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Examining the Repercussions of Crawford: The Uncertain Future of Hearsay Evidence in Missouri

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Notes

Examining the Repercussions of *Crawford*: The Uncertain Future of Hearsay Evidence in Missouri

Crawford v. Washington[1]

I. INTRODUCTION

While making a course correction in Confrontation Clause jurisprudence, the United States Supreme Court leaves much uncertainty in its wake. Some hearsay evidence previously admissible under a "firmly rooted hearsay exception" or because it possessed "particularized guarantees of trustworthiness"[2] will no longer be allowed under the Court's new standard.[3] However, the Court's failure to define its key terms leaves practitioners in desperate need of further clarification.[4]

This Note is intended to assist Missouri practitioners in understanding the Supreme Court's new Confrontation Clause standard as stated in *Crawford v. Washington* and provide practical guidance for its application. The Note identifies Missouri's existing hearsay exceptions that are likely to suffer the greatest impact under *Crawford*[5] and outlines a framework for determining whether a given statement violates the defendant's constitutional right of confrontation.[6]

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1. 541 U.S. 36 (2004).

2. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004). The *Roberts* Court had previously held that the admission of hearsay evidence by an unavailable witness required that the evidence bear "adequate 'indicia of reliability'" which were satisfied either when the evidence was admissible under a "firmly rooted hearsay exception" or because it otherwise possessed "particularized guarantees of trustworthiness." *Id.*

3. *Crawford*, 541 U.S. at 67-69.

4. One commentator notes that "[t]he precise ramifications of *Crawford* will take some time to sort out, but they no doubt will be pervasive." Mark T. Treadwell, *Evidence*, 55 MERCER L. REV. 1219, 1220 (2004). Professor Michael M. Martin observed that "[i]t is very much a matter of how the courts are going to define testimonial . . . . The Supreme Court gave us absolutely no clue on this, except for classic testimony." Tom Perrotta, *The Struggle to Define 'Testimony' After* 'Crawford,' N.Y. L. J., June 21, 2004, at 1.

5. *See infra* Part V.A.

6. *See infra* Part V.B.

II. FACTS AND HOLDING

On August 5, 1999, Kenneth Lee ("Lee") was stabbed in his apartment.[7] The police suspected that Michael Crawford ("Crawford") committed the act and arrested Crawford shortly after the stabbing.[8] After giving *Miranda* warnings to both Crawford and his wife, Sylvia, the police interrogated each separately.[9] During the interrogation, Crawford described an earlier incident in which Lee tried to rape Sylvia.[10] Crawford was upset over this incident and had gone with Sylvia in search of Lee.[11] When they found him, the two men fought and Crawford stabbed Lee in the torso.[12] While Crawford and Sylvia's accounts of the events leading up to the fight were similar, they varied regarding the details immediately surrounding the stabbing.[13] Crawford's account indicated that there may have been a weapon in Lee's hands just before the stabbing.[14] In contrast, Sylvia stated that Lee's hands were empty prior to the stabbing, though Lee may have been reaching for something immediately afterward.[15] The state charged Crawford with attempted murder and assault.[16]

At trial, Crawford claimed self-defense.[17] Sylvia did not testify at trial because of the state's marital privilege[18] which generally bars one spouse's testimony without the other spouse's consent.[19] However, this privilege did not bar evidence of out-of-court statements made by a spouse if a hearsay exception applied.[20] The prosecution offered Sylvia's tape-recorded statements as evidence that Crawford did not act in self-defense.[21] Crawford objected claiming that the evidence violated his federal constitutional right to be "'confronted with the witnesses against him.'"[22]

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7. *Crawford*, 541 U.S. at 38.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 39.
14. *Id.* at 38-39.
15. *Id.* at 39-40.
16. *Id.* at 40.
17. *Id.*
18. *Id.*
19. *See* WASH. REV. CODE. § 5.60.060(1) (1995 & Supp. 2005).
20. *Crawford*, 541 U.S. at 40 (noting that because Sylvia admitted to facilitating the assault by leading Crawford to Lee's apartment, the testimony was admitted as "against penal interest" under WASH. R. EVID. 804(b)(3) (2003)).
21. *Id.*
22. *Id.* (quoting U.S. CONST. amend. VI).

The trial court admitted the evidence anyway, relying on *Ohio v. Roberts*.[23] Under *Roberts*, the confrontation clause is not violated if the out of court statement declared by an unavailable witness bears "adequate 'indicia of reliability.'"[24] A statement bears adequate indicia of reliability if it "falls within a firmly rooted hearsay exception"[25] or possesses "particularized guarantees of trustworthiness."[26]

The trial court looked primarily to procedural factors relating to Sylvia's questioning and found that Sylvia's statements were sufficiently trustworthy.[27] The prosecution played the tape for the jury and emphasized during its closing argument that it was "damning evidence" and that it "completely refutes [Crawford's] claim of self-defense."[28] Crawford was convicted of assault.[29]

The Washington Court of Appeals reversed Crawford's conviction after noting inconsistencies in Sylvia's statement.[30] However, the Washington Supreme Court reinstated the conviction after concluding that sufficient "guarantees of trustworthiness" existed because Sylvia's statement and Crawford's statement were sufficiently similar to one another.[31]

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23. *Id.* (citing Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004)).

24. *Roberts*, 448 U.S. at 66.

25. *Id.*

26. *Id.*

27. *Crawford*, 541 U.S. 40. The trial court reasoned that Sylvia's testimony was sufficiently reliable because she was attempting to corroborate her husband's story, not trying to shift blame; as an eyewitness, she had direct knowledge of the events in question; the events had recently occurred; and "she was being questioned by a 'neutral' law enforcement officer." *Id.*

28. *Id.* at 40-41.

29. *Id.* at 41.

30. *Id.* The appellate court reasoned that Sylvia's testimony was not sufficiently reliable because she gave multiple conflicting statements; the statement in question was made in response to specific questions; and she admitted that she had her eyes closed during the stabbing. *Id.*

31. State v. Crawford, 54 P.3d 656, 664 (Wash. 2002) (en banc), *rev'd*, 541 U.S. 36 (2004). The Washington Supreme Court indicated that "'[w]hen a co-defendant's confession is virtually identical . . . to that of a defendant, it may be deemed reliable' [as] an interlocking confession." *Id.* at 663 (quoting State v. Rice, 844 P.2d 416, 427 (Wash. 1993) (en banc) (citation omitted)). The Washington Supreme Court reasoned that the statements "interlocked" because Crawford and Sylvia were "equally unsure" of the timeline of events and "equally unsure" how Crawford got the cut on his hand. *Id.* at 664. The court concluded that "'neither [Crawford] nor Sylvia clearly stated that Lee had a weapon in hand from which [Crawford] was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable.'" *Id.* (quoting State v. Crawford, No. 25307-1-II, 2001 WL 850119, at *7 (Wash Ct. App. July 30, 2001) (Armstrong, C.J., dissenting)).

The United States Supreme Court granted certiorari[32] to determine whether admitting Sylvia's statement at trial violated Crawford's rights under the Confrontation Clause. Writing for the majority, Justice Scalia stated that one of the failings of the *Roberts* test was its unpredictability, observing that "[r]eliability is an amorphous, if not entirely subjective, concept."[33] As evidenced by the conflicting holdings of the lower courts in this case,[34] the Supreme Court noted that the outcome of the test "depends heavily on which factors the judge considers and how much weight he accords each of them."[35]

However, the Court found that the "unpardonable vice" of the *Roberts* test was not its unpredictability but rather "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[36] Abrogating *Ohio v. Roberts*, the Court held that to meet the requirements of the Confrontation Clause, testimonial hearsay evidence is admissible only when the witness is unavailable and the defendant had a prior opportunity for cross-examination.[37]

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32. Crawford v. Washington, 539 U.S. 914 (2003) (mem.).

33. *Crawford*, 541 U.S. at 63. The Court noted that "[t]he framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Id.*

34. *See supra* notes 27, 30-31 and accompanying text.

35. *Crawford*, 541 U.S. at 63. As further evidence of the subjective nature of the *Roberts* test, the Court observed that "[s]ome courts wind up attaching the same significance to opposite facts." *Id. See* United States v. Photogrammetric Data Servs. Inc., 259 F.3d 229, 245 (4th Cir. 2001) (holding a statement more reliable because it was "fleeting"), *abrogated by Crawford*, 541 U.S. 36; People v. Farrell, 34 P.3d 401, 406-07 (Colo. 2001) (en banc) (holding a statement more reliable because it was "detailed"), *abrogated by Crawford*, 541 U.S. 36. *See also Farrell*, 34 P.3d at 407 (holding a statement more reliable because it was made "immediately after" the events at issue); Stevens v. People, 29 P.3d 305, 316 (Colo. 2001) (en banc) (holding a statement more reliable because two years had passed since the events at issue), *abrogated by Crawford*, 541 U.S. 36; Nowlin v. Commonwealth, 579 S.E.2d 367, 372 (Va. Ct. App. 2003) (holding a statement more reliable because the witness was in custody and charged with a crime, thus making the statement against her penal interest), *abrogated by Crawford*, 541 U.S. 36; State v. Bintz, 650 N.W.2d 913, 918 (Wis. Ct. App. 2002) (holding a statement more reliable because the witness was *not* in custody and *not* a suspect), *abrogated by Crawford*, 541 U.S. 36.

36. *Crawford*, 541 U.S. at 63. The Court noted that despite its cautionary dicta indicating it was "highly unlikely" that accomplice confessions attempting to shift blame to a criminal defendant would be deemed reliable under the *Roberts* test, *id.* at 63-64 (citing Lilly v. Virginia, 527 U.S. 116, 137 (1999)), courts continue to admit these statements, *id.* The Court cited a recent study finding that accomplice statements were admitted by appellate courts in 25 out of 70 cases. *Id.* at 64 (citing Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in* Lilly v. Virginia, 53 SYRACUSE L. REV. 87, 105 (2003)).

37. *Id.* at 68. The Supreme Court acknowledges two possible exceptions to this rule: (1) Dying Declarations (*see infra* notes 130-34 and accompanying text) and (2)

III. LEGAL BACKGROUND

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[38] To determine the extent to which the Framers intended "witnesses against" to include out-of-court statements, we must examine the text in light of the historical backdrop against which the amendment was adopted.

A. The Historical Backdrop of the Confrontation Clause

While the right to confront one's accusers is a concept dating back to Roman times,[39] its roots in English common law probably originated in 1603 with Sir Walter Raleigh's trial for treason.[40] During Raleigh's trial, prior statements made by Lord Cobham, Raleigh's alleged accomplice, were read to the jury.[41] Raleigh argued that in his original statement Cobham had lied to save himself[42] and demanded to confront his accuser "face to face."[43] However, "the English court rejected his request as having no foundation in the common law,"[44] and Raleigh was convicted and sentenced to death.[45] One of the trial judges later acknowledged that "'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'"[46]

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the Forfeiture by Wrongdoing Doctrine (*see infra* notes 163-73 and accompanying text).

38. U.S. CONST. amend. VI.

39. *See* Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988) (quoting the biblical account of Roman Governor Festus' treatment of prisoners in Acts 25:16 where Paul states: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.").

40. *See* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 482 (1994).

41. *Crawford*, 541 U.S. at 44.

42. *Id.*

43. Hermmann & Speer, *supra* note 40, at 481 (quoting Trial of Sir Walter Raleigh, 2 How. St. Tr. 1, 15 (1603)).

44. *Id.* at 481-82.

45. *Crawford*, 541 U.S. at 44.

46. *Id.* (quoting 1 DAVID JARDINE, CRIMINAL TRIALS 520 (1832)). As an underscore to this injustice, it is now believed that Cobham sent a written statement to Raleigh prior to trial which denied Raleigh's involvement in any plot to overthrow the throne. California v. Green, 399 U.S. 149, 157 n.10 (1970) (citing 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883)). Contrary to Cobham's initial statement, Raleigh believed if Cobham were called to testify, he would instead testify in Raleigh's favor. *Id.* (citing 1 STEPHEN, *supra*, at 333-36).

In reaction to the injustice of *Raleigh* and similar abuses, English law began recognizing the right of confrontation.[47] Courts began to strictly limit the admission of testimonial evidence by witnesses unavailable to testify at trial.[48] In *King v. Paine*,[49] even when the witness died prior to trial, the King's Bench refused to admit a prior statement made to a government official because the defendant did not have the opportunity for cross-examination.[50] By 1791, when the Sixth Amendment was ratified, the bright-line rule articulated in *Paine* had become a settled rule at common law.[51]

B. The Supreme Court's Prior Interpretations of the Confrontation Clause

In 1807, during the trial of Aaron Burr, the government attempted to introduce the prior statements of Burr's alleged accomplice who was unavailable to testify.[52] Chief Justice Marshal noted the futility of the Confrontation Clause if "mere verbal declarations, made in his absence, may be evidence against him."[53] The Court held that prior statements not made in the presence of the accused could not be admitted into evidence.[54] However, subsequent opinions show a migration away from this bright-line rule. In 1878, the Court stated that the right of confrontation does not apply when the witness is dead or out of the court's jurisdiction.[55] The Court later retracted part of this hold-

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47. *See Green*, 339 U.S. at 156-57 & n.10.

48. *See* Lord Morley's Case, 6 How. St. Tr. 769 (1666); *see also* MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 164 (1713) and WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1768) (both suggesting that the quest for truth can only be satisfied when an accused is given the opportunity for cross-examination of witnesses against him).

49. 5 Mod. 163, 87 Eng. Rep. 584 (1696).

50. *Id.*

51. *Crawford*, 541 U.S. at 46-47 (citing King v. Woodcock, 1 Leach 500, 502-04, 168 Eng. Rep. 352, 353 (1789); King v. Dingler, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 383-84 (1791); *cf.* King v. Radbourne, 1 Leach 457, 459-61, 168 Eng. Rep. 330, 331-32 (1787); 3 JOHN H. WIGMORE, EVIDENCE § 1364, at 23 (2d ed. 1923)).

52. *See* United States v. Burr, 25 F. Cas. 187, 193 (C.C. Va. 1807) (No. 14,694).

53. *Id.*

54. *Id.* at 198. Chief Justice Marshall further stated,

> If, for example, one of several men who had united in committing a murder should have said, that he with others contemplated the fact which was afterwards committed, I know of no case which would warrant the admission of this testimony upon the trial of a person who was not present when the words were spoken.

Id. at 194-95.

55. Reynolds v. United States, 98 U.S. 145, 151-52 (1878). The Court later clarified its position by holding that mere negligence on the part of the adverse party which prevents a witness from appearing in court is sufficient to allow the admissibility of a prior statement. Motes v. United States, 178 U.S. 458 (1990).

ing by stating that the witness's absence from the court's jurisdiction alone was not sufficient to admit the prior statement.[56] But, in a subsequent decision, the Court conceded that the witness's absence from the court's jurisdiction alone was sufficient when the witness had moved to Sweden.[57]

In *Pointer v. Texas*,[58] the Court found that the right to "confront" a witness is not satisfied when the prior statement was made in the presence of the defendant if the defendant was unrepresented and did not have the opportunity for cross-examination.[59]

In *California v. Green*,[60] Justice Harlan wrestled with the meaning of the Sixth Amendment right noting that "[t]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause."[61] The Court examined the context in which the prior statement was made, and suggested that a level of formality similar to that of trial may be required for its later admissibility.[62]

By the time of *Ohio v. Roberts*, the Court had been trying to divine the Framers' intent for nearly two centuries. Recognizing the importance of the Confrontation Clause,[63] the *Roberts* Court noted that, despite a general bar against the admission of hearsay evidence,[64] the common law has become "riddled with exceptions."[65] In its examination of these common law devel-

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56. Barber v. Page, 390 U.S. 719 (1968).

57. Mancusi v. Stubbs, 408 U.S. 204 (1972).

58. 380 U.S. 400 (1965).

59. *Id.* at 407-08.

60. 399 U.S. 149 (1970).

61. *Id.* at 173-74 (Harlan, J., concurring). Justice Harlan noted that:

> The Confrontation Clause of the Sixth Amendment is not one that we may assume the Framers understood as the embodiment of settled usage at common law. . . . Such scant evidence as can be culled from the usual sources suggests that the Framers understood "confrontation" to be something less than a right to exclude hearsay, and the common-law significance of the term is so ambiguous as not to warrant the assumption that the Framers were announcing a principle whose meaning was so well understood that this Court should be constrained to accept those dicta in the common law that equated confrontation with cross-examination.

Id. at 174-75 (Harlan, J., concurring).

62. *Id.* at 165. *See also* State v. Hall, 508 S.W.2d 200 (Mo. Ct. App. 1974).

63. Ohio v. Roberts, 448 U.S. 56, 64 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004). The Court noted that the inability to adequately confront witnesses "'calls into question the ultimate integrity of the fact-finding process.'" *Id.* (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (internal quotations omitted)).

64. *See generally* FED. R. EVID. 802.

65. *Roberts*, 448 U.S. at 62. See MCCORMICK ON EVIDENCE §§ 253-324 (John W. Strong ed. 4th ed. 1992) for a list of common law exceptions which varies drastically by jurisdiction. See also FED R. EVID. 803, 804(b) for more than twenty codified

opments, the Court concluded that many of the hearsay exceptions were predicated on ensuring the reliability of the evidence.[66] The Court held that when the prosecution is unable to produce the witness for trial after making a "good faith effort,"[67] a prior statement can be admitted if it bears "adequate 'indicia of reliability.'"[68]

IV. INSTANT DECISION

A. The Majority Opinion

In *Crawford v. Washington*,[69] the Supreme Court reexamined the constitutionality of its twenty-three-year-old *Roberts* decision.[70] Writing for the majority, Justice Scalia[71] noted that the Confrontation Clause is ambiguous on its face because the phrase "witnesses against" could be interpreted to include a variety of possible meanings.[72] A narrow interpretation could limit its scope to include only those witnesses who testify at trial, or the text could be interpreted broadly to include any statement offered at trial.[73] After a lengthy examination of the common law right of confrontation prior to the

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exceptions. The Court compared the variety of available exceptions to "'an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.'" *Roberts*, 448 U.S. at 62 (quoting Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)).

66. *Roberts*, 448 U.S. at 66. The Court noted that the "'hearsay rules and the Confrontation Clause are generally designed to protect similar values.'" *Id.* (quoting California v. Green, 399 U.S. 149, 155 (1971)).

67. *Id.* However, the Court noted that sometimes no effort is required because "[t]he law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith' demands nothing of the prosecution." *Id.* at 74.

68. *Id.* at 66. The Court found that "adequate 'indicia of reliability'" exist when the evidence is admissible under a "firmly rooted hearsay exception" or otherwise bears "particularized guarantees of trustworthiness." *Id.*

69. 541 U.S. 36 (2004).

70. *Id.* at 42. More than a decade earlier, Justice Thomas (joined by Justice Scalia) foreshadowed this reexamination noting that "our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself." White v. Illinois, 502 U.S. 346, 358 (1992) (Thomas, J., concurring in judgment).

71. Justice Scalia was joined in his majority opinion by Justices Stevens, Kennedy, Souter, Thomas, Ginsberg, and Breyer. Chief Justice Rehnquist, joined by Justice O'Connor, filed a separate opinion concurring in the judgment. *Crawford*, 541 U.S. at 37.

72. *Id.* at 42-43.

73. *Id.*

adoption of the Sixth Amendment,[74] the Court concluded that the primary focus of the Confrontation Clause was the "use of *ex parte* examinations as evidence against the accused."[75] The Court concluded that the constitutionally limited use of *ex parte* examinations applied to "'witnesses' against the accused," or in other words, to "those who 'bear testimony.'"[76]

The Court then turned to a variety of possible definitions of "testimonial" evidence to be included in the limitations of the Sixth Amendment.[77] Failing to agree on a specific definition, the Court reasoned that some determinations can be made "[r]egardless of the precise articulation."[78] To illustrate, the Court noted that *ex parte* testimony at a preliminary hearing would be considered "testimonial" under any definition,[79] but that business records and statements in furtherance of a conspiracy would not be included.[80]

The Court also reasoned that statements taken by police officers during "interrogations" would also be considered "testimonial."[81] However, the Court again stopped short of defining its terminology, noting only that it "use[d] the term 'interrogation' in its colloquial, rather than any technical

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74. *Id.* at 43-50. *See supra* Part III.A.

75. *Id.* at 50. The Court noted that there is no direct correlation between the scope of the Confrontation Clause and the use of hearsay testimony. *Id.* at 50-51. First, some hearsay statements are not included in the scope of the Confrontation Clause. *Id.* at 51. For example, "[a]n off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id.* Second, the Court acknowledged the possibility that the scope of the Confrontation Clause may not be "solely concerned with testimonial hearsay." *Id.* at 53.

76. *Id.* at 51 (quoting 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

77. *Id.* at 51-52. In exploring the meaning of the term "testimonial," the Court cited the following four definitions: (1) "'A solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (quoting 1 WEBSTER, *supra* note 76). (2) "'[*E*]*x Parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'" *Id.* (quoting Petitioner's Brief at 23, *Crawford* (No. 02-9401)). (3) "'[E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" *Id.* at 52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)). (4) "'[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* (quoting Brief of Amici Curiae National Association of Criminal Defense Lawyers et al. at 3, *Crawford* (No. 02-9401)).

78. *Id.* at 52.

79. *Id.*

80. *Id.* at 56. *See infra* notes 144-45 for further discussion of the intended scope of these exclusions.

81. *Crawford*, 541 U.S. at 52.

legal, sense."[82] The Court acknowledged that "[j]ust as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case."[83] The Court concluded that because Sylvia's statement was "knowingly given in response to structured police questioning," it would be considered testimonial under "any conceivable definition."[84] Having found Sylvia's statement to "fall squarely" within the scope of testimonial evidence limited by the Confrontation Clause, the Court turned its attention to interpreting the specific limitations that must be constitutionally imposed.[85]

After a review of the historical record, the Court reasoned that the central purpose of the Confrontation Clause is to ensure the reliability of evidence.[86] According to the Court, the Sixth Amendment addresses this concern by prescribing a specific procedural method for accomplishing this goal.[87] The Court concluded that the right of cross-examination is not merely a suggested method for ensuring the reliability of testimonial evidence, but rather it is an absolute constitutional requirement for its admissibility.[88]

The Court criticized its prior decision in *Roberts* by observing that allowing a judicial determination of reliability is substituting the "constitutionally prescribed method of assessing reliability with a wholly foreign one."[89] It reasoned that the *Roberts* test is simultaneously too broad and too narrow.[90] It is too broad because the test applies regardless of whether *ex parte* testimony is involved and often excludes evidence that is unrelated to the concerns of the Confrontation Clause.[91] It is also too narrow because it allows for the admission of *ex parte* testimony based on the mere determination of reliability, a result which is constitutionally prohibited by the Court's new interpretation of the Sixth Amendment.[92]

To correct the simultaneous overbreadth and underbreadth of its previous test,[93] the Court abrogated its decision in *Ohio v. Roberts*, holding that to meet the requirements of the Confrontation Clause, testimonial hearsay evidence is admissible only when the witness is unavailable and the defendant

82. *Id.* at 53 n.4.
83. *Id.*
84. *Id.*
85. *Id.* at 53.
86. *Id.* at 61.
87. *Id.*
88. *Id.*
89. *Id.* at 62. The Court analogized that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.*
90. *Id.* at 60.
91. *Id.*
92. *Id.*
93. *Id.* at 61.

had a prior opportunity for cross-examination.[94] Applying this rule to the facts of the case, the Court concluded that because Crawford did not have the opportunity to cross-examine Sylvia, the admission of her testimonial statements at trial violated Crawford's Sixth Amendment right to confront witnesses against him.[95] The judgment of the Washington Supreme Court was reversed and the case was remanded for further proceedings consistent with this opinion.[96]

B. The Concurrence

In a separate opinion concurring only in the judgment, Chief Justice Rehnquist,[97] reading the majority opinion to have entirely overruled *Ohio v. Roberts*, disagreed with the majority's decision.[98] The Chief Justice noted that any decision to overrule a case "decided nearly a quarter of a century ago" must be approached with caution and weighed against the principles of *stare decisis*.[99] In such a case, a ruling consistent with established precedent "'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'"[100]

Rehnquist argued that *stare decisis* should apply here because the majority's "distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history" than the *Roberts* test.[101] Rehnquist noted that "[s]tarting with Chief Justice Marshall's interpretation as a Circuit Justice in 1807, 16 years after the ratification of the Sixth Amendment[102]

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94. *Id.* at 68. The Supreme Court acknowledges two possible exceptions to this rule: (1) Dying Declarations (*see supra* notes 130-34 and accompanying text) and (2) the Forfeiture by Wrongdoing Doctrine (*see supra* notes 163-73 and accompanying text).

95. *Crawford*, 541 U.S. at 68. The Court expressed no opinion about whether invoking spousal privilege constituted a waiver of Crawford's confrontation rights. *Id.* at 42 n.1. The Washington Court of Appeals rejected the State's waiver argument reasoning that "[f]orcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." State v. Crawford, 54 P.3d 656, 660 (Wash. 2002) (en banc), *rev'd*, 541 U.S. 36 (2004). The state did not subsequently challenge this conclusion. *Crawford*, 541 U.S. at 42 n.1.

96. *Crawford*, 541 U.S. at 69.

97. Justice O'Connor joined Chief Justice Rehnquist in his concurring opinion.

98. *Id.* at 69 (Rehnquist, C.J., concurring).

99. *Id.* at 75. (Rehnquist, C.J., concurring).

100. *Id.* (Rehnquist, C.J., concurring) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)).

101. *Id.* at 69 (Rehnquist, C.J., concurring).

102. *Id.* at 71 (Rehnquist, C.J., concurring) (citing United States v. Burr, 25 F. Cas. 187, 193 (CC Va. 1807) (No. 14,694)).

continuing with our cases in the late 19th century[103] and through today[104] we have never drawn a distinction between testimonial and nontestimonial statements."[105]

Rehnquist further argued that the ambiguity of the majority's new rule also weighs in favor of maintaining the *Roberts* test.[106] The Chief Justice opined that the majority decision "casts a mantle of uncertainty over future criminal trials in both federal and state courts."[107] The majority deliberately omitted a comprehensive definition of "testimonial," on which its new test relies.[108] The Chief Justice chastised the Court for leaving "the thousands of federal prosecutors and the tens of thousands of state prosecutors . . . in the dark."[109] Because the rules of evidence are applied every day in courts throughout the country, Rehnquist felt that practitioners needed clearer guidance regarding the specific types of "testimony" covered by this new rule.[110] Absent clearer guidance, the Chief Justice gave the majority credit for holding any court's mistaken application of the rule to a mere harmless-error standard.[111]

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103. *Id.* (Rehnquist, C.J., concurring) (citing Mattox v. United States, 156 U.S. 237, 243-44 (1885) and Kirby v. United States, 174 U.S. 47, 54-57 (1899)).

104. *Id.* at 72 (Rehnquist, C.J., concurring) (citing White v. Illinois, 502 U.S. 346, 352-53 (1992)).

105. *Id.* According to Rehnquist, a distinction that appears to emerge from the historical record is one based not on the classification of the statement as "testimonial," but rather a distinction that relates to whether or not the declarant was under oath. *Id.* at 69-70 (Rehnquist, C.J., concurring) (citing King v. Woodcock, 1 Leach 500, 503, 168 Eng. Rep. 352, 353 (K.B.1789) and King v. Braisier, 1 Leach 199, 200, 168 Eng. Rep. 202 (K.B. 1779)).

106. *Id.* at 75-76 (Rehnquist, C.J., concurring).

107. *Id.* at 69 (Rehnquist, C.J., concurring).

108. *Id.* at 75 (Rehnquist, C.J., concurring).

109. *Id.* at 75-76 (Rehnquist, C.J., concurring).

110. *Id.* at 76 (Rehnquist, C.J., concurring).

111. *Id.* (Rehnquist, C.J., concurring). Rehnquist referred to an implicit recognition of the harmless error standard in a majority footnote which observed that "[t]he State also has not challenged the Court of Appeals' conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless. We express no opinion on [this] matter[]." *Id.* at 42 n.1. Subsequent courts have followed this implicit recognition, holding erroneous admissions that violate *Crawford* to a harmless error standard. *See* United States v. Rashid, 383 F.3d 769, 776 (8th Cir. 2004) (While the out-of-court statements made by a co-defendant to an FBI agent during the course of an interrogation were "testimonial" and thus inadmissible under *Crawford*, the conviction was affirmed because "the other evidence of [the defendant's] guilt was overwhelming."); United States v. Lee, 374 F.3d 637, 643-45 (8th Cir. 2004) (The court declined to determine whether defendant's confession to his mother who allegedly later became an agent of the government was "testimonial" under *Crawford*, concluding that the confession "merely corroborated the large amount of evidence presented against Lee at trial. Any error in the admission of these statements was harmless beyond a reasonable doubt.").

Rather than overturning *Ohio v. Roberts*, Rehnquist suggested that the Washington Supreme Court's decision to support the admission of Sylvia's statement in this case could be reversed on other grounds.[112]

V. COMMENT

The Supreme Court's decision in *Crawford v. Washington* can be simultaneously viewed as both a victory for criminal defendants[113] and an additional obstacle for prosecutors.[114] Hailed as the Court's "most significant evidence decision in a number of years,"[115] *Crawford* has significant repercussions for criminal practitioners.[116]

Prior to *Crawford*, the admission of prior statements by an unavailable witness under a "firmly rooted hearsay exception" automatically satisfied the "adequate 'indicia of reliability'" requirement to overcome the defendant's

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112. *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring). The Chief Justice would instead rely on the Court's holding in *Idaho v. Wright*, 497 U.S. 805, 820-24 (1990), which states that an out-of-court statement is not admissible solely because its truthfulness was corroborated by other evidence at trial. *Id.* (Rehnquist, C.J., concurring). Rehnquist reasoned that because the Supreme Court of Washington gave decisive weight to the corroborative evidence that Sylvia's statement "interlocked" with Crawford's testimony, it erred in applying the law and its judgment could be reversed without reexamining the constitutionality of the *Roberts* test. *Id.* (Rehnquist, C.J., concurring).

113. One commentator notes that "*Crawford* is a very positive development, restoring to its central position one of the basic protections of the common law system of criminal justice." Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores the Confrontation Clause Protection*, CRIMINAL JUSTICE, Summer 2004, at 4, 5 (2004).

114. According to the American Prosecutor's Research Institute, "the United States Supreme Court has interpreted the 6th amendment confrontation clause in such a manner as to undermine the ability of prosecutors to admit . . . hearsay statements when the [witness] is unavailable for testimony." Victor I. Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, UPDATE (Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), Nov. 12, 2004, at 12, *available at* http://www.ncdsv.org/images/KeepingBalanceWake.pdf.

115. Treadwell, *supra* note 4, at 1219.

116. In anticipation of trial, *Crawford* "requires that all counsel keep a close eye on future interpretations of the opinion. To do otherwise is to put at risk future prosecutions or to suffer the consequences of ineffective assistance of counsel." Major Robert William Best, *2003 Developments in the Sixth Amendment: Black Cats on Strolls*, ARMY LAW., July 2004, at 55, 64. Practitioners may also face instances where evidence was originally admitted under the *Roberts* standard, but is later subjected to post-*Crawford* appeal. *See* Perrotta, *supra* note 4, at 1 (identifying strategies for appeal). "While prosecutors suggest they will be able to deflect most appeals with a 'harmless error' defense, it is clear they will have to spend hours vetting cases they thought were all but closed." *Id.*

right of confrontation.[117] *Crawford* essentially parses the hearsay and confrontation requirements into two separate inquires.[118] After determining the admissibility under a hearsay exception, a court must then determine whether a confrontation violation exists.

The analysis that follows is intended as a practitioner's guide to understanding the Supreme Court's decision in *Crawford v. Washington.* First, this analysis begins by identifying Missouri's previously-settled hearsay exceptions which will likely suffer the greatest impact under the new interpretation of the Confrontation Clause. Second, this analysis provides a framework for determining whether a given statement violates a defendant's right of confrontation under the new standard.

A. Crawford*'s Impact on Previously-settled Missouri Hearsay Exceptions*

Statements previously admitted under the following hearsay exceptions will now have difficulty surviving a constitutional challenge:

Statements of Child Abuse Victims—The Court's holding in *Crawford* seriously calls into question the validity of Missouri's statutory provision allowing the admissibility of prior statements of child abuse victims that are absent from trial.[119] The determination of admissibility will hinge on whether these statements are considered "testimonial" under *Crawford.*[120] *Crawford* makes it clear that statements made in response to police interrogations that were admissible prior to *Crawford*[121] will now be considered "testimonial" and inadmissible.[122] Depending upon which definition of "testimonial" is

117. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 124 S. Ct. 1354 (2004).

118. *Crawford*, 541 U.S. at 60-61.

119. See MO. REV. STAT. § 491.075 (2000) which provides that a statement made by a child under the age of fourteen relating to an offense under MO. REV. STAT. chs. 565 (offenses against the person), 566 (sexual offenses), or 568 (offenses against the family) is admissible upon a judicial determination of reliability when the child is either determined to be unavailable or when "significant emotional or psychological trauma . . . would result from testifying."

120. The Court specifically questioned the validity of its holding in *White v. Illinois*, 502 U.S. 346 (1992), where the out-of-court statements by a child abuse victim to an investigating police officer were admitted over a hearsay objection. *Crawford*, 541 U.S. at 58 n.8.

121. *See* State v. Murray, 838 S.W.2d 83 (Mo. Ct. App. 1992) (admitting statements of five-year-old sodomy victim made during police interrogation), *overruled on other grounds by* State v. Redman, 916 S.W.2d 787 (Mo. 1996) (en banc); State v. Gill, 806 S.W.2d 48, 52 (Mo. Ct. App. 1991) (admitting statement of four-year-old victim of sexual abuse during police questioning); State v. Phelps, 816 S.W.2d 227, 229 (Mo. Ct. App. 1991) (admitting child statement in response to questioning by juvenile officer).

122. *Crawford*, 541 U.S. at 53.

eventually adopted, statements made to the victim's physician,[123] nurse,[124] therapist,[125] parent,[126] or other relative[127] that were previously admitted under the *Roberts* test may also no longer be admissible.[128] Even when the statement is determined to be testimonial, an argument could be made in favor of its admissibility under the forfeiture doctrine.[129]

Dying declarations—In Missouri, statements made just before death by a now-deceased victim of criminal homicide concerning the cause of death have long been an exception to the hearsay rule.[130] The *Crawford* Court noted that dying declarations which are non-testimonial are not covered by its new rule.[131] The Court saved for another day the decision of exactly what rule applies to dying declarations that are testimonial.[132] The court acknowledged the argument that testimonial dying declarations may be permissible because the hearsay exception for dying declarations is the only criminal hearsay exception recognized at common law.[133] However, the Court was careful to note that it "need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*."[134]

Statements Against Interest—Missouri courts have historically recognized a hearsay exception for statements against interest. A statement against interest is a statement made against the pecuniary, proprietary, or penal interest of the declarant when the circumstances make any motive to falsify improbable.[135] Because the Supreme Court in *Crawford* held that the judicial

123. *See* State v. Naucke, 829 S.W.2d 445 (Mo. 1992) (en banc).

124. *See* State v. Mackey, 822 S.W.2d 933 (Mo. Ct. App. 1991).

125. *See* State v. Jankiewicz, 831 S.W.2d 195 (Mo. 1992) (en banc).

126. *See* State v. Whittle, 813 S.W.2d 336 (Mo. Ct. App. 1991).

127. *See* State v. Jefferson, 818 S.W.2d 311 (Mo. Ct. App. 1991), *overruled on other grounds by* State v. Gillam, 916 S.W.2d 787 (Mo. 1996) (en banc).

128. In *State v. Courtney*, 682 N.W.2d 185 (Minn. Ct. App. 2004), a Minnesota court found that a videotaped interview of a child witness by a child protection worker was considered "testimonial" under *Crawford* and violated the defendant's right of confrontation. *Id.* at 196-97. The court reversed the conviction stating that the error in admitting the statement was not harmless because the evidence was critical to the case. *Id.*

129. *See infra* notes 163-73 and accompanying text.

130. Cummings v. Illinois Cent. R.R. Co., 269 S.W.2d 111, 119-21 (Mo. 1954); *see also* State v. Strawther, 116 S.W.2d 133, 137 (Mo. 1938).

131. Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004).

132. *Id.*

133. *Id.*

134. *Id.*

135. *See* State v. Grant, 560 S.W.2d 39, 42-43 (Mo. Ct. App. 1977). *See also* State v. Blankenship, 830 S.W.2d 1, 6-8 (Mo. 1992) (en banc) (further expanding the exception to statements against penal interests in criminal cases when the declarant's confession exculpating the criminal defendant is corroborated by additional evidence); Osborne v. Purdome, 250 S.W.2d 159, 163 (Mo. 1952) (en banc) (originally

determination of reliability was an impermissible substitute for the defendant's right of confrontation,[136] testimonial statements admitted under this exception will undoubtedly fail to survive a constitutional challenge.

Residual Exception—The residual exception allows for the admissibility of declarations not included within other hearsay exceptions upon a finding of reliability and trustworthiness.[137] As with statements against interest, a judicial determination of reliability will no longer be sufficient to admit prior testimonial statements by an unavailable witness under the residual hearsay exception.[138]

B. Determining if a Prior Statement Violates the Confrontation Clause

To determine whether the admissibility of a prior statement violates the Confrontation Clause, a Missouri practitioner must engage in the following six-step process:

[1] *Is the statement being used to establish the truth of the matter asserted?* If not, the *Crawford* majority acknowledged that no violation occurs.[139] Only if the prior statement is being used to establish the truth of the matter asserted does the *Crawford* analysis continue.

[2] *Will the declarant be testifying at trial?* If so, the *Crawford* majority confirmed that "the Confrontation Clause places no constraints at all on the use of" prior statements."[140] Only if the declarant will not be testifying at trial does the *Crawford* analysis continue.[141]

[3] *Is the statement "testimonial"?* Although the Supreme Court failed to provide a comprehensive definition of what statements would be considered "testimonial" under the *Crawford* test, it recognized that statements at a preliminary hearing or trial are testimonial,[142] as are statements made in re-

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applying the exception only to statements against pecuniary or proprietary interests); Sutter v. Easterly, 189 S.W.2d 284, 289-90 (Mo. 1945) (expanding the exception in civil cases to include statements against penal interests).

136. *Crawford*, 541 U.S. at 61-62.

137. *See* Moore v. Dir. of Revenue, 811 S.W.2d 848, 851-52 (Mo. Ct. App. 1991).

138. *Crawford*, 541 U.S. at 61-62.

139. *Id.* at 59 n.9.

140. *Id.* (citing California v. Green, 399 U.S. 149, 162 (1970)).

141. In a recent post-*Crawford* decision, the Eight Circuit distinguished between a criminal trial and a subsequent parole revocation hearing and concluded that *Crawford* did not apply to the admission of evidence in the later instance. United States v. Martin, 382 F.3d 840, 844 n.4 (8th Cir. 2004). The court noted that "a parole revocation hearing should not, for this purpose, be equated with a criminal trial. In other words, the constitutional standard applicable in this type of post-conviction revocation hearing will sometimes permit the admission of evidence that would otherwise be inadmissible in a criminal prosecution." *Id.* at 844 (citing Morrissey v. Brewer, 408 U.S. 471, 489 (1972)).

142. *Crawford*, 541 U.S. at 52.

sponse to structured police questioning.[143] However, the Court cited business records[144] and statements made in furtherance of a conspiracy[145] as examples of non-testimonial statements. Beyond these limited examples, the Court surveyed four possible definitions of "testimonial."[146] These definitions appear to be mostly concerned with the presence of sufficient formality in the declaration.

The Eighth Circuit recently indicated a preference for the adoption of the most limited definition of "testimonial" allowed by the Supreme Court.[147] The Eighth Circuit noted that "by its terms, *Crawford*'s holding applies '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.'"[148] Although acknowledging "this definition," the Eighth Circuit concluded that *Crawford* was not to be retroactively applied.[149]

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143. *Id.*

144. *Id.* at 56. While the Court did not define what constituted "business records" for the purposes of this exclusion, it is unlikely that the Court intended all records kept in the course of business to be categorically excluded from any finalized definition of "testimonial." For example, while an autopsy report specifically prepared in preparation for trial could technically be considered a "business record," it also resembles the very type of *ex parte* testimony that the Confrontation Clause is intended to protect. However, a recent trial court decision in Alabama failed to conduct a fact specific analysis, but instead elected to categorically admit an autopsy report prepared by a medical examiner who was unavailable to testify at trial after classifying the report as a "business record." Smith v. State, No. CR-02-1218, 2004 WL 921748, at *8 (Ala. Crim. App. Apr. 30, 2004).

145. *Crawford*, 541 U.S. at 56. Unlike the Court's example of "business records" as non-testimonial hearsay, its recognition of statements by a co-conspirator as non-testimonial is more likely intended as a categorical exclusion due to this exception's basis in agency theory. *See* United States v. Kehoe, 310 F.3d 579, 590-91 (8th Cir. 2002) (holding that the Confrontation Clause did not guarantee the defendant the right to cross-examine a speaker whose statements were imputed to the defendant as adoptive admissions of a party opponent.). Post-*Crawford* decisions have consistently recognized that statements by co-conspirators are categorically non-testimonial. *See* United States v. Reyes, 362 F.3d 536, 540-41 (8th Cir. 2004); United States v. Lee, 374 F.3d 637, 644 (8th Cir. 2004).

146. *Crawford*, 541 U.S. at 51-52; *see also supra* note 77.

147. Evans v. Luebbers, 371 F.3d 438, 445 (8th Cir. 2004)

148. *Id.* (quoting *Crawford*, 541 U.S. at 68). In quoting the Supreme Court, the Eighth Circuit omitted the preceding text of *Crawford* which states, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers it applies *at a minimum* . . . ." *Crawford*, 541 U.S. at 68 (emphasis added).

149. *Evans*, 371 F.3d at 444-45. In support of its conclusion that the *Crawford* standard should only be prospectively applied, the Eight Circuit noted that "the *Crawford* Court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to

If the statement is not testimonial, the *Crawford* Court left undefined the appropriate standard to apply and instead enumerated three possibilities.[150] The Court first noted that "it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law."[151] Alternatively, the Court did not foreclose application of the *Roberts* test to non-testimonial statements.[152] Finally, the Court noted that perhaps non-testimonial statements should be "exempted . . . from Confrontation Clause scrutiny altogether."[153]

Only if the statement is "testimonial" does the *Crawford* analysis continue.

[4] *Is the declarant "unavailable" to testify?* Prior testimonial statements by a witness absent from trial are admissible only when the court determines that "the witness is unavailable as a practical proposition."[154] Missouri courts have found declarants "unavailable" for trial when the declarant is dead,[155] insane,[156] physically[157] or emotionally[158] disabled, suffering from

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Teague v. Lane's non-retroactivity doctrine." *Id.* (citing Teague v. Lane, 489 U.S. 288 (1989)). The Eighth Circuit indicated that these two exceptions include "(1) new rules that place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" and "(2) 'watershed rules of criminal procedure' that increase the accuracy of the judicial process." *Id.* (quoting *Teague*, 489 U.S. at 311). However, the Eighth Circuit's decision did not reference another *Teague* exception which provides for the retroactive application of new rules "if a failure to adopt them will result in an impermissibly large risk that the innocent will be convicted and if the procedure at issue implicates the fundamental fairness of the trial." United States v. Sanchez-Cervantez, 282 F.3d 664, 668-69 (9th Cir. 2002). The application of this exception is supported by the *Crawford* majority's references to the Confrontation Clause as a "bedrock procedural guarantee" of a fair trial, *Crawford*, 541 U.S. at 42, and the only constitutionally prescribed method for ensuring the reliability of testimony, *id.* at 61. Alternatively, retroactivity could be advocated by arguing that the *Crawford* Court did not actually articulate a "new rule" at all, but merely recognized a requirement that was incorporated into the Constitution in 1791. The *Crawford* Court noted that the roots of its holding date "back to Roman times." *Id.* at 43. In addition, "the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations." *Id.* at 54.

150. *Crawford*, 541 U.S. at 68.

151. *Id.*

152. *Id.*

153. *Id.* Although states may not be constrained by the Confrontation Clause when adopting admission standards for non-testimonial evidence, presumably they would still be constrained by other constitutional limitations such as the Due Process Clause. U.S. CONST. amend. XIV.

154. Sutter v. Easterly, 189 S.W.2d 284, 289 (Mo. 1945).

155. *See* State v. Fleming, 451 S.W.2d 119, 121 (Mo. 1970) (per curiam).

156. *See* State v. Pierson, 85 S.W.2d 48, 52-54 (Mo. 1935) (per curiam).

157. *See* State v. Williams, 554 S.W.2d 524, 531-35 (Mo. Ct. App. 1977).

158. *See In re* S. J., 849 S.W.2d 608, 613 (Mo. Ct. App. 1993).

memory loss,[159] asserting the privilege against self-incrimination,[160] or after the exercise of due diligence to procure the declarant's presence.[161] Only if the declarant is "unavailable" to testify does the *Crawford* analysis continue.

[5] *Did the defendant have the prior opportunity for cross-examination?* If so, the Confrontation Clause is not violated.[162] Only if the defendant did not have the opportunity to cross-examine the declarant does the *Crawford* analysis continue.

[6] *Did the defendant forfeit the right to confront the witness against him?* The *Crawford* majority affirmed the validity of the forfeiture by wrongdoing doctrine which essentially extinguishes the right of confrontation on equitable grounds.[163] In 1934 dicta, the Supreme Court acknowledged that the right of confrontation "may be lost by consent or at times even by misconduct."[164] However, the doctrine has only recently gained mainstream application.[165] While many jurisdictions,[166] including the Eighth Circuit,[167] have

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159. *See* Orr v. State Farm Mut. Auto. Ins. Co., 494 S.W.2d 295, 299 (Mo. 1973) (en banc).

160. *See* State v. Holt, 592 S.W.2d 759, 766 (Mo. 1980) (en banc).

161. *See* State v. Sanders, 903 S.W.2d 234, 237 (Mo. Ct. App. 1995).

162. Crawford v. Washington, 541 U.S. 36, 68 (2004). The *Crawford* holding does not abrogate its prior decisions which define the circumstances under which a sufficient "opportunity" for cross examination has been provided. *See* Mancusi v. Stubbs, 408 U.S. 204, 213-16 (1972); California v. Green, 399 U.S. 149, 165-68 (1970); Pointer v. Texas, 380 U.S. 400, 406-08 (1965).

163. *Crawford*, 541 U.S. at 62. The doctrine of forfeiture by wrongdoing was articulated in *Reynolds v. United States*, 98 U.S. 145 (1878), which stated:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Id. at 158. For a discussion of the historical background of this doctrine and related issues, see Paul T. Markland, Comment, *The Admission of Hearsay Evidence Where Defendant Misconduct Causes the Unavailability of a Prosecution Witness*, 43 AM. U. L. REV. 995 (1994).

164. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

165. In 1997, the forfeiture by wrongdoing doctrine was codified as an exception to the hearsay evidence rule in the Federal Rules of Evidence. FRE 804(b)(6) now allows the admission of "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of

recently recognized the forfeiture by wrongdoing doctrine, Missouri has not applied the doctrine in nearly eight decades.[168]

Although the forfeiture doctrine has historically been applied to instances where the defendant's act of wrongdoing occurred subsequent to the

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the declarant as a witness." FED. R. EVID. 804(b)(6). The Federal Rules of Evidence committee notes state that

> Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself."

FED. R. EVID. 804 advisory committee note (quoting United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir.1982)).

166. In *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), the only witness to a drug conspiracy was killed while en route to the courthouse. *Id.* at 271. While the trial court admitted the deceased witness's prior grand jury testimony under the residual hearsay exception, the Second Circuit remanded the case for an evidentiary hearing to determine the defendant's role in the death of the witness. *Id.* at 273. The Second Circuit noted that

> [i]f the District Court finds that [the defendant] was in fact involved in the death of [the witness] through knowledge, complicity, planning or in any other way, it must hold his objections to the use of [the witness's] testimony waived. Bare knowledge of a plot to kill [the witness] and a failure to give warning to appropriate authorities is sufficient to constitute a waiver.

Id. at 273-74. *See also* United States v. Aguiar, 975 F.2d 45, 47 (2d Cir.1992); United States v. Potamitis, 739 F.2d 784, 789 (2d Cir. 1984); Steele v. Taylor, 684 F.2d 1193, 1199 (6th Cir. 1982); United States v. Balano, 618 F.2d 624, 629 (10th Cir. 1979).

167. United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976). The court found that a witness to a drug transaction had "refused to testify because of threats directed against him by [the defendant]." *Id.* at 1353. The court recognized that "[t]he Sixth Amendment right of confrontation is, by its language and historical underpinnings, a personal right of the accused and is intended for his benefit." *Id.* at 1357 (citing Faretta v. California, 422 U.S. 806, 819-20 (1975)). "As such, this right, like other federally guaranteed constitutional rights, can be waived by the accused." *Id.* at 1357-58 (citing Brookhart v. Janis, 384 U.S. 1, 4, (1966)). The court further noted that a valid waiver requires a voluntary "'relinquishment or abandonment of a known right or privilege.'" *Id.* at 1358 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The court admitted the witness's prior grand jury testimony after concluding that the defendant's threats against the witness constituted a voluntary waiver of his right of confrontation. *Id.* at 1360.

168. The last Missouri case recognizing the forfeiture by wrongdoing doctrine was decided in 1926. State v. Brown, 285 S.W. 995 (Mo. 1926). In this case, the defendant was tried for selling "moonshine" and the court admitted the witness's prior testimony after finding that the witness "was absent and out of the jurisdiction of the court by the procurement and connivance of the defendant." *Id.* at 995.

criminal act for which the defendant was charged,[169] the *Crawford* decision has led at least one commentator to advocate the expansion of this doctrine to include instances where the witness was prevented from testifying due to the very act for which the defendant is on trial.[170] The Supreme Court of Kansas recently agreed with this expansive application allowing the statements of a gunshot victim to be admitted against his assailant.[171] If Missouri courts also decide to endorse the expansive application of the forfeiture doctrine, the statutory allowance of hearsay testimony of child abuse victims may survive a constitutional challenge.[172] The courts could reach this conclusion by finding that the "significant emotional or psychological trauma which would result from testifying" was caused by the defendant's wrongful act.[173]

If the rule of forfeiture by wrongdoing does not apply, the admission of an unavailable witness's prior testimonial hearsay statement clearly violates the defendant's Sixth Amendment right of confrontation under the *Crawford* test.

VI. CONCLUSION

Although this Note has identified potential repercussions of the Supreme Court's decision in *Crawford v. Washington* and provided a framework for analyzing the new standard, Missouri practitioners still face significant uncertainty. Some hearsay evidence previously admissible under a "firmly rooted hearsay exception" or because it possessed "particularized guarantees of trustworthiness"[174] will no longer be allowed under the Court's new stan-

169. *See supra* notes 163-68 and accompanying text.

170. *See* Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 252 (2002) (noting that "[a]t first glance, this application of the forfeiture principle might seem to be a bizarre instance of bootstrapping. But it is not. . . . For purposes of deciding whether the forfeiture principle applied, the judge would determine whether the accused had committed misconduct rendering the witness unable to testify. . . . [T]he judge would not have to explain her decision to the jurors and so would not need to inform them that she had made a determination as to whether the accused had committed misconduct. The jury would decide guilt or innocence of the crime.").

171. State v. Meeks, 88 P.3d 789 (Kan. 2004). In response to questioning by the first police officer to arrive at the scene, the victim stated, "Meeks shot me." *Id.* at 792. The victim died as a result of the injury and was unavailable to testify at trial. *Id.* The court recognized that the victim's statement made in response to police questioning was arguably "testimonial" under *Crawford*. *Id.* at 793. However, the court concluded that it "need not determine whether the response was testimonial or not . . . because we hold that Meeks forfeited his right to confrontation by killing the witness." *Id.* at 793-94.

172. *See supra* notes 119-29 and accompanying text.

173. *See* MO. REV. STAT. § 491.075.1(c) (2000).

174. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

dard.[175] However, because the Court failed to define its key terms, practitioners await future judicial guidance to help solidify the application of the Court's new interpretation of the Confrontation Clause.

JON W. JORDAN

175. *Crawford*, 541 U.S. at 68-69.