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EVIDENCE—SIXTH AMENDMENT AND THE CONFRONTATION CLAUSE—
TESTIMONIAL TRUMPS RELIABLE: THE UNITED STATES SUPREME COURT
RECONSIDERS ITS APPROACH TO THE CONFRONTATION CLAUSE. Crawford

I. INTRODUCTION

“In all criminal prosecutions, the accused shall enjoy the right . . . to be
confronted with the witnesses against him.”

The Confrontation Clause of the Sixth Amendment is composed of just
these eighteen words, yet this small phrase has been an enigma for the
United States Supreme Court for many years. Over the past half century the
Court has merged an absolute constitutional right with the rule against hearsay.
In doing so the Court has subjected the categorical right of confrontation to a “malleable standard” of evidence law that “often fails to protect
against paradigmatic confrontation violations.” Since its formalization in
Ohio v. Roberts, this approach has rendered inconsistent and contradictory
results and has increasingly drawn the attention of critics who have advocated a return to the original ideas behind the Clause. By its recent decision in Crawford v. Washington, the Court attempted to remedy some of the
problems resulting from Roberts. In Crawford the Court returned to an
examination of the historical influences behind the Confrontation Clause
and formulated a doctrine that should appease the historical advocates while
remaining applicable to modern criminal procedure concerns.

1. United States Const. amend. VI.
2. Penny J. White, Rescuing the Confrontation Clause, 54 S.C. L. Rev. 537, 539
(2003). At least some of the confusion over the Confrontation Clause has been blamed on its
Tech L. Rev. 67, 67–68 (1969). Unlike many other constitutional provisions, the Confrontation
Clause is somewhat unclear from its text and there is very little documentation to explain the framers’ reasoning behind its inclusion in the Sixth Amendment. Id.
3. White, supra note 2, at 539.
5. 448 U.S. 56 (1980).
7. See id. Justice Scalia delivered the majority opinion for the Court. Id. at 1356. Chief
Justice Rehnquist wrote a concurring opinion in which Justice O’Connor joined. Id. at 1374
(Rehnquist, C.J., concurring).
8. See infra Part IV.A.
This note examines the inestimable significance of *Crawford v. Washington*\(^9\) to evidentiary procedures in the criminal justice system. The note first briefly summarizes the facts behind the *Crawford* case and the twisted procedural history that it traversed on its way to a grant of certiorari.\(^{10}\) Next, the note tracks the history of the Confrontation Clause from its English and American Colonial origins through the case law leading up to the establishment of the *Roberts* doctrine.\(^{11}\) This historical trek sets the stage for an examination of the Court’s analysis in the *Crawford* decision.\(^{12}\) The note concludes with a discussion of the promises of the *Crawford* approach, the resulting problems it may create in its application, and a discussion of the new approach’s interrelation with the law of hearsay.\(^{13}\)

II. FACTS

A. The Incident

On August 5, 1999, Michael Crawford, accompanied by his wife Sylvia Crawford, went to the apartment of Kenneth Lee.\(^{14}\) An argument ensued, and Michael stabbed Kenneth.\(^{15}\) Later that evening, the police picked the couple up and, when they arrived at the police department, the police separated the couple for questioning.\(^{16}\) During interrogation each gave separate tape-recorded statements.\(^{17}\) The couple’s first story was that the two had gone to visit Lee, and while Michael went to the store, Kenneth tried to sexually assault Sylvia. Michael then returned and the fight occurred.\(^{18}\) Both Michael and Sylvia gave roughly the same story; the police, however, decided to take a second statement from each of them due to some discrepancies.\(^{19}\) The second set of stories differed greatly from the first.\(^{20}\)

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9. 541 U.S. at 36.
10. See infra Part II.
11. See infra Part III.
12. See infra Part IV.
13. See infra Part V.
15. Id. Lee sustained severe injuries to his stomach. Id. During the altercation, Sylvia’s sweater got blood on it, and Michael’s hand was deeply cut, requiring twelve stitches to close the wound. Id. Michael could not recall how he received the cut, but he indicated that it might have been from a weapon that Lee was carrying. Joint Appendix at 155, *Crawford III* (No. 02–9410). In Sylvia’s second statement to the police she indicated that Michael might have cut himself while stabbing Lee. Id. at 137.
16. Brief for Petitioner at 2, Crawford III (No. 02–9410).
17. Id.
19. Joint Appendix at 127, Crawford III (No. 02–9410).
The couple's second accounts of the incident revealed that the alleged sexual assault had actually occurred weeks earlier. Both stated that while visiting with friends earlier that day, Lee's name arose in conversation and Michael became angry. The two then went in search of Lee. When they arrived at his house, the fight started and Michael stabbed Lee. The stories diverged on the point of whether or not Lee actually brandished a weapon while Michael was stabbing him—Michael claimed that Lee might have been holding a weapon during the fight. Sylvia, however, indicated that Lee might not have grabbed for a weapon until after Michael had assaulted him. Michael was charged with one count of attempted first degree murder.

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20. See Crawford I, 2001 WL 850119, at *1. The first and second statements were taken a few hours apart, and Sylvia's were always taken before Michael's—Sylvia's at 7:03 p.m. and 10:43 pm., and Michael's at 8:00 p.m. and approximately 12:45 a.m. Joint Appendix at 79, 98, 124, 142 Crawford III (No. 02-9410).


22. Id. According to Sylvia's second statement, the couple had been drinking, and Michael was "past tipsy." Joint Appendix at 132, Crawford III (No. 02-9410). She also reported that when Lee's name came up, Michael declared that he needed an "ass whoopin." Id. at 131.

23. Joint Appendix at 132-33, Crawford III (No. 02-9410).

24. See id. at 137.

25. See id. at 155. Michael's second statement read as follows:

Q: okay. Did you ever see anything in his hands
A: I think so, but I'm not positive
Q: okay, when you think so, what do you mean by that
A: I could a swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff... I don't know, I think, this is just a possibility, but I think, I think that he pulled some-thin' out and I grabbed for it and that's how I got cut... but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.

Joint Appendix at 155, Crawford III (No. 02-9410).

Sylvia's second statement read as follows:

Q: did Kenny do anything to fight back from this assault
A: (pausing) I know he reached into his pocket... or somethin'... I don't know what
Q: after he was stabbed
A: he saw Michael coming up. He lifted his hand... his chest open, he might of went to go strike his hand out or something and then (inaudible)
Q: okay, you, you gotta speak up
A: okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his... put his right hand in his right pocket... took a step back... Michael proceeded to stab him... then his hands were like... how do you explain this... open arms... with his hands open and he fell down... and we ran (describing subject holding hands open, palms to-ward assailant)
Q: okay, when he's standing there with his open hands you're talking about Kenny, correct
A: yeah after, after the fact, yes
with a deadly weapon and one count of first degree assault with a deadly weapon. 26

B. Procedural Posture

1. The Trial Court

At trial Michael pleaded self-defense and invoked the marital privilege under Washington evidence law to prevent Sylvia from testifying. 27 In response the prosecution sought to admit both of Sylvia's statements into evidence under the hearsay exception of statements against penal interest; 28 the defense objected on the grounds that this would implicate Michael's rights under the Confrontation Clause of the Sixth Amendment. 29 Under the United States Supreme Court decision Ohio v. Roberts, 30 an out-of-court statement of an unavailable witness could be admitted when the statement bore "adequate 'indicia of reliability.' " 31 The reliability test could be satisfied if the statement (1) fell within "a firmly rooted hearsay exception" or (2) bore "particularized guarantees of trustworthiness. " 32 The trial court determined that Sylvia's statement did not fall into a "firmly rooted hearsay exception" after considering the Supreme Court's ruling in Lilly v. Virginia, 33 but it did find the statement trustworthy enough to bypass cross-examination under the Sixth Amendment. 34 The court allowed both of Sylvia's statements to be admitted, declaring them reliable because Sylvia was

Q: did you see anything in his hands at that point
A: (pausing) um um (no)
Joint Appendix at 137, Crawford III (No. 02–9410).

26. Joint Appendix at 1, Crawford III (No. 02–9410).

A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without consent of the other, examined as to any communication made by one to the other during marriage.

Id.

28. See Joint Appendix at 61, Crawford III (No. 02–9410). The trial court found that the statements were against Sylvia's penal interest because she acted as an accomplice by leading Michael to the scene of the crime and aiding him in his escape. Id.
31. Id. at 66.
32. Id.
33. 527 U.S. 116, 127 (1999) (holding that the category of statements against penal interest is too broad to be considered a "firmly rooted hearsay exception").
34. Crawford III, 124 S. Ct. at 1358.
not attempting to inculpate her husband and exculpate herself; rather, she was trying to support him by corroborating his story. The prosecution admitted the evidence, and the jury returned a verdict finding Michael guilty of first degree assault with a deadly weapon.

2. The Court of Appeals of Washington

On appeal Michael again challenged the trial court's admission of Sylvia's statements as a violation of his right to confrontation. The Court of Appeals of Washington analyzed the reliability of the statements using a nine factor test designed to show "particularized guaranties of trustworthiness." The court found that Sylvia's statements failed the test and were not admissible under the Confrontation Clause. Accordingly, the court of appeals reversed Michael's conviction.

3. The Supreme Court of Washington

The Supreme Court of Washington reversed the appellate division's decision. While acknowledging the nine factor test used by the Appellate

35. Joint Appendix at 60–61, Crawford III (No. 02–9410). The trial judge did seem to show some hesitance towards allowing the admission of the statement, stating: So when I take the statement of Sylvia Crawford in the context of the statement of the Defendant Crawford, I do not find that it is unreliable and untrustworthy. It's not dissimilar to the defendant's own statement. When I take it in a vacuum, not measured against any other evidence known at the time or understood at the time, I think it's a closer call. Id. at 61. Also, the trial judge recommended that the prosecution not admit Sylvia's statements to avoid possible error on appeal. Id. at 62. He suggested that in the alternative the state could rely on the statements made by Michael Crawford and the testimony of the alleged victim, Kenneth Lee. Id.


38. Id. at *4. The failure of any one of the nine factors was not dispositive. Id. The factors were (1) whether the declarant had an apparent motive to lie, (2) whether the declarant's general character suggests trustworthiness, (3) whether more than one person heard the statement, (4) whether the declarant made the statement spontaneously, (5) whether the timing of the statements and the relationship between the declarant and the witness suggests trustworthiness, (6) whether the statement contained express assertions of past fact, (7) whether cross-examination could help to show the declarant's lack of knowledge, (8) the possibility that the declarant's recollection was faulty because the event was remote, and (9) whether the circumstances surrounding the statement suggest that the declarant misrepresented the defendant's involvement. Id. at *4–5.

39. Id. at *6. Sylvia's second statement failed seven out of the nine factors, and the court found that one factor was irrelevant in this situation. Id. at *4–5.

40. Id. at *7.

Division, the court relied on its decision in *State v. Rice*\(^{42}\) to declare that “interlocking” confessions could satisfy the reliability requirement as an alternative to the nine factor test.\(^{43}\) The court rejected the court of appeals conclusion that the couple’s statements contradicted each other, finding instead that the statements actually overlapped.\(^{44}\) It based this conclusion on the idea that both Michael and Sylvia’s statements were equally ambiguous as to whether Lee actually had a weapon because both indicated that it was possible that he grabbed for a weapon either before or after the assault.\(^{45}\) The court deemed the couple’s statements to be “virtually identical” thus satisfying the interlocking confessions rule and the residual reliability test of the Confrontation Clause.\(^{46}\)

**III. Background**

The United States Supreme Court has struggled for decades to distinguish the Sixth Amendment’s Confrontation Clause as a categorical right separate from the rule against hearsay.\(^{47}\) One reason for this struggle may be

\(^{42}\) 844 P.2d 416 (Wash. 1993). In *Rice*, the Washington Supreme Court adopted dicta from *Lee v. Illinois*, 476 U.S. 530 (1986), to conclude that when the statements of co-defendants are “virtually identical” they can be deemed reliable as “interlocking” confessions in place of other reliability tests. *Id.* at 427. In *Lee*, the United States Supreme Court rejected Illinois’s contention that the reliability of a co-defendant’s statement was insured because it interlocked with that of the defendant and stated that “when the discrepancies between the statements are not insignificant, the codefendant’s confession may not be admitted.” 476 U.S. at 545. The Court would discount this inference by the Washington Supreme Court claiming that if it had intended to announce a new exception to the Confrontation Clause it would have done so in a more clear and authoritative manner. *Crawford III*, 541 U.S. 36, 57–58 (2004).

\(^{43}\) *Crawford II*, 54 P.3d at 661.

\(^{44}\) *Id.* at 664.

\(^{45}\) *Id.* The court sided with the dissent from the court of appeals. *Id.* That dissent stated:

Whether or not Lee was armed is certainly critical to Michael’s claim of self-defense. But any dissimilarity in the Crawfords’ statements regarding Lee being armed is minor. The majority confuses these two considerations and wrongly concludes that because the statements are slightly dissimilar on a critical issue, there is a critical difference between the two statements. I disagree.


\(^{46}\) *Crawford II*, 54 P.3d at 664. The United States Supreme Court later criticized this statement and pointed out that the “ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.” *Crawford III*, 541 U.S. at 67. The Court also pointed out that the prosecutor did not seem to share in the Washington Supreme Court’s opinion that the statements were ambiguous because during his closing argument he called Sylvia’s statement “‘damning evidence’ that ‘completely refutes [petitioner’s] claim of self-defense.’” *Id.*

\(^{47}\) See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO.
that American history gives no clear origin of the right in this country.\textsuperscript{48} Traditionally, it has been traced to the abuses of the English courts in the century preceding the American Revolution, and at least some of its roots may be found in the transgressions of the Crown in the American colonies.\textsuperscript{49} This section briefly addresses the historical reasons for the inclusion of the Confrontation Clause in the Sixth Amendment.\textsuperscript{50} Then, it moves on to discuss the early American case law concerning the Confrontation Clause.\textsuperscript{51} Next, the section reviews the cases preceding \textit{Ohio v. Roberts}.\textsuperscript{52} Finally, this section analyses the \textit{Roberts} decision.\textsuperscript{53}

A. The History Surrounding the Drafting of the Clause: The Framers' Intentions

1. \textit{The Influence of the English Courts}

The traditional view is that the Framers drafted the Confrontation Clause because of the "remembered harms or injuries suffered or feared by the colonists" that were linked to the abuses in the English courts of the sixteenth and seventeenth centuries.\textsuperscript{54} It was the political trials of this time and the proceedings of the Star Chamber\textsuperscript{55} that would lead to reforms after the Glorious Revolution.\textsuperscript{56}

In the sixteenth century the English courts adopted trial techniques from the civil law countries that gave criminal proceedings an inquisitorial approach.\textsuperscript{57} The political cases were assigned to the Privy Council,\textsuperscript{58} which

\begin{flushleft}
\textsuperscript{48} See Larkin, \textit{supra} note 2, at 67. \\
\textsuperscript{50} See \textit{infra} at Part III.A. \\
\textsuperscript{51} See \textit{infra} at Part III.B.1. \\
\textsuperscript{52} 448 U.S. 56 (1980); see \textit{infra} at Part III.B.2. \\
\textsuperscript{53} See \textit{infra} at Part III.B.3. \\
\textsuperscript{54} Larkin, \textit{supra} note 2, at 67,70. \\
\textsuperscript{55} The Star Chamber was a division of the English courts where criminal cases of misdemeanor were tried without a jury. 1 \textit{SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND} 325, 337–38 (1883). \\
\textsuperscript{56} See Margaret A. Berger, \textit{The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model}, 76 MINN. L. REV. 557, 577 (1992). The Glorious Revolution was an English civil war that ended with the replacement of James II with William and Mary. 2 \textit{WEST'S ENCYCLOPEDIA OF AMERICAN LAW} 77 (1998). It was the precursor to the English Bill of Rights, which was passed in 1689 and advanced individual freedoms while restricting the power of the monarch. \textit{Id.} Parts of the English Bill of Rights served as a model for the fledgling state governments and America's own Bill of Rights. \textit{See id.} \\
\textsuperscript{57} Berger, \textit{supra} note 56, at 569. \\
\textsuperscript{58} The Privy Council is the private council of the British Crown, which derived from
\end{flushleft}
examined the accused in preparation for trial, sometimes resorting to torture in order to exact a confession. Witnesses did not testify in open court; instead, their statements were presented in the form of depositions, letters, and accomplice confessions that had been taken during examination by the Counsel. It was this lack of an opportunity to cross-examine the witnesses that led to the repeated requests by the prisoners to have the witnesses brought before them face-to-face.

This procedure was adopted in Sir Walter Raleigh's infamous trial for treason in 1603. The principal evidence against Raleigh was the confession of his alleged co-conspirator, Lord Cobham. During trial, the court repeatedly rejected Raleigh's request to have Cobham brought before him. Raleigh was convicted and sentenced to be hanged, drawn, and quartered. Raleigh's conviction was later lamented as a debasement of the English justice system.

the King's Council of the Middle Ages. 8 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 173 (1998). The Council once wielded great administrative power, but after the civil wars in England it lost most of its power and now its function in mainly ceremonial. See id.

59. STEPHEN, supra note 55, at 325.
60. Id. at 326. The judges during that period did not adhere to any code of evidence as we know it today. See id. at 336. The only distinction they made between the different kinds of evidence was between eyewitness evidence and all other kinds of evidence. Id. Also the defendant had no right to counsel, no means of procuring evidence, and no right to admit evidence in a proceeding, leaving the prisoner almost completely subject to the court. Id. at 337. Additionally, the jury had almost absolute freedom to base their decision on whatever they deemed to be evidence, including their own personal knowledge. See id. at 336–37.
61. Id. at 326.
62. See id. at 333–36. The indictment charged Raleigh with conspiring with Lord Cobham to oust James I and advance Arabella Stuart to the throne. Trial of Sir Walter Raleigh, 2 How. St. Tr. 1 (1603) [hereinafter Raleigh].
63. STEPHEN, supra note 55, at 333. Contrary to the modern view of accomplice confessions, the prosecution in Raleigh's case declared that accusations that are also self-inculpatory for the accuser are the most forcible sort of evidence. Raleigh, supra note 62, at 7. See Lee v. Illinois, 476 U.S. 530, 541 (1986) (confessions by an accomplice inculpating the principal are "presumptively suspect").
64. Raleigh, supra note 62, at 15–18. The court cited various reasons for rejecting Raleigh's requests. For instance, if Raleigh were allowed to confront Cobham, Cobham might be influenced to change his story by his loyalty to Raleigh and by Raleigh's persuasiveness. Id. at 17–18. Ironically, the court claimed that if the accused was allowed to confront his accusers few prosecutions for treason would ever lead to guilty verdicts. Id.
65. Id. at 31. Raleigh did not go quickly to his death. He lived another fourteen years in the Tower, and in 1616 King James I decided to utilize him by sending him on an expedition to Guinea in search of gold. Id. at 32. The voyage was unsuccessful, and Raleigh lost his fortune and his son to the excursion. Id. at 34. When he returned to England he was again imprisoned and brought before the King's Bench for the enforcement of the judgment of execution against him. Id. at 33. The king considered bringing a new charge against Raleigh for breach of the peace, but decided against it because of the experience with Raleigh's wit and abilities in the first trial. Id. Raleigh was condemned to death. Id. at 34–35.
66. See White, supra note 2, at 543.
2. The Influences in the Colonies

There is another perhaps more compelling argument that the most significant impact upon the framers came from the various influences within the colonies during the pre-Revolutionary era. Aside from the troubles in England, the colonies faced their own problems with the poor administration of justice, beginning with the abuses of authority by the early colonial governors. As the founders of new colonies learned from the mistakes made by their seniors, provisions were made in the new governments, and the right to confrontation and cross-examination gradually became part of colonial criminal procedure by the beginning of the eighteenth century.

Around the time of the French and Indian War, the Crown’s administration in the colonies began to exhibit increased weakness and unfairness that adversely affected the right to trial by jury. The first of these injustices occurred with the attempt to enforce the Sugar Act in 1763 and the Stamp Act in 1765. When the colonial courts resisted the enforcement of the new laws, which they regarded as unconstitutional, Parliament granted jurisdiction over those cases to the admiralty courts. In the admiralty courts the defendants were not afforded a trial by jury, and the procedures in those courts made frequent use of testimony by deposition and ex parte examinations of witnesses. In addition to the Sugar Act and Stamp Act prosecutions, Parliament called for persons charged with certain treasonous acts to be sent to England for trial, which severely limited their trial rights. The outrage over these cases was probably fueled by contemporary publications

67. See Larkin, supra note 2, at 70–72.

68. See Pollitt, supra note 49, at 390–95. The earliest examples come from Virginia where, in 1702, the Virginia Council complained that Governor Nicholson encouraged “sycophants” and “tattlers” and conducted ex parte examinations and tampered with the results from these examinations all while not allowing the accused the right to confront his accusers. Id. at 391. Massachusetts did not have a stable system of justice, and the colonists were not allowed knowledge of the offenses they could be charged with and the procedures the court would use against them until 1641. Id. at 392.

69. See id. at 393–95.

70. Larkin, supra note 2, at 71. The French and Indian War took place from 1754–63. Id.

71. Pollitt, supra note 49, at 396. England was in severe debt after the French and Indian War and in response enacted taxes on the colonies; Charles Townsend, acting as the first Lord of Trade called for the strict enforcement of these new laws and of the existing trade laws that had grown lax in previous years. Id.

72. Id. at 396–97.

73. Id. at 397.

74. Larkin, supra note 2, at 71–72. Transporting the accused to England denied him the right to a jury drawn from the locality where the alleged crime took place, limited his right to challenge the jurors, deprived him of an ability to call witnesses for his defense, and almost insured that the testimony from the prosecution’s witnesses would be given by deposition. Id. at 72.
such as William Blackstone’s *Commentaries on the Laws of England* that advocated the superiority of trial by jury and the rights it encompassed over other modes of criminal procedure.\(^{75}\)

As a result of these influences, when the original draft of the constitution contained little mention of criminal procedure, the states vehemently refused to ratify it.\(^{76}\) Several of the states had already included a right to trial by jury and a right to confrontation in their constitutions and declarations of rights, and it was contended in the Federal Convention of 1787 that the state declarations would be sufficient to protect these rights.\(^{77}\) After the states voiced strong objections, however, a full bill of rights was amended to the Constitution, which included the Sixth Amendment’s Confrontation Clause.\(^{78}\) With the inclusion of the Sixth Amendment and the Confrontation Clause the framers furthered their purpose of employing a checks and balances system to limit the powers of the sovereign.\(^{79}\)

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75. See Berger, *supra* note 56, at 581–83. Blackstone’s *Commentaries* enjoyed an avid readership in the colonies and had a profound impact on the development of the early Americans’ attitude towards the legal system. Larkin, *supra* note 2, at 72. In a significant passage Blackstone praised the examination of witnesses in open court as opposed to the old civil law practices. *Id.* Blackstone wrote:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of the truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 373 (2d. ed. 1768).

76. One example of the discussions raised in the state conventions comes from Abraham Holmes’s comments in the Massachusetts convention:

> The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet with his accuser face to face; whether he is allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.


78. Larkin, *supra* note 2, at 76.

B. The Interpretations of the Confrontation Clause

1. The First Discussion of the Confrontation Clause: Mattox v. United States

The United States Supreme Court gave the Confrontation Clause little treatment until the late 1800s when the court decided Mattox v. United States. In Mattox, the defendant had been convicted of murder but was awarded a retrial; however, some of the witnesses who testified at the first trial had died during the interim. During the second trial, the prosecution admitted the reporter’s notes of the two deceased witnesses’ testimony from the first trial.

Because both of the deceased witnesses had appeared at the first trial and had been fully examined and cross-examined, the Supreme Court rejected the defendant’s claim that his right to confrontation had been violated. The Court stressed that the “primary object” of the Confrontation Clause was to prevent the use of the inquisitorial techniques of the civil law (ex parte affidavits) by offering a method for deciphering the truth—cross-examination. The Court then stated that a constitutional provision should not be construed so narrowly as to harm the interest of the public in order to protect a defendant, when the defendant had been previously afforded the protections guaranteed by the Constitution. The Court indicated that the Bill of Rights was subject to the common law at 1791 and all of its exceptions. The Confrontation Clause was subject even to those exceptions that strayed from its purposes because they were grounded in experience that had shown them to be of the same reliability and trustworthiness as testimony that was taken under oath. These statements might have opened the

82. Id.
83. Id. at 240–42. The court cited several state cases to prove that the admission of such evidence was the general practice across the country. Id. at 241.
84. Id. at 242. The court praised cross-examination stating:

The accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242–43.
85. See id. at 243.
86. Id.
87. See Mattox, 156 U.S. at 243–44. The Court drew upon the example of dying declarations, in which the defendant is rarely afforded the opportunity to come face-to-face with a
door for the “firmly rooted hearsay exception” and “indicia of reliability” tests that would be employed in the future.\textsuperscript{88}

2. \textit{The Development of a Doctrine: The Precursors to Ohio v. Roberts\textsuperscript{89}}

The Court did not address a great number of confrontation cases after \textit{Mattox} until 1965 when it decided \textit{Pointer v. Texas}.\textsuperscript{90} The court in \textit{Pointer} held that the Sixth Amendment’s Confrontation Clause applies to criminal trials in the state courts by way of the Fourteenth Amendment.\textsuperscript{91} Until \textit{Pointer} there was no urgency to formulate a doctrine for applying the Confrontation Clause to out-of-court statements because the states simply applied their own rules of evidence to such situations.\textsuperscript{92} After \textit{Pointer}, some statements that had previously been admissible in the states were now barred by a constitutional provision.\textsuperscript{93} Thus, it became much more pressing for the Court to devise a doctrine for the Clause’s application.\textsuperscript{94} John Henry Wigmore’s treatise on evidence influenced the Court’s decisions following \textit{Pointer}.\textsuperscript{95} Wigmore’s theory endorsed the Confrontation Clause as an evidentiary doctrine—an constitutionalization of the rules against hearsay that essentially consisted of an absolute right to cross-examination.\textsuperscript{96} Thus, according to Wigmore, when the hearsay rule required that a statement be taken in court, the Confrontation Clause required that it be taken subject to cross-examination and the current rules of evidence.\textsuperscript{97}

dying declarant. \textit{Id.} The Court stated that dying declarations are admissible because “the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath.” \textit{Id.} at 244.

\textsuperscript{88} White, \textit{supra} note 2, at 558–59.
\textsuperscript{89} \textit{Ohio v. Roberts}, \textit{supra} note 56, at 599.
\textsuperscript{90} 448 U.S. 56 (1980).
\textsuperscript{91} 380 U.S. 400 (1965).
\textsuperscript{92} \textit{Id.} at 403. \textit{Pointer} was a test case indicative of the Confrontation Clause violations occurring in the states. \textit{Id.} at 401–02. In \textit{Pointer} a robbery victim testified at a preliminary hearing that Pointer was one of his assailants. \textit{Id.} at 401. Before trial, however, the witness moved out of state, and the prosecution declared him unavailable for trial. \textit{Id.} The prosecution was allowed to admit the transcript from the preliminary hearing even though the defendant had not been represented by counsel and had not attempted to cross-examine the witness at the preliminary hearing. \textit{Id.}

\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} Berger, \textit{supra} note 56, at 592.

\textsuperscript{97} \textit{Id.} at 130. Wigmore thought that the Framers intended the Clause to be subject to exceptions, but that they did not wish to enumerate them. \textit{Id.} at 131.
The sufficiency of the opportunity to cross-examine: *Barber v. Page*

Shortly after *Pointer* the Court was called upon to answer one of the many questions concerning the application of the Confrontation Clause in *Barber v. Page*.98 The issue in *Barber* was whether the defendant had been given sufficient opportunity to cross-examine when the witness's prior testimony was given at a preliminary hearing.99 Barber and his co-defendants were charged with committing armed robbery in Oklahoma, and at the preliminary hearing, Woods, one of the co-defendants, waived his privilege against self-incrimination and gave testimony that incriminated Barber.100 Barber's attorney did not cross-examine Woods.101 When Barber's trial arrived seven months later, Woods was incarcerated in a federal prison in Texas.102 The state claimed that Woods was unavailable as a witness because he was out of the jurisdiction and sought to admit the transcript of his preliminary hearing testimony.103

Initially, the Court scolded the prosecution for even claiming that the witness was unavailable because of the ease with which the state could obtain his presence due to the growing cooperation between the federal and state prison systems.104 The Court held that a witness is unavailable only when the prosecution can show that it made a good faith effort to procure his presence at trial.105

Next the Court rejected the State's argument that the defendant had waived his right to confront Woods because he did not take advantage of his opportunity to do so at the preliminary hearing.106 The Court proclaimed that even if Barber had cross-examined Woods at the preliminary hearing, it would not have been sufficient because confrontation was "basically a trial right" reserved to give the jury the opportunity to scrutinize the witness.107 The Court further explained stating that "[a] preliminary hearing is ordinar-

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99. Id. at 720.
100. Id.
101. Id. Counsel for one of the other co-defendants did cross-examine Woods. Id.
102. Id. The prison was in Texarkana, Texas approximately 225 miles from the Oklahoma court. Id.
103. Id. at 720.
104. *Barber*, 390 U.S. at 723–24. The Court claimed that the old idea that once a witness left a state he was rendered impossible to produce had grown obsolete because of the rising cooperation between the states and within the prison systems. Id.
105. Id. at 724–25.
106. Id. at 725. The Court asserted that Barber's failure to cross-examine Woods at the preliminary hearing could hardly qualify as a waiver because he could not have known that Woods would be incarcerated or that the State would neglect to produce him at trial. Id.
107. Id.
ily a much less searching exploration into the merits of a case than a trial, simply because its function is [a] more limited one" In dicta, however, the Court skirted its critical statements saying that there may be a necessity and a good argument for admission of preliminary hearing testimony in some cases in which the witness was actually unavailable.

b. The beginnings of a test: *California v. Green*

Just two years after *Barber*, the Court decided *California v. Green*, a case that disregarded *Barber* and set the stage for the new tests that would arise in the following years. In *Green* a sixteen-year-old boy testified that Green was his drug supplier at Green's preliminary hearing for drug charges. At trial, however, the boy claimed uncertainty as to this point because he had been under the influence of LSD. During the boy's direct examination, the prosecution read excerpts from his preliminary hearing testimony and submitted the previous testimony as substantive evidence. After the boy's statement was read, he claimed that his memory was "refreshed" and proceeded to tell a muddled account of the incident. The District Court of Appeals later held, and the California Supreme Court affirmed, that the admission of the boy's prior testimony implicated Green's Sixth Amendment right to confrontation even if it was subject to cross-examination because the prior inconsistent statements were admitted as substantive evidence.

The United States Supreme Court rejected the California court's decision, holding that the Confrontation Clause was not violated as long as the witness was subjected to cross-examination at trial. The Court attempted to bolster this argument by weighing the "alleged dangers" of admitting out-of-court statements against the Confrontation Clause's protections. The Court stated that the Confrontation Clause provides the following:

(1) insure that the witness will give his statements under oath thus impressing him with the seriousness of the matter and guarding against the

108. *Id.*
109. *Id.* at 725–26.
111. *Id.*
112. *Id.* at 151.
113. *Id.* at 151–52. The boy claimed to have taken "acid" twenty minutes prior to Green's phone call about the marijuana. *Id.* at 152.
114. *Id.* at 152.
115. *Id.* at 152. On cross-examination he testified that his memory had been "refreshed" as to the preliminary hearing, not as to the actual incident. *Id.*
117. *Id.* at 158.
118. *Id.*
lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for discovery of the truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.\footnote{119}

The Court concluded that, in light of this balancing test, Green's opportunity to confront the witness was sufficient because Green had the opportunity for "full and effective cross-examination," the conditions of trial were present, and the jury was provided an opportunity to scrutinize the witness's testimony regarding his prior statements.\footnote{120} The Court claimed that the question was not whether the jury could be in a better position to experience the prior testimony, but whether the jury could still obtain a "satisfactory basis for evaluating the truth of the prior statement."\footnote{121}

Then, in part III of the opinion, the Court seemingly discounted what it had held two years earlier in \textit{Barber} concerning the sufficiency of preliminary hearing testimony.\footnote{122} Instead of acknowledging the \textit{Barber} holding that preliminary hearing testimony is not of the same degree as trial testimony, the Court concluded that the prior testimony in this case was taken "under circumstances closely approximating those that surround the typical trial" and was thus sufficient.\footnote{123} The Court relied upon dicta from \textit{Barber} that stated that preliminary hearing testimony might be satisfactory in some circumstances to infer that the boy's prior statement would have been admissible even if the boy had been unavailable for trial because there was "substantial compliance with the purposes behind the confrontation requirement."\footnote{124}

c. Expanding on the test: \textit{Dutton v. Evans}

In \textit{Dutton v. Evans},\footnote{125} the Court added another condition to the test that the court would adopt in \textit{Roberts}.\footnote{126} In that case Evans and his co-

\footnotetext[119]{119. \textit{Id.}}
\footnotetext[120]{120. \textit{Id.} at 158–60. The majority based this conclusion partially upon the \textit{Mattox} decision, claiming that it was not against the Confrontation Clause to admit out-of-court statements of a witness who was available to testify at trial. \textit{Id.} at 157–58. The court did not, however, distinguish that the witness in \textit{Mattox} was available and cross-examined at the first trial rather than at a preliminary hearing. \textit{Mattox v. United States}, 156 U.S. 237, 240 (1895).}
\footnotetext[121]{121. \textit{Id.} at 161.}
\footnotetext[122]{122. \textit{Green}, 399 U.S. at 165.}
\footnotetext[123]{123. \textit{Id.}}
\footnotetext[124]{124. \textit{Id.} at 166. In his dissent, Brennan criticized the majority's treatment of \textit{Barber} stating that "it ignores reality to assume that the purposes of the Confrontation Clause are met during the preliminary hearing." \textit{Id.} at 199 (Brennan, J., dissenting).}
\footnotetext[125]{125. 400 U.S. 74 (1970).}
\footnotetext[126]{126. \textit{Id.} \textit{Dutton} was actually argued before \textit{Green}, but it was scheduled for reargument}
conspirators Truett and Williams were charged with murder.\textsuperscript{127} Truett turned state’s witness, and Williams was arraigned and imprisoned in the federal penitentiary before Evans’s trial.\textsuperscript{128} At Evans’s trial, Shaw, one of Williams’s fellow inmates, testified that Williams had made a comment to him that implicated Evans as the mastermind of the scheme.\textsuperscript{129} The state claimed that Shaw’s statement was admissible under a Georgia hearsay exception that allowed the admission of statements made by a co-conspirator during the commission of the conspiracy or during the time the co-conspirators are continuing to conceal the crime.\textsuperscript{130} Evans claimed that his Sixth Amendment right to confrontation had been violated by the admission of Shaw’s hearsay statement.\textsuperscript{131}

The plurality opinion began by distinguishing this case from the Court’s recent decisions regarding co-conspirators, claiming that those cases far out-weighed the case at bar in regards to the significance of the admitted evidence.\textsuperscript{132} Then the Court decided that the state’s longstanding hearsay exception regarding co-conspirators was applied in a manner consistent with the Confrontation Clause.\textsuperscript{133} The Court supported this conclusion by stating that the rule against hearsay does not restrict a witness from telling what he heard; rather, the rule prevented the use of extra-judicial statements to prove fact.\textsuperscript{134} The Court concluded that the circumstances surrounding the making of Williams’s statement bore “indicia of reliability,” which were considered to be determinative of whether a statement could be admitted into evidence without an opportunity for confrontation.\textsuperscript{135}

and was decided in the term following the Green decision. \textit{Id.} at 76–77.

\begin{itemize}
  \item 127. \textit{Id.} at 76.
  \item 128. \textit{Id.} at 77.
  \item 129. \textit{Id.} at 77–78. Shaw testified that when Williams arrived back to his cell after his arraignment he stated, “If it hadn’t been for that dirty son-of-a-bitch Alex Evans, we wouldn’t be in this now.” \textit{Id.} at 77. Truett, however, was the principal witness for the prosecution, and both he and Shaw were fully cross-examined by defense counsel. \textit{Id.} at 77–78.
  \item 130. \textit{Id.} at 78.
  \item 131. \textit{Dutton}, 400 U.S. at 77–78.
  \item 132. \textit{Id.} at 87.
  \item 133. \textit{Id.} at 87–88.
  \item 134. \textit{Id.} at 88. The Court recognized that the possibility of a constitutional violation arose because Shaw’s statement encouraged the jury to conclude that Williams had implicitly identified Evans as the one who murdered the victims. \textit{Id.} The Court, however, proceeded to list the ways in which Evans’s confrontation right was not denied by showing the reliability of Williams’s statement. \textit{Id.} at 88–89.
  \item 135. \textit{Id.} at 89. The circumstances bearing “indicia of reliability” were that Williams made the statement against his penal interest and that it was a spontaneous utterance. \textit{Id.} The Court went on to remark that “the possibility that cross-examination of Williams could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal.” \textit{Id.} In his concurring opinion, Justice Blackmun stated that the admission of Shaw’s statement was “harmless error if it was error at all.” \textit{Id.} at 90 (Blackmun, J., concurring). Justice Marshall, however, dissented, stating that Shaw’s statement put Evans’s case in very
3. *The Birth of a Doomed Doctrine*: Ohio v. Roberts

In *Ohio v. Roberts*, the Court unveiled its long-awaited approach to the Confrontation Clause. In *Roberts*, the defendant was charged with forgery of a check and possession of stolen credit cards that belonged to Bernard and Amy Isaacs. At the preliminary hearing, the defense called the Isaacs’s daughter, Anita, to testify and attempted to draw out an admission that she had given the defendant permission to use the checks and credit cards, but she denied these assertions. Defense counsel did not cross-examine Anita or declare her a hostile witness. When time for trial arrived, Anita could not be located at her last permanent address, and the prosecution declared her unavailable and admitted her preliminary hearing statements.

The defendant contended that his rights under the Sixth Amendment’s Confrontation Clause had been violated and advanced the two following arguments: (1) that the defendant did not enjoy a sufficient opportunity to cross-examine the witness, and (2) that the state did not make a good faith effort to obtain the witness’s presence. The majority focused mainly on the first argument. The Court began by stating that the Confrontation Clause should not be read so narrowly that all prior statements would be inadmissible. The Court advanced the argument first set out in *Mattox* that the competing interests of protecting the defendant’s rights and protecting the public must be balanced to determine whether confrontation could real danger and that this was the very kind of situation in which cross-examination was needed to sift out the truth. See id. at 103–04 (Marshall, J., dissenting). Marshall was also wary of the Court’s use of “indicia of reliability” to admit the statement, claiming that this approach would undermine the Confrontation Clause’s purpose if any statement could be admitted on a showing of reliability. Id. at 109–10 (Marshall, J., dissenting).

137. Id.
138. Id. at 58.
139. Id. Anita did testify that she had allowed the defendant to live in her apartment while she had been away for several days. Id.
140. Id.
141. Id. at 59. Five subpoenas had been issued to Anita at her parent’s home over a period of five months. Id. The defense objected to the state’s assertion that Anita was unavailable, and a voir dire hearing was held in which her mother, Amy, testified that her family had been unable to locate Anita after the preliminary hearing. Id. at 59–60.
142. Roberts, 448 U.S. at 62, 74.
143. See id. at 62–73. In part IV of the opinion the court quickly dismissed the defendant’s argument that the prosecution had not made a good faith showing of the witness’s unavailability. See id. at 74–77. The Court contrasted *Barber* in which the prosecution knew the exact location of the witness and made no effort to procure him with this case in which the prosecution and the witness’s family had no idea as to her whereabouts. Id.
144. Id. at 63.
be dispensed with in a particular case.\(^{145}\) It then mapped out the two ways in which the Clause was designed to restrict admissibility of hearsay.\(^{146}\) First, a threshold requirement had to be met in which the prosecution proved the unavailability of the witness whose statement it wished to use.\(^{147}\) For the second step, the prior statement must bear adequate “indicia of reliability,” a requirement that could be satisfied if the statement (1) fell within a “firmly rooted hearsay exception” or (2) bore “particularized guarantees of trustworthiness.”\(^{148}\) The Court declined to identify any particular “guarantees of trustworthiness”; rather, it referred to dicta in Green to assert that “substantial compliance with the purposes behind the confrontation requirement was all that the Sixth Amendment demanded.\(^{149}\) 

In part III of the opinion the Court compared the facts of Roberts to those in Green to determine whether the “indicia of reliability” requirement had been met.\(^{150}\) The Court drew on Green to conclude that the Confrontation Clause was satisfied when the defendant had the opportunity to cross-examine the witness at a preliminary hearing even without the actual occurrence of cross-examination.\(^{151}\) The Court then concluded that the Confrontation Clause was satisfied in this case because on direct examination the defense counsel engaged in “cross-examination as a matter of form” by using very leading questions in order to challenge the truth of the witness’s state-

\(^{145}\) Id. at 64.

\(^{146}\) Id. at 65.

\(^{147}\) Id. at 65. Six years later in United States v. Inadi, the Court held that the unavailability requirement was not necessary for the admission of co-conspirator statements. See 475 U.S. 387, 396 (1986). Due to the nature of these statements, cross-examination of co-conspirators would lend little to the finding out of the truth. Id. The Court decided that the burden of proving unavailability in such cases would outweigh the benefit that could be reaped from producing the declarant at trial. See id. at 398–400. A year later in Bourjaily v. United States, the Court held that the “indicia of reliability” requirement did not apply in the case of co-conspirator’s statements. 483 U.S. 171, 182 (1987).

\(^{148}\) Roberts, 448 U.S. at 65–66. The Court bolstered the “firmly rooted hearsay exception” prong of the test by referring to the dying declarations example set forth in Mattox to show that some hearsay exceptions are based on such firm foundations of reliability and trustworthiness that they will always comport with the Confrontation Clause. Id. at 66 (citing Mattox v. United States, 156 U.S. 237, 244 (1895)).

\(^{149}\) Roberts, 448 U.S. at 69. In Idaho v. Wright, the Court gave a rough guideline of how to determine whether a statement bore “particularized guarantees of trustworthiness” 497 U.S. 805 (1990). The Court held that a court must look to the “totality of the circumstances that surround the making of the statement” to determine whether the “particularized guarantees of trustworthiness” had been met. Id. at 820. The Court rejected the argument that a statement was reliable if there was other evidence corroborating it. Id. at 822. The Court stated that this would risk the “admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial,” a result that they found to be contrary to the purposes of the Confrontation Clause. Id. at 823.

\(^{150}\) Roberts, 448 U.S. at 67–73.

\(^{151}\) Id. at 69–70.
ments.\textsuperscript{152} This approach was destined to create instability in the lower courts, to be ridiculed by commentators and members of the Court, and ultimately to be dissolved by \textit{Crawford v. Washington}.\textsuperscript{153}

IV. REASONING

In \textit{Crawford v. Washington},\textsuperscript{154} the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment mandates that the common law requirements of unavailability and a prior opportunity for cross-examination be met for the admission of prior testimonial statements.\textsuperscript{155} The majority opinion, written by Justice Scalia, began with a discussion of the history behind the right of confrontation.\textsuperscript{156} Then the Court moved on to present two conclusions it had reached about the Framers’ intentions behind writing the Confrontation Clause.\textsuperscript{157} Finally, the Court concluded that the \textit{Ohio v. Roberts} \textsuperscript{158} “guarantees of trustworthiness” and “firmly rooted hearsay exception” tests produced results that ran counter to the original purposes of the Confrontation Clause\textsuperscript{159} and, thus, overruled \textit{Roberts}.\textsuperscript{160}

Chief Justice Rehnquist wrote a concurring opinion in which Justice O’Connor joined.\textsuperscript{161} The Chief Justice concurred in the outcome but dissented from the majority’s decision to overrule \textit{Roberts}.\textsuperscript{162} The concurring opinion stressed that \textit{Roberts} and its progeny were not in conflict with the Clause’s history and that the majority’s categorical exclusion of testimonial statements was an arbitrary move that did not fully serve the framers’ purposes.\textsuperscript{163}

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\textsuperscript{152} Id. at 70–71.
\textsuperscript{153} 541 U.S. 36 (2004). For examples of the instability caused in the state and circuit courts see \textit{infra} Part IV.A.3.a. at n.207. For discussion of the criticism that \textit{Roberts} received see \textit{infra} Part IV.A.3. at n.197.
\textsuperscript{154} 541 U.S. 36 (2004).
\textsuperscript{155} Id. at 1374.
\textsuperscript{156} Id. at 1356, 1359–63.
\textsuperscript{157} Id. at 1363–67.
\textsuperscript{158} 448 U.S. 56 (1980).
\textsuperscript{159} \textit{Crawford III}, 124 S. Ct. at 1369–72.
\textsuperscript{160} See id. at 1374.
\textsuperscript{161} Id. at 1374–78 (Rehnquist, C.J., concurring).
\textsuperscript{162} Id. at 1374 (Rehnquist, C.J., concurring).
\textsuperscript{163} Id. at 1374–78 (Rehnquist, C.J., concurring).
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A. The Majority Opinion

1. The History of the Right of Confrontation

The Court began by tracing the history behind the right to confrontation in England and America in order to determine the purposes behind the Confrontation Clause. First, it discussed the right of confrontation’s roots in the English common law as a reaction to the problematic civil law practices that were adopted in the English courts in the sixteenth and seventeenth centuries. The majority accredited these trials with prompting reforms in the English system and the resulting requirements of witness unavailability and prior opportunity for cross-examination. Moving on, the Court discussed the controversial practices in the colonies during the pre-Revolutionary period. The discussion then shifted to the early adoption of the right of confrontation by individual states, which lead to its inclusion in the United States Constitution.

2. Two Propositions about the Confrontation Clause

The Court used the history and the text of the Sixth Amendment to glean two propositions about its meaning. First, the Confrontation Clause’s principal aim was the defeat of the civil-law procedures that had been abused by the English and early American courts. Second, the Framers would have only admitted prior testimonial statements if the witness was proven unavailable and the defendant had been afforded a prior opportunity for cross-examination.

a. The principal purpose of the Confrontation Clause

The Court first propositioned that the principal purpose of the Confrontation Clause was to combat the use of civil law practices in American courts, particularly ex parte examinations. Then, the Court rejected the

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164. Id. at 1359-63.
165. Crawford III, 124 S. Ct. at 1359-60. The majority discussed the Raleigh case and the criminal procedure statutes from that period. Id. at 1360.
166. Id. at 1360-61.
167. Id. at 1362.
168. Id. at 1362-63.
169. Id. at 1363.
170. Id.
171. Crawford III, 541 U.S. at 52.
172. Id. at 50.
view hypothesized by Wigmore that while the Confrontation Clause governs the admission of in-court testimony, the Clause's application to out-of-court statements depends upon "the law of Evidence for the time being." The Court stressed the separation of the Confrontation Clause from the general rule against hearsay, asserting that the Clause applies to those statements that are akin to the ex parte examinations of the sixteenth century. The Court drew upon the text of the Confrontation Clause to determine that a "witness" is a person who "bear[s] testimony"; thus, the Clause is concerned with a specific kind of out-of-court statement, a testimonial statement. Then the Court went on to list the various definitions of testimonial statements that had been presented to it, such as affidavits and pretrial statements made with the expectation of prosecution and trial. It concluded that statements produced from interrogation by police officers qualify as testimonial under any formulation because present day interrogations by police are very similar to examinations conducted by justices of the peace during the sixteenth century.

b. The common law requirements: unavailability and opportunity to cross-examine

The Court's second proposition was that the right of confrontation

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173. Id. at 51 (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 101 (2d ed. 1923)).

174. Id.

175. Id. (quoting 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). In his concurring opinion, Chief Justice Rehnquist limited his definition of witness to include only sworn "testimonial" statements. See id. at 70 (Rehnquist, C.J., concurring). The Chief Justice stressed that the true concern of the judiciary at common law was whether the statement sought to be admitted was made under oath, not whether it was testimonial or non-testimonial. See id. Further, the Chief Justice claimed that the majority's broad categorization that includes unsworn statements was not what the Framers intended. Id. But, Justice Scalia retorted to this claim by asserting that it is "implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unsworn ex parte affidavit perfectly OK." Id. at 52 n.3.

176. Id. at 1364. See Brief for Petitioner at 23, Crawford III, (No. 02–9410) (stating that "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"); Brief of Amici Curiae, National Association of Criminal Defense Lawyers et al., at 3, Crawford III (No. 02–9410) (stating that "out-of-court statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"); White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) (stating that "extra-judicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions").

177. Crawford III, 541 U.S. at 52.
should be interpreted subject to the requirements at common law in 1791.\textsuperscript{178} Therefore, the Court concluded that the Framers would not admit testimonial statements unless it was proven that the witness was unavailable to testify at trial and the defendant had been provided a prior opportunity to cross-examine the witness.\textsuperscript{179} The majority stressed that prior opportunity for cross-examination is more than just sufficient to satisfy the Clause—it is a dispositive factor for a statement to be admissible.\textsuperscript{180} The Court acknowledged that some exceptions to the Clause were present and established at common law.\textsuperscript{181} The Court claimed, however, that there was little evidence to show that they were used in criminal trials and the majority of such exceptions did not apply to testimonial statements.\textsuperscript{182} Thus, the Court determined that the Framers would not have used these exceptions in the context of prior testimony.\textsuperscript{183}

The Court went on, in section IV of the opinion, to discuss the ways in which the case law supported these two propositions.\textsuperscript{184} The Court explained that both the early case law and more recent decisions were consistent with the majority's propositions, showing several instances in which the Court required either a witness's unavailability or an adequate opportunity for cross-examination.\textsuperscript{185} The Court placed special emphasis on the decision in Lee v. Illinois,\textsuperscript{186} on which the state court relied for different reasoning, to show that Lee was not contradictory to these principals.\textsuperscript{187}

\textsuperscript{178} Id. at 54.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 55–56.
\textsuperscript{181} Id. at 56.
\textsuperscript{182} Id.
\textsuperscript{183} Crawford III, 541 U.S. at 55. At footnote six of the opinion, the Court did recognize the longstanding use of the dying declarations exception in criminal hearsay law—even dying declarations that were testimonial in nature—but declined to address whether the exception was incorporated into the Sixth Amendment; rather, it let the exception stand on historical grounds as being "sui generis." Id. at 1367 n.6.
\textsuperscript{184} Id. at 1367–69. The Court did admit that White v. Illinois, 502 U.S. 346 (1992), was contradictory to the requirement for prior opportunity to cross-examine, but declined to address that case because the only question argued in White was necessity of the unavailability requirement in respect to the spontaneous declarations hearsay exception. Id. at 1368 n.8. In White the Court affirmed the admission of the statements of a child victim of sexual abuse to a police officer and medical personnel under the hearsay exceptions of spontaneous utterances and statements made in the course of securing medical treatment. 502 U.S. at 350–51. The Court relied on its opinion in United States v. Inadi, 475 U.S. 387 (1986), to conclude that the unavailability prong of the Roberts analysis applied only to statements made in a prior judicial proceeding. Id. at 354. Relying further on Inadi, the Court held that the unavailability requirement did not apply to the hearsay exceptions in White, which addressed statements with a certain inherent reliability that could not be reproduced at trial. See id. at 354–56.
\textsuperscript{185} Crawford III, 541 U.S. at 56–57.
\textsuperscript{186} 476 U.S. 530 (1986). For discussion of the Washington Supreme Court's use of Lee,
3. The Problems with Ohio v. Roberts

In section V of the opinion the Court criticized the Ohio v. Roberts\(^8\) decision in light of the historical objectives of the Clause and the unstable results created in the state and circuit courts of appeals.\(^9\) The Court discussed how Roberts was unsatisfactory in that it was too broad because it applied the "same mode of analysis whether or not the hearsay consist[ed] of ex parte testimony" and too narrow because it "admit[ted] statements that do consist of ex parte testimony upon a mere finding of reliability."\(^10\) The Court acknowledged the criticisms of the Roberts approach, citing recent opinions by members of the Court and works of commentators.\(^11\) Then, the Court discussed the two proposals presented by those criticizing the Roberts decision: (1) that the excessive broadness of Roberts could be eliminated if the Confrontation Clause was applied only to testimonial statements, and (2) that Roberts's extreme narrowness could be eliminated if the Clause was read categorically to exclude all testimonial statements where the defendant did not have an opportunity to cross-examine the witness.\(^12\) Because the first proposition was rejected in White v. Illinois,\(^13\) and in light of the case at bar, the Court chose an analysis based upon the second proposition.\(^14\)

\(^{187}\) see supra Part.II.B.3. at note 42.

\(^{188}\) Crawford III, 541 U.S. at 59-60.

\(^{189}\) 448 U.S. 56 (1980).

\(^{189}\) Crawford III, 541 U.S. at 60-68.

\(^{190}\) \textit{Id.} at 60. The Court's reasoning on the overbreadth and excessive narrowness of the Roberts approach follows Justice Breyer's concurring opinion in Lilly v. Virginia, 527 U.S. 116, 141-43 (1999). See \textit{id.}

\(^{191}\) \textit{Id.} at 61. The Court cited Justice Breyer's concurring opinion in Lilly, which criticized the Roberts analysis for being both too broad and too narrow. \textit{Id.} Justice Breyer also urged the Court to reevaluate the connection between the Sixth Amendment and the rule against hearsay. \textit{Id.} The Court also referred to Justice Thomas's concurring opinion in White v. Illinois, 502 U.S. 346, 365 (1999), which argued for a narrow reading of the clause that would apply to both infra judicial and extra judicial statements made in a formal testimonial setting. \textit{Id.} The Court also cited the works of commentators such as Akhil Reed Amar, \textit{The Constitution and Criminal Procedure: First Principles}, 125-31 (1997), which argue that a distinction should be made between the confrontation clause and the rule against hearsay and that the term witness should be read to refer to the maker of any statement prepared for the purposes of trial. \textit{Id.} The Court also cited Richard D. Friedman, \textit{Confrontation: The Search for Basic Principles}, 86 GEO. L.J. 1011, 1031 (1998), which argues that the right to confrontation should apply to testimonial statements. \textit{Id.}

\(^{192}\) \textit{Id.}

\(^{193}\) 502 U.S. 346 (1992). In that case the United States, as amicus curiae, argued that the Confrontation Clause was only concerned with the admission of evidence that was similar to the dreaded ex parte affidavits of the sixteenth and seventeenth centuries. \textit{Id.} at 352. The United States further argued that declarants who made out-of-court statements in a context different from this were not "witness[es] against" the accused and thus, other such statements would be governed by the rules of hearsay. \textit{Id.} The Court rejected this argument claiming that "[s]uch a narrow reading of the Confrontation Clause, which would virtually eliminate
a. The failings of Roberts and its progeny

The Court began its analysis of the flaws of Roberts by discussing the conflict between the framers' intentions and the admission of testimonial statements using judge-made tests of "reliability." While it recognized that the "ultimate goal" of the Confrontation Clause is to ensure reliable evidence, the Court suggested that the right of confrontation is a procedural rather than a substantive right. It bolstered this idea by asserting that proof of the reliability of evidence is not demanded before admission, but rather it is ensured by the guaranteed procedure of cross-examination.

The Court argued that by employing a judge-made reliability analysis, Roberts had effectively nullified the very constitutional protection provided by the Clause—the opportunity to confront the witness and thus show the reliability or unreliability of his statement. The majority proclaimed that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."

The Court continued its criticism of Roberts by demonstrating the unpredictability that it had produced in the state and circuit courts. It argued that reliability was an almost wholly subjective concept that yielded to whatever test or set of factors a particular judge deemed necessary. Despite its unpredictability, the most damning aspect of the Roberts test was its tendency to allow admission of evidence absent an opportunity to cross-

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195. Id.
196. Id.
197. Id.
198. Id. at 62. The Court asserted that the reason the method used at Raleigh's trial was unjust was not because the judges had made a faulty evaluation of the reliability of Lord Cobham's confession, but because Raleigh had not been allowed the opportunity to confront Cobham and show the degree of reliability in his testimony. Id.
199. Id. at 62-63.
201. Id. The Court listed several examples of the differing results in the lower courts, especially those in which different courts read the same significance into opposite fact patterns. Id. Compare People v. Farrell, 34 P.3d 401, 407 (Colo. 2001) (holding statement more reliable because the inculpation of the defendant was "detailed") with United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 245 (4th Cir. 2001) (holding that a statement was more reliable because the implication of the defendant was "fleeting"). Compare Nowlin v. Commonwealth, 579 S.E.2d 367, 371-72 (Va. Ct. App. 2003) (finding a statement is more reliable because the witness made it while in police custody) with State v. Bintz, 650 N.W.2d 913, 918 (Wis. Ct. App. 2003) (finding the statement more reliable because it was made while the witness was not in custody).
examine and thus, being completely contrary to the purpose of the Clause.\textsuperscript{202} Finally, the Court expressed its dismay at the fact that some courts admitted testimonial statements absent an opportunity to cross-examine simply because of the very elements that made them testimonial, such as being taken under oath or while in police custody.\textsuperscript{203} The Court declared that it is not enough that a statement is made in a testimonial setting with “most of the usual safeguards of the adversary process” when the one factor required by the Clause, the opportunity to cross-examine, is missing.\textsuperscript{204}

b. Application to the case at bar

The Court continued its criticism of Roberts by showing the differing results it had produced in the procedural history of the case at bar.\textsuperscript{205} The Court pointed out that each of the lower courts that heard Crawford’s case employed different methods for determining whether or not the prior testimonial statement was reliable.\textsuperscript{206} Further, the lower courts made inferences about the reliability of the evidence that could have been remedied by a mere opportunity to cross-examine and draw out the real truth of the matter.\textsuperscript{207} Finally, the Court refused to dispose of this case easily by applying its own reliability analysis.\textsuperscript{208} Instead, it chose to take the opportunity to overrule Roberts, holding that testimonial statements are inadmissible under the Confrontation Clause of the Sixth Amendment unless the witness has been shown to be unavailable and the defendant has been afforded a prior opportunity to cross-examine the witness.\textsuperscript{209} The Court declined to provide a “comprehensive definition” of a testimonial statement, but it did provide some examples that it would include in that category, “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations.”\textsuperscript{210} Thus, in light of its holding, the Court found that the ad-

\textsuperscript{202} Crawford III, 541 U.S. at 63. The Court discussed the plurality’s statement in Lilly that the accomplice statements implicating the accused would probably not pass the Roberts test, and the resulting admission of such statements by several lower courts. Id.

\textsuperscript{203} Id. at 64–65.

\textsuperscript{204} Id.

\textsuperscript{205} Id. at 66.

\textsuperscript{206} Id.

\textsuperscript{207} Id. at 66–67. The Court discussed the weight that the Washington Supreme Court placed upon the interlocking nature of the defendant and his wife’s statements. Id. at 1373. The Washington Court thought that the statements were interlocking because they were both ambiguous on the point of whether the victim had a weapon, but the Court found that this ambiguity was the very thing that called for cross-examination. Id.

\textsuperscript{208} Crawford III, 541 U.S. at 66–67.

\textsuperscript{209} Id. at 68.

\textsuperscript{210} Id. The Court also implied that guilty plea allocutions were testimonial in Part V.B. of the opinion. Id. at 65.
mission of Sylvia's testimonial statement in the case at bar was a violation of the defendant's Sixth Amendment right to confrontation, and it reversed and remanded the decision of the Washington Supreme Court.211

B. Chief Justice Rehnquist's Concurring Opinion

Chief Justice Rehnquist delivered a concurring opinion that criticized the majority's interpretation of the history of the right of confrontation and its application of that history to Roberts.212 The Chief Justice argued that the English judiciary of the sixteenth and seventeenth centuries was not concerned with whether a statement taken from an unavailable witness was testimonial or non-testimonial.213 Rather, the judges at common law were more concerned with whether a statement was taken under oath because unsworn statements were not considered to be substantive evidence and thus, the oath requirement was considered before the confrontation requirement.214 He further argued that the majority's broad categorization of testimonial statements was inconsistent with history and the Court's precedent, stating that the "classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended."215

The Chief Justice also did not think that the categorical exclusion of testimonial statements was supported by the history behind the Clause because the law in both America and England concerning testimonial evidence was not uniform at the time of the framing.216 He argued that exceptions to the general rule of exclusion existed at the time of the development of the rules regarding out-of-court statements.217 Furthermore, the Chief Justice stated that the Framers could not have intended to create a rigid rule of exclusion when the law during their time was still developing.218 The Chief Justice argued in support of Ohio v. Roberts219 that the exceptions to the general rule of exclusion of out-of-court statements had developed because those types of statements were believed to be just as reliable as statements

211. Id. at 66-67.
212. Id. at 68-75 (Rehnquist, C.J., concurring).
213. Id. at 68 (Rehnquist, C.J., concurring).
215. Id. at 70-73 (Rehnquist, C.J., concurring).
216. See id. 73 (Rehnquist, C.J., concurring). Justice Scalia replied to this assertion by discrediting the English sources that the Chief Justice cited, and he stressed that even if the English rule was uncertain, the early state cases in America support the conclusion that the common law right of confrontation was included in the Sixth Amendment's Confrontation Clause. Id. at 54 n.5.
217. Id. at 73 (Rehnquist, C.J., concurring).
218. Id.
made under cross-examination.\textsuperscript{220} He recognized that cross-examination was a very useful truth finding tool, but asserted that sometimes its use is rendered needless by the reliability of the evidence sought to be admitted.\textsuperscript{221}

Finally, the Chief Justice concluded by warning against the danger of overturning a quarter-century of precedent and leaving the criminal law community with a new rule and no definitive way to apply it.\textsuperscript{222}

\section*{V. SIGNIFICANCE}

\textit{Crawford v. Washington} has been called "one of those rare Supreme Court decisions that will come up on a daily basis in courts all over the country."\textsuperscript{223} \textit{Crawford} replaces twenty-five years of case law with a new and hopefully more stable approach to interpreting the Sixth Amendment’s Confrontation Clause. The Court’s refusal to give “testimonial” a comprehensive definition, however, may lead to inconsistent application of \textit{Crawford} in the lower courts. The abrogation of \textit{Ohio v. Roberts}\textsuperscript{224} will also have an effect on the law of hearsay. This section will attempt to show the further significance of the \textit{Crawford} decision through a discussion of all of these issues.

\subsection*{A. Replacing a Balancing Test with a Categorical Right}

Commentators have called for the termination of the \textit{Ohio v. Roberts}\textsuperscript{225} “indicia of reliability” approach for several years. The \textit{Roberts} balancing test has been criticized for its inadequate protection of the absolute constitutional right of confrontation due to its malleability in the hands of judges.\textsuperscript{226} Hopefully, the Court’s holding in \textit{Crawford} will appease these dissenters by placing a categorical bar on all statements that are “testimonial” in nature, where the witness was not proven unavailable or the defendant was not afforded a prior opportunity for cross-examination.\textsuperscript{227} By overruling \textit{Roberts}, the Court shifts its approach towards the Confrontation Clause from an emphasis on the categorization of exceptions to a focus on the context in which a statement is made. This shift should serve to do away with the numerous

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\item \textsuperscript{220} \textit{Crawford III}, 541 U.S. at 73–74 (Rehnquist, C.J., concurring).
\item \textsuperscript{221} \textit{Id.} at 75 (Rehnquist, C.J., concurring).
\item \textsuperscript{222} \textit{Id.} (Renquist, C.J., concurring).
\item \textsuperscript{223} Erwin Chemerinsky, \textit{Court Bars Out-of-Court ‘Testimonial’ Statements}, 40 TRIAL 82 (July 2004).
\item \textsuperscript{224} 448 U.S. 56 (1980).
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} See Friedman, supra note 47, at 1031 (advocating a categorical rule that affords the defendant the right to confront witnesses who make testimonial statements against the defendant).
\item \textsuperscript{227} \textit{Crawford III}, 541 U.S. at 68–69.
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and varied reliability tests used in the lower courts and to exclude those statements that clearly violate the Confrontation Clause that would have been admissible under a Roberts reliability analysis.\(^\text{228}\) Crawford should thus promote the purposes of the Confrontation Clause by testing the reliability of a declarant's statement in open court under cross-examination as was intended by the Framers—not at the front door in the absence of a jury. The strong majority, in which seven justices supported the abrogation of Roberts, foreshadows the Court's steadfast adherence to the new doctrine, and once the lower courts adjust to applying the Crawford approach, it should result in more consistent and homogenous outcomes than under the previous doctrine.\(^\text{229}\)

B. The Court's Refusal to Define "Testimonial"

While the Crawford approach seems promising, it is soiled by the Court's refusal to comprehensively define "testimonial."\(^\text{230}\) Given that the Crawford approach is principally concerned with whether a statement is testimonial, this void in the Court's decision makes it very difficult for criminal trial attorneys to ascertain how to apply it.\(^\text{231}\) The Court did provide a list of statements that it would deem testimonial, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial... police interrogations" and "plea allocution[s]."\(^\text{232}\) The extension of this list beyond

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228. See id. at 62.

229. Crawford has already demonstrated the ease of its application in some lower court decisions. See United States v. Hendricks, No. CRIM.2004–05 F/R, 2004 WL 1125143, at *2 (D. V.I., St. Croix Div. Apr. 27, 2004) (holding that the statements of a dead witness were not admissible because the defendants did not have an opportunity for cross-examination); see also People v. Fry, 92 P.3d 970, 978–79 (Colo. 2004) (holding that because preliminary hearings in Colorado do not provide the defendant an adequate opportunity for cross-examination and the admission of preliminary hearing testimony is banned by the Sixth Amendment).

230. For the Court's refusal to formulate a definition see Crawford III, 541 U.S. at 68.

231. See id. at 75 (Rehnquist, C.J., concurring).

232. Id. at 64, 68. This compilation raises questions itself because some of the statements it encompasses and that have been used by criminal prosecutors in the past will most likely fail under a Crawford analysis. Testimony from a prior trial seems quite safe, assuming that the defendant had a prior opportunity for cross-examination. Grand jury testimony, however, although it is made for the purposes of finding out the truth, may fail under Crawford because grand jury proceedings do not provide for cross-examination of witnesses. See Fed. R. Crim. P. 6(d). Statements made during police interrogations again will probably fail under Crawford because they would rarely if ever provide for confrontation of the witness. Guilty plea allocutions were once admissible under the Federal Rules of Evidence 804 (b)(3) statements against penal interest exception if they bore "particularized guarantees of trustworthiness." See, e.g., United States v. Moskowitz, 215 F.3d 265, 269 (2d Cir. 2000). Now these statements may be inadmissible unless the declarant is called as witness during trial. See, e.g., United States v. McClain, 377 F.3d 219, 222 (2d Cir. 2004) (holding that admission of
statements made under oath, however, may open the door for various different definitions of "testimonial" in the lower courts.

Beyond this specific list, the Court did give some general guidelines to determine whether a statement is testimonial. Generally, the Court indicated that testimonial statements are those with the "closest kinship to the abuses at which the Confrontation Clause was directed." The Court also drew upon different definitions that it had been presented with by commentators and members of the Court to draw a rough sketch of "testimonial" statements as formalized statements made by a declarant in view of prosecution and trial. Additionally, the Court's concern over statements made to government officials indicates that some of these statements, other than police interrogations, might be regarded as testimonial in the future. With these vague descriptions in hand, the criminal justice system has an interesting road to travel before the Supreme Court provides more details on its definition of "testimonial."

C. The Effects of the Court's Decision on Hearsay Law

Critics of Roberts presented the Court with two options: (1) to limit the application of the Confrontation Clause to only testimonial statements and leave the rest to governance by hearsay law, or (2) to impose an absolute bar on the admission of testimonial statements absent an opportunity for cross-examination. The Court chose to follow the second suggestion, indicating that the Court might not yet be ready to release other kinds of hearsay from the Confrontation Clause's grasp. This failure to relinquish control over hearsay law calls into question what effect the Crawford decision will have

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233. Crawford III, 541 U.S. at 68. This would seem to include such things as sworn affidavits and depositions to the list of potential testimonial statements.

234. See id. at 51. The classification of "testimonial" statements as being made with the expectation of prosecution raises interesting questions, such as how far this idea will be carried in regards to statements made to police officers. Will a statement made by a passer-by to a police officer that "X just committed the murder of Y" be regarded as a statement made in view of prosecution, and thus testimonial?

235. See id. at 66.

236. Id. at 61.

237. See id. The Court based this decision on the rejection of the first proposition in White v. Illinois, 502 U.S. 346 (1992). The Court did recognize, however, that Crawford would cast doubt on the White holding, but declined to address that point. Id.
upon the exceptions to the rule against hearsay and by what means they will be analyzed for admittance under the Confrontation Clause. One proposition is that non-testimonial hearsay will continue to undergo an Ohio v. Roberts\textsuperscript{238} reliability analysis.\textsuperscript{239} Along those same lines it may be feasible to apply requirements for admission under the Federal Rules of Evidence, especially the residual hearsay exception, which is similar to the doctrine under Roberts.\textsuperscript{240} This approach seems to be consistent with the Court's objectives in Crawford: "Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers'\textsuperscript{2} design to afford the States flexibility in their development of hearsay law."\textsuperscript{241} The Court did assure that some hearsay exceptions will not be deemed testimonial, such as business records and statements made in furtherance of a conspiracy.\textsuperscript{242} Some hearsay exceptions, however, walk the fine line between testimonial and non-testimonial statements depending upon their particular fact pattern, and their admissibility will hinge on that factor. The Court indicated this by its hesitance to address the dying declarations and the excited utterance exceptions, both of which could very easily fall into either the testimonial or non-testimonial category.\textsuperscript{243}

From these examples it seems that Crawford could have long resounding effects on criminal trial procedure. Crawford promises stability in an area of the law that has been a long time lost in a haze of uncertainty. Time and experience will tell, however, whether Crawford will live up to this promise or create more uncertainty by leaving criminal prosecutors with no viable precedent.

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\textsuperscript{238} 448 U.S. 56 (1980).
\textsuperscript{240} See Fed. R. Evid. 807.
\textsuperscript{241} Crawford III, 541 U.S. at 68.
\textsuperscript{242} See id. at 56.
\textsuperscript{243} For the Court's discussion of dying declarations see id. at 56 n.6. For the Court's discussion of testimonial spontaneous utterances see id. at 58 n.8.

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