Minutes later Arthur died of his wounds. Judge Weinstein of the District Court for the Eastern District of New York admitted Arthur's state-

177. Bockting, 399 F.3d at 1020 (citing Schriro v. Summerlin, 542 U.S. 348 (2004)).
178. Id. at 1020 (citing Arizona v. Fulminante, 499 U.S. 279 (1991)).
179. Brown, 381 F.3d at 1226 (quoting United States v. Mora, 293 F.3d 1213, 1219 (2002)).
181. Id. at 1020 (citation omitted).
182. Mungo, 393 F.3d at 330.
ment identifying the shooter under the excited-utterance exception to the hearsay rules. 183

Upon review, the Second Circuit might have avoided much controversy had it instead admitted the statement as a dying declaration. 184 The distinction is significant because Crawford acknowledges powerful historical precedent for recognizing dying declarations as exempt from the strictures of the Confrontation Clause:

The existence of [the dying-declaration] exception as a general rule of criminal hearsay law cannot be disputed. . . . [T]here is authority for admitting even those [dying declarations] that clearly are [testimonial]. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis. 185

Instead, the Second Circuit recognized in dicta that the victim's statement to police identifying the triggerman was likely testimonial. 186 It did not officially reach the question because it found that Teague barred the collateral attack. But that conclusion required the court to advance the dubious claim that Crawford did not work an overall improvement in trial accuracy, a conclusion which the Ninth Circuit vigorously disputes and which runs against the whole tenor of the decision. The stronger argument would dispose of petitioner's claim on the merits: Even if Crawford was applied retroactively, and even if the statement was testimonial, it was a dying declaration upon which the Sixth Amendment does not operate.

Admittedly, this approach would require the Second Circuit to take a bold stance on an issue the Supreme Court explicitly declined to resolve. Indeed, the Duncan court preferred to skirt the issue, even at the cost of generating a less intellectually persuasive argument. Nevertheless, from a policy standpoint the dying-declaration exception is wise, particularly after Crawford, so the court should have seized the opportunity to preserve it. The traditional justification for the exception, that one about to meet his maker would not go with a lie on his lips, has come under criticism of late as outdated and naive. One commentator described the rationale as "laughable" in today's world. 187 There is much more to it though than quaint religious piety. Crawford

183. Id.
184. Perhaps, despite the timeline, the court felt that the victim did not believe his death was impending when he identified his assailants.
186. Mungo, 393 F.3d at 336 n.7.
187. Friedman, supra note 20, at 449. There are certainly cultural issues at work. The introduction of the rule in India by the British was attended by much embarrassment as locals on their deathbeds would implicate all their hereditary enemies. As a native of Madras put it: What possible motivation could a man have to tell the truth when he is about to die?
1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 448–49 (1883).
CRAWFORD heralds a return to original understanding of the clause under which testimonial hearsay is entirely barred. But in the original understanding, a robust conception of the confrontation right must go hand in hand with an exception for dying declarations lest the law become a prod to the unscrupulous. The law long maintained a forfeiture-by-wrongdoing exception to the hearsay rule, codified in Rule 804(b)(6), which admits hearsay if the defendant wrongfully procures the declarant’s absence. But the forfeiture exception does not apply in cases like Duncan where the reason for the witness’ absence is the very crime with which the defendant is charged. Yet society was particularly concerned that a murderer not profit from his killing. That is why the common law had an additional exemption for dying declarations, so that in the particularly heinous realm of homicides, the most compelling non-circumstantial evidence of guilt—the victim’s identification of his killer—would not be barred. Defendants may applaud Crawford’s return to the old learning, but they have to take the bitter with the sweet. Reinvigorating the confrontation right without also maintaining the old learning on the one prudent exception overprotects defendants to the detriment of law and order.

A final and general point on retroactivity is that the entire doctrine as set out in the Teague line of cases seems backwards. The greater the novelty of the ruling, the weaker the claim to retroactivity should be. Instead the Court reserves retroactivity only for watershed opinions which issue, according to Justice Harlan, when “time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process . . . alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.” But if the catalyst for a decision is “time and growth in social capacity and judicial perceptions,” the decision is an innovation, not a correction. It means the old rule is wrong now, but it was not wrong until now. So the claim for retroactivity should fail. In contrast, when the Court merely tweaks the doctrine, it may be correcting a mistake. The victim of a mistake has a strong claim for retroactive relief, because he was actually wronged. Teague produces a perverse result, putting those least deserving of relief in the best position to obtain it.

VIII. THE CONFRONTATION RIGHT IN CIVIL CASES

The Sixth Amendment applies “[i]n all criminal prosecutions.” This language spurs to action two opposing forces. There are the ag-
gressive prosecutors and the tough-on-crime legislators who strain to classify proceedings as civil so as to avoid the commands of the Sixth Amendment. Then there is the defendant's bar which argues for coverage whenever significant private interests are at stake if not by the specific terms of the Constitution, then by its logic and structure. In the post-Crawford world, judicial efforts to strike a balance have produced three approaches.

The first looks to the statute or settled precedent to determine whether a proceeding is civil or penal. If it is civil the Confrontation Clause is inoperative, but due process bars unreliable hearsay. Reliability is established if the hearsay falls within a firmly rooted exception or otherwise exhibits indicia of reliability. Thus, Roberts finds

191. See In re Civil Commitment of E.S.T., 854 A.2d 936, 948 (N.J. Super. Ct. App. Div. 2004) (worrying that classification of sexually violent predator commitment hearing as civil rather than penal may be abuse of system: "[T]he solution may lie in an honest use of criminal sentencing to achieve an appropriate period of confinement rather than use—or abuse—of the civil commitment statute to remedy the situation.").

192. See In re Children of L.D., No. A04-1368, 2005 WL 526734, at *7 n.3 (Minn. Ct. App. Mar. 8, 2005) (rejecting argument that proceedings to terminate parental rights are quasi-criminal because they implicate fundamental parental rights and therefore Crawford ought to control).

193. Commonwealth v. Given, 808 N.E.2d 788, 793–94 (Mass. 2004) ("While commitment proceedings under c. 123A [to have offender involuntarily committed as a sexually dangerous person] are civil proceedings, the potential deprivation of liberty to those persons subjected to these proceedings 'mandates that due process protections apply.'" (quoting Commonwealth v. Bruno, 735 N.E.2d 1222 (Mass. 2000)); In re Children of L.D., 2005 WL 526734, at *7 ("Termination proceedings are civil proceedings; they are not quasi-criminal."); In re Davis, 101 P.3d 1, 25 (Wash. 2004) ("A personal restraint petition is a civil proceeding, and none of the authority [defendant] cites supports his claim that he had a Sixth Amendment right to question witnesses at the reference hearing on the issue of bias."). It may seem anomalous that courts used the Due Process Clause to incorporate the Sixth Amendment, but now insist that due process applies even where the Confrontation Clause does not. Due process, though, incorporated confrontation only to the extent it is required under the federal constitution—for criminal proceedings. Due process has greater reach encompassing cases involving deprivations of life, liberty, and property, and in those cases it applies even though confrontation does not.

194. People v. Self, No. F043526, 2005 WL 78555, at *5 (Cal. Dist. Ct. App. Jan. 14, 2005) (no confrontation right in sexually violent predator (SVP) commitment hearing because “[n]othing in Crawford v. Washington extended the Sixth Amendment [C]onfrontation [C]lause to civil litigants, such as participants in SVP proceedings.”). Due process is satisfied where hearsay contains "'special indicia of reliability.'" Id. at *4 (quoting People v. Otto, 26 P.3d 1061, 1067 (Cal. 2001)). See also In re C.M., 815 N.E.2d 49, 52 (Ill. App. Ct. 2004) (in appeal from finding that child was abused and declaring him ward of the court, minor's out of court statement that he saw father hit son admissible because "'[t]his court has previously held that a proceeding under the Juvenile Court Act constitutes a civil proceeding—meaning that no Sixth Amendment right to confront witnesses is implicated. . . . [a]nd the] record reveals that [the minor's] version of the events was corroborated."); In re N.B., No. B173088, 2004 WL 2985080, at *8 (Cal. Ct. App.
new vitality in the context of civil proceedings governed by the Due Process Clause. The Supreme Judicial Court of Massachusetts is the greatest proponent of this first approach, which it articulated in Commonwealth v. Given: "[R]eliability is the ‘touchstone’ for due process . . . . [and] we adopt[ ] the United States Supreme Court’s rule that ‘reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”195 The Roberts test for reliability in the civil context survives Crawford because,

[unlike the [C]onfrontation [C]lause, due process demands that evidence be reliable in substance, not that its reliability be evaluated in “a particular manner.” That the focus on reliability may not accommodate a simple, predictable, bright-line rule does not alter the fact that reliability, not cross-examination, is the “due process touchstone.”196

But not everyone agrees. The dissenter in Given was adamant that “[a]lthough the holding in the Crawford case is inapplicable here because the proceeding was civil rather than criminal, it is the Court’s reasoning regarding the reliability of out-of-court statements that applies in this context.”197 Courts which follow this line of argument concede that confrontation does not apply by force of the Sixth Amendment in civil proceedings. Nevertheless, Crawford’s emphasis on cross-examination as the best engine of truth suggests that the due process guarantee of reliability will in very limited circumstances require some confrontation.198 The New Jersey courts bear the standard of this second approach: In re Commitment of GGN overturned a civil commitment order under the Sexually Violent Predator Act

Jan. 12, 2005) (in challenge to State’s reliance on “indicia of reliability” to excuse confrontation in state dependency proceedings, court rejected argument that “in light of Crawford’s wholesale rejection of the constitutionality of the Robert’s test . . . the child dependency hearsay exception [i.e., indicia of reliability] can no longer withstand constitutional scrutiny in the state dependency context under the due process principles that derive from the 14th Amendment.”) (quoting Brief for the Appellant)). Rules of hearsay designed for adults

Id. (internal quotation marks omitted) (quoting In re Kailee B., 22 Cal. Rptr. 2d 485 (Ct. App. 1993)).

195. Given, 808 N.E.2d at 794 n.9 (quoting Commonwealth v. Durling, 551 N.E.2d 1193, 1193 (1990)).

196. Id. at 794, n.9.

197. Id. at 796 n.1 (Ireland, J., dissenting).

198. In re Civil Commitment of E.S.T., 854 A.2d 936, 944 (N.J. Super. Ct. App. Div. 2004) (“It does not comport with fundamental fairness to have the opinions of the non-testifying experts bootstrapped into evidence through the testimony of the testifying experts without an opportunity for cross-examination of the underlying opinions.”).
While acknowledging that no jurisdiction has extended *Crawford* to civil proceedings, the court explained that,

> [even] without the explicit restriction adopted in *Crawford*, there is a tipping point where due process is violated by the use of hearsay. "As we view it, the infirmity lies in the greatly reduced, if not entirely absent, opportunity for effective cross-examination, a right specifically guaranteed by the SVPA."199

Another New Jersey court relied on the Massachusetts dissent to reverse a sexually violent predator commitment order for lack of opportunity to cross-examine the doctors who authored reports relied on at trial:

> Of course, since this is a civil proceeding, the Sixth Amendment right of confrontation is not directly applicable. Nevertheless .... an SVPA commitment hearing, with its very real threat of lengthy incarceration, is almost pseudo-criminal in nature and should provide as much procedural protection to the committee as the circumstances permit. As the dissenters said in *Commonwealth v. Given* .... 200

Note however, that in both New Jersey cases, the insistence on cross-examination as an element of due process was heavily determined by the fact that the underlying statute promised it to the litigant.201 In the absence of a similar statutory command other courts are not likely to follow suit.

Under the more extreme third approach, due process fully incorporates Sixth Amendment confrontation rights even into certain civil proceedings. In *People ex rel. R.A.S.*, the defendant, himself a minor, was adjudged delinquent for sexually assaulting a child.202 The Colorado court reversed: Because the victim did not testify at trial, the videotape of the victim's interrogation by authorities was admitted in violation of the defendant's confrontation rights. The court, citing Colorado precedent, asserted that

> [T]he United States Supreme Court has determined that despite the similarities of juvenile proceedings to civil proceedings, due process requires that courts make certain protections offered to adult criminal defendants available to alleged juvenile offenders, including the Sixth Amendment right of confrontation.203

Although lower Colorado courts follow this 2001 approach, and it finds support in Supreme Court precedent, its continuing viability after *Crawford* ought to be in question for both methodological and practical reasons.


200. *In re Civil Commitment of E.S.T.*, 854 A.2d at 944 n.5.


202. Technically as a juvenile "he committed acts which, if committed by an adult, would constitute the offense of sexual assault on a child." *People ex rel. R.A.S.*, 111 P.3d 487, 488 (Colo. 2004).

203. *Id.* at 489 (citing A.C. v. People, 16 P.3d 240, 242 (Colo. 2001)).
The Crawford analysis is textual and heavily historical. It meticulously dissects the historical record to discern the intent of the Framers. The result is a doctrine which encompasses less, but which is more rigorous as to that which is protected. This approach does not fit well with McKeiver and Gault, which are products of a different type of constitutional analysis—a more functional open-ended inquiry into evolving social norms and questions of public policy, an earlier era of jurisprudence captured in the phrase "the living constitution."

The practical reason to abandon the McKeiver and Gault precedent is that since the requirements of confrontation are now stricter, the costs of demanding it are greater. It is one thing to say that on balance, due process requires confrontation when confrontation just means hearsay must be reliable. It is wholly another to insist upon confrontation when it will entirely bar otherwise reliable hearsay in a compelling case. In this situation the calculus changes and the balance may tip against the civil defendant. Notice the cases cited above involve sexual and physical abuse of children. Confrontation issues arise frequently in such cases. Where not directly compelled by constitutional analysis, courts may not wish to make things harder for prosecutors. This precise sentiment was expressed by the California court in In re N.B., citing an earlier case:

The court in Kailee B. captured the practical difference between constitutional principles as applied to criminal cases versus those appropriate for dependency cases. In a criminal case the issue is the guilt of the defendant, whereas in a dependency case the subject is the well-being of the victim. Getting to the heart of the matter, the court commented that while it may be true that "it is better that ten guilty persons escape, than that one innocent suffer" (4 Blackstone's Commentaries 358). . . . few, if any, would agree it is better that 10 pedophiles be permitted to continue molesting children than that 1 innocent parent be required to attend therapy sessions in order to discover why his infant daughter was falsely making such appalling accusations against him.\footnote{204}

When the Kailee court made this argument in 1993, it was not persuasive as regards confrontation. There was no real threat the guilty would go free, because under the then governing Roberts regime, all that was required to admit testimonial hearsay was reliability, which was a proper if not necessary demand on prosecutors in any case. However, now that Crawford completely bars even reliable testimonial hearsay absent prior opportunity to cross-examine, the fear that actual abusers may go free is quite real.

IX. CONCLUSION

Crawford v. Washington announced the rule that testimonial hearsay is inadmissible unless the witness is unavailable and there was

prior opportunity for cross-examination. In so doing, it rejected the test of Roberts v. Ohio, which admitted hearsay upon a showing that the testimony was reliable. This shift from a functional to a formal analysis of the Confrontation Clause presents a host of new challenges for the lower courts: What is testimonial hearsay? When is a witness unavailable? What is the scope of the forfeiture exception? What constitutes prior opportunity for cross-examination? Is Crawford retroactive? What rule governs nontestimonial hearsay? And finally, What application does the confrontation right have in civil cases under the Due Process Clause?

Courts have reached different conclusions, but the best analysis is both attuned to the methodology of Crawford and mindful of its practical consequences. The Crawford analysis is textual and heavily historical. It meticulously dissects the historical record to discern the intent of the Framers. The result is a doctrine which encompasses less, but which is more rigorous as to that which is protected. This observation suggests an approach to all Crawford problems after the threshold issue of whether a statement is testimonial. Where nontestimonial hearsay is at issue, any doubt should be resolved in favor of the lenient position—that is, the government's position that there is no constitutional issue. However, where testimonial hearsay is at issue, doubt must be resolved in favor of the strict position—that is, the defendant's position that constitutional rights are implicated. Thus the issues of whether under existing jurisprudence Crawford is a watershed rule to be applied retroactively, whether the standard of proof required to show a forfeiture ought to be heightened, whether the doctrine should apply where the cause of the witnesses' unavailability and the charged offense are identical, and whether an adequate opportunity for cross-examination was had at a preliminary hearing, all should be resolved in the defendant's favor.

At the same time, courts must be wary of expanding the scope of Crawford. With the requirements of confrontation now stricter, the burden of demanding it is greater. There is a real cost to prosecutors in complying with Crawford. Confrontation issues often arise in cases involving sex crimes and domestic abuse. Testimonial hearsay may often be the best evidence against the accused in homicides and other horrific crimes. Crawford makes things hard enough for prosecutors. There is no duty to add to their woes by stretching the constitutional blanket of protection when there are numerous state remedies like evidence rules to ensure fairness. Thus, questions of whether the Confrontation Clause is concerned with nontestimonial hearsay, whether forfeiture applies where the charged offense and the cause of the unavailability are different, whether current retroactivity doctrine ought to be altered to deny retrospective relief in watershed cases, and
whether due process requires confrontation in indisputably civil cases, should all be resolved against the defendant.

This approach is preferable to taking an unnecessarily strong pro-defendant stance at the outset only to strain reason later to avoid the undesirable consequences of the by-then established precedent. Unnecessary stringency at the outset creates pressure for results-driven decisions at the back end. True, there are numerous opportunities to tinker with the doctrine to reach the desired result, but it is much better for the integrity of the process to limit Crawford at the outset and avoid the need for unconvincing arguments later when the courts realize they cannot live with their own jurisprudence.