

## **THE CRAWFORD ISSUE:**

The Supreme Court Sharpens the Teeth of the Confrontation Clause  
(Spring, 2005)

By: Nathan R. Haines

### **Introduction**

The landmark U.S. Supreme Court decision, *Crawford v. Washington*,<sup>1</sup> has completely changed the traditional framework<sup>2</sup> for evaluating the admissibility of testimonial hearsay in criminal trials. The decision revives the authority found under the 6<sup>th</sup> Amendment to the U.S. Constitution, specifically, one's right to be confronted by the witnesses against him in a criminal trial.<sup>3</sup> Although the decision has only recently been released, practitioners, courts, and academics alike recognize the enormous impact the case will have on Confrontation Clause analysis.<sup>4</sup> The following is an analysis of the *Crawford* decision and its impact on the admissibility of testimonial hearsay. This analysis provides a brief overview of the traditional framework used prior to the *Crawford* decision in analyzing hearsay statements in relation to the Confrontation Clause, the law as it stands now and a brief overview of some questions the Court left unanswered. Lastly, this analysis takes a look at the recent Alaska Court of Appeals case,

---

<sup>1</sup> 124 S.Ct 1354 (2004).

<sup>2</sup> Traditional in terms of the last 25 years.

<sup>3</sup> U.S. Const. Amend. VI.

<sup>4</sup> Valladares, Rene L., Forsman, Franny A., *Crawford v. Washington: The Confrontation Clause Gets Teeth*, 12 Nevada Lawyer 12 at 14 (September, 2004) recognizing that *Crawford* will have significant ramifications for criminal law practitioners in the State of Nevada (Mr. Valladares and Ms. Forsman are both Assistant Federal Public Defenders for the District of Nevada); *see also States v. Manfre*, 368 F.3d 832, n.1. (Where Circuit Judge Richard S. Arnold described *Crawford* as a "case of great importance"); *see also* Friedman, Richard D., *ADJUSTING TO CRAWFORD: High Court Decision Restores Confrontation Clause Protection*, 19 Criminal Justice 4, at 5 (2004) (Where professor Friedman of the University of Michigan Law School recognizes *Crawford's* radical impact on Confrontation Clause doctrine.)

*Anderson v. State of Alaska*,<sup>5</sup> and other Ninth Circuit cases that have interpreted *Crawford*, and the impact these decisions will have on future evidence and Confrontation jurisprudence in Alaska.

### **Factual Context**

Michel Crawford was tried for assault and attempted murder after stabbing a man who allegedly tried to rape his wife, Sylvia.<sup>6</sup> Crawford claimed self-defense. At trial the prosecution played the tape-recorded statements of Sylvia describing the stabbing, which she had made during police interrogation.<sup>7</sup> Sylvia's statements were not entirely consistent with her husband's as to the sequence of events leading up to the stabbing. At his initial interrogation Crawford testified that he thought the victim had been reaching for a weapon of some sort just before he stabbed him.<sup>8</sup> Sylvia's statements corroborated her husband's story for the most part, however, it was arguably different with regards to whether the victim had drawn a weapon before Crawford stabbed him.<sup>9</sup> Sylvia did not testify at trial because of the marital privilege. Washington's marital privilege does not extend to a spouse's out-of-court statements where the statements would be admissible under a hearsay exception.<sup>10</sup> The state used the "statement against penal interest" exception to the general exclusion of hearsay statements, based on the fact that Sylvia had led her husband to the victim's home and helped facilitate the assault.<sup>11</sup> The prosecution used the statements to prove that the stabbing was not in self-defense despite

---

<sup>5</sup> ---P.3d---, 2005 WL 858773 (Alaska App. April 15, 2005).

<sup>6</sup> *Crawford*, 124 S.Ct at 1355

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1357

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Crawford's inability to cross-examine his wife.<sup>12</sup> Crawford argued that despite state law, by admitting Sylvia's statements without the opportunity to cross-examine her, the state was violating his Sixth Amendment right to be "confronted with the witnesses against him."<sup>13</sup>

The trial court adhered to the traditional "adequate 'indicia of reliability'" framework laid out in *Ohio v. Roberts*, 100 S.Ct. 2531 (1980), allowing statements of unavailable witnesses to be introduced as evidence if the statement falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of reliability."<sup>14</sup> The trial court allowed the statements to be introduced, finding that the statements bore particular guarantees of reliability.<sup>15</sup> The Washington State Supreme Court unanimously upheld Crawford's conviction on similar grounds.<sup>16</sup> The court reasoned that the statement was reliable because it was nearly identical to Crawford's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.<sup>17</sup> The Supreme Court of the United States granted certiorari to determine whether the introduction of Sylvia's statements at her husband's trial violated the Confrontation Clause.<sup>18</sup> In a unanimous decision the Court reversed the Washington Supreme Courts ruling in an opinion authored by Justice Scalia.<sup>19</sup>

### **Historical Background of the Confrontation Clause and Its Effect on Hearsay**

---

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1358

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* 124 S.Ct. at 1358

<sup>16</sup> *Id.*

<sup>17</sup> 147 Wash.2d, at 438,439, 54 P.3d, at 664

<sup>18</sup> 23 S.Ct. 2275 (2003)

<sup>19</sup> The Chief Justice and Justice O'Connor felt that the statement sought to be introduced did not meet the criteria laid out in *Roberts*, while the other seven justices pointed out the inherent flaws with the *Roberts* framework and adopted an entirely different approach as to the question of the admissibility of testimonial hearsay.

Justice Scalia does an excellent job at tracing the historical progression of the Confrontation Clause and its impact on the admissibility of testimonial hearsay statements stemming all the way back to Roman times. For purposes of this paper it is much more useful to focus on the law as it stood just prior to the *Crawford* decision. First, however, it is important to begin with a fundamental review of what the plain language of the Confrontation Clause requires, and generally what hearsay actually is.

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”<sup>20</sup> The basic premise is that, in our judicial system an accused cannot be tried with the aid of testimony of a witness whom the accused has not had a chance to confront.<sup>21</sup> Applying that language strictly, it would mean that the introduction of any statements, made out of court, without the declarant available for cross examination, would be unconstitutional. Therefore, prosecutors, in order to introduce out-of-court testimonial statements, would have to present the declarant at trial or forego introduction of the statements into evidence. However, such a strict approach has never been applied and it has generally been accepted that rendering all hearsay inadmissible would be impractical.<sup>22</sup> Thus, exactly what the Confrontation Clause requires has been subject to the Supreme Court’s interpretation and the development of evidence law of individual states over the years. The *Crawford* decision offers not a new interpretation of the Confrontation Clause, but adherence to the traditional meaning of the clause.<sup>23</sup>

---

<sup>20</sup> *Id.*

<sup>21</sup> Friedman, 19 Criminal Justice 4, at 5

<sup>22</sup> *Id.*

<sup>23</sup> *Crawford*, 124 S.Ct. at 1359-60 (Author Justice Scalia provides a detailed historical analysis on the development of the Confrontation Clause stemming from its Roman roots through its common law development.)

While reading this it helps to keep in mind that hearsay is strictly an evidence issue whereas Confrontation is a constitutional right. The two are not synonymous and the fact that one is at issue does not necessarily mean the other will arise as well. Hearsay, simply put, is “an out of court statement used to prove the truth of the matter asserted.”<sup>24</sup> Hearsay includes such things as words, documents, and nonverbal conduct that was intended to be an assertion (i.e. pointing, initialing invoices, smile coupled with silence, other physical acts). Under the Federal Rules of Evidence the general rule is that hearsay is not admissible,<sup>25</sup> however, this rule is subject to significant exceptions.<sup>26</sup> The *Crawford* decision, as well as this paper, only addresses a specific kind of hearsay called “testimonial hearsay.” The definition of testimonial hearsay is not entirely clear since the *Crawford* Court expressly failed to provide a comprehensive definition (addressed in the section dealing with questions left unanswered below) but it basically encompasses statements made in previous court-like proceedings and in circumstances where it is likely that they will be used later in court proceedings. A more comprehensive definition of “testimonial hearsay” is provided below, but first a background review of the law as it stood just before *Crawford* is merited.

Just prior to the *Crawford* decision the admissibility of out of court testimonial witness statements was addressed through the framework laid out in *Ohio v. Roberts*.<sup>27</sup> Under the *Roberts*’ framework, basically any hearsay statement that posed a confrontation issue could nevertheless be admitted if it satisfied certain criteria. Specifically, the statement would be admitted, despite the Confrontation Clause, if it bore

---

<sup>24</sup> Professor Ann Murphy, Evidence lecture at Gonzaga University School of Law (Fall Semester- 2003)

<sup>25</sup> Fed. R. Evid. 802.

<sup>26</sup> Fed. R. Evid. 803, 804, 807.

<sup>27</sup> 100 S.Ct. 2531 (1980)

adequate “indicia of reliability”.<sup>28</sup> To be deemed reliable, courts would look to whether the statement fell within a “firmly rooted hearsay exception” or was supported by “particularized guarantees of trustworthiness.”<sup>29</sup> In some circumstances there was the added requirement that the declarant be unavailable to testify.<sup>30</sup>

Over the years the *Roberts*’ framework and its offspring had drawn skepticism as being too unpredictable, unmanageable, and in violation of the Confrontation Clause.<sup>31</sup> The *Crawford* decision delivered the deathblow to the use of the *Roberts*’ framework with regards to testimonial hearsay. The Court scrutinized the *Roberts*’ framework’s shortcomings, and pointed to the fact that reliability is dependent upon a judge’s own interpretation on which factors are important and how much weight will be afforded those factors in different or similar circumstances, for different or similar reasons,<sup>32</sup> and that such inconsistency is not allowed by the Confrontation Clause when determining the reliability of a statement.<sup>33</sup> Moreover, the Court found that “the unpardonable vice of the *Roberts* test is its demonstrated capacity to admit core testimonial statements that the

---

<sup>28</sup> *Id.* 110 S.Ct. at 2531

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Friedman, 19 Criminal Justice 4, at 5.

<sup>32</sup> *See Id.* at 6 (providing numerous examples of inconsistencies between courts including a situation where a state Supreme Court found a statement more reliable because its inculcation of the defendant was “detailed” while the Fourth Circuit found a statement more reliable because the portion implicating another was “fleeting”); *see also Crawford*, 124 S.Ct. at 1372 (pointing out “... the trial court admitted [Sylvia’s] statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts*’ unpredictable and inconsistent application.”)

<sup>33</sup> *Crawford*, 124 S.Ct. at 1369-70. (Finding that the *Roberts* test departs from historical confrontation principles because it admits statements consisting of *ex parte* testimony upon a mere reliability finding, and that the test’s unpredictable nature is apparent by its very nature because “whether a statement is deemed reliable depends on which factors a judge considers and how much weight he accords each of them.”)

Confrontation Clause plainly meant to exclude.”<sup>34</sup> The Court finally solidified what many skeptics/scholars had been preaching: reliability is not something to be left to the creativity of one’s advocate or the whims or any particular judge, instead the Confrontation Clause “commands ... that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>35</sup>

### **The Law Derived From *Crawford*- The New Test**

So what exactly has *Crawford* left us with? Is all the previous hearsay and Confrontation Clause precedent now null and void? Is the *Roberts*’ framework completely dead? Is *Crawford* now the ultimate authority on the admissibility of hearsay? What is the new test? Maintaining an all-encompassing perspective is the only way to approach these questions. One must keep in mind the two areas dealt with here, hearsay and the Confrontation Clause. These are separate creatures, each with a rather expansive precedential history. First, I will examine the test to be taken from *Crawford*, the parameters of that test, and some of the questions/issues that the decision leaves unanswered. Finally, I will touch on some areas of the law that *Crawford* has left untouched.

### **The Test**

The test derived from *Crawford* is the result of an excellent exercise in logic formulated by Justice Scalia. Even if one disagrees with the decision, praise must be given for its craftsmanship. Building upon Justice Scalia’s extensive background

---

<sup>34</sup> *Id.* 124 S.Ct at 1370-71 (Finding that, “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of “reliability.””).

<sup>35</sup> *Id.* 124 S.Ct at 1370-71, 1364 (finding that the Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and the Supreme Court, no less than the state courts, lacks the authority to replace it with one of its own devising, and that “leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”)

analysis of the Confrontation Clause, the Court determined that the Clause's history supported two general principles about the purposes of the Confrontation Clause.

First, the Court determined that the most overriding purpose of the Confrontation Clause was to protect criminal defendants from the civil law method of criminal procedure, that is, preventing the use of *ex parte* examinations as evidence against the accused, the overall goal being reliability of evidence.<sup>36</sup> Furthermore, the Court determined that the focus of the Clause within the previously mentioned purpose was upon witnesses against the accused or those who offer testimony.<sup>37</sup> Thus the primary object of concern for the Confrontation Clause is "testimonial hearsay" (term discussed below).<sup>38</sup> The Court rejected the view that the Confrontation Clause only applies to in-court testimony "and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being.""<sup>39</sup> A clear understanding of *Crawford* dictates that this sort of approach to the Confrontation Clause is inconsistent with the nature of the Clause as well as traditional principles of constitutional law.

The second principal supported by the Court's historical investigation was "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."<sup>40</sup> This exception was incorporated into the 6<sup>th</sup> Amendment from English common law, which the Court determined was the only

---

<sup>36</sup> *Crawford*, 124 S.Ct at 1364,1370. ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.")

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting 3 J. Wigmore, *Evidence* § 1397, p. 101 (2d ed.1923); accord, *Dutton v. Evans*, 400 U.S. 74, 94, 91 S.Ct. 210 (1970).

<sup>40</sup> *Id.* 124 S.Ct. at 1365

exception envisioned by the drafters since the language found in the 6<sup>th</sup> Amendment leaves no open exceptions and this was the only exception in existence at the time the provision was drafted.<sup>41</sup>

Thus the general rule to be taken from the *Crawford* decision is this: if the out of court statement is testimonial, and the declarant is unavailable, the statement is inadmissible as evidence against the defendant, unless the defendant had previously had an opportunity to cross-examine the declarant.

### **Parameters of Test- Questions Left Unanswered?**

It appears that for every answer the *Crawford* decision offers two questions are created. On its face the test seems simple enough, however a second look offers glaring gaps when its use is sought in the arena of practical application. The three linchpins to the test are the words/phrases: “testimonial”, declarant “unavailability”, and “previous opportunity to cross-examine” the declarant. Stop for a second and put on your lawyer hat. Even if given their colloquial meanings, all three linchpins beg for an attorney’s creative interpretation. The test is much more like a constitution than a steadfast rule of law in that it functions more as a guide, outlining the parameters of the law. To say the least, *Crawford* may have reduced the level of the pond but the water remains as muddy as ever.

Hands down, the most exasperating aspect of the *Crawford* decision is the fact that the Court failed to answer probably the most obvious question one would ask: what exactly constitutes testimonial hearsay? In fact, not only did the Court simply overlook

---

<sup>41</sup> *Id.*

this problem, the Court expressly declined to offer any concrete definition.<sup>42</sup> Courts across the country now have the task of filling this void. However, the Court did offer some guidance on this issue. For instance, it noted that certain types of hearsay like off-hand remarks, business records, and statements in furtherance of a conspiracy are not, by their nature “testimonial”.<sup>43</sup> Another exclusion may be dying declarations. However, the Court failed to definitively answer this question, instead offering only that if the dying declaration exception must be accepted on historical grounds it is “*sui generis*”.<sup>44</sup>

Whereas the Court did offer, “[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”<sup>45</sup> Professor Friedman offers a more workable outline.<sup>46</sup> He determined that the Court offered three standards but did not choose any one of them for determining what makes a statement “testimonial”, they include: 1.) “ex-parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable

---

<sup>42</sup> See *Id.* at FN.10 (Where the Court recognized that failing to provide a comprehensive definition would lead to uncertainty for a while but eventually will be resolved, but noted that the uncertainty developed by this decision maintains the status quo (*Roberts* framework), and that the problem with the *Roberts* framework was inherent and therefore permanent whereas the interim problem here is not.)

<sup>43</sup> *Id.* 124 S.Ct. at 1367

<sup>44</sup> *Id.* (meaning that the exception is “unique” or “peculiar”) See *Black’s Law Dictionary* 1448 (7<sup>th</sup> Ed. 1999). For one Court’s take on dying declarations see *United States v. Jordan*, 2005 WL 513501 (D. Co. March 3, 2005) (excluding dying declarations that identify a killer to investigators, unless it can be shown that the killers motivation was the desire to prevent the victim from testifying.)

<sup>45</sup> *Id.* 124 S.Ct. at 1374; see also *Id.* at 124 S.Ct. at 1364 (where the Court identified different formulations of a core class of “testimonial” statements such as “*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,” (citing Brief for Petitioner 23); “extra-judicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” (citing *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736 (1992))).

<sup>46</sup> Professor Richard D. Friedman of the University of Michigan Law School submitted an amicus brief on behalf of eight other law professors and himself in the Crawford case, additionally he sat second chair to petitioner’s counsel, Jeffery Fisher, at the oral arguments in the Supreme Court.

to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;” 2.) “extra-judicial statements ... formalized in testimonial materials, such as affidavits, depositions, prior testimony, or confessions” and 3.) statements made in situations where an objective witness would conclude that they would later be used in trial.<sup>47</sup> Given the Court’s vagueness on this issue it is unavoidable, at least in the interim, that absent a concrete definition from them each jurisdiction will develop their own interpretations and tests as to what constitutes a “testimonial” statement inevitably resulting in inconsistency.<sup>48</sup>

The Court placed some emphasis on situations involving governmental involvement in the elicitation of the statement.<sup>49</sup> No doubt in such circumstances it would seem the most likely context in which a testimonial statement would arise. The Court offered this distinction, “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>50</sup> This is not to say that the presence or involvement of government officials will be the determining factor as to whether the statement is

---

<sup>47</sup> Friedman, 19 Criminal Justice 4, at 9

<sup>48</sup> See Valladares, 12 Nevada Lawyer 12 at 14 (“Courts across the country are churning out Crawford-related opinions at breakneck speed. The results of some of these post-Crawford cases are somewhat contradictory and reflect a tendency to apply a more narrow view of what is testimonial. In a New York case, which could have a big impact on domestic violence prosecutions, the state unsuccessfully sought to introduce a 9-1-1 tape that described an ongoing shooting. The court found that the contents of the tape were testimonial, because the dispatcher elicited detailed information from the caller regarding the event. *People v. Cortes*, 2004 WL 1258018 (N.Y. Sup. Ct., May 26, 2004). Likewise, a California court held that the statements by assault victims to a police officer were testimonial, as they were the product of police questioning. *People v. Adams*, No. C040891, 2004 WL 1637965 (Cal. Ct. App. July 22, 2004). On the other hand, a North Carolina appellate court found that victim statements made to a police officer immediately after being rescued from a kidnapping were non-testimonial, because they were spontaneously initiated by the victim. *State v. Forrest*, 596 S.E.2d 22 (N.C. Ct. App. 2004).”).

<sup>49</sup> *Crawford*, 124 S.Ct. at 1364-65 and n.7 on 1367

<sup>50</sup> *Id.*

testimonial or not, although it tends to lend itself as such in most situations.<sup>51</sup> To the contrary, there are many situations where such a standard would seem ridiculous.<sup>52</sup>

Similarly the Court was equally evasive when explaining whether it is the perception of the declarant when making the statement that matters or whether it is the purpose of the government official, or the perception of the person obtaining the statement, that is determinative. One practitioner claims that “[t]he Crawford case strongly implies that the status and motivations of the person eliciting the information, not the perceptions of the declarant, should determine whether the right attaches.”<sup>53</sup> On the other hand the Court did quote, as an example of the different formulations of testimonial statements, the National Association of Criminal Defense Lawyers Amicus brief which offered the opposite approach, “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[.]”<sup>54</sup> Simply put, this “objective standard” places emphasis on the perception of the declarant and no one else. Thus it would appear that arguments could be made on either side.

---

<sup>51</sup> See Hood III, Will and Padilla, Lucia, *The Right To Confront Witnesses After Crawford v. Washinton*, 33 Colorado Lawyer 83, at 84-85 (September, 2004) (Comparing two Colorado Court of Appeal decisions that attempted to interpret the meaning of “testimonial statements” under *Crawford*, each of which indicated that government involvement was a necessary element if a statement is to be “testimonial”); *but see* Friedman, 19 Criminal Justice 4, at 9-10 (“I do not believe that participation by government official—either receipt of the statement as the initial audience of the statement or active procurement of the statement through interrogation—is the essence of what makes a statement testimonial.”);

<sup>52</sup> See Friedman, 19 Criminal Justice 4 at 9 (offering the following example: “if just before trial a person shoved a written statement under the courthouse door, asserting that the accused committed the crime, that would plainly be testimonial even though no government official played a role in preparing the statement.”)

<sup>53</sup> Hood III, 33 Colorado Lawyer 83, at 85 (Mr. Hood is “Of Counsel” at the Denver Firm Issaacson, Rosenbaum, Woods & Levy, P.C.)

<sup>54</sup> *Crawford*, 124 S.Ct. at 1364 (citing National Association of Criminal Defense Lawyers et al. as *Amici Curiae* at 3.

The second linchpin to the test appears to be the least confusing. As discussed below,<sup>55</sup> the body of case law developed under the *Roberts* framework for determining when the declarant is unavailable has been left in place by the Court. Additionally, under the Federal Rules of Evidence a declarant is unavailable for the purposes of offering hearsay evidence in the following situations: death or illness, refusal to testify, they are exempted by privilege, they cannot be found (absent), or they lack memory of the specific statement.<sup>56</sup> Only time will tell whether a rule of evidence will be incorporated that expands or narrows this rule to take into consideration *Crawford*.

The last linchpin of the test offers not so much of an interpretational paradox as the testimonial definition issue but is of equal magnitude in terms of importance. If the accused has had a prior opportunity to cross-examine the declarant than Confrontation has been satisfied. Again, sounds simple, however, this aspect of the test poses some rather interesting questions and again is subject to creative lawyering given its vague standing.

First off, does a prior opportunity to cross-examine a witness mean that the accused must actually cross-exam the witness or simply be afforded the opportunity to do so?<sup>57</sup> This could be a particularly amorphous standard to develop. Second, what is the benchmark for an adequate opportunity to cross-examine? What happens when there are

---

<sup>55</sup> See *supra* at p.12

<sup>56</sup> Fed. R. Evid. 804(a) (establishes foundation one must lay for 804(b) exceptions to apply including former testimony.)

<sup>57</sup> See Friedman, 19 Criminal Justice 4 at 11 (offering the following example: a prosecutor notifies the defendant of his intention to use a witnesses statement at trial, and encourages the defendant to depose the witness and ensures their availability if the defendant chooses to do so. Would the defendant be deemed to have waived his confrontation right if he decided not to depose the witness and the prosecution used the statement?); see also Friedman, Richard D., *Shifting the Burden*, The Confrontation Blog, (March 16, 2005) at <http://www.confrontationright.blogspot.com/> (citing *Bratton v. State*, 2005 WL 459019 (Tex. App. Dallas Feb. 28,2005), where the court rejected this tactic, as had *State v. Cox*, 876 So.2d 932 (La. App. 3d Cir. 2004)).

claims of ineffective assistance of counsel? Will the standards be lowered for parties that decide to go to trial pro-se? What happens when new facts/evidence is discovered by the defendant after his opportunity to cross-examine had taken place? Will *Crawford* apply retroactively?<sup>58</sup> Is there a point when it is too early to present the accused with an opportunity to cross-examine? For example what if a prosecutor decided to take a deposition prior to charging an individual? In some situations it would seem that offering the potential defendant an opportunity to cross-examine at this point would be inconsistent with the purpose of Confrontation Clause. The whole idea behind the Confrontation Clause is to address the reliability of evidence through cross-examination. However, how is one to prepare a thorough cross-examination when all the issues have not been identified? There must be a certain point where providing this opportunity would be inadequate.<sup>59</sup> For example, assume Daren (D) is being investigated for criminal tax evasion and is given the opportunity to cross-examine witnesses against him at a deposition prior to his being charged. Tax issues can be rather complex and time consuming even with adequate preparation. Even if D had obtained competent counsel how early in the game is too early? How would he know which issues to press or what information he needed to provide to his lawyer so as to prepare a defense.<sup>60</sup> These questions make apparent there is significant room for argument. Through the parameters outlined in *Crawford* courts across the country will have to answer these questions.

---

<sup>58</sup> See Valladares, Rene L., 12 Nevada Lawyer 12 at 15-16 for a comment on whether *Crawford* will apply retroactively.

<sup>59</sup> See *People v. Smith*, 2005 WL 294371 (Cal.App. 3 Div. 2005) (only Westlaw citation is available) (where a defendant's fellow gang member made inculpatory statements to investigator at interrogation, testified only that he would not testify at the 1<sup>st</sup> trial, and refused to testify at 2<sup>nd</sup> trial, recorded interrogation was allowed and deemed not in violation of *Crawford*.)

<sup>60</sup> Friedman, 19 Criminal Justice 4 at 11.

## Law Left Unaffected by Crawford

Through my research I have found an article, authored by an actual participant in the *Crawford* case that does an excellent job of explaining what law *Crawford* leaves untouched and what law *Crawford* will change.<sup>61</sup> First, the *Crawford* decision did discard the traditional *Roberts* framework in situations where testimonial hearsay is at issue.<sup>62</sup> Now it is inconsequential whether the testimonial hearsay statement falls under one of the many firmly rooted exceptions or whether the statement displays adequate indicia of reliability, when the statement is testimonial in nature the Confrontation stage is set. However, this does not mean that *Crawford* is the new test for the admissibility of all hearsay, *Roberts* is still very much alive.<sup>63</sup> It is important to remember that hearsay and the Confrontation Clause are two different areas of the law; they come together only when the statement at issue is testimonial in nature.<sup>64</sup> Therefore, it is crucial to understand that where the statement at issue is “non-testimonial” *Crawford* places no restriction on it and *Roberts* is still viable. This is not to say that *Roberts*’ framework is not open to further challenge. To the contrary, given the strong language used by the Court denouncing *Roberts*, I believe *Crawford* provides ample ammunition for other challenges outside the testimonial hearsay arena, however this is an entirely different paper altogether.

---

<sup>61</sup> *Id.* (Professor Richard D. Friedman of the University of Michigan Law School submitted an amicus brief on behalf of eight other law professors and himself in the *Crawford* case, additionally he sat second chair to petitioner’s counsel, Jeffery Fisher, at the oral arguments in the Supreme Court.)

<sup>62</sup> *Crawford*, 124 S.Ct. at 1365

<sup>63</sup> *Crawford*, 124 S.Ct. at 1374 (finding that, “[where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”)

<sup>64</sup> Friedman, 19 *Criminal Justice* 4 at 7 (indicating that the “question in each case is whether the given statement is testimonial, and the fact that a statement fits within a hearsay exception does not alter its status with respect to that question.”)

Second, the statement offered must be offered for the truth of the matter that it asserts, otherwise you do not have a confrontation issue<sup>65</sup> nor even a hearsay issue for that matter. Thus a prosecutor offering an out of court statement, if ethical, can make the argument that the statement is not being offered to shed light on the truth of what it asserts, but for some other reason such as offering the confession of a co-defendant simply to show that the confession is substantially different from the defendant's own confession.<sup>66</sup>

Third, the *Crawford* Court reaffirms the rule derived in *California v. Green*,<sup>67</sup> that “[w]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”<sup>68</sup> The obvious reason being that the declarant is available to answer questions as to the prior statements. “Fourth, in applying the unavailability requirement to prior testimony under the *Roberts* regime, the Court developed a body of case law concerning when the prosecution has adequately proven unavailability, and for better or worse that case law, including part of *Roberts* itself, is left untouched.”<sup>69</sup>

Fifth, the traditional rule that one cannot benefit from their own misconduct still remains in effect and they will forfeit their confrontation right in such situations.<sup>70</sup> For example one cannot cause the declarant to “disappear” or otherwise purposely impact the opportunity to cross-examine the declarant. This leaves to question whether a murder suspect may exclude his victim's statements on Confrontation grounds or whether this

---

<sup>65</sup> See *Tennessee v. Street*, 471 U.S. 409, 414 (1985) (which *Crawford* explicitly reaffirms, see *Crawford*, 124 S. Ct. at 1369 n.9.)

<sup>66</sup> See *Tennessee v. Street*, 471 U.S. 409, 414

<sup>67</sup> 399 U.S. 149 (1970)

<sup>68</sup> Friedman, 19 Criminal Justice 4 at 7-8; citing *Crawford*, 124 S.Ct at 1369 n.9

<sup>69</sup> Id. 19 Criminal Justice 4 at 8

<sup>70</sup> Id.

qualifies as benefiting from their own misconduct. Surely at the time the murder took place it was not the murder's motive to prevent the victim from testifying as to his own murderer. Such an argument would be absurd.

Sixth, Professor Friedman "presumes" the rule established in *Maryland v. Craig*, 479 U.S. 836 (1990), will not be impacted by the *Crawford* decision.<sup>71</sup> There, "the Court held that, upon a particularized showing that a child witness would be traumatized by having to testify in the presence of the accused, the child may testify in another room with the judge and counsel present but the jury and the accused connected electronically."<sup>72</sup>

Lastly, the *Crawford* decision does not disturb the rule derived from *Delaware v. Van Arsdall*,<sup>73</sup> "that a violation of the confrontation right may be deemed harmless and therefore not require reversal."<sup>74</sup> As has been evidenced by numerous cases (discussed below).<sup>75</sup>

### **Crawford's Impact on Alaska**

While writing this essay the Alaska Court of Appeals has handed down its first decision grappling with the *Crawford* issue, *Anderson v. State of Alaska*.<sup>76</sup> The decision was handed down literally days ago at the time of the drafting of this essay. The court formulated its own interpretation of what the *Crawford* Court meant by "interrogation" and "testimonial" in adapting its test for the admissibility of testimonial hearsay. In the

---

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (explaining that *Crawford* addresses when confrontation is required, whereas *Craig* addresses what procedures confrontation requires.)

<sup>73</sup> 475 U.S. 673 (1986),

<sup>74</sup> *Id.*

<sup>75</sup> *See supra* at p.31-32

<sup>76</sup> *Anderson*, 2005 WL 858773.

*Anderson* case police received a 911 call from a woman indicating that the defendant, Joseph Anderson, had assaulted her.<sup>77</sup> When officers arrived on the scene they found a woman bleeding and very upset.<sup>78</sup> The woman then told the police that someone else had been hurt as well and took them to an apartment where an injured man was lying on the floor.<sup>79</sup> The officer at the scene noticed several bruises on the man's torso and that he appeared to be in a lot of pain.<sup>80</sup> At that point the officer asked the man, "What happened?" To which the man responded that "Joe" had hit him with a pipe.<sup>81</sup> The injured man did not testify at Anderson's trial, however, the trial court allowed the officer to testify as to his out-of-court statement identifying Anderson as the perpetrator, under the excited utterance exception to the hearsay rule.<sup>82</sup>

Thus the issue before the Alaska Court of Appeals was whether the injured man's response to the officer's question was testimonial under *Crawford*. Despite some

---

<sup>77</sup> *Id.* 2005 WL 858773 at p. 1

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Alaska Evidence Rule 803(2)

authority to the contrary<sup>83</sup> the court decided to “follow the emerging majority view on the admissibility of excited responses to brief on-the-scene questioning by police officers.”<sup>84</sup>

The majority view holds that “an excited utterance by a crime victim to a police officer, made in response to minimal questioning, is not testimonial.”<sup>85</sup> This approach basically

---

<sup>83</sup> *Anderson*, 2005 WL 858773 at 5-6, citing *In re E.H.*, 823 N.E.2d 1029, 2005 WL 195376 (Ill.App.2005) (holding that children’s statements to grandmother that thirteen-year-old babysitter had sexually assaulted them a year before were testimonial under *Crawford*.) (The *Anderson* court distinguished *In re E.H.* because “[t]he victims’ statements were not excited utterances and the statements were not made to the authorities.” *Anderson*, 2005 WL 858773, at 5); *Washington v. Powers* 99 P.3d 1262, 1263-66 (Wash.App.2004) (holding that that a tape-recorded 911 call reporting a violation of a domestic violence restraining order was a testimonial statement. Where “the Court concluded that the purpose of the 911 call was to report a violation of the restraining order to allow the police to apprehend the defendant and was not made “under the stress of immediate threat of harm nor was [the defendant] still present.”” *Anderson*, 2005 WL 858773, at 5 (interpreting *Powers*), (the *Anderson* court distinguished *Powers* based on the fact that “the statements were made in response to several questions and by the court’s finding that the purpose of the call was to initiate a criminal prosecution” *Anderson*, 2005 WL 858773, at 5); *Lopez v. State* 888 So.2d 693,700 (Fla.Dist.Ct.App.2004) (holding that kidnap victims statement to police identifying the kidnapper was testimonial since victim had to know that his statement to the police was a “a formal report of the incident that would be used against the defendant.”)

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at FN 26 relying on the following authority and comments: “*People v. Cage*, 15 Cal.Rptr.3d 846, 848 (Cal.App.2004) (holding that hearsay statement made at the hospital to police that defendant had cut him was not testimonial because the interview was “unstructured” and “informal and unrecorded”) petition for review granted 19 Cal.Rptr.3d 824 (Cal.2004); *Leavitt v. Arave*, 371 F.3d 663, 683 n. 22 (9th Cir.2004) (murder victim calls police night before death to report that defendant had broken into her home--court concluded that this was excited utterance and non-testimonial because victim initiated contact, was not interrogated, and her motive in calling was only to obtain “help in a frightening intrusion into her home”); *Stancil v. United States*, 866 A.2d 799, 815 (D.C.App.2005) (holding that excited utterances made to police officers are testimonial only when given in response to “questioning in a structured environment”); *United States v. Webb*, 2004 WL 2726100, at p.4 (D.C.Super.2004) (Officer dispatched to scene of assault asks victim “What happened?” Victim states that defendant punched her in the face. Victim’s statement held non-testimonial); *Fowler v. State*, 809 N.E.2d 960, 961-66 (Ind.App.2004) (held that statements to police in response to informal police questioning at the scene of a crime shortly after crime occurred are not testimonial); *State v. Barnes*, 854 A.2d 208, 211-12 (Me.2004) (Defendant charged with murder of his mother. In an earlier incident, the mother went to police station in tears stating that defendant had tried to kill her. Statements admitted as excited utterance. Mother’s statements non-testimonial because she had gone to the police on her own while under the stress of the alleged assault and police only asked questions to determine why she was upset); *People v. Bryant*, 2004 WL 1882661, at p.1 (Mich.App.2004) (murder victim’s statement that “Rick shot me” was not testimonial because police had only asked “What happened?”); *State v. Forrest*, 596 S.E.2d 22, 29 (N.C.App.2004) (Kidnapping victim’s statements to police shortly after being rescued were admissible as excited utterances and not testimonial. The police asked no questions and victim gave account of crime); *People v. Mackey*, 785 N.Y.S.2d 870, 874 (N.Y. City Crim. Ct.2004) (assault victim’s statements to police non-testimonial where she initiated contact with officers immediately after defendant punched her--her statements were made to seek immediate protection rather than initiate a prosecution, and there was no formal police questioning); *People v. Moscat*, 777 N.Y.S.2d 875, 880 (N.Y. City Crim. Ct.2004) (911 call made by domestic violence victim to obtain emergency help is non-testimonial. Call made to get help, not to initiate prosecution); *People v. Watson*, 2004 WL 2567124, at p.14 (N.Y.Sup.2004) (Armed robbery victim makes statements to police immediately following crime. Victim’s first spontaneous statement to police that “that man just robbed me” was not testimonial. Second

hones in on the “ex-parte in-court testimony or its functional equivalent” standard, which encompasses police interrogations and ignores the “objective standard”. The court’s analysis focused on the definition of “interrogation”.<sup>86</sup> Noting that the *Crawford* Court offered simply the “colloquial” definition of interrogation, the Alaska Court of Appeals turned to the dictionary for guidance.<sup>87</sup> Based on these definitions the court determined that the injured man was not being “interrogated” by the officer when he made the accusatory statements since the questioning did not “seem to fall within the category of formal, official, and systematic questioning.”<sup>88</sup> The court felt that, in formulating its opinion, the Supreme Court appeared “to be speaking of more formal statements than the single excited response at issue in Anderson’s case.”<sup>89</sup>

The *Anderson* case is a product of other courts holdings and perhaps not the last word on *Crawford* in Alaska. Indeed *Crawford* offers many other issues than the one decided in *Anderson*. Given the inevitable presence of other *Crawford* issues in future criminal litigation in Alaska an overview of how the Ninth Circuit Court of Appeals and

---

statement in response to police question if there was anyone else involved, that defendant "was the only one" was not in response to a "structured question asked with an eye towards trial" but was designed to secure the area, and also not testimonial. Victim's further responses to police questioning were testimonial); *United States v. Griggs*, 2004 WL 2676474, at p.5 (S.D.N.Y.2004) (Police officer dispatched to scene hears declarant say, "Gun! Gun! He's got a gun!" and observed declarant gesture towards defendant. Statement held non-testimonial); *State v. Anderson*, 2005 WL 174441 (Tenn.Crim.App.2005) (holding that excited utterances made to police officers responding to reported crime are not "testimonial"); *State v. Maclin*, 2005 WL 313977, at p.17 (Tenn.Crim.App.2005) (domestic violence victim's statements made to responding police officer were excited utterances and not testimonial); *Key v. State*, --- S.W.3d ---, 2005 WL467167, at 5 (Tex.App.2005) (holding that excited utterance made by victim to officer responding to scene of assault was not testimonial); *State v. Orndorff*, 95 P.3d 406, 408 (Wash.App.2004) (where witness told police she saw man with a gun downstairs, saw two men leave, was panic-stricken and tried to dial 911, statement held to be non-testimonial).”

<sup>86</sup> *Id.* at p. 5

<sup>87</sup> *Id.* (Defining interrogate as "to examine by questioning formally or officially." *American Heritage Dictionary of the English Language* (4th ed.2000) (visited March 23, 2005) <http://www.bartleby.com/61/72/I0197200.html>.; and "to question formally and systematically" *Merriam-Webster Dictionary of Law* (1996) (visited March 23, 2005) <<http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com & topic= 94/94289c09ca673bf97beadcaff2836254>>.

<sup>88</sup> *Id.* at p. 5

<sup>89</sup> *Id.* at p. 4

other Ninth Circuit states have been treating the case is merited. Not surprisingly in almost every instance the primary issue revolves around whether a particular piece of hearsay evidence qualifies as a “testimonial” statement. An overview of these cases provides an excellent example of how applying a different standard to similar facts will result in different outcomes.

### **Testimonial vs. Non-testimonial Statements- 9<sup>th</sup> Circuit Interpretations**

The United States Court of Appeals for the Ninth Circuit has taken on the “testimonial” definition issue in a few different cases. For instance, in *Parle v. Runnels*<sup>90</sup> following a state court conviction of first-degree murder, the Court of Appeals denied a defendant’s habeas corpus petition on his Confrontation Clause challenge to the introduction of the murder victim’s diary entries.<sup>91</sup> The court held the diary entries, which contained detailed descriptions of abuse and arguments between the victim and the defendant, were not the sort of out-of-court statements that *Crawford* was concerned with because they were non-testimonial.<sup>92</sup> In coming to this conclusion the court relied upon one of its prior decisions dealing with the “testimonial” issue, *Leavit v. Arave*<sup>93</sup> and found that the diary entries were not created “under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial.”<sup>94</sup> The court concluded that the diary entries were properly admitted under California Evidence Code section 1370, citing the portion of *Crawford* that reads “[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’

---

<sup>90</sup> 387 F.3d 1030 (9<sup>th</sup> Cir. Nov, 2004)

<sup>91</sup> *Id.* 387 F.3d at 1035-36

<sup>92</sup> *Id.* 387 F.3d at 1037

<sup>93</sup> 383 F.3d 809,830 n.22 (9<sup>th</sup> Cir. 2004)

<sup>94</sup> *Parle*, 387 F.3d at 1037 (citing *Crawford*, 124 S.Ct at 1364 and *Leavit*, 383 F.3d at 830 n.22 (9<sup>th</sup> Cir. 2004))

design to afford the States flexibility in their development of hearsay law—as does [*Ohio v. Roberts*], and as would an approach that exempted such statements from confrontation Clause scrutiny altogether.”<sup>95</sup>

However, in the earlier *Arave* case, the court used an entirely different standard to deny a habeas petition. There, (as noted above in FN 86) a murder victim's statements to police on the night before her death, regarding her suspicions as to identity of the prowler at her home, were admitted in the defendant's subsequent murder trial under Idaho's excited utterance exception to the hearsay rule.<sup>96</sup> Denying the defendant's habeas petition as to the Confrontation challenge the court found that, “[a]lthough the question is close”, the victim's statements to the police the night before her murder were not testimonial.<sup>97</sup> Instead of using the “objective standard” in reaching this conclusion the court utilized the “ex-parte in-court testimony or its functional equivalent” standard, which includes police interrogations to conclude the statement was not testimonial.<sup>98</sup> The court pointed to the fact that the victim initiated the contact with the police and that the police were there to help and that she was not being interrogated.<sup>99</sup> The next case provides a similar example.

In the California state appellate case, *People v. Compton*,<sup>100</sup> a murder victim's statements to police, at the crime scene and in the emergency room identifying the defendant as the shooter, were admitted into evidence at the defendant's trial under California's excited utterance exception and an exception for statements purporting to narrate or explain the infliction or threat of physical injury upon the declarant.<sup>101</sup> On

---

<sup>95</sup> *Id.* (citing *Crawford*, 124 U.S. at 1374)

<sup>96</sup> *Arave*, 383 F.3d at 830

<sup>97</sup> *Id.* 383 F.3d at 830 n.22

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 2005 WL 236841 (Cal. App. 2 Dist.), Only the Westlaw citation is currently available.

<sup>101</sup> California Evidence Code section 1240 and 1370.

appeal the court denied the defendant's argument that his Confrontation right was violated, concluding that the victim's statements to the police implicating the defendant were not testimonial because they were not made in response to police interrogation.<sup>102</sup> The court cited an earlier case where it had determined that "[p]reliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in *Crawford*."<sup>103</sup> The court determined that while at the crime scene and the emergency room the police were not conducting a "formal investigation in which trial was contemplated".<sup>104</sup> They based this conclusion on the fact that there was no suspect under arrest, and no determination had been made whether a crime had been committed.<sup>105</sup>

### **Did They Get It Right?**

It is my opinion that the Ninth Circuit was incorrect in its application of *Crawford* in the *Leavit* case. There, *Crawford* was decided after the court had heard oral arguments and it appears that the court felt the issue only merited discussion in a single footnote. Their analysis is too simplistic. Had they used the same standard and analysis applied months later in the *Parle* case the result surely would have been different. Clearly, explaining a purported crime to police officers would constitute "circumstances which would lead an objective witness reasonably to believe that [the statements] would be

---

<sup>102</sup> Compare *People v. Morgan*, 125 Cal.App.4<sup>th</sup> 935 (2005) (where statements of telephone caller asking to buy drugs, which were heard by police officer who answered phone while executing search warrant for defendants' residence, were nontestimonial in character.)

<sup>103</sup> *People v. Corella* 122 Cal.App.4<sup>th</sup> 461, 468-69 (2004).

<sup>104</sup> *Compton*, 2005 WL 236841 at 6.

<sup>105</sup> *Id.*

available for use at a later trial.”<sup>106</sup> It seems the court completely overlooked this standard, perhaps to maintain harmony with the result that it had already reached. The *Compton* and *Corella* cases provide similar examples where, in my opinion, the court got it wrong. These cases exemplify how applying the “ex-parte in-court testimony or its functional equivalent” standard will result in an entirely different result than if the “objective standard” would have been used. To me the California Court of Appeals reasoning contains the same flaw as the Ninth Circuit Court of Appeals above. Surely the victim thought and hoped that the police would use his statements to bring to justice his attacker. Under the objective standard this clearly would qualify as “testimonial” for *Crawford’s* purposes. Furthermore, I disagree with the court’s reliance on *Corella* because the court focused only on the interrogation question and ignored the other standards offered by *Crawford*. Additionally, it would seem that *Corella* is inconsistent with the purpose of *Crawford* in terms of what constitutes an interrogation. *Corella* attempts to set a specific time and place on when an interrogation takes place and what an interrogation is. This is completely in conflict with *Crawford*, which specifically points out, the term “interrogation” was meant to be used in its colloquial form and not in any “technical legal, sense.”<sup>107</sup> By relying upon *Corella* the California Court of Appeals has formulated a technical “legal” definition of interrogation in conflict with the express language of *Crawford*.

In my opinion the Alaska Court of Appeals decision in *Anderson* suffers from the same flaws as listed above. Courts are taking a conservative approach to *Crawford* and

---

<sup>106</sup> *Lopez v. State* 888 So.2d 693, 700 (Fla. Dist. Ct. App. 2004) (Court concluded that kidnap victim had to know that his statement to the police, identifying his kidnapper was "a formal report of the incident that would be used against the defendant.")

<sup>107</sup> *Crawford*, 124 S.Ct. at 1365 n. 4

in doing so are misinterpreting the case by formulating their own legal definitions of interrogation. Instead of viewing the “objective standard” and the “ex-parte in-court testimony or its functional equivalent” standard as separate standards the court seemed to mesh the two, or perhaps simply ignored the objective standard so as to be consistent with the majority view. Had the court bothered to at least examine the objective standard, instead of dismissing it outright, given the circumstances there, I think it is obvious that a person identifying their assailant would reasonably expect that identification to be used to arrest the person they identified. Furthermore, a reasonable person in such circumstances would surely expect that his or her identification must be used later on in trial.<sup>108</sup> Therefore instead of getting bogged down with the definition of “interrogation” the court should have simply focused on whether there was a reasonable expectation that the identification would have been used at the defendants trial.

### **Child Abuse Cases**

The state of Washington, the birthplace of *Crawford*, offers equally conservative interpretations of what constitutes “testimonial”. In *State of Washington v. Fisher*,<sup>109</sup> a child abuse case, the Court of Appeals for the 2<sup>nd</sup> Division addressed the issue of whether statements made to physicians in child abuse situations constitute testimonial statements. Relying upon numerous other state cases dealing with the issue,<sup>110</sup> the fact that the doctor was not a government employee, the fact that the defendant was not yet under suspicion, the fact that the doctor testified that she questioned the child only as part of her efforts to

---

<sup>108</sup> *Lopez v. State* 888 So.2d 693, 700 (Fla. Dist. Ct. App. 2004)

<sup>109</sup> Citation not yet available. *State of Washington v. Fisher* ---P.3d.---, slip opinion available at No. 28282-8-II (Wash. App. Div. 2, March 22, 2005).

<sup>110</sup> See *State v. Vaught*, 268 Neb. 316 (2004) (finding that a four-year-old's child's statement's implicating his abuser did not constitute testimonial statements under *Crawford*.); see also *State v. Scacchetti*, 690 N.W.2d 393,396 (Minn. App. 2005) (testimony relating a three-year-old's response when a nurse practitioner asked her if anything had happened was not testimonial hearsay.); compare *Snowden v. State*, 156 Md. App. 139 (2004); *People v. Sisavath*, 118 Cal. App. 4<sup>th</sup> 1396 (2004).

properly diagnose and treat the child and thus no indication of a purpose to solicit testimony for trial existed, and that an objective observer, under the circumstances, would not reasonably foresee the use of the statements in a future trial, the court held that the statement was not testimonial and *Crawford* therefore did not apply.<sup>111</sup> Thus the court here used the objective standard to determine *Crawford* did not apply.

In another Washington Court of Appeals case, *State of Washington v. Dezee*<sup>112</sup> a child rape case, a mother testified as to out of court statements made by her daughter indicating that the child's father had raped her. In concluding the statements made by the child to the mother did not constitute "testimonial" hearsay under *Crawford*, the court relied on the following facts: the child's statements were spontaneous, they were made to her mother while riding in the car to school, the only apparent purpose of the statements was expressing the child's concerns with the acts and seeking comfort from her mother, there was no indication that the child ever sought the involvement of the police, and nothing in the record indicated that the nine-year-old reasonably believed the statements would be available for use at a later trial involving her father.<sup>113</sup> Here again the objective standard was utilized.

## **DUI Reports**

Montana has recently addressed the increasingly popular strategy of challenging reports in DUI cases through *Crawford*.<sup>114</sup> In *State of Montana v. Carter*<sup>115</sup> the

---

<sup>111</sup> *Fisher*, No. 28282-8-II at paragraphs 29-36.

<sup>112</sup> *State of Washington v. Dezee*, Unpublished Opinion, slip opinion available at No. 51521-7-I (Wash.App. Div 1, Jan. 18, 2005); (available on Westlaw at 5 WL 246190); see also *State of Idaho v. Doe*, 103 P.3d 967, 970 (Idaho Ct. App., 2004) (admittance of Child sexual assault victim's statements to mother and grandmother describing incident did not violate *Crawford*).

<sup>113</sup> *Id.* at p. 4

<sup>114</sup> See Kapsack, Bruce and Oberman, Steven, *Crawford v. Washington: The DUI Defense Practitioner's Perspective*, 28 *Champion* 25, 26 (September/October, 2004), (offering the proposition that "[a] machine and its results are clearly testimonial.>").

defendant claimed that his right to confront witnesses against him was violated when the state introduced three certification reports (weekly, monthly, yearly) for a breath analysis machine but failed to proffer the individual who compiled the reports for cross-examination.<sup>116</sup> The court determined that certification reports for breath testing instruments do not constitute “testimonial” hearsay and therefore does not raise a Confrontation issue because “certification reports are not substantive evidence of a particular offense, but rather are foundational evidence necessary for the admission of substantive evidence.”<sup>117</sup> However, many defense practitioners would disagree with Montana courts decision. They would take the argument a step further claiming that, not only must the person who performed the calibration or performed the actual breath test be present at trial for cross examination, the also a technician who could testify to the “inner workings” of the machine itself must also be present.<sup>118</sup> A DUI practitioner’s article on the subject offers the following argument:

“A machine and its results are clearly testimonial. In fact, it is the piece of testimony necessary, and indeed often the only one needed, to prove a per se charge. That being said, aren’t the inner workings of the machine necessarily testimonial? ... The printout of the machine is in court ‘saying,’ “here is the breath (or blood) alcohol content of Mr. Defendant.” If this were a live person, the first question we would ask is how did you determine this result? We would clearly be allowed to ask about the science used, the calculations made, and the procedures followed; yet, because it is a machine, we are denied this confrontation.”<sup>119</sup>

Some would argue that this type of reasoning is just another example of lawyers trying to find loopholes for their clients and exploit the protections offered by our Constitution. However, as technology progresses so must the law. As our society

---

<sup>115</sup> Citation not yet available. *State of Montana v. Carter* ---P.3d.---, slip opinion available at No. 03-563 (Mont. April 5, 2005) (available on Westlaw at 2005 WL 767264 (Mont.))

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at p. 8

<sup>118</sup> Kapsack, 28 *Champion* 25, 26

<sup>119</sup> *Id.*

becomes increasingly dependent upon technology the likelihood that they will trust it increases. This could have significant ramifications if you are a resolute government conspiracy theorist. Indeed, it is shocking to think that our freedom could hinge upon a machine. However, as the Kapsack article surmises, “our constitution does not yet provide for conviction by machine”.<sup>120</sup> I do not know whether I agree with that statement or not, but I do know that *Crawford* will be the medium within which that battle is fought.

### **Excited Utterance Heard by Lay Witness**

An Arizona appellate court tackled the issue as to whether an excited utterance, a hearsay-expected statement, heard by a lay witness qualifies as testimonial under *Crawford*.<sup>121</sup> There, two out of court statements, one overheard by the victim’s son and one the victim made to her brother-in-law over the phone the night before she was murdered, were admitted into evidence under the “excited utterance” exception to the bar on hearsay evidence. The court held that “an excited utterance heard and testified to by a lay witness does not fit within *Crawford*’s definition of testimonial...”. The court reasoned that Arizona State’s definition of an excited utterance<sup>122</sup> is not “even remotely similar to most of what *Crawford* offers as an example of a testimonial statement.”<sup>123</sup>

Specifically, the court reviewed the three standards outlined in *Crawford* and

---

<sup>120</sup> *Id.*

<sup>121</sup> *State of Arizona v. Aguilar*, 107 P.3d 377 (March, 2005).

<sup>122</sup> “[U]nder certain circumstances of physical or mental shock, a stress of nervous excitement may be produced in a spectator which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perception already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him”. *Aguilar*, 107 P.3d at 379; (quoting *Keefe v. State*, 72 P.2d 425, 427 (1937)).

<sup>123</sup> *Id.* 107 P.3d at 379.

distinguished each one pointing to the fact that an excited utterance is not a solemn, formal declaration nor is it the sort that would be found in ex-parte in-court testimony or its functional equivalent; nor would a person making such an utterance reasonably expect it to be used later in trial when they have no time to reflect on what they have said.<sup>124</sup> In holding that excited utterances heard by lay witnesses are non-testimonial the court also cited other jurisdictions dealing with this issue and coming to the same conclusion.<sup>125</sup> The court did note that in situations where the excited utterance is made in response to a police officer's questions there might be more room for a *Crawford* challenge.<sup>126</sup>

### **Co-Defendants Statements**

In *State of Oregon v. Page*<sup>127</sup> the Oregon Court of Appeals dealt with, what has always been one of the most prevalent areas raising confrontation issues, hearsay evidence of co-defendant's statements to police. There the primary defendant was convicted of several felonies stemming from a robbery committed by two men after the initial arrestee made statements to the police implicating the primary defendant in the felonies and made a deal to testify against the primary defendant for a reduced sentence.<sup>128</sup> However, when the primary defendant's trial came to pass the initial arrestee

---

<sup>124</sup> *Id.*

<sup>125</sup> See *State v. Orndorff*, 95 P.3d 406, 408 (Wash. App. 2004) (court came to same conclusion reasoning that the declarant had no reason to expect the statement would be used by prosecutors, the statement was not made to establish or prove a fact, and it was not a statement made in response to police questioning.); *People v. Vigil*, 104 P.3d 258,265(Colo.App.2004); *People v. Compan*, 100 P.3d 533,538 (Colo.App. 2004); *Doe*, 103 P.3d 967,972; *People v. Rivera*, 8 A.D.3d 53 (N.Y App.Div. 2004).

<sup>126</sup> *Aguilar*, 107 P.3d at 379 (providing two examples with opposite results, *Fowler v. State*, 809 N.E.2d 960,964 (Ind.App. 2004) (court admitted excited utterance made to police officer at scene because “[w]hatever else police ‘interrogation’ might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred.”); *Lopez*, 888 So.2d at 700 (Fla.App. 2004) (holding that excited utterance to police was testimonial because “[the declarant] surely must have expected that the statement he made to Officer Gaston might be used in court against the defendant.”)).

<sup>127</sup> *State of Oregon v. Page*, 104 P.3d 616 (2005)

<sup>128</sup> *Id.*

refused to testify. The trial court deemed the initial arrestee unavailable<sup>129</sup> and admitted his interview statements under Oregon's statement against penal interest exception to the hearsay bar.<sup>130</sup> This was before *Crawford* had been decided. On appeal the court determined that the trial court's admission into evidence of the testimonial hearsay evidence of the unavailable codefendant's statements to police violated *Crawford* and was plain error.<sup>131</sup> The court relied on the "police interrogation" benchmark provided by the *Crawford* Court in determining that the statements were testimonial.<sup>132</sup>

## 911 Calls

Finally there is the growing controversy over how *Crawford* should apply to 911 calls. This issue has sparked numerous opinions from both academics and courts.<sup>133</sup> The determining factor seems to be whether the police dispatcher elicited statements from the caller in a structured manner.<sup>134</sup> Courts appear to be split on the issue, New York in particular has had several conflicting decisions.<sup>135</sup> These cases demonstrate that it is not clear whether it is the perception of the caller that matters or whether it is the

---

<sup>129</sup> Under OEC 804 (Oregon's evidence rule for determining unavailability for hearsay purposes, similar to the federal rules of evidence)

<sup>130</sup> OEC 804(3)(c)

<sup>131</sup> *Page*, 104 P.3d at 622,624. (offering the following comparison: *State v. Thackaberry*, 95 P.3d 1142 (2004) (plain error doctrine did not apply to defendant's failure to object to admission of urinalysis report without opportunity to cross-examine author; there was "reasonable dispute" whether laboratory report was testimonial in nature under *Crawford*).

<sup>132</sup> *Id.*

<sup>133</sup> See Valladares, 12 Nevada Lawyer 12 at 14 ("911 calls to report crimes that are followed up by questions and answers from a police dispatcher might be testimonial"); See Hood, 33 Colorado Lawyer 83, at 88-89; *People v. Moscat*, 777 N.Y.S. 2d 875 (N.Y. Crim. Ct. 2004); *People v. Cortes*, 2004 WL 1258018(N.Y. Sup. Ct., May 26, 2004).

<sup>134</sup> *Cortes*, 2004 WL 1258018;

<sup>135</sup> *Id.* (In a domestic violence case the prosecution sought to introduce 911 tapes that described an ongoing shooting, court determined the tapes were inadmissible because they were testimonial in nature since the dispatcher elicited detailed information from the caller regarding the shooting); *Moscat*, 777 N.Y.S. 2d 875 (holding that 911 call was not testimonial under *Crawford* because "it is generated not by a desire of the prosecution or the police to seek evidence against a particular suspect"); *New York v. Conyers*, 777 N.Y.S.2d 274 (N.Y.App.Div. 2004) (court admitted 911 tape under the excited utterance exception and found no confrontation violation reasoning that the declarant's statements were non-testimonial because the "intention of placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in future proceedings.").

purpose of the police dispatcher that is determinative in deciding whether a 911 call is testimonial or not. Within the Ninth Circuit courts are equally divided. In contrast to the *Conyers* case, *Washington v. Powers*,<sup>136</sup> a Washington Court of Appeals decision, held that a tape-recorded 911 call reporting a violation of a domestic violence restraining order was a testimonial statement.<sup>137</sup> The court recognized that there were two types of 911 calls, those where the caller's objective is to "gain immediate official assistance in ending or relieving an exigent, perhaps dangerous situation," and those where the caller seeks to "provide information to aid investigation and possible prosecution related to the situation."<sup>138</sup> Based on the facts of the case before them the court determined that the purpose of the 911 call was to report the violation of the restraining order so as to secure the arrest of the defendant and was not made "under the stress of immediate threat of harm nor was [the defendant] still present."<sup>139</sup> Because the caller sought to provide information for the defendant's arrest the statement was testimonial.

California, on the other hand, has taken a different approach. Instead of differentiating between 911 calls where the caller seeks "immediate assistance" or seeks to provide "information for prosecution", California courts have simplified the issue by embracing an all encompassing rule that "a telephone call to the police reporting a crime, is not a testimonial statement."<sup>140</sup>

---

<sup>136</sup> 99 P.3d 1262, 1263-66 (Wash.App.2004)

<sup>137</sup> *Id.* at 1266

<sup>138</sup> *Id.* at 1265

<sup>139</sup> *Id.* at 1266.

<sup>140</sup> *People v. Trillo*, Unpublished opinion, available on Westlaw at 2005 WL 615832 (Cal.App. 3 Dist. (March, 2005) (citing *People v. Corella* (2004) 122 Cal.App.4th 461, 467-469)

“A telephone call reporting a crime is not "given in response to structured police questioning" related to a formal investigation. Rather, a citizen, often seeking assistance, initiates the call. The operator receiving the call is not conducting an investigation, but seeking information to determine an appropriate response to the crime. Thus, statements made during a telephone call reporting a crime do not implicate the right to confront witnesses.”<sup>141</sup>

The California court’s line of reasoning is questionable. Washington seems to be more in line with the spirit of *Crawford*. Fortunately, the Supreme Court has granted review in another California case that determined a 911 call was not a testimonial statement.<sup>142</sup> This could be the first step at carving out an actual hard core definition of testimonial.

### **Harmless Error and Retroactivity**

In another Ninth Circuit Appellate case the court found that the introduction of out-of-court statements of a defendant’s girlfriend to police during a search, which indicated that the defendant was the only one that could access a safe containing drugs, was in violation of *Crawford*.<sup>143</sup> The court found that the statements were testimonial but offered no reasoning as to why they merited such designation.<sup>144</sup> However, the court ultimately determined that the violation was harmless beyond a reasonable doubt considering the minor importance of the statements and the overwhelming evidence of the defendant’s guilt.<sup>145</sup>

In *Bockting v. Bayer*, 399 F.3<sup>rd</sup> 1010 (9<sup>th</sup> Cir. Feb, 2005), a more recent Ninth Circuit habeas petition, the court addressed whether *Crawford* applies retroactively and revisited the harmless error doctrine. In *Bockting* the defendant was convicted of child

---

<sup>141</sup> Id. (citing *Corella*, 122 Cal.App.4th at p. 468).

<sup>142</sup> See *People v. Caudillo*, review granted Jan. 12, 2005, S129212.

<sup>143</sup> *United States v. Nielsen*, 371 F.3d 574, 581 (9<sup>th</sup> Cir. June, 2004).

<sup>144</sup> Id.

<sup>145</sup> Id.

sexual abuse and sentenced to life imprisonment. The only witness to the conduct was his six-year old stepdaughter who did not testify at trial but whose interview with a detective was admitted as key evidence. The statements of the step-daughter at the interview contradicted statements she made at a preliminary hearing, where she said she could not remember what occurred with her father or whether she had talked with the detective. The judge declared the stepdaughter an unavailable witness given the fact that she could not remember and admitted the interview statements. The Court of Appeals determined that admission of the interview statements without cross-examination was a violation of *Crawford*. Applying the test for retroactivity outlined in *Teague v. Lane*,<sup>146</sup> the court found that *Crawford* was both a “watershed rule” and “one without which the likelihood of an accurate conviction was seriously diminished, and therefore applied retroactively in the pending habeas proceeding”.<sup>147</sup> In addressing the harmless error argument the court found that because the stepdaughter’s testimony was central to the defendant’s conviction “its admission can hardly be classified as harmless error.”<sup>148</sup>

## **Conclusion**

The examples above make clear that there is no one test to apply and that inconsistency is rampant when it comes to the *Crawford* issue. It appears that, in determining whether a statement is testimonial, the states within the Ninth Circuit and the Circuit Court of Appeals itself, place emphasis on whichever standard outlined by the *Crawford* Court will ultimately gain the result they deem fit in the underlying case. This

---

<sup>146</sup> 109 S.Ct. 1060, (1989)

<sup>147</sup> *Bockting*, 399 F.3<sup>rd</sup> at 1015-20

<sup>148</sup> *Id.* 399 F.3<sup>rd</sup> at 1012

has led to inconsistency from state to state. Nonetheless, one thing is clear, courts have adopted a rather conservative approach to *Crawford*.

It is my hope that this article illustrates how important it is for practitioners in states that have not tackled the *Crawford* issue to keep up to speed with how their particular circuits are interpreting the issues presented here. It is even more important that practitioners have a working knowledge of the standards outlined in *Crawford* for determining a testimonial statement so as to be able to make proficient arguments and understand their implications, especially if they disagree with how their circuit is interpreting the case. For now Alaska has taken the position that “an excited utterance by a crime victim to a police officer, made in response to minimal questioning, is not testimonial”.<sup>149</sup> However, the *Anderson* decision address only one issue in the myriad of issues that *Crawford* encompasses. For Alaska practitioners, I believe it is a safe bet that future Alaska Appellate cases will continue the national trend and produce similar conservative decisions. It appears that more instruction will be available in the near future, the *Crawford* issue is again knocking at the doors of the Supreme Court at this very moment.<sup>150</sup>

---

<sup>149</sup> See *supra* at FN 86

<sup>150</sup> See *supra* at FN 143