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Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington (or, What You Learned in Law School About Confrontation is Passé

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SIR WALTER RALEIGH REVIVED: THE SUPREME COURT RE-VAMPS TWO DECADES OF CONFRONTATION CLAUSE PRECEDENT IN *CRAWFORD V. WASHINGTON*

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I. INTRODUCTION

In March 2004, the United States Supreme Court dramatically changed the rules regarding the use of the confrontation clause in criminal cases. In *Crawford v. Washington*,[1] the Court abandoned the test for Confrontation Clause issues that it had constructed over two decades ago in *Ohio v. Roberts*.[2] It adopted a new approach that, in the Court's view, is more faithful to the Sixth Amendment[3] and common law.[4] *Crawford* has re-vamped the connection between the Federal Rules of Evidence and constitutional evidence rules. Its immediate effect will be to re-shape, among others, cases involving domestic violence or child witnesses.[5] That impact could be expanded further if *Crawford* is held to be retroactive, thereby applying to cases which have become final.[6] *Crawford's* reach may be curbed, on the other hand, as the courts address how its protections can be forfeited,[7] and whether harmless error rules apply.[8] These issues will be discussed below, following a brief background section explaining what the applicable law was prior to *Crawford*, how the Court foreshadowed the coming change in the rules, and what *Crawford* itself holds.

II. BACKGROUND

A. OHIO V. ROBERTS (1980)

While not purporting to answer all Confrontation Clause issues, *Ohio v. Roberts* set the parameters for resolution of many of the most important.[9] The case dealt with hearsay, unavailability and how to satisfy the Sixth Amendment's requirements of confrontation and cross-examination in a criminal case. In deciding *Roberts*, the Supreme Court established standards which it continued to

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1. 124 S. Ct. 1354 (2004).

2. 448 U.S. 56 (1980). *See* discussion *infra* Part II.A.

3. *Crawford,* 124 S. Ct. at 1374. The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *See generally* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 89 (1997); Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 GEO. L.J. 1011, 1011 (1998); Carol A. Chase, *The Five Faces of the Confrontation Clause,* 40 HOUST. L. REV. 1003, 1004 (2003); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model,* 76 MINN. L. REV. 557, 613 n.1 (1992).

4. *Crawford,* 124 S. Ct. at 1359-63. *See also* Penny J. White, *Rescuing the Confrontation Clause,* 54 S.C. L. REV. 537 (2003).

5. *See infra* Part III.

6. *See infra* Part VI.A-B.

7. *See infra* Part V.

8. *See infra* notes 278-79 and accompanying text.

9. *See generally* 448 U.S. 56 (1980); 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 396 (2d ed. 1994).

refine in a number of decisions in the subsequent twenty years.

Roberts was a criminal prosecution alleging the defendant had used a credit card without authorization.[10] At the preliminary hearing, the defendant called the daughter of the credit card owner to give exculpatory testimony.[11] Not only did she fail to satisfy his expectations, but she also provided information helpful to the government. By the time of trial, the witness had disappeared and was found to be unavailable.[12] The government then introduced her preliminary hearing testimony against the defendant. The Supreme Court approved.[13] The Court reasoned that the witness was unavailable, so the only choices were to admit her prior testimony and agree that the defendant's questioning of her in the prior proceeding satisfied his confrontation rights, or to exclude her testimony because the defendant could not cross-examine her in the presence of the jury. On the bases of necessity and reliability, the Court opted for the former.[14]

The confrontation issue in *Roberts* was interwoven with the Federal Rules of Evidence. In the hearsay context, Federal Rules of Evidence (hereinafter FRE) section 804(a) describes the circumstances under which a witness can be found to be unavailable.[15] FRE section 804(b) sets forth the types of prior out-of-court statements that can be admitted at trial if a witness has become unavailable. These include preliminary hearing testimony under FRE section 804(b)(1).[16] Therefore, the Rules permitted admission of the testimony at issue in *Roberts*. The Court's holding that the Confrontation Clause was not violated reinforced an acknowledged overlap between the Confrontation Clause and the

10. *Roberts*, 448 U.S. at 58.
11. *Id.*
12. *Id.* at 59-61, 75-77.
13. *Id.* at 70, 73.
14. *Id.* at 65-66.
15. FED. R. EVID. 804(a). Federal Rule of Evidence 804(a) provides:
(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant –
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
(3) testifies to lack of memory on the subject matter of the declarant's statement; or
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) is absent from the hearing and the proponent of his statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
Id.
16. FED. R. EVID. 804(b)(1). Federal Rule of Evidence 804(b)(1) provides:
(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
Id.

rules of evidence.[17]

Roberts is most easily understood as addressing two issues: availability and adequate substitutes for live trial testimony.[18] The Court's language seemed to imply that in all cases where a witness is available, he or she must be called at trial if the Confrontation Clause is to be satisfied.[19] Only if the witness cannot be present may out-of-court statements be admitted. The famous "test" of *Roberts* sets the following parameters: if a witness is unavailable for trial, out-of-court statements may be used if they have "indicia of reliability."[20] Those indicia can be established either with (1) a firmly rooted hearsay exception; or (2) circumstantial guarantees of trustworthiness of the out-of-court statement.[21] The latter category was intended to include statements as reliable as those covered by the firmly rooted hearsay exceptions.[22] The reasoning for this rule was that cross-examination would be unnecessary in cases with firmly rooted exceptions or circumstantial guarantees of trustworthiness. The out-of-court statement itself would be deemed so reliable that cross-examination would not accomplish anything significant.[23] If the statement were excluded, reliable and useful evidence would be lost.

B. *ROBERTS'S* SUCCESSORS

Several cases which followed *Roberts* refined – and substantially modified – its two-part approach to the use of hearsay.[24] In these cases, the Court allowed the Rules of Evidence to distort how availability should be assessed. If the Rules said a statement was admissible only if a witness were unavailable, that was dispositive.[25] If, on the other hand, the Rules said a statement was admissible without regard to availability[26] (meaning a hearsay statement could be admitted without calling the witness even if the witness were available) that likewise would be dispositive. In other words, the availability of a witness was important

17. *Roberts*, 448 U.S. at 62.

18. *Id.* at 65.

19. *Id.* Justice Blackmun explained:

> The Confrontation Clause operates in two separate ways to restrict the range of inadmissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. The second aspect operates once a witness is shown to be unavailable.

Id. (internal citations omitted).

20. *Id.* at 66 (citing Mancusi v. Stubbs, 408 U.S. 204, 213 (1972); Dutton v. Evans, 400 U.S. 74, 86 (1970)).

21. *Id.*

22. *Id.* The Court merely mentioned "particularized guarantees of trustworthiness" in *Roberts* and explained the application of this prong in subsequent cases in greater detail. *See, e.g.*, Idaho v. Wright, 497 U.S. 805, 821 (1990); White v. Illinois, 502 U.S. 346, 355-57 (1992). The Court explained that statements admissible without confrontation are viewed as so reliable that "cross-examination would add little." *White*, 502 U.S. at 357.

23. *See Roberts*, 448 U.S. at 66-68 nn.8-9.

24. *See infra* notes 25-31 and accompanying text.

25. FED. R. EVID. 804. This was the situation in *Roberts* itself and also in *Mattox v. United States*, 156 U.S. 237 (1895).

26. FED. R. EVID. 803. *See White*, 502 U.S. 346; Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986). *See supra* notes 23-25 and accompanying text.

only if the Rules of Evidence so dictated.[27]

The second part of the *Roberts* test – admitting a statement with indicia of reliability – meant that many hearsay statements were admitted without regard to whether there was actual confrontation and cross-examination.[28] A statement which fit into the rubric of a "firmly rooted exception" would be admitted without confrontation if the Rule of Evidence provided. Thus excited utterances,[29] statements for medical diagnosis and treatment,[30] business records,[31] and statements under the co-conspirator exception,[32] for example, were admitted even if the defendants claimed they should have been excluded in the absence of confrontation and cross-examination. Fitting a statement under a firmly-rooted exception that disregarded availability was the prosecutor's goal.

At the same time, admitting a statement which did not involve a firmly-rooted exception might be found to violate the Confrontation Clause. Of particular interest in this context is the "residual exception" or "catchall."[33] Not firmly-rooted, and incapable of becoming so because of its *ad hoc* approach to statements, the "catchall" requires satisfaction of circumstantial guarantees of trustworthiness for the admission of hearsay statements.[34] While the residual exception is used in many contexts,[35] it is particularly helpful in cases with child witnesses. If the child's statements qualified as "excited utterances" or "statements for medical diagnosis" they were admissible through the testimony of the adults who heard the statements.[36] If they did not fit one of the firmly-rooted exceptions, they were admissible only if they were as trustworthy as those

27. Availability is required if the evidence listed at Federal Rule of Evidence 801(d)(1) is admitted. These statements are "not hearsay" according to the Federal Rules. *See also* FED. R. EVID. 803(5) (past recollection recorded permitted to assist testifying witness).

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

29. FED. R. EVID. 803(2). *See* United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980). *See also infra* notes 120-22 and accompanying text.

30. FED. R. EVID. 803(4). *See also Iron Shell*, 633 F.2d 77 (8th Cir. 1980); Blake v. State, 933 P.2d 474 (Wyo. 1997). *See infra* notes 123-26 and accompanying text.

31. FED. R. EVID. 803(6). *See, e.g.*, State v. Christensen, 1998 SD 75, 582 N.W.2d 675.

32. FED. R. EVID. 801(d)(2)(E). *See* Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Inadi, 475 U.S. 387 (1986).

33. FED. R. EVID. 807.

34. Federal Rule of Evidence 807 provides:

> A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id. See generally 4 MUELLER & KIRKPATRICK, *supra* note 9, § 398-99, at 144-54.

35. *See, e.g.*, State v. Frazier, 2001 SD 19, 622 N.W.2d 246 (reversing conviction where statement of accomplice was admitted under residual exception without satisfying requirement of guarantees of trustworthiness). *See also* State v. Weaver, 554 N.W.2d 240 (Iowa 1996). The residual exception was initially adopted using the rationale of *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961).

36. *See supra* notes 29-30.

statements covered by the firmly-rooted exceptions.[37] Once they met the test, confrontation and cross-examination could be avoided (depending on the provisions of the rule of evidence governing admissibility).[38]

In addition, although not adopted as part of the Federal Rules of Evidence, many states enacted child witness statutes.[39] Reflecting legislative intent that children's hearsay statements be admitted regardless of whether the child testified at trial, these statutes provided extensive grounds for admissibility. The constitutional requirement of "guarantees of trustworthiness" governs these statutes, however, so they do not necessarily assure admission of the child's statements even though they express a preference for admission.[40]

This coincidence of the evidentiary and constitutional standards allowed a myriad of evidence into criminal cases without confrontation and cross-examination. Hearsay from children involved in sexual abuse cases[41] and from adult victims of domestic abuse who declined to or could not testify at trial[42] were admitted routinely under the *Roberts* formulation.

Apparently, the Supreme Court had second thoughts about *Roberts* and its progeny. A few years ago, the Court expressed reservations about having the Rules of Evidence dictate the outcome of confrontation issues. Precedent indicates that the Court balked, and signaled that it had revised its thinking.

C. THE RETREAT FROM *ROBERTS*

While some members of the Court seemed satisfied with the admission of un-cross-examined and un-cross-examinable statements because of their

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37. *See, e.g.*, Idaho v. Wright, 497 U.S. 805 (1990) (residual exception was not satisfied); United States v. Eagle, 137 F.3d 1011 (8th Cir. 1998) (residual exception); State v. Alidani, 2000 SD 52, 609 N.W.2d 152 (child hearsay exception, S.D.C.L. § 19-16-38 (2000)).

38. *See infra* notes 120-28 and accompanying text.

39. *See, e.g.*, S.D.C.L. § 19-16-38 (2004). This section provides:

> A statement made by a child under the age of ten, or by a child ten years of age or older who is developmentally disabled as defined in § 27B-1-3, describing any act of sexual contact or rape performed with or on the child by another, or describing any act of physical abuse or neglect of the child by another, or any act of physical abuse or neglect of another child observed by the child making the statement, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant or in any proceeding under chapters 26-7A, 26-8A, 26-8B, and 26-8C in the courts of this state if:
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> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
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> (2) The child either:
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> (a) Testifies at the proceedings; or
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> (b) Is unavailable as a witness.
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> However, if the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
>
> No statements may be admitted under this section unless the proponent of the statement makes known his intention to offer the statement and the particulars of it, including the name and address of the declarant to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

Id.

40. *See supra* note 34 and accompanying text (quoting Federal Rule of Evidence 807). *See also* 4 MUELLER & KIRKPATRICK, *supra* note 9, § 399, at 152.

41. *See infra* notes 120-30 and accompanying text.

42. *See infra* notes 93-98 and accompanying text.

reliability and the needs of a particular case, others appeared troubled.[43] Expressions of this dissatisfaction surfaced most prominently in *Lilly v. Virginia*.[44] The case raised the problem of interpretation of the rule governing declarations against interest,[45] and more importantly, whether the admission of such a statement violated the defendant's rights under the Confrontation Clause. The Court held in the affirmative.[46] Several Justices stated outright that the *Roberts* test was flawed in deferring to the Rules of Evidence regarding whether to dispense with confrontation, rather than employing the proper analysis mandated by the Sixth Amendment.[47] While the Justices' opinions expressed

43. *See* Idaho v. Wright, 497 U.S. 805 (1990). In *Wright,* a two-year-old and five-year-old were alleged to be sexually abused by their parents. *Id.* at 808. Certain statements by the older daughter to a doctor were admitted at trial under the catchall exception. *Id.* at 811-12. The Supreme Court reversed in a 5-4 opinion, finding the state courts had improperly expanded the concept of "circumstantial guarantees of trustworthiness" in admitting the statements, resulting in a Confrontation Clause violation. *Id.* at 826-27. The four dissenting justices were comfortable with an approach favoring admissibility of children's statements under circumstances of this type. *Id.* at 827-35. In contrast, a four-year-old child's statements to a doctor were admitted under Federal Rule of Evidence 803(4) in *White v. Illinois,* 502 U.S. 346 (1992), without regard to unavailability of the child. *Id.* at 354-55 n.8. Justices Scalia and Thomas in concurrence urged the Court to analyze confrontation issues more carefully and not allow the Rules of Evidence to dictate resolution of constitutional claims. *See id.* at 364-65 (Scalia, J., & Thomas, J., concurring). *White* was noted in *Crawford* on the issue of the child's "excited utterance" to a police officer. Crawford v. Washington, 124 S. Ct. 1354, 1368 n.8 (2004). The Court apparently would now view those statements as testimonial. *See id. See generally* Dana T. Blackmore, *The Tug of War Between the Confrontation Clause and Hearsay Exceptions in Child Sexual Abuse Cases: Implications of White v. Illinois*, 28 S.U. L. REV. 93 (2001); Myrna S. Raeder, *Hot Topics in Confrontation Clause Cases, and Creating a More Workable Confrontation Clause Framework without Starting Over,* 21 QUINNIPIAC L. REV. 1013 (2003).

44. 527 U.S. 116 (1999). In *Lilly,* the defendant was convicted of capital murder, robbery, and other offenses committed during a "crime spree" with others and was sentenced to death. *Id.* at 122. At trial, the government introduced the confession of one of the perpetrators, the defendant's brother, in which he indicated the defendant was the ringleader. *Id.* at 121. The state court affirmed, holding the statement was admissible as a declaration against interest by an unavailable witness. *Id.* at 122. It also held the statement was within a "firmly rooted exception," and thus, admitting it without giving the defendant the right to confront and cross-examine the declarant did not violate his rights under the Sixth Amendment. *Id.*

The Supreme Court reversed. *Id.* at 140. The Court reiterated that it has declined to limit the protection of the Confrontation Clause to analogs of the ex parte affidavits of centuries ago and has instead adhered to the framework established in *Ohio v. Roberts*. *Id.* at 124-25. That approach requires analysis of whether a statement offered without the opportunity for cross-examination falls within a firmly rooted exception to the hearsay rule or has particularized guarantees of trustworthiness sufficient to establish its reliability. *Id.* A firmly rooted exception is one with such a solid foundation that, as established with substantial experience, virtually any evidence within that category is so trustworthy that cross-examination is unnecessary. *Id.* at 126. The "declaration against penal interest" category is not based on the assumption that all such statements are trustworthy and made without a motive to lie but is based instead on the notion that one is unlikely to fabricate a statement against his own interest. *Id.*

Accomplice confessions that implicate a defendant are not within a firmly rooted exception and must be subject to cross-examination, according to the Court. *Id* at 130-31. In this case, the state court had held that not only were the statements within a firmly rooted exception, but they also had particularized guarantees of trustworthiness. *Id.* at 122. The Court rejected this reasoning, stating that those guarantees must be judged not by the other evidence at trial, which generally corroborates the statement, but by the trustworthiness of the statement itself and the circumstances of its making. *Id.* A statement made during police interrogation in which the declarant admits his guilt is admissible against him. *Id.* at 139. But when in this statement he implicates another, the statement is not against his own interest and is not so reliable that adversarial testing is unnecessary. *Id. See also* Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 SYRACUSE L. REV. 87 (2003).

45. FED. R. EVID. 804(b)(3). *See also* Williamson v. United States, 512 U.S. 594 (1994); United States v. Chapman, 345 F.3d 630 (8th Cir. 2003).

46. *Lilly*, 527 U.S. at 139-40.

47. *See id.* at 140 (Breyer, J., concurring) (urging re-evaluation of the alignment of the Confrontation Clause and Hearsay rules); *id.* at 143 (Scalia, J., concurring) (finding a clear violation of

their dissatisfaction with the *Roberts* formula, they applied *Roberts* in finding a Confrontation Clause violation.[48] Nevertheless, they had apparently become convinced that *Roberts* was ineffective as a tool for ensuring compliance with the Confrontation Clause.[49] *Crawford v. Washington* provided the vehicle for the Court to eliminate the *Roberts* standard and adopt a radically different one.

1. Crawford v. Washington

The defendant in *Crawford* was convicted of aggravated assault for stabbing a man who had attacked his wife.[50] The defendant made a statement after he was given *Miranda* warnings and indicated he had acted in self-defense.[51] His wife spoke to the police as well, and her statement was introduced at trial to contradict Crawford's claim of self-defense.[52] The wife did not testify because of spousal privilege.[53] Her account was introduced as a declaration against her penal interest[54] over the defendant's objection that this procedure violated his right to confront and cross-examine his wife.[55] The state courts admitted the statement,[56] finding it had circumstantial guarantees of trustworthiness which satisfied the Sixth Amendment as interpreted in *Roberts*.[57]

The Supreme Court reversed, commenting that the text of the Sixth Amendment must be informed by the common-law tradition of preferring testimony live, in court, subject to adversarial testing.[58] As Justice Scalia's opinion for the Court explained, occasionally a practice would develop at common law that allowed out-of-court testimony to be admitted at trial.[59] Thus,

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the Confrontation Clause without producing the declarant for cross-examination; remand should be for harmless error analysis); *id.* at 143 (Thomas, J., concurring) (arguing the Confrontation Clause applies to live testimony and to testimonial out-of-court statements; disagreeing with a "blanket ban" on use of accomplice's statements against a defendant).

48. *Id.* at 140 (Breyer, J., concurring); *id.* at 143 (Thomas, J., concurring); *id.* at 144 (Rehnquist, C.J., concurring).

49. It would be disingenuous to give the Court sole credit or blame for re-examining *Roberts*. That course had been urged upon the Court by a number of scholars. Professors Clark, Duane, Friedman, Garland, Maveal, McCormack, Moran, Mueller, and Park filed a brief as amici curiae in *Crawford*. Brief of Amici Curiae, Crawford v. Washington, 124 S. Ct. 1354 (2004) (No. 02-9410). They urged the Court to repudiate *Roberts* and adopt the "testimonial" framework the Court ultimately embraced in *Crawford*. *Id.* at *1-2. Professor Friedman had participated in a similar effort as amicus curiae with Professor Berger in *Lilly*. Brief of Amici Curiae, American Civil Liberties Union, Lilly v. Virginia, 527 U.S. 116 (1999) (No. 98-5881). Through writings and lectures, the amicus Evidence professors had advocated this position for many years. *See generally Symposium Issue: Evidence*, 21 Q. L.P. 731-1172 (2003). In *Crawford*, the Court acknowledged this influence upon *Crawford's* restructuring of the doctrine. 124 S. Ct. at 1369-70.

50. *Crawford*, 124 S. Ct. at 1357.

51. *Id.*

52. *Id.* at 1358.

53. *Id.* at 1357-58. Unlike most states, including South Dakota, which have a privilege covering spousal confidences, Washington has a spousal testimony privilege. WASH. REV. CODE § 5.60.060(1) (1994). This permits one spouse to bar the other spouse from testifying. *Id.* However, state law permits the use of a spouse's hearsay statements in this context. State v. Burden, 841 P.2d 758, 761 (Wash. 1992). *See* S.D.C.L. § 19-13-12 (2004).

54. FED. R. EVID. 804(b)(3).

55. *Crawford*, 124 S. Ct. at 1358.

56. *Id.*

57. *Id.*

58. *Id.* at 1359.

59. *Id.*

the Sixth Amendment was specifically directed at prohibiting the use of *ex parte* examinations against the defendant.[60] The Confrontation Clause, in the Court's view, is *not* limited to in-court testimony, thereby leaving the law of evidence to govern the admissibility of out-of-court statements.[61]

Justice Scalia also explained that much of hearsay does not implicate the Sixth Amendment: off-hand, out-of-court statements do not involve the Sixth Amendment, while out-of-court "testimony" does.[62] "Testimonial" statements include affidavits, custodial examinations, prior testimony, or other pretrial statements that are anticipated to be used prosecutorially.[63] In addition, the Sixth Amendment does not permit use of out-of-court testimony unless the witness is unavailable and the defendant had a prior opportunity to cross-examine.[64] The Court noted that much of the modern Supreme Court precedent incorporated these ideals, although the Court's rationales had not adopted them. Thus, the indicia of reliability test from *Ohio v. Roberts*, focusing on the need for a firmly-rooted exception or circumstantial guarantees of trustworthiness, was not in accord with the principles of the Sixth Amendment.[65]

In *Crawford,* Justice Scalia advised that the correct approach is (1) to apply the Confrontation Clause only to out-of-court statements which are testimonial

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60. *Id.* at 1363.

61. *Id.* at 1364.

62. *Id.* The Court also noted that business records have not been considered "testimonial." *Id.* at 1367.

63. *Id.* at 1364. The Court was neither consistent in describing nor comprehensive in employing the term "testimonial" in *Crawford*. *See generally id.* This lapse makes it unclear whether a subjective, objective, or combined standard applies in gauging whether a statement is testimonial. *Id.*

Justice Scalia first endeavored to define the term by referring to "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 1364 (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). He added that "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* He acknowledged that there are "various formulations" of the concept and initially identified three:

> 1) "*ex parte* in court testimony or its functional equivalent." He included "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." *Id.* (citing Petitioner's Brief at 23, Crawford v. Washington, 124 S. Ct. 1354 (2004) (No. 02-9410));
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> 2) "extrajudicial statements . . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions." (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia J., concurring in part and concurring in judgment)); and
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> 3) "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." *Id.* (citing Brief of Amici Curiae, National Association of Criminal Defense Lawyers at 3, Crawford v. Washington, 124 S. Ct. 1354 (2004) (No. 02-9415)).

Id.

Justice Scalia's first formulation sets up a standard that depends on the vantage point of the declarant. *See Crawford*, 124 S. Ct. at 1364. The third formulation requires assessment of the view of an objective witness. *Id.* The two may not be capable of being reconciled, as the courts applying *Crawford* have demonstrated. *See infra* notes 156-206 and accompanying text. Justice Scalia then complicated matters by identifying a possible fourth category – "statements taken by police officers in the course of interrogations." *Crawford*, 124 S. Ct. at 1367. The Justice repeated this later in the opinion. *Id.* at 1374.

Throughout this article, an effort will be made to assess both the subjective and objective standards and to reconcile them where possible. It is unclear at this point whether the view of the declarant or view of an objective witness will ultimately be adopted by the Court.

64. *Id.* at 1365-66.

65. *Id.* at 1369-70.

and (2) to impose an absolute bar to introduction of testimonial statements without a present or prior opportunity to cross-examine.[66] Although the Court has evaded adopting the former, Justice Scalia recommended revisiting the issue.[67] With respect to the latter, a "reliability" inquiry is misplaced with respect to a testimonial statement.[68] The only question was whether the opportunity to cross-examine was available.[69] Thus, *Roberts's* test of "indicia of reliability" could no longer stand.[70]

In concurrence, Chief Justice Rehnquist and Justice O'Connor argued that *Ohio v. Roberts* should not be overruled.[71] They stated that the Court's new test addressing "testimonial" statements is not rooted in history and is not clearcut.[72] The Confrontation Clause does not require exclusion of "testimonial" statements, however they might ultimately be defined.[73] The Justices thought that in *Crawford*, the statement was improperly admitted using the rationale that it "interlocked" with the defendant's own statement.[74] That was an incorrect application of the rule admitting statements that bear "circumstantial guarantees of trustworthiness" under *Roberts*.[75]

The starting point for grasping the breadth of *Crawford* is that witnesses must testify at trial if they are available; their hearsay statements that might have been admitted under *Ohio v. Roberts* and the Rules of Evidence are no longer admissible under the Confrontation Clause if they were "testimonial." In practice, if a witness is available at trial, the Confrontation Clause is satisfied by the in-court cross-examination.[76] The Clause would not bar previously made statements even if the Rules of Evidence limit or exclude them.[77] In contrast, if a witness is unavailable, previously made statements are not admissible unless there was a prior opportunity to cross-examine (the situation in *Roberts* itself) if those prior statements are considered "testimonial."[78] This is the case even if the Rules of Evidence authorize their admission.

To summarize, *Crawford* makes several important modifications to the practice of the last two decades, including the following:

(1) severing the Confrontation Clause from the Rules of Evidence;

(2) establishing a requirement for in-court testimony unless unavailability is established;

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66. *Id.* at 1374.
67. *Id.* at 1370.
68. *Id.* at 1371-72.
69. *Id.* at 1374.
70. *Id.*
71. *Id.*
72. *Id.* at 1374-78.
73. *Id.* at 1376.
74. *Id.* at 1378.
75. *See id.*
76. *See* California v. Green, 399 U.S. 149, 159 (1970). *See infra* cases cited at note 241.
77. *Green*, 399 U.S. at 156. Statements which do not qualify for admission under these rules might still be admissible under the Confrontation Clause. *Id.* See Federal Rule of Evidence 801(d)(1), which requires a witness to testify as a prerequisite to the admission as substantive evidence of certain prior inconsistent statements made under oath (801d(1)(A)), certain prior inconsistent statements (801d(1)(B)) and certain prior statements of identification (801d(1)(C)).
78. *Crawford*, 124 S. Ct. at 1374.

(3) setting up a category of "testimonial" statements which are subject to the Confrontation Clause, in contrast to non-testimonial statements, which are not;[79] and

(4) declaring that the Confrontation Clause requires the opportunity to confront and cross-examine either at trial or previously, if a witness is now unavailable and "testimonial" evidence is offered.

Merely outlining *Crawford's* provisions fails to capture the impact it will have. Therefore, some hypotheticals will illustrate *Crawford's* influence more clearly.

2. Scenario #1

A twelve-year-old reports to a teacher, police officer and forensic interviewer that his father has sexually abused him. Under *Crawford*, those statements will be testimonial if given under circumstances where the speaker or an objective witness would reasonably expect the statement to be used prosecutorially.[80] That means the statements cannot be used over the defendant's objection that he desires confrontation and cross-examination of the twelve-year-old. The child must take the stand.

Under the pre-*Crawford* approach from *Roberts*, the government would have offered the statements under any of a number of hearsay exceptions, including, for example, excited utterance[81] or statement for medical diagnosis or treatment.[82] If the hearsay rationale were accepted by the court, the child's statement would be admitted by calling the adult to whom it was made to relate it.[83] Often, the child would not be called as a witness. And, if a firmly-rooted hearsay exception applied, there would be no Confrontation Clause violation because a firmly-rooted exception bears adequate indicia of reliability to satisfy the Clause. The understanding was that confrontation and cross-examination would accomplish so little they were dispensable.[84]

3. Scenario #2

A woman dials 911 to enlist help from the local police. The woman reports that her husband is drunk and violent, and she needs help right away. Under *Crawford*, the court will have to determine whether her statement to the police is "testimonial."[85] If so, she will have to testify in court to satisfy any Confrontation Clause objection to use of the statement, even though it likely would be admissible under the Rules of Evidence as an excited utterance or present-sense impression.[86]

Pre-*Crawford*, the constitutional and evidentiary treatment of the statement

79. *Id.* Although the Court did not specifically adopt or define this, it is implicit. *See id.*

80. *Id.* at 1364.

81. FED. R. EVID. 803(2). *See infra* notes 120-22 and accompanying text.

82. FED. R. EVID. 803(4). *See infra* notes 123-24 and accompanying text.

83. *See infra* notes 120-24, 130-31 and accompanying text.

84. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

85. *Crawford*, 124 S. Ct. at 1364. *See also* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1228, 1240-41 (2002).

86. FED. R. EVID. 803(2) (excited utterance); FED. R. EVID. 803(1) (present sense impression).

would be the same – admit the woman's statement as an excited utterance or present sense impression. According to either exception, under the Federal Rules of Evidence, the speaker of the out-of-court statement was not required to testify at trial.[87] The Rules allow either the speaker or someone who heard the excited utterance or present sense impression to repeat it. Therefore, the 911 operator could testify to what the caller said, and the caller would not have to testify at all. There would be no Confrontation Clause problem because the hearsay exception for excited utterances was firmly-rooted, with sufficient indicia of reliability under *Roberts*.[88]

These two hypotheticals put some flesh on the bones of *Crawford*, dramatizing that more accusers will be required to testify in court. The case will have a critical impact on both domestic violence and child abuse prosecutions. Some of the pertinent issues in those cases, and recent decisions applying *Crawford* to them, are taken up below. Discussion of the additional problems of forfeiture by misconduct and retroactivity follows.

III. *CRAWFORD'S* UNRESOLVED ISSUES – THE IMPACT ON DOMESTIC VIOLENCE AND CHILD WITNESS CASES

As indicated above, the crux of *Crawford* is the meaning of testimonial evidence. The Court supplied a definition - a statement that "declarants would reasonably expect to be used prosecutorially," or that an "objective witness" would reasonably believe "would be available for use at a later trial."[89] Justice Scalia chided us to remember the paradigm abuse of testimonial evidence, which eventually resulted in the enactment of the Sixth Amendment to preserve confrontation rights.[90] Sir Walter Raleigh was convicted of treason in part on the out-of-court statement of his alleged co-conspirator, Lord Cobham. Raleigh demanded that Cobham be produced, but the court declined to order it.[91] Cobham's out-of-court affidavit was "testimonial" – it implicated Raleigh in a crime, and the speaker or an objective witness would reasonably expect that it would be used to prosecute him.[92] That is the sort of statement covered by *Crawford's* term "testimonial," and while the Court did not provide an all-encompassing definition, that was its reference point.

A. DOMESTIC VIOLENCE CASES

Many of us view a typical domestic violence situation as one involving an

87. FED. R. EVID. 803.

88. White v. Illinois, 502 U.S. 346 (1992) (excited utterance). *See infra* notes 93-97 and accompanying text.

89. *Crawford*, 124 S. Ct. at 1364 (citations omitted). The Court acknowledged that a "comprehensive definition of 'testimonial'" awaits resolution on another day. *Id.* at 1374. "[A]t a minimum," however, the term encompasses "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." *Id. See supra* notes 62-63 and accompanying text.

90. *Crawford*, 124 S. Ct. at 1364-66.

91. *Id.* at 1360.

92. *See id.*

assault by one spouse or companion upon the other followed by the victim's dive for the telephone to dial 911 and scream for help.[93] In evidentiary terms, that scream would qualify as an excited utterance,[94] and under the provisions of FRE section 803(2), it would be admissible through the testimony of the 911 operator, the person who made the call, or anyone who heard the call.[95] As a result, prior to *Crawford*, cases of domestic violence could be prosecuted with the 911 operator and police who responded to the call;[96] the victim was not needed as a witness to admit the statement.[97] Whether *Crawford* changed that and demands calling the individual who dialed 911 as a witness depends on whether the "cry" was testimonial.[98] This apparently must be resolved on a case-by-case basis.

While the assumption might be that a cry for help on 911 in a domestic abuse situation is an excited utterance and not a "testimonial" statement, that assumption is incorrect in a certain number of cases. As Professors Friedman and McCormack described the phenomenon, some domestic violence situations involve people who "are not naïve about the system"[99] and seek to exploit it. A "race to the phone"[100] even by the spouse at fault, can yield benefits – that person is listed as the complainant, the other spouse (even if he/she was actually the victim) is considered "at fault," and the latter may be removed from the home

93. *See, e.g.*, State v. Stanga, 2000 SD 129, ¶¶ 2-7, 617 N.W.2d 486, 487-88. *See generally* JOHN LARSON, SOUTH DAKOTA EVIDENCE (1991).

94. FED. R. EVID. 803(2). An alternative theory of admissibility would be present sense impression, Federal Rule of Evidence 803(1), if the assault was ongoing. *See* FED. RULE EVID. 803(1).

95. FED. R. EVID. 803. The introductory statement of Federal Rule of Evidence 803 provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness." *Id.* The caption of the provision reads: "Hearsay Exceptions; Availability of Declarant Immaterial." *Id.* This permits introduction of the hearsay statement by anyone with personal knowledge of it (*i.e.*, the witness heard it or spoke it), unless the hearsay rule itself requires the declarant to testify as a prerequisite to use of the exception. An example is Federal Rule of Evidence 803(5), which authorizes recorded recollection to be used with a testifying witness.

The original Advisory Committee note to Federal Rule of Evidence 803 states in pertinent part:

> The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor.

FED. R. EVID. 803 advisory committee's note. *See* JACK WEINSTEIN & MARGARET BERGER, 5 WEINSTEIN'S FEDERAL EVIDENCE 803-46 (Joseph M. McLaughlin, 2d ed. 2004).

96. Friedman & McCormack, *supra* note 85, at 1173-80. Among others, the following cases serve as examples: People v. Hendrickson, 586 N.W.2d 906, 910 (Mich. 1998); State v. Edwards, 31 S.W.3d 73, 77 (Mo. Ct. App. 2000); State v. Lee, 657 N.E.2d 604 (Ohio Mun. Ct. 1995). Friedman and McCormack cite additional cases, including several in which the complainant was determined to be unavailable by choice or privilege. Friedman & McCormack, *supra* note 85, at 1175-77, 1179-80 nn.26-28.

97. If the victim did testify, the testimony might be inconsistent with the government's theory of the case and involve a recantation. The prior inconsistent statement of the complaint might then be admitted as an excited utterance and serve as a basis for conviction despite the complainant's in-court contradiction. Friedman & McCormack, *supra* note 85, at 1171 n.22 (citing examples). *See also* State v. Courtney, 682 N.W.2d 185 (Minn. Ct. App. 2004); People v. Thompson, 812 N.E.2d 516 (Ill. App. Ct. 2004). *See infra* notes 188-97 and accompanying text.

98. *Crawford v. Washington*, 124 S. Ct. 1354, 1370 (2004).

99. Friedman & McCormack, *supra* note 85, at 1196.

100. *Id.* at 1197. There are many beneficial effects of public education about domestic violence and the willingness of police and prosecutors to respond aggressively. Unfortunately, some people are savvy enough and motivated to mis-use the system. *Id.*

and placed in jail.[101] In other situations, the 911 caller does not just "cry for help" – he/she lists many details and grievances to justify action against the spouse.[102]

Crawford dictates that we treat these cases in an individualized manner and make a determination about the nature of the initial call. If it was a short cry for help – consider it a non-testimonial excited utterance, admissible under the Rules of Evidence through the testimony of the 911 operator.[103] If the statement was not given immediately or contained more detailed allegations, it may well be testimonial.[104] If so, it is necessary under *Crawford* to call the speaker for confrontation and cross-examination, regardless of whether the Rules of Evidence would consider the statement an excited utterance admissible under FRE 803(2).

A step back from the intricacies of the rules provides a broader perspective on *Crawford's* day-to-day impact in domestic violence cases. It is fair to say that the legal system, at the urging of victims and advocates dealing with the scourge of domestic violence, assumed greater responsibility and involvement in aggressively pursuing such cases.[105] Ranging from stalking laws[106] to protection orders[107] to grants from Congress under the Violence Against Women Act (VAWA),[108] there has been a push to stop the problem and punish it when it occurs.

In this vein, prosecutions of defendants charged with domestic violence could relatively easily be pursued with the 911 operator and responding officer as the main witnesses. Perhaps a physician who treated the victim would round out the prosecution's case. Those witnesses (police, doctor) would tend to have credibility before the jury in relating their observations and supplementing them with victim statements.[109] The case would be fairly routine and not particularly "messy" in many instances. In particular, the myriad problems prosecutors have identified in dealing with those cases – the victim's recantation or inconsistencies, sometimes a history of a relationship with both parties at fault[110] – did not arise if the victim was not a necessary witness.

Defendants may have complained about this formula used to convict them, but to no avail if the Rules of Evidence obviated the need to call the complainant as a witness. Defendants who had threatened retaliation against testifying

101. *See id.* at 1183-92. *See also* S.D.C.L. § 23A-3-2.1 (2004) (mandating arrest in certain domestic violence situations). *See* State v. Herting, 2000 SD 12, 604 N.W.2d 863.

102. Friedman & McCormack, *supra* note 85, at 1242-43.

103. *See infra* notes 177, 185 and accompanying text.

104. *See infra* notes 177, 185 and accompanying text.

105. *Id.* at 1180-1200. *See also* Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L. J. 281 (2003). Many courts have been educated to recognize the nuances of domestic violence situations. *See* People v. Santiago, No. 2725-02, 2003 WL 21507176 (N.Y. Sup. Ct. Apr. 7, 2003); People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

106. *See, e.g.*, S.D.C.L. ch. 22-19A (2004).

107. *See, e.g.*, S.D.C.L. ch. 25-10 (2004).

108. 42 U.S.C. § 10415 (1994) (providing funding to states as an incentive to prosecute domestic violence cases).

109. These include excited utterances and statements for medical diagnosis or treatment.

110. Friedman & McCormack, *supra* note 85, at 1188-92.

victims were thwarted in this effort, since the victim would not testify and the prosecutor could – and usually would – pursue the case anyway.[111] There have been reported cases of prosecutors prosecuting domestic violence victims who refused to cooperate,[112] but these cases are few, both for policy (why harm the victim more?) and evidentiary (why bother to call the victim if that person's testimony is not essential?) reasons. Of course, where the victim was cooperating with the prosecutor, that person likely would be called as a witness to enable a stronger case to be presented to the jury. But clearly that was not a prerequisite. From the defense perspective, a guilty plea might make perfect sense even with a non-cooperating victim because the rules of evidence permitted the prosecution to prove the case without that testimony. Threats or intimidation to a victim by the defendant, therefore, would not be particularly productive.

Crawford creates a new regime for domestic violence prosecutions. Prosecutors may still have many cases that fit the pre-*Crawford* mold: a 911 call that is a non-testimonial cry for help, testimony from police and medical personnel who can relate observations and some of the victim's hearsay, and either no need to call the victim or a cooperating victim. But many cases will be difficult or impossible to prosecute if the victim refuses to testify since the substitutes (the 911 operator and police officer) can no longer relate the hearsay statements if they are testimonial. A victim who recants, either from fear or a change of mind, will necessarily weaken the prosecutor's ability to obtain a conviction.

Some will condemn this development. Others will applaud it as restoring a necessary scrutiny of such situations through confrontation and cross-examination. Whether the transformation is met with approval or dismay, it must be recognized as a transformation. *Crawford* reinforces the idea that people ordinarily cannot make serious allegations which will result in conviction of a crime without being willing to participate in a significant way in the process leading to conviction. Both strength and a commitment to obtaining a conviction will be demanded of complainants at a new, higher level.[113] Many victims will meet this challenge. Some will not.

The likely immediate result will be fewer convictions in the domestic violence arena. With time, the legal system will determine whether and how well it participates in addressing the domestic violence problem.[114] Alternatives – more education, more counseling, fewer criminal cases – may be pursued more

111. *Id.* at 1188-90 (noting that if the victim does not control the case he/she is safer). *But see* Dayton, *supra* note 105, at 288-90 (arguing this view is inaccurate and paternalistic).

112. Friedman & McCormack, *supra* note 85, at 1189, 1190-91 nn.75-76. *See generally* People v. Santiago, No. 2725-02, 2003 WL 21507176 (N.Y. Sup. Ct. Apr. 7, 2003). *See also* Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004); *infra* note 182.

113. *See, e.g.*, Dayton, *supra* note 105, at 294-97.

114. *See generally* Sharon Portwood, *When Paradigms Collide: Exploring the Psychology of Family Violence and Implications for Legal Proceedings*, 24 PACE L. REV. 221 (2003); Jay Silverman, *When Paradigms Collide: Exploring the Psychology of Family Violence and Implications for Legal Proceedings*, 24 PACE L. REV. 231 (2003).

vigorously as *Crawford's* impact is evaluated through the lens of experience.[115] While cases involving adult victims have been jolted by *Crawford*, cases with child witnesses will be affected as significantly, if not more so. The following section addresses some of the issues arising in situations involving child witnesses.

B. CHILD WITNESS CASES

Having recognized the blight on victims and communities from child abuse, including sexual abuse, the legal system in the past two or three decades has aggressively moved to prosecute the perpetrators.[116] The Rules of Evidence enhanced the ability of prosecutors to win convictions, with prior acts evidence liberally admitted under FRE sections 404(b),[117] 413,[118] and 414.[119] The

115. *See, e.g.,* Linda G. Mills, *Intimate Violence as Intimate: The Journey and a Path*, 9 CARDOZO WOMEN'S L. J. 461 (arguing that alternatives responsive to individual needs are in order and may not fit within a legal system with a uniform response). *See also* Jennifer Hagen, Note, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919 (2001).

116. *See generally*, MARY EDNA HELFER et. al., THE BATTERED CHILD (1997); Richard D. Friedman, *The Conundrum of Children, Confrontation and Hearsay*, 65 LAW & CONTEMP. PROBS. 243 (2002); Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004 (1999); Myrna S. Raeder, *Navigating Between Scylla and Charybdis: Ohio's Efforts to Protect Children Without Eviscerating the Rights of Criminal Defendants – Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, 25 U. TOL. L. REV. 43 (1994); Lucy Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167 (1985).

117. FED. R. EVID. 404(b). This rule provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id. South Dakota child witness cases admitting evidence under Federal Rule of Evidence 404(b) include the following: State v. Chernotik, 2003 SD 129, 671 N.W.2d 264; State v. Christensen, 2003 SD 64, 663 N.W.2d 691; State v. Wright, 1999 SD 50, 593 N.W.2d 792 (holding Rule 404(b) is a rule of inclusion, not exclusion); State v. Steichen, 1998 SD 126, 588 N.W.2d 870; State v. Ondricek, 535 N.W.2d 872 (S.D. 1995); State v. Werner, 482 N.W.2d 286 (S.D. 1992); State v. Christopherson, 482 N.W.2d 298 (S.D. 1992); State v. Perkins, 444 N.W.2d 34 (S.D. 1989); State v. Champagne, 422 N.W.2d 840 (S.D. 1988); State v. Sieler, 397 N.W.2d 89 (S.D. 1986); State v. Roden, 380 N.W.2d 669 (S.D. 1986). *See generally* Chris Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604 (1989). The Eighth Circuit Court of Appeals has addressed the admissibility of 404(b) evidence as well but has taken a more restrictive view of its admissibility than the South Dakota Supreme Court. The Eighth Circuit tends not to admit such evidence unless one of the grounds for admissibility under 404(b) is seriously in issue. United States v. Sumner, 119 F.3d 658 (8th Cir. 1997). *See, e.g.,* United States v. Blue Bird, 372 F.3d 989 (8th Cir. 2004); United States v. Mound, 149 F.3d 799 (8th Cir. 1998); United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996); United States v. Has No Horse, 11 F.3d 104 (8th Cir. 1993). However, any hesitancy to admit other acts evidence in cases with child victims has been trumped by Federal Rules of Evidence 413 and 414. *See infra* notes 118-19.

118. FED. R. EVID. 413. This rule provides:

> Evidence of Similar Crimes in Sexual Assault Cases. (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Id. See, e.g., Blue Bird, 372 F.3d 989; United States v. Gabe, 237 F.3d 954 (8th Cir. 2001); United States v. Withorn, 204 F.3d 790 (8th Cir. 2000); *Mound*, 147 F.3d 1153; United States v. Eagle, 137 F.3d 1011 (8th Cir. 1998).

119. FED. R. EVID. 414. This rule indicates:

hearsay rules have proved useful to prosecutors as well. A child's allegations made to a parent[120] or other adult[121] often qualify as excited utterances. Statements made a considerable time after the event – 45 to 75 minutes later, for example, and to a police officer in response to questioning – have been admitted.[122] Statements made to a doctor,[123] psychologist, or social worker[124] might be considered statements for medical diagnosis or treatment and, thus, admissible. Also, the latter hearsay exception has been stretched to cover not just information about the harm but, in a reversal of precedent, the identity of the perpetrator as well.[125] When these exceptions were applied expansively to admit statements that in the past would have been excluded, they were still deemed firmly-rooted exceptions, and the statements, therefore, were admissible without confrontation and cross-examination.[126] The residual exception[127] and, in state court, the "child hearsay exception"[128] also served as a means of admitting a

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Evidence of Similar Crimes in Child Molestation Cases. (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

Id. See, e.g., Withorn, 204 F.3d 790; *Eagle*, 137 F.3d 1011; *LeCompte*, 131 F.3d 767.

120. Excited utterances to a parent appear in the following South Dakota cases: State v. Floody, 481 N.W.2d 242 (S.D. 1992) (admitting statements made to the victim's mother and a friend); State v. Logue, 372 N.W.2d 151 (S.D. 1985) (referencing statements made to the victim's mother).

121. *Eagle*, 137 F.3d 1011 (admitting statements to school teacher and social worker); State v. Orelup, 520 N.W.2d 898 (S.D. 1994) (allowing an excited utterance made to a doctor and nurse). *See, generally*, John E. B. Myers et. al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 LAW & CONTEMP. PROBS. 3 (2002).

122. United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980); State v. Bawdon, 386 N.W.2d 484 (S.D. 1986) (admitting statements to police officer and social worker three hours after incident). *See also* 4 MUELLER & KIRKPATRICK, *supra* note 9, § 435, at 388.

123. *See* White v. Illinois, 502 U.S. 346 (1992); *Gabe*, 237 F.3d 954; *Orelup*, 520 N.W.2d 898 (allowing statements to emergency room doctor and nurse). *But see* Olesen v. Class, 164 F.3d 1096 (8th Cir. 1999) (affirming in part and reversing on use of medical diagnosis exception). *See also* Myers, et al., *supra* note 104; Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 LAW & CONTEMP. PROBS. 47 (2002).

124. *See, e.g.,* United States v. Wright, 119 F.3d 630 (8th Cir. 1997); *Orelup*, 520 N.W.2d. 898; State v. Basker, 468 N.W.2d 413 (S.D. 1991); State v. Spaans, 455 N.W.2d 596 (S.D. 1990) (holding statements to a social worker admissible); State v. Foell, 416 N.W.2d 45 (S.D. 1987) (admitting statements made to social worker); State v. Hallman, 391 N.W.2d 191 (S.D. 1986); State v. Bawdon, 386 N.W.2d 484 (S.D. 1986) (allowing statements to social worker); State v. Spronk, 379 N.W.2d 312 (S.D. 1985).

125. United States v. Renville, 779 F.2d 430, 439 (8th Cir. 1985); *Gabe*, 237 F.3d at 960.

126. *See Iron Shell*, 633 F.2d at 87 (rejecting the defendant's Confrontation Clause argument). *See also* State v. Olesen, 443 N.W.2d 8 (S.D. 1989), *rev'd* Olesen v. Class, 164 F.3d 1096 (8th Cir. 1999) (reversing in part because of Confrontation Clause violation).

127. FED. R. EVID. 807. *See* United States v. N.B., 59 F.3d 771 (8th Cir. 1995) (discussing statements to social workers); United States v. Grooms, 978 F.2d 425 (8th Cir. 1992) (holding statements made to FBI agent admissible).

128. S.D.C.L. § 19-16-38 (2004). *See supra* note 32 and accompanying text. *See also* State v. Guthmiller, 2003 SD 83, 667 N.W.2d 295 (admitting statements to friend and grandmother); State v. Cates, 2001 SD 99, 632 N.W.2d 28 (allowing statements to mother, police officer, and another adult); State v. Alidani, 2000 SD 52, 609 N.W.2d 152 (discussing statements to grandmother, social worker, and investigator); State v. Peterson, 1996 SD 140, 557 N.W.2d 389 (addressing statements to social worker); State v. Moriarty, 501 N.W.2d 352 (S.D. 1993) (holding statements to babysitter admissible); State v. Buller, 484 N.W.2d 883 (S.D. 1992) (admitting statements to counselors); State v. Floody, 481 N.W.2d 242 (S.D. 1992) (discussing statements to social worker and sheriff); *Spaans*, 455 N.W.2d 596 (allowing statements to mother and counselors); State v. Schoenwetter, 452 N.W.2d 549 (S.D. 1990) (addressing statement to social worker); *Foell*, 416 N.W.2d 45 (reversing the trial court for failing to make necessary findings regarding statements to social worker and babysitter); *Spronk*, 379 N.W.2d 312 (remanding with

child's statements. Neither of these exceptions is firmly-rooted, so under *Roberts,* circumstantial guarantees of trustworthiness were needed and often were found.[129] Through use of these liberal hearsay rules, a case of child sexual abuse could be proved without resort to the testimony of the child at trial. Adults could serve as substitute witnesses by testifying to the child's excited utterances and statements for medical treatment.[130] The parents, police officers, social workers, teachers, doctors, and forensic interviewers who testified to the child's statements were often powerful and convincing witnesses. Their testimony might be bolstered by physical evidence of abuse of the child, although not always.[131] Also, in some cases, evidence of the defendant's prior acts of abuse of a child was admitted.[132] Often, a conviction would result.

Was the defendant entitled to have the child produced as a witness to satisfy the right to confront and cross examine? In some cases, the child could testify, and was subject to cross-examination.[133] Relevant hearsay, physical evidence, the defendant's prior acts, and perhaps expert testimony[134] would corroborate this testimony and, if sufficiently persuasive, would yield a conviction.[135] But in

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order to trial court to make sufficient finds of indicia of reliability concerning statements made to mother, grandmother, and social worker).

129. *See supra* note 23 and accompanying text (supporting the inference that the statement would have to be as reliable as one fitting a firmly-rooted hearsay exception).

130. *See supra* notes 120-29 and accompanying text.

131. For example, physical evidence of rape (DNA evidence) was compelling in *State v. Herrmann.* 2004 SD 53, 679 N.W.2d 503. It was absent in *State v. Moriarty.* 501 N.W.2d 352. In cases of sexual contact, which fall under S.D.C.L. section 22-22-7, physical evidence ordinarily would not exist because the offense involves merely touching certain parts of the body. *See* S.D.C.L. § 22-22-7.1 (2004); *see, e.g.,* State v. Bunger, 2001 SD 116, 633 N.W.2d 606; State v. Verhoef, 2001 SD 58, 627 N.W.2d 437; State v. Edelman, 1999 SD 52, 593 N.W.2d 419; State v. Loop, 477 N.W.2d 40 (S.D. 1991). Under the federal statute prohibiting sexual contact, 18 U.S.C. § 2244, a similar lack of physical evidence is the norm. *See, e.g.,* United States v. Thunder Horse, 370 F.3d 745 (8th Cir. 2004); United States v. Turning Bear, 357 F.3d 730 (8th Cir. 2004) (reversing conviction based almost entirely on children's account where trial court excluded proffered opinion on their lack of credibility); United States v. Gabe, 237 F.3d 954 (8th Cir. 2001); United States v. Kirkie, 261 F.3d 761 (8th Cir. 2001); United States v. Wright, 119 F.3d 630 (8th Cir. 1997).

132. *See supra* notes 117-19.

133. *See, e.g., Turning Bear,* 357 F.3d at 737-38 (8th Cir. 2004); United States v. Grassrope, 342 F.3d 866, 869 (8th Cir. 2003); *Wright,* 119 F.3d at 635-36; United States v. Grooms, 978 F.2d 425, 428 (8th Cir. 1992); United States v. Iron Shell, 633 F.2d 77, 87 (8th Cir. 1980); State v. Alidani, 2000 SD 52, ¶ 26, 609 N.W.2d 152, 159; State v. Cates, 2001 SD 99, ¶ 9, 632 N.W.2d 28, 34; State v. Gonzalez, 2001 SD 47, 624 N.W.2d 836 (reversing on other grounds); *Floody,* 481 N.W.2d at 251. If a child did testify, accommodations might be made. *See, e.g.,* Maryland v. Craig, 497 U.S. 836 (1990) (closed circuit television approved); Coy v. Iowa, 487 U.S. 1012, 1022 (1988) (screen disapproved). *See also* Chase, *supra* note 3, at 1011. In *Alidani,* the court noted that S.D.C.L. section 22-1-11 permits a victim-witness assistant to accompany the victim in a criminal proceeding. 2000 SD 52, ¶ 7, 609 N.W.2d at 157. The court found no abuse of discretion in the trial court's permitting the victim-witness assistant to sit with the child and hold her hand as she testified. *Id.* ¶ 19.

134. *See, e.g.,* United States v. Withorn, 204 F.3d 790 (8th Cir. 2000); United States v. Running Horse, 175 F.3d 635 (8th Cir. 1999); United States v. Eagle, 133 F.3d 608, 611 (8th Cir. 1998); United States v. Reynolds, 77 F.3d 253 (8th Cir. 1996); State v. Osgood, 2003 SD 87, ¶ 19, 667 N.W.2d 687, 693-94; *Cates,* 2001 SD 99, 632 N.W.2d 28; State v. Edelman, 1999 SD 52, 593 N.W.2d 419; State v. Letcher, 1996 SD 88, 552 N.W.2d 402; State v. Koepsell, 508 N.W.2d 591, 594 (S.D. 1993). *See generally* Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility,* 65 LAW & CONTEMP. PROBS. 149 (2002); Lucy S. McGough, *Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims,* 65 LAW & CONTEMP. PROBS. 179 (2002); Chris Hutton, *Child Sexual Abuse Cases: Reestablishing the Balance within the Adversary System,* 20 U. MICH. J.L. REFORM 491 (1987).

135. *See supra* note 133.

many cases the child was unable to testify because of age, fear, or lack of competency; the adult "substitute witnesses" were thus crucial and sufficient in these cases for obtaining a conviction.[136] The defendant might demand confrontation of the child, but it would not be mandated under the extant evidentiary system.[137]

Crawford exploded this arrangement. It is not clear how and where the pieces will fall in cases involving children. The starting point is a preference for live testimony to enable the defendant to confront and cross-examine.[138] If hearsay is admitted, it is subject to the Confrontation Clause if it is testimonial.[139] A subsidiary question, of course, is whether as a matter of evidence law, the particular hearsay is admissible under the Rules of Evidence. Hearsay which is not testimonial is apparently not subject to the Confrontation Clause,[140] although it must be admissible under the Rules of Evidence.[141]

Crawford poses the crucial question: was an out-of-court statement testimonial? The answer includes a subjective and objective aspect. The subjective: did the declarant reasonably expect the statement to be used prosecutorially? The objective: would an objective witness reasonably believe the statement would be available for later use at trial?[142] If yes, confrontation is needed.[143] That means if a hearsay exception such as "excited utterance" is stretched to fit a child's statement to a police officer an hour after the event involving the defendant, that statement is not necessarily admissible through the testimony of the police officer. If the statement is testimonial, the child must appear in court to testify (not to repeat the out-of-court statement but to relate what occurred; the out of court statement itself would come in only if the Rules of Evidence permitted), or the case must be proved by evidence other than the child's prior statements – with physical evidence, a confession, or eyewitness testimony, for example.

The difficult question in applying *Crawford* to children's statements is how would a child (the declarant)[144] know an out-of-court statement is to be used prosecutorially? And, if the child does not know, is it always sufficient to render a statement testimonial if an objective observer would know? Pending additional guidance from the Supreme Court, some hypotheticals are useful in endeavoring to provide an answer.

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136. *See, e.g.*, White v. Illinois, 112 S. Ct. 736 (1992); United States v. Looking, 156 F.3d 803 (8th Cir. 1998); State v. Herrmann, 2004 SD 53, 679 N.W.2d 503.

137. *See, e.g.*, United States v. Grassrope, 342 F.3d 866 (8th Cir. 2003); United States v. N.B., 59 F.3d 771 (8th Cir. 1995); State v. Moriarty, 501 N.W.2d 352 (S.D. 1993); State v. Buller, 484 N.W.2d 883 (S.D. 1992). *But see* Olesen v. Class, 164 F.3d 1096 (8th Cir. 1999) (reversing in part because of Confrontation Clause violation).

138. 124 S. Ct. 1354, 1374.

139. *Id.*

140. *Id.*

141. FED. R. EVID. 803, 804.

142. *Crawford*, 124 S. Ct. at 1365. *See supra* notes 62-63.

143. *Crawford*, 124 S. Ct. at 1365. Confrontation can occur at trial or prior to trial if the witness is now unavailable and was previously subject to cross-examination at a preliminary hearing or deposition. *Id.* at 1365-67.

144. *See id.* at 1364.

1. Hypothetical #1

A fourteen-year-old girl or boy alleges her/his father sexually abused her/him. The child tells a teacher, knowing the teacher will report to the police. The child wants the abuse to stop and does not think at all about the father being prosecuted. However, the child is sophisticated enough to watch TV shows which deal with criminal cases, has read newspaper accounts of such cases, and knows the father is doing something that will get him into trouble if the authorities are informed.

After the teacher reports the allegation, the child speaks to her/his mother, a police officer, a forensic interviewer, a doctor, and a psychologist about what occurred. These statements likely are testimonial, and not admissible without the defendant's having the right to confront and cross-examine the declarant, *i.e.* the child. Why? Because the young person is sophisticated enough to understand the gravity of the accusation and that she/he is actually making an accusation that will be used by law enforcement against the accused. Furthermore, an objective witness would understand the statement's likely usefulness in prosecution since the primary purpose in obtaining the information is to respond through the criminal process.[145] No longer can a prosecutor choose to protect a child in this situation by declining to call her/him as a witness and using the adults as substitutes to relate the child's statements.

2. Hypothetical #2

A three-year-old child reports sexual abuse to a parent, using whatever language the child can muster to describe what occurred. The child later speaks to a forensic interviewer and doctor. Would the child's statements be admissible under *Crawford*, assuming the child is too young to be considered a competent witness?

The threshold question is whether any or all of the statements are testimonial.[146] It might well be the case given the child's youth and immaturity that she/he would have no concept of a statement's being used prosecutorially. The child may not even know the act was wrong, and perhaps, told the mother just because she/he did not like it. Under this subjective standard the statement to the mother would not be testimonial and likely would be admissible, perhaps as an excited utterance[147] or fact of complaint.[148] The objective standard likely

145. *Id.*. at 1364.

146. *Id.*

147. FED. R. EVID. 803(2).

148. *See, e.g.*, State v. DeVall, 489 N.W.2d 371, 375 (S.D. 1992). In *De Vall*, the court explained:

> Generally, the testimony of a witness cannot be bolstered or supported by showing that a witness made similar statements out of court in harmony with her testimony on the stand. M. Graham, Handbook of Federal Evidence § 801.12, at 760 (3d ed. 1991). There is an exception to this rule in rape cases which permits testimony to prove complaint was made.
>
> > "Since it is natural for a woman or child to complain to someone responsible for her welfare of an outrage of this character, the failure to complain could be urged by the defense to contradict or discredit her testimony. Because of this[,] cases generally allow the prosecution to forestall such discrediting, or any inference derived from failure to complain, by admitting testimony of the fact of the complaint, but not the details."

would not bar use of the statement, either. The statement lacks formality, is not part of interrogation, and is initiated by the child. The Confrontation Clause should pose no barrier to use of the statement.

The child's subsequent statements to a police officer or forensic interviewer are more problematic. The child's age and maturity militate against a finding of "testimonial" with the subjective aspect of the standard. However, the problem is that the adults fashion the interview in such a way that the child understands how important the matter is, and that the adults need to know the details so they can respond. Of course, a child needs to have a sense of the importance of accuracy in the interview so it is understood not to be child's play or fantasy. But this formal type of interview has the effect of eliciting a testimonial statement, because an objective witness would understand the statement is designed specifically for prosecutorial use.

Crawford did not endeavor to answer this problem, although it is clear from the briefs in the case and scholarly materials presented to the Court that there is an awareness of the difficulty of this scenario.[149] It might be tempting for the Court to adopt a standard that recognizes extremely young age and informal circumstances in making a statement as ordinarily disqualifying it as testimonial. However, the standard will likely be flexible. The reason is that the Court will be reluctant to deny confrontation because of a categorical exclusion based on extremely young age if the child in actuality does not fit the stereotype. Furthermore, structured interviews, whether of adults or children, seem to fit precisely within *Crawford's* description of testimony.[150] Under these circumstances the statements are more likely to qualify as testimonial.

3. Hypothetical #3

A child between the ages of six and eleven alleges that her/his mother has sexually abused her/him. This child, as was the case with the fourteen-year-old and three-year-old in the preceding hypotheticals, describes the abuse to the other parent, a police officer, a forensic interviewer, and, perhaps, a teacher or social worker.

Under *Crawford's* direction, these cases will pose the most difficulty in assessing subjectively whether an out-of-court statement is testimonial and, therefore, subject to the Confrontation Clause. For a child of the age of twelve or older, the answer most likely is yes; for a young child, under four or five, the

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State v. Thorpe, 162 N.W.2d 216, 218 (S.D. 1968) (quoting J. Wigmore, 4 Wigmore on Evidence, §§ 1134-1140 at 297-314.)). *See also State v. Twyford*, 186 N.W.2d 545, 548 (S.D. 1971); *State v. Schultz*, 169 N.W. 547, 549 (1918).

> [T]he testimony of third parties is admissible to prove the fact that complaint was made, but the rule allows no further proof than that fact and possibly proof of what was said as to the name of the guilty party. 'It does not permit testimony of the third party relating what the complaining witness said as to the details of the offense . . . .'

Thorpe, 162 N.W.2d at 217 (quoting *Schultz*, 169 N.W. at 549) (footnote omitted).

489 N.W.2d at 385. *See also* State v. Midgett, 2004 SD 57, 680 N.W.2d 288.

149. Brief for the United States as Amicus Curiae at n.12, Crawford v. Washington, 124 S. Ct. 460 (2003) (No. 02-9410).

150. *Crawford*, 124 S. Ct. at 1364.

answer often will be no. For the children in-between there likely will be no inference either way.[151] This means on a case-by-case basis the child's sophistication and understanding not only of the sexual abuse itself but also of concepts such as prosecution and punishment, will be evaluated. These are the cases most "up for grabs," in contrast to those with the four or fourteen-year-old. They also are cases in which the child most likely is competent to testify at trial.[152] Although there may be cases where the child would be found to be unavailable because of inability to handle the courtroom,[153] the threshold assumption will be competency and availability for direct and cross-examination. More importantly, regardless of the age of the child, the circumstances of an interview can be dispositive under the objective formulation of the standard. Formality, meaning questioning by police or forensic interviewers, makes it clear the interview will yield evidence for trial. This will be testimonial evidence under *Crawford*.[154]

This is a sea change for prosecution of cases involving child witnesses. The legal system's ability to shield the child from having to testify, and to prove the case against the defendant with adult/substitute witnesses has disappeared for many cases as the result of *Crawford*. Prosecutions with strong physical evidence or eyewitnesses will not change significantly.[155] Those are the unusual cases, however. Much more frequent are prosecutions using the child's statements to adults, accompanied by unwillingness or inability of the child to testify.[156] Where previously the adults could substitute for the child, *Crawford* imposes substantial impediments to continuing that practice.

IV. POST-CRAWFORD DEVELOPMENTS IN DOMESTIC VIOLENCE AND CHILD WITNESS CASES

Crawford's impact will be felt over the long term as the Supreme Court refines its definition of testimonial evidence. In the case's immediate aftermath, however, lower courts have had to define the term in a number of settings.[157] Several courts have dealt with domestic violence and child abuse situations,

151. This is reminiscent of the common law age categories for capacity to commit a crime. A child under age seven was presumed to lack capacity; over fourteen was presumed to have it; and between seven and fourteen, there was no presumption. ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 936 (3d ed. 1982).

152. FED. R. EVID. 601. *See also* Cal. Jury Instr. No. 2.20.1 (10th ed. 1996) (concerning child witnesses). This jury instruction was quoted in *People v. Warner*. 14 Cal. Rptr. 3d 419, 432 (Cal. Ct. App. 2004).

153. *See* MUELLER and KIRKPATRICK, *supra* note 9, at § 487(h).

154. *Crawford*, 124 S. Ct. at 1364.

155. *See, e.g.*, State v. Herrmann, 2004 SD 53, ¶ 13, 679 N.W.2d 503, 508.

156. *See supra* notes 121-37 and accompanying text.

157. *See, e.g.*, United States v. Hendricks, No. CRIM.2004-05F/R, 2004 WL 1125146 (D. Virgin Is. May 11, 2004) (holding wiretapped conversations are testimonial under *Crawford*); People v. Fry, 92 P.3d 970, 976 (Colo. 2004) (preliminary hearing is testimonial); City of Las Vegas v. Walsh, 91 P.3d 591, 595 (Nev. 2004) (applying *Crawford* to preclude use of affidavit at defendant's trial for DUI); People v. Cortes, 781 N.Y. S.2d 401, 402 (N.Y. Sup. Ct. 2004) (911 call in murder case was testimonial). *But see* Diaz v. Herbert, 317 F. Supp. 2d 462, 481 (S.D.N.Y. 2004) (co-conspirator statement not testimonial); Brooks v. State, No. 2001-KA-01826-COA, 2004 WL 1516503, at *18 (Miss. Ct. App. June 29, 2004) (statement to friend was not testimonial); State v. Blackstock, 598 S.E.2d 412, 420-21 (N.C. App. 2004) (non-testimonial statement).

which are briefly surveyed below.

A. DOMESTIC VIOLENCE

In the reported cases dealing with domestic violence, the courts have considered whether excited utterances and other forms of evidence detailing the alleged assault are testimonial and, thus, subject to *Crawford's* requirements.[158] In *State v. Hammon*, the defendant was convicted of domestic battery of his wife, who did not testify at trial.[159] The responding officer testified about her statements, which the trial court admitted as excited utterances.[160] The Court of Appeals of Indiana agreed with that characterization and ruled that admission of the statements did not violate the defendant's confrontation rights.[161] The court acknowledged that its task was to determine whether the wife's statements to the officer were testimonial and concluded they were not.[162] The court interpreted the Supreme Court's characterization of testimonial statements[163] to encompass statements with an "official and formal quality."[164] In the case at hand, the wife's statement "was not given in a formal setting even remotely resembling an inquiry before King James I's Privy Council."[165] Further, the statement was not given in the course of a police interrogation, because all police questioning is not necessarily "interrogation." The court explained, "'interrogation' carries with it a connotation of an at least slightly adversarial setting."[166] Since the officer was acting in the wife's interests, he was not interrogating her for purposes of *Crawford*.[167] Therefore, her statements were not testimonial and were admissible through the police officer's testimony as excited utterances.[168] The defendant's confrontation rights were not violated by using the wife's out-of-court statements without calling her as a witness.[169]

Similarly, in *People v. Compan* the defendant was convicted of domestic assault on his wife, who had called a friend for help and was taken to the hospital for examination by a doctor.[170] The wife did not testify at trial. The statements

158. *See, e.g.*, People v. Compan, No. 02CA-1469, 2004 WL 1123526 (Colo. Ct. App. May 20, 2004); Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004); Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004); State v. Courtney, 682 N.W.2d 185 (Minn. Ct. App. 2004); People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

159. 809 N.E.2d at 948. Although a 911 call was not pertinent to resolution of the case, the wife's statements to the responding officer when he arrived at the scene were. *Id.* She described her husband's attack on her; the officer observed broken glass and furniture in disarray. *Id.* at 949.

160. *Id.* at 948.

161. *Id.* at 953.

162. *Id.* at 952.

163. *Id.* "Affidavits, custodial examinations, prior testimony . . . depositions [and] confessions." Crawford v. Washington, 124 S. Ct. 1354, 1364 (2004).

164. *Hammon*, 809 N.E.2d at 952.

165. *Id.*

166. *Id. But see* the child witness cases *infra* notes 242, 248 and 252.

167. *Hammon*, 809 N.E.2d at 952.

168. *Id.*

169. *Id.* at 953.

170. No. 02CA-1469, 2004 WL 1123526, at *1 (Colo. Ct. App. May 20, 2004) (petition for review pending).

to the friend were admitted as excited utterances,[171] and those to the doctor were admitted as statements for medical diagnosis or treatment.[172] The court concluded that although the statements to the friend were made fifteen minutes after the assault, they fit the hearsay exception as excited utterances.[173] Further, in the court's view, they were not "testimonial" statements under *Crawford* because they were not "solemn or formal" declarations and "were not made for the purpose of establishing facts in a subsequent proceeding."[174] The court added that if any error occurred in admitting the subsequent statement to the doctor,[175] it was harmless because the evidence was cumulative.[176]

In two domestic violence cases involving 911 calls, courts have ruled the calls were not testimonial evidence for purposes of *Crawford*.[177] In *People v. Moscat*, the court addressed a motion in limine, premised on the understanding that the complainant who called 911 to report the assault by the defendant would not testify.[178] The court canvassed some problems in prosecuting domestic abuse cases, including victims who refuse to testify and the role of 911 calls in proving the case in a "victimless" (meaning no victim testifying at trial) prosecution.[179] The court agreed that the 911 call was an "excited utterance" and subject to Confrontation Clause analysis after *Crawford*. The court ruled that such a "cry for help"[180] is not testimonial since it is initiated by the victim, is not analogous to a formal pretrial examination, and, basically, is a call by someone trying to save her life rather than make an accusation.[181] Therefore, *Crawford* would not bar its use if it fit these criteria. Likewise, in *Fowler v. State*, the Indiana Court of Appeals ruled that five minutes after a 911 call made by a friend of the victim of domestic assault, the victim's statements to the responding officer were excited utterances and not admitted in violation of *Crawford*.[182] The statements lacked the "official and formal quality" of

171. *Id.* *See* FED. R. EVID. 803(2).

172. *Compan*, 2004 WL 123526 at *2. *See* FED. R. EVID. 803(4).

173. *Compan*, 2004 WL 1123526 at *2. The court identified the following factors to be considered in evaluating whether a statement is an excited utterance:

> (1) the lapse of time between the startling event and the out-of-court statement, (2) whether the statement was made in response to an inquiry, (3) whether the statement was accompanied by outward signs of excitement or emotional distress, and (4) the choice of words employed by the declarant to describe the experience.

Id.

174. *Id.* at *4. The court added that nontestimonial statements should be evaluated under the state constitution to determine compliance with the state's rules on confrontation. *Id.* The court found no error in admitting the excited utterances, using *Roberts* as the guide. *Id.*

175. *Id.* at *6-7. The statement identified the husband as the assailant. *Id.* at *1.

176. *Id.* at *7.

177. People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004); Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004).

178. *Moscat*, 777 N.Y.S.2d at 875-76.

179. *Id.* at 878.

180. *Id.* at 880.

181. *Id.* at 879-80.

182. 809 N.E.2d 960. The officer arrived at the victim's home shortly after an assault that resulted in bleeding, pain, and other after-effects. *Id.* at 961. The victim's friend had made the call to 911 fifteen minutes prior to the officer's arrival; the assault apparently had occurred a short time prior. *Id.* at 962. The defendant also was present when the officer arrived. *Id.* at 961. The victim implicated the defendant as the assailant, although she refused to testify at trial. *Id.*

testimonial statements addressed in *Crawford*.[183] The court observed that police on-the-scene questioning is not interrogation or an inquisitorial practice that *Crawford* might encompass.[184] Thus, the use of the woman's statements despite her refusal to testify did not violate the defendant's right to confront and cross-examine.

In two domestic violence cases, the courts did find that testimonial evidence was at issue, thus requiring compliance with *Crawford*.[185] In *State v. Courtney*, the state introduced the taped interview of a woman who had been badly beaten and provided the details to the responding officer.[186] The woman testified for the defense.[187] The court ruled the statement was testimonial, but since the woman testified, *Crawford's* requirements were met.[188] During the same investigation, the woman's six-year-old child described the defendant's behavior to a child protection worker who had been asked to assist in the investigation of the defendant.[189] The adult repeated the child's statements at trial, but the child did not testify.[190] Admission of the child's statements was reversible error: the statement was testimonial since it was specifically taken to prepare the case against the defendant; the child did not testify at trial, and there was no prior opportunity for cross-examination.[191] Admission of the statement was not harmless error, since the credibility of the child's mother was in issue,[192] and the child's evidence was used as corroboration.[193]

Likewise, the Illinois Appellate Court found a confrontation violation in the admission of a petition for a protection order by a victim of domestic assault in *People v. Thompson*.[194] The allegations were used at trial to cross-examine the defendant, who had denied the assaultive conduct.[195] The woman recanted at the defendant's sentencing hearing and testified on his behalf.[196] The Illinois Court of Appeals ruled that the statements in the protection order were testimonial and that the defendant was denied the right to confront and cross-examine because the woman was available and the state used her statements without the defendant having a prior or present opportunity for cross-examination.[197]

The results of the post-*Crawford* decisions were predictable, although some of the reasoning may be problematic. The cases that found the Confrontation violation – *Courtney* and *Thompson* – relied on out-of-court statements that

183. *Id.* at 963.
184. *Id.* at 963-64.
185. State v. Courtney, 682 N.W.2d 185 (Minn. Ct. App. 2004); People v. Thompson, 814 N.E.2d 516 (Ill. App. Ct. 2004).
186. 682 N.W.2d at 190. There was medical evidence as well. *Id.* at 191-92.
187. *Id.* at 191.
188. *Id.* at 196.
189. *Id.* at 190-91.
190. *Id.* at 191.
191. *Id.* at 196-97.
192. *Id.* at 197. She had recanted and testified for the defendant at trial. *Id.* at 191.
193. *Id.* at 191.
194. 814 N.E.2d 516 (Ill. App. Ct. 2004).
195. *Id.* at 519.
196. *Id.* at 520.
197. *Id.* at 521-52.

clearly fit *Crawford's* definition of testimony. The protection order application in *Thompson* accused the defendant of reprehensible conduct;[198] the child's interview in *Courtney* was specifically conducted to obtain information useful in prosecuting the defendant for assault of the mother. Both courts recognized that failure to provide confrontation and cross-examination could be harmless error, but in both cases, the error was reversible because of the importance of the evidence to the case.[199] *Crawford* also appeared to be applied properly in *Compan*, where the victim spoke to her friend about the assault and the court viewed the statements as non-testimonial because of their informality.

Informative, but arguably more difficult to square with *Crawford,* were the results and rationales in *Hammon, Moscat* and *Fowler.* In *Hammon,* the excited utterance was minutes after the assault to a police officer engaging in questioning at the scene.[200] The court emphasized that police questioning is not interrogation, so the statements were not testimonial.[201] However, given the lapse of time and the person to whom the statements were made, the assault victim probably understood that there was a reasonable likeliness that the statements would be used prosecutorially.[202]

In both *Moscat* and *Fowler*, the court found dispositive the non-formal nature of the statements. In *Moscat*, the court emphasized that the 911 call at issue was not analogous to an interrogation or akin to a pretrial examination conducted by a Justice of the Peace, to which the framers of the Confrontation Clause sought to respond.[203] The court denominated the informal 911 call seeking help as an "electronically augmented equivalent of a loud cry for help."[204] The court reasoned that the caller was "trying simply to save her own life," and not giving a formal statement "conscious that [she was] bearing witness and that [her] words [would] impact further legal proceedings."[205] The court was correct in this analysis, assuming the facts of the case fit the court's conception of the circumstances in which the 911 call was made.[206] Where the call is a cry for help, it should be considered an excited utterance and admissible.

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198. *Id.* at 522.

199. State v. Courtney, 682 N.W.2d 185, 197 (Minn. Ct. App. 2004). *See also infra* notes 278-79 and accompanying text.

200. Hammon v. State, 809 N.E.2d 945, 948 (Ind. Ct. App. 2004).

201. *Id.* at 951-52.

202. *Id.* Both *Hammon* and *Fowler* were decided by the Indiana Court of Appeals, which employed similar reasoning in the two cases. In *Hammon*, in deciding whether the statement in response to police questioning qualified as interrogation, the court explained:

> [W]e observe that the Supreme Court chose not to say that any police *questioning* of a witness would make any statement given in response thereto "testimonial"; rather, it expressly limited its holding to police "interrogation." We conclude this choice of words clearly indicates that police "interrogation" is not the same as, and is much narrower than, police "questioning."

Hammon, 809 N.E.2d 945 at 952. *See* Fowler v. State, 809 N.E.2d 960, 63-64 (Ind. Ct. App. 2004). The court added that the Supreme Court had used the term "interrogation" in a colloquial sense. *Hammon,* 809 N.E.2d at 952. It had not meant to incorporate all police questioning but only the adversarial type. *Id. But see* People v. Ochoa, No. D042215, 2004 WL 1945741 (Cal. Ct. App. Sept. 2, 2004) (interpreting "interrogation" to apply to investigative questioning by police).

203. 777 N.Y.S.2d 875, 879-80 (N.Y. Crim. Ct. 2004).

204. *Id.* at 880.

205. *Id.*

206. *See id.* at 879. A call made during or immediately after a violent assault would qualify; that seems to be the assumption of the Court. *See id.*

If, however, the circumstances do not indicate excitement and immediacy, or do reveal a more lengthy and thought-out allegation, the excited utterance exception would not be appropriate.[207] Any follow-up interview after the initial report also should be considered testimonial.

Finally, in *Fowler*, the court analyzed the statement as non-testimonial, given that it lacked the "official and formal quality" of a testimonial statement.[208] This would encompass a statement given in response to "structured police questioning" or in the context of something analogous to "examinations of witnesses by English magistrates or justices of the peace."[209] The statement also was distinguishable from the Cobham affidavit used against Sir Walter Raleigh.[210] While the victim's circumstances were compelling, the court's analysis did seem to blink reality: the police were called to a crime scene, and the victim made an accusation to a police officer, which detailed the defendant's conduct. It is difficult to see that such comments to a uniformed officer would not be understood by the victim to constitute accusations against the defendant. The cry of help to her friend would not be an accusation, but a statement to an officer investigating a crime; this certainly seems to fit *Crawford's* description of "testimony."[211] An objective witness likely would understand it that way as well.[212]

As is evident, *Crawford* has not led to wholesale reversal of convictions in domestic violence cases to date. The use of some statements has been curbed, but many statements – the initial 911 call, statements to friends, or statements to the police – still seem most often to be viewed as excited utterances. That result is not entirely unexpected given both the nature of the excited utterance exception and the nature of the statements.[213] However, while the reported cases have not produced radically different outcomes, *Crawford's* immediate effect has likely been felt most in the local prosecutor's office where a decision may have been made not to prosecute because of potential evidentiary problems.[214] And, as is seen below, *Crawford* is having a similar, significant impact on cases involving children as witnesses/victims.

B. CHILD WITNESS/VICTIM

Several cases with children as witnesses-victims have been decided in *Crawford's* wake.[215] Children as young as four have been characterized as

207. *See generally id.* Since the case was in the posture of a motion in limine, the court's ruling was tentative and indicated the state would have to make the appropriate evidentiary showing.

208. 809 N.E.2d 960, 963 (Ind. Ct. App. 2004).

209. *Id. See also* note 202 and accompanying text.

210. *See Fowler,* 809 N.E.2d at 963.

211. *See supra* notes 62-63 and accompanying text.

212. *See supra* note 53 and accompanying text.

213. *See supra* notes 93-98 and accompanying text.

214. *See generally* Wendy N. Davis, *Hearsay, Gone Tomorrow?*, 9 A.B.A. J. 22 (2004).

215. *See, e.g.,* People v. Warner, 14 Cal. Rptr. 3d 419 (Cal. Dist. Ct. App. 2004); People v. Sisavath, 13 Cal. Rptr. 3d 753 (Cal. Dist. Ct. App. 2004); People v. R.A.S., No. 03CA1209, 2004 WL 1351383 (Colo. Ct. App. June 17, 2004); People v. Vigil, No. 02CA0833, 2004 WL 1352647 (Colo. Ct. App. June 17, 2004); Snowden v. State, 846 A.2d 36 (Md. Ct. Spec. App. 2004); People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004); State v. Vaught, 682 N.W.2d 284 (Neb. 2004).

having supplied testimonial evidence which is subject to the Confrontation Clause.[216] Older children in the seven-to-ten year age range have done so as well.[217] In *State v. Vaught* a four-year-old girl reported sexual abuse by the defendant to her stepmother a day after it occurred.[218] The child was taken to the emergency room, where she spoke to the doctor about the abuse and identified the defendant as the perpetrator.[219] The court ruled the child's statements were properly admitted through the doctor's testimony as statements for medical diagnosis.[220] The court believed that the child's motive was to obtain medical treatment and found that her age did not cast doubt on her ability to make a statement for that purpose.[221] The defendant's argument that the statements were testimonial, thereby implicating the need for confrontation, was not persuasive.[222]

The court adopted the analysis of the United States Court of Appeals for the First Circuit, which constructed three possible categories of testimonial statements from *Crawford*.[223] The first comprehended several types, including those a declarant would reasonably expect to be used prosecutorially.[224] The second category embraced certain formal statements.[225] A third category covered statements which 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."[226] These categories may not be precisely defined but include "testimony at a preliminary hearing, before a grand jury, or at a former trial, and . . . police interrogations."[227] The Nebraska court declined to place the child's statement within any of these parameters and concluded that "[t]here was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination."[228] The statements were non-testimonial, because they lacked the requisite motivation and involvement.

Context was dispositive in *People v. Geno* as well.[229] There, the father of a two-year-old girl suspected abuse and took her to Children's Protective Services

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216. *See infra* notes 218, 234, 242, 248 and accompanying text.

217. *See infra* notes 252, 259 and accompanying text.

218. 682 N.W.2d at 286.

219. *Id.*

220. *Id.* at 289-90. *See also* FED. R. EVID. 803(4); NEB. REV. STAT. ANN. § 27-803(3) (Michie 2003).

221. *Vaught*, 682 N.W.2d at 289.

222. *Id.* at 290.

223. Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004).

224. *Id.* In the first category, testimonial statements consist of "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." *Id.* (citations omitted).

225. *Id.* These formal statements include "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions." *Id.* (citations omitted).

226. *Id.*

227. *Id.* (quoting Crawford v. Washington, 124 S. Ct. 1354, 1374 (2004)). *See also supra* note 63.

228. State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004).

229. 683 N.W.2d 687 (Mich. Ct. App. 2004).

for an assessment.[230] The child asked the director to take her to the bathroom, and in response to a question about "an owie," the child said the defendant "hurts me [there]."[231] The court ruled the statement was not testimonial: the child was with the adult at the child's request in an informal setting, the girl responded to a non-accusatory question, and the adult was not a governmental employee.[232] Therefore, the statement lacked the trappings of formality – actual, or the functional equivalent of, "ex parte in-court testimony."[233]

In *People v. Warner*, a three year-old child told her mother the defendant touched her improperly.[234] By the time of trial, the child was four. She testified about some of the defendant's actions, but gave few details.[235] Other evidence in the case included the defendant's admissions on several occasions and the child's statements to a forensic interviewer.[236] The state argued the child's statements to the interviewer were admissible under the child hearsay exception and were not testimonial under *Crawford*.[237] The state argued such statements encompass only "formal statements akin to a solemn declaration made to establish or prove a fact that are made to government officials who are acting to advance a criminal investigation or prosecution."[238] The state suggested an interview of a child in these circumstances serves a "broader purpose" than advancing a police investigation – it is also designed to "reduce trauma to the child and [also] ensure that children in need of services are identified and referred appropriately."[239] The court rejected the state's "narrow" view and held that since the interview was expected to be used prosecutorially and was similar to a police interrogation, it was testimonial for purposes of *Crawford*.[240] Since the child testified about the molestation, although not about the out-of-court statement, that was sufficient to satisfy the confrontation requirement.[241]

The difficulty of cross-examining the four-year-old in *Warner* is typical of cases with very young children. Frequently, they cannot testify. Yet it appears that in the view of several courts, their pre-trial statements will be considered testimonial and, thus, not admissible without an opportunity for confrontation. In *People v. Sisavath*,[242] the four-year-old victim (one of two victims) could not express herself and was disqualified as a witness.[243] Her statements to a police officer were deemed testimonial because they were "knowingly given in

230. *Id.* at 689.
231. *Id.* The statement was admitted under the residual exception. *Id.* at 690.
232. *Id.* at 692.
233. *Id.* (citations omitted).
234. 14 Cal. Rptr. 3d 419, 424 (Cal. Dist. Ct. App. 2004).
235. *Id.* Some protective measures were used. *Id.*
236. *Id.*
237. *Id.* at 425. CAL. EVID. CODE § 1360 (2004). *See supra* note 39.
238. *Warner,* 14 Cal. Rptr. 3d at 428.
239. *Id.* at 429.
240. *See id.*
241. *Id. Accord* People v. Miles, No. 4-02-0623, 2004 WL 1909550 (Ill. App. Ct. Aug. 24, 2004); Clark v. State, 808 N.E.2d 1183 (Ind. 2004), Crawford v. State, 139 S.W.3d 462 (Tex. Crim. App. 2004) (finding no violation of *Crawford* where witness testifies at trial).
242. 13 Cal. Rptr. 3d 753 (Cal Dist. Ct. App. 2004).
243. *Id.* at 755.

response to structured police questioning."[244] Her statements to a trained interviewer likewise were testimonial.[245] The court reasoned that the case had been filed against the defendant; the district attorney and investigator were present; and the interview was conducted by a "forensic interview specialist."[246] The conclusion was inescapable that an "objective witness" would "reasonably...believe that the statement would be available for use at a later trial."[247] Thus an objective assessment, and not just the subjective perception of the declarant, can render a statement testimonial for purposes of confrontation.

The forensic interview of the four-year-old child in *People v. R.A.S.* was also deemed testimonial and subject to confrontation requirements.[248] The child was not competent to testify.[249] The police investigator conducted an interview of the child at a facility for abused children, using a question and answer format.[250] The court found the child's statements "'testimonial' within even the narrowest formulation of the court's definition of that term."[251] Again, the child's perception was not dispositive; the intended use based on an objective standard was.

The police interview of a seven-year-old who was unable to testify was handled similarly in *People v. Vigil*.[252] The court viewed the situation as interrogation and, thus, subject to *Crawford*.[253] The court specifically rejected the notion that the declarant's perception of the expected uses of the statements governed whether they were testimonial.[254] Rather, because an objective person would have viewed the statements as designed to lead to the defendant's punishment, they were testimonial.[255] The court also found the child's statements to a doctor, who examined him after the police interview and who was also a member of a "forensic sexual abuse examination" team, to be testimonial.[256] The doctor consulted with the police and knew the statements would be used in prosecution, thus satisfying that an "objective witness" would expect the statements to be used prosecutorially.[257]

A licensed social worker's repetition of a ten-year-old and eight-year-old victims' statements admitted through the state's "tender years" exception[258] violated the Confrontation Clause according to the court in *Snowden v. State*.[259]

244. *Id.* at 757. The state agreed. *Id.*
245. *Id.* The interviewer was employed at the county Multidisciplinary Interview Center (MDIC). *Id.*
246. *Id.*
247. *Id. See supra* note 63.
248. No. 03CA1209, 2004 WL 1351383, at *4 (Colo. Ct. App. June 17, 2004).
249. *Id.* at *1.
250. *Id.*
251. *Id.* at *4.
252. No. 02CA0833, 2004 WL 1352647, at *1 (Colo. Ct. App. June 17, 2004).
253. *Id.* at *2.
254. *Id.*
255. *Id.* at *6.
256. *Id.*
257. *Id.*
258. MD. CODE ANN., CRIM. PROC. § 11-304 (2002).
259. 846 A.2d 36, 39, 47 (2004). The state statute allows admission of the statement whether or not the child testifies. MD. CODE ANN., CRIM. PROC. § 11-304.

Neither girl testified.[260] The court found their statements were testimonial since the social worker interviewed the children "for the expressed purpose of developing their testimony . . . under the relevant Maryland statute that provides for the testimony of certain persons in lieu of a child, in a child sexual abuse case."[261] Therefore, the failure to provide confrontation violated the Sixth Amendment and was reversible error.[262]

Crawford's impact on these cases cannot be overstated. Although *Vaught* and *Geno* found no violation under *Crawford*, the confrontation issue had to be addressed and resolved. Deciding in favor of the use of the statements was predictable, given that the former was to a doctor and the latter was made in an informal setting. Neither would fit the testimonial definitions of *Crawford*. In *Warner*, *Crawford* also was applied, but since the child testified, the confrontation requirement was satisfied. The outcomes of these three cases appear to conform to the Sixth Amendment requirements articulated in *Crawford*.

In contrast, the statements in *Sisavath, R.A.S.*, *Vigil*, and *Snowden* were found to have been admitted in violation of *Crawford*. What these cases all have in common is that the statements were made to professional "forensic" interviewers who had been given the task of investigating possible crimes against children. *Crawford*, thus, has curbed in dramatic fashion the use of children's statements under the tender years or residual exceptions. The courts have interpreted *Crawford* to apply to children's statements in police interrogation – even if it occurs in a friendly atmosphere where the evidence is being adduced to inure to the child's benefit.[263] *Crawford* applies to forensic interviews – whether by social workers, police, or medical personnel – if the statements are taken to develop the case against the defendant. Mixed motives, such as arranging for services or protection for the child, do not render these testimonial statements non-testimonial.[264]

Strikingly, in these child witness cases, the courts focus on whether an objective witness would view the statements as designed for prosecutorial purposes. In contrast, several of the courts in the domestic violence cases addressed only whether the declarant would view them in that manner. Both approaches were set forth in *Crawford*;[265] what seems not to have been addressed is whether, in the domestic violence setting with a 911 call or similar cry for help, the cry would be perceived by an "objective witness" as available for use in a later prosecution. In many cases, the answer would be yes. Yet the subjective appreciation of the use of the statement trumps the objective. The opposite outcome has prevailed in the child witness cases.

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260. *See Snowden*, 846 A.2d at 41-42.

261. *Id.* at 47.

262. *See generally id.*

263. *But c.f.* Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004); Fowler v. State, 809 N.E.2d 960, 963 (Ind. Ct. App. 2004) (finding statements of this sort non-testimonial). *See also supra* note 202.

264. *See, e.g.*, People v. Vigil, No. 02CA0833, 2004 WL 1352647, at II. A.2 (Colo. Ct. App. June 17, 2004).

265. *See supra* notes 66-67 and accompanying text.

Equally striking in these cases is that the age of the child is not dispositive on the question of whether a statement is testimonial. As noted above, the subjective standard has been overwhelmed by the objective standard, where a formal interview or police questioning occurred.[266] Adults cannot circumvent *Crawford's* requirements by emphasizing the lack of the child's subjective appreciation for the consequences of speaking about the abuse.

V. CURBING THE CONFRONTATION RIGHT - FORFEITURE BY MISCONDUCT

What *Crawford* gives, a defendant can squander. As a matter of constitutional law,[267] the Rules of Evidence[268] and evidentiary common law,[269] the defendant's misconduct can result in forfeiture of the confrontation right. The Supreme Court noted this in *Crawford*, mentioning that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds."[270]

The rule is designed to provide a response when the defendant acts in such a way as to "[strike] at the heart of the system of justice itself."[271] A sense of fairness is the impetus behind the rule – a defendant who kills a witness should not be permitted to claim that use of the witness' statements in her place violates the hearsay rule. If applied carefully, FRE section 804(b)(6) or its common law analogue will circumscribe *Crawford*. If applied extravagantly, it will eviscerate it. In the domestic violence and child abuse scenarios discussed above, there is the potential for a defendant to intimidate or coerce a witness to remain silent or recant. Those who work with familial abuse frequently describe cycles and patterns involving control by the abuser over members of the family or others under the domination of the abuser.[272] The all-too-frequent recantations and refusals to testify are attributable in many situations to the defendant's wrongdoing. Under those circumstances, where the victim or witness does not testify, the hearsay statements can be admitted.[273]

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266. *See supra* notes 242-63 and accompanying text.

267. *See* 4 MUELLER & KIRKPATRICK, *supra* note 9, § 507.1, at 267 (Supp. 2004) (collecting cases).

268. FED. R. EVID. 804(b)(6):

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. [Effective December 1, 1997.]

Id.

269. S.D.C.L. Title 19 does not include a provision equivalent to FED. R. EVID. 804(b)(6). Where a specific provision is lacking, courts would use the common law to apply equitable principles to the issue. *See generally* MUELLER & KIRKPATRICK, *supra* note 9, § 507.1 (Supp. 2004).

270. Crawford v. Washington, 124 S. Ct. 1354, 1370 (2004). A post-*Crawford* application of this doctrine can be found in *State v. Meeks*, 88 P.3d 789 (2004) (holding murder forfeited his right of confrontation and waived hearsay objections by wrongdoing).

271. United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982).

272. *See supra* note 105 and accompanying text.

273. This would be a slightly different approach to cases such as *Fowler*, 809 N.E.2d 960 (Ind. Ct. App. 2004) and *Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

Not all situations of domestic violence or child abuse involve intimidation or coercion, however. Many victims of domestic violence, for example, profess their love for the defendant or they desire to keep the family together. The defendant's incarceration, resulting not only in domestic disruption but also in loss of income and resources, may look like an unattractive outcome to someone who unwittingly began the process of a criminal investigation by dialing 911. The defendant may reinforce the undesirability of this outcome by promising love and reformed ways, as well as expressing fear of incarceration. In those situations, an inference that the defendant has procured the witness' unavailability when she refuses to testify would be misplaced. It must be recognized that a victim or witness in a case might choose not to cooperate of her/his own accord rather than because of a threat.

Likewise in cases involving children, the reluctance or inability to testify may or may not be attributable to the defendant. Children are intimidated by many aspects of the courtroom, from the formal setting to the adult strangers asking about and listening to accounts of traumatic, damaging – and very personal – activity. That is enough to render many children unable to testify.[274] Inferring that the defendant actually procured the child's unavailability by conduct *other than and in addition to* the alleged sexual abuse simply because the child is unable to testify would be rash. Procedures such as a hearing at which the government would have to establish the wrongdoing by a preponderance are essential.[275] Conducting the hearing outside the presence of the jury, and applying FRE section 403 in any event, should help to minimize potential abuses of this rule.

VI. RETROACTIVITY OF CRAWFORD

The Supreme Court did not address the retroactivity of *Crawford*. However, based on the Court's approach to retroactivity articulated in *Griffith v. Kentucky*,[276] *Crawford* does apply to all cases tried after its date of March 8, 2004, and to all cases pending on direct review at the time of decision in which the confrontation issue was raised.[277] If *Crawford* applies to a case on appeal, that does not necessarily mean reversal is mandated – *Crawford* error is widely viewed as potentially harmless under normal constitutional harmless error analysis.[278] *Crawford* error is reversible only if the government cannot prove it

274. *See supra* note 136 and accompanying text.

275. *See* 4 MUELLER & KIRKPATRICK, *supra* note 9, § 507.1, at 267 (Supp. 2004) (citing Advisory Committee Notes to FED. R. EVID. 804(b)(6)). *See also* United States v. Zlatogur, 271 F.3d 1025 (11th Cir. 2001); United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001); United States v. White, 116 F.3d 903 (D.C. Cir. 1997).

276. 479 U.S. 314 (1987). In *Griffith*, the court held that "the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 328.

277. *Id.* at 328. *See* application of *Crawford* to cases discussed *supra* notes 157-266 and accompanying text.

278. Chapman v. California, 386 U.S. 18, 20-22 (1967); Arizona v. Fulminante, 499 U.S. 279, 307-09 (1991) (Rehnquist, C.J., concurring) (addressing analysis of constitutional error that constitutes "trial error"). *See also* People v. Compan, No. 02CA1469, 2004 WL 1123526 (Colo. Ct. App. May 20, 2004); Moody v. State, 594 S.E.2d 350, 354-55 (Ga. 2004) (finding that error was harmless); People v. Miles,

did not contribute to the verdict.[279] The difficult question is whether *Crawford* applies to cases which are final but implicate the confrontation issue. The next section will briefly explain the Supreme Court's retroactivity doctrine, then address the likely application to *Crawford*.

A. NEW RULE?

It is fair to describe the current majority of the Supreme Court as reluctant to impose new rules of criminal procedure to criminal cases that have become final. In its landmark decision in *Teague v. Lane*,[280] the Court established a very restrictive test for retroactivity.[281] The Court declared that a new rule is one which is not dictated by precedent.[282] As the Court commented in *Graham v. Collins*,[283] "[T]here can be no dispute that a decision announces a new rule if it expressly overrules a prior decision."[284] If a rule is new, it will not be applied retroactively because of the interest in finality of criminal cases and a desire not to disrupt the decisions of courts which were correctly applying the law as it then existed.[285]

Could *Crawford* be viewed as articulating an old rule – not an innovation— but rather an adjustment? If this interpretation were accepted, it would necessarily be found that neither the Supreme Court nor the lower courts were applying the Sixth Amendment correctly if they interpreted *Roberts* to allow testimony which should have been subject to cross-examination. Obviously, it would be both problematic and radical for the Court to view as erroneous much of its work of the last twenty-four years in the area of confrontation. Although several Justices had forshadowed five years before *Crawford* that the Court's Confrontation Clause jurisprudence was unsound in *Lilly v. Virginia*,[286] only three Justices (Scalia, Thomas, and Breyer) opposed the *Roberts* approach.[287]

No. 4-02-0623, 2004 WL 1909550 (Ill. App. Ct. Aug. 24, 2004) (applying harmless error analysis but finding the error reversible); State v. Herrmann, 2004 SD 53, ¶ 73, 679 N.W.2d 503, 510 (finding that *Crawford* error, if any, was harmless given that the issue in the case was identity and the child's out-of-court statement did not address it).

279. *See* People v. Seijas, 9 Cal. Rptr. 3d 826, 827 (Cal. Ct. App. 2004); Hale v. State, 139 S.W.3d 418, 421 (Tex. Ct. App. 2004) (both reversing for failure to comply with *Crawford*). In *People v. Fry*, 92 P.3d 970 (Colo. 2004), the Colorado Supreme Court set forth factors that can assist in an analysis of constitutional error in determining if it is harmless. *Id.* at 980. The court stated:

> Factors a reviewing court should consider include, "the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence on the material points of the witness' testimony, the extent of the cross-examination otherwise permitted, and the overall strength of the prosecution's case."

Id. at 980 (quoting Merritt v. People, 842 P.2d 162, 169 (Colo. 1992)). *Accord* Samarron v. State, No. 04-01-00124-CR, 2004 WL 1932787 (Tex. Ct. App. Sept. 1, 2004) (applying constitutional harmless error standard to *Crawford* violation); *see also* cases discussed *supra* notes 186, 194, 234, 242, 248, 252 and accompanying text.

280. 489 U.S. 288 (1989).

281. *Id.* at 300.

282. *Id.* at 301.

283. 506 U.S. 461 (1993).

284. *Id.* at 467.

285. *Teague*, 489 U.S. at 306-07.

286. 527 U.S. 116 (1999).

287. Only four justices (Stevens, Souter, Ginsburg, Breyer) agreed with Justice Stevens's opinion

Six justices were apparently in favor, which was certainly a sufficient majority to keep *Roberts* entrenched. Yet, within five years, four Justices "defected" from the *Roberts* camp to form the majority in *Crawford*.[288]

In light of this recent history, it would be difficult for the Court to hold that *Crawford* was not a substantial break with precedent and, therefore, articulated an "old" rule that had been misapplied. The significance for retroactivity analysis is that an inmate would likely be unsuccessful in arguing the trial court had erred in applying the Sixth Amendment by using the *Roberts* formula until *Crawford* was decided. Therefore, the retroactivity of the decision should be judged by applying the *Teague v. Lane* analysis for new rules.[289] The likely outcome is that the Supreme Court will rule that *Crawford* established a new rule.

B. WATERSHED RULE?

There are two narrow exceptions to *Teague*. If a new rule places certain primary, private conduct beyond the power of the state to criminalize, the rule will be made retroactive.[290] *Lawrence v. Texas*,[291] which prohibits the criminalization of consensual homosexual sex, is an example. The second exception is for watershed rules of criminal procedure and, in particular, rules that enhance the accuracy of the fact-finding process.[292] The Court has cited (and continues to cite) *Gideon v. Wainwright*[293] as the paradigmatic example of this type of rule. In fact, the Court noted in its most recent decision on retroactivity, *Beard v. Banks*,[294] that *Gideon* was really the only example of a watershed rule that would have to be applied retroactively.[295] With that cramped

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for the Court applying *Roberts*. *Id.* at 117. Although he signed on to the plurality opinion, Justice Breyer in concurrence disagreed with the alignment of the Confrontation and hearsay rules. *Id.* at 125 (Breyer, J., concurring). He cited with approval Justice Scalia's and Thomas's concurring opinion in *White v. Illinois*, 502 U.S. 346 (1992), which argued the Court had veered off track in aligning the Confrontation Clause with the Rules of Evidence and in following *Roberts*. Justice Breyer cited in support of his position scholarly commentary by Professor Friedman and others, whose position the Court ultimately adopted in *Crawford*. *Lilly*, 527 U.S. at 140 (Breyer, J., concurring). He also discussed the long history of the confrontation right, from Biblical sources to Shakespeare to Sir Walter Raleigh. *Id.* at 141-42. (Breyer, J., Concurring). Justice Scalia simply stated his agreement that the Confrontation Clause had been violated and cited to his prior comments on the subject in *White v. Illinois*. *Id.* at 143 (Scalia, J., concurring) (citing *White*, 502 U.S. at 364-65). Justice Thomas expressed a more limited view of the Confrontation Clause – it applies to witnesses who testify and to testimonial evidence – and he, too, referred to his opinion in *White*. *Id.* at 143-44 (Thomas, J., concurring). The three remaining concurring justices – Rehnquist, O'Connor, and Kennedy – adhered to *Roberts* while disagreeing with the Court's sweeping response to the constitutional question presented by the "declaration against interest" at issue in *Lilly*. *Id.* at 144-49 (Rehnquist, C.J., O'Connor, J., & Kennedy, J., concurring).

288. Justices Stevens, Kennedy, Souter, and Ginsburg joined Justices Scalia, Thomas, and Breyer. *Crawford*, 124 S. Ct. at 1356.

289. *See supra* notes 280-85 and accompanying text.

290. *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

291. 539 U.S. 558 (2003).

292. *Teague*, 489 U.S. at 311.

293. 372 U.S. 335 (1963).

294. 124 S. Ct. 2504 (2004).

295. *Id.* at 2514. In *Beard*, the Court ruled that its decision in *Mills v. Maryland*, 486 U.S. 367 (1988), should not apply retroactively since it did not establish a "watershed" procedural rule. *Beard*, 124 S. Ct. at 2515. *Mills* had invalidated that part of a capital sentencing scheme which directed the jury to disregard mitigating evidence which was not found unanimously. *Mills*, 486 U.S. at 374-75. *See also*

view of the propriety of retroactive application of new rules, *Crawford* would not be made retroactive. One significant problem, however, is the desire for accuracy in the fact-finding process.

Confrontation and cross-examination are not empty rights. Their purpose is to enable the fact-finder to not only hear the testimony under oath, but to observe the witness's demeanor and to hear through the cross-examination whether there are gaps or flaws in what the witness has testified to on direct examination.[296] The reason for limiting the use of hearsay at trial is that the fact-finder is denied this opportunity. Introducing hearsay precludes confrontation and cross-examination of the declarant, *i.e.*, the person who made the statement outside of the courtroom. When a "substitute witness" replaces the declarant and relates what was said, the confrontation and cross-examination of the substitute witness is limited essentially to whether the substitute heard the out-of-court statement correctly and is relating it accurately.[297] The cross-examination does not reach the validity of the content of the statement – and it cannot, ordinarily, because the person on the stand (the substitute or proxy) is not the person who experienced the event. A second-hand account is all the cross-examiner and jury have before them.

This proxy witness system likely yields legitimate results in many cases, but equally clear is that it does not guarantee accuracy. Just as Sir Walter Raleigh demanded that Lord Cobham appear to be questioned about his allegation so the truth could be established, the accused in a criminal case desires the accuser to be called so the allegations can be disputed. Of course, this raises the problem remarked upon by commentators in cases involving child witnesses – does the requirement of confrontation and cross-examination of a child yield the truth or bury the truth?[298] The system - built upon the Sixth Amendment - presupposes that cross-examination remains the "greatest engine ever invented for the discovery of truth"[299] as Professor Wigmore described it. That premise has been challenged in cases involving children.[300] The legal system has made substantial accommodations to take account of that critique, which has resulted in expansive interpretations and modifications to the Rules of Evidence.[301] *Crawford* not only has caused those innovations to cease, it also will require the legal system to re-evaluate whether its new directives will produce greater accuracy in fact-finding. If so, the decision should be made retroactive. However, if what

Schriro v. Summerlin, 124 S. Ct. 2519 (2004). In *Summerlin*, the Court declined to make retroactive its decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which invalidated the Arizona death penalty. *Id.* The judge-alone sentencing scheme was deemed to violate the defendant's right to a jury trial under the Sixth Amendment. *Ring*, 536 U.S. at 603-09. The Court viewed *Ring* as establishing a new procedural rule but not a "watershed rule." *Summerlin*, 124 S. Ct. at 2523-26.

296. Pointer v. Texas, 380 U.S. 400, 406 (1965) (applying Confrontation Clause to the states as an integral aspect of due process). *See generally* 4 MUELLER & KIRKPATRICK, *supra* note 9, at § 396.

297. *See* Laurence Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974). *See generally* MICHAEL GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.1 (2d ed. 1986); 4 MUELLER & KIRKPATRICK, *supra* note 9, § 370, at 23.

298. *See supra* notes 116-37 and accompanying text.

299. 5 WIGMORE ON EVIDENCE § 1367 (J. Chadbourn rev. 1974).

300. *See supra* notes 116-37 and accompanying text.

301. *See supra* notes 39, 121, 123 and accompanying text.

Crawford has rendered is simply a formal change, the Supreme Court will mandate that it need be applied only prospectively.

In the interim, a number of courts have addressed the retroactivity issue. The cases have arisen in a variety of contexts, with the courts either explicitly determining that *Crawford* is not retroactive[302] or denying relief of habeas on other grounds implicated by *Crawford*.[303] In a domestic violence situation, the Colorado Court of Appeals ruled that *Crawford* did not apply retroactively.[304] The court reasoned that *Crawford* established a new rule because its result was not dictated by precedent, and in fact, it overruled precedent. The rule established was procedural, but not a "watershed" rule. Even if the rule established in *Crawford* improves the accuracy of trials, it must be "groundbreaking" to be a "watershed" rule.[305] In the court's view, *Crawford* merely altered the manner in which the defendant's right to confrontation is effected,[306] but did not re-define the basic understanding of the confrontation right itself. The court also was persuaded that since a *Crawford* violation can be considered "trial error" and, therefore, subject to harmless error review,[307] it is an unlikely candidate for classification as a bedrock or watershed procedural rule.[308] This analysis will likely be adopted by the Supreme Court when it addresses the retroactivity of *Crawford* in the future.

VII. CONCLUSION

Volcano. Earthquake. Hurricane. *Crawford* has shaken our treatment of the Confrontation Clause in a manner which will reverberate for years. Much was left undecided with respect to domestic violence and child witness cases. The specifics will be resolved over time, but cases prosecuted, defended, and decided today will necessarily reach tentative conclusions about the admissibility of hearsay statements and how they square with confrontation rights. *Crawford* may be seen as benefiting the defendant in excluding evidence not subject to confrontation. Further developments, such as narrowing the concept of testimonial evidence, may swing the balance to the prosecution. In the meantime, as a criminal defense lawyer suggested, every defense lawyer should

302. *See, e.g.*, Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004) (dealing with a murder prosecution); Hendricks v. State, 809 N.E.2d 865 (Ind. Ct. App. 2004) (stating that counsel was not ineffective for failing to raise *Crawford* issue ten years before).

303. *See, e.g.*, Horton v. Allen, 370 F.3d 75 (1st Cir. 2004) (bypassing retroactivity issue because *Crawford* did not apply to statements in question); Roy v. Coplan, No. Civ. 03-206-JD, 2004 WL 603412 (Dist. Ct. N.H. Mar. 24, 2004) (discussing murder); Liggins v. Graves, No. 4:01-CV-40166, 2004 WL 729111 (S.D. Iowa Mar. 24, 2004) (ruling state courts complied with *Crawford* in a child murder case); Horton v. Allen, 370 F.3d 75 (1st Cir. 2004) (bypassing retroactivity issue because *Crawford* did not apply to statements in question).

304. People v. Edwards, No. 4:01-CV-40166, 2004 WL 1575250 (Colo. Ct. App. July 15, 2004). Thus, the assault victim's excited utterance to a police officer reporting to the attack was properly admitted as an excited utterance. *Id.* at *7. Her statements to a nurse were properly admitted under the hearsay exception for statements for medical diagnosis or treatment and business records. *Id.* at *8.

305. *Id.* at *4.

306. *Id.* at *5.

307. *Id.* at *6.

308. *Id.*

invoke the *Crawford* decision with every hearsay objection.[309] He added that the attorney should "say the words 'confrontation clause'."[310] That is good advice, given *Crawford's* breadth and uncertainty.

309. Davis, *supra* note 214, at 24 (quoting John Wesley Hall, Jr. of NACDL).
310. *Id.*