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# The Admissibility of Co-Conspirator Statements in a Post-Crawford World

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# THE ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS IN A POST-*CRAWFORD* WORLD

MICHAEL L. SEIGEL* AND DANIEL WEISMAN**


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## I. INTRODUCTION

The Supreme Court's decision in *Crawford v. Washington*[1] has significantly changed the status quo regarding the types of statements that may come into evidence in criminal trials. Inculpatory out-of-court statements that a prosecutor could once count on to be admitted against a defendant at trial through various hearsay exceptions are now being suppressed. The government is in damage-control mode, and defense lawyers are pushing to find out just how

* Professor of Law, University of Florida Fredric G. Levin College of Law. Professor Seigel would like to acknowledge his co-author for conceiving the basic idea that led to the proposal put forth in this Article and for all of his hard work on seeing the project through to a successful conclusion.

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1. 541 U.S. 36 (2004). *Crawford* is discussed at length in this Article. It essentially held that where "testimonial" evidence is at issue, the Constitution demands that before the government can introduce out-of-court statements against an accused, it must be shown that (1) the witness is unavailable and (2) the defendant had a previous opportunity to cross-examine him.

much more protection the Confrontation Clause[2] will afford their clients. Courts are being forced to reexamine the constitutional validity of hearsay exceptions long thought to be "firmly rooted."[3] In addition to its far-reaching holding, the *Crawford* opinion reverberated with *obiter dictum* reflecting suspicions of both hearsay declarants and the law enforcement personnel who coax them into speaking.[4]

The majority in *Crawford*, perhaps stung by the dissent's criticism that the opinion's paradigm shift would result in a widespread and ultimately inefficacious doctrinal upheaval,[5] understandably sought to calm the nerves of practitioners and lower courts by offering reassurances that most prior cases approving the receipt of evidence under existing hearsay exceptions would remain good law—in outcome if not in their reasoning. Indeed, the Court went even further and actually named some nontestimonial hearsay exceptions in an apparent attempt to leave no doubt about their status. One category of exceptions to receive such "bright-line" treatment was co-conspirator statements, such as those admitted pursuant to Federal Rule of Evidence (FRE) 801(d)(2)(E) or a state equivalent.[6] In short, the Court went out of its way to make clear that statements made by a defen-

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2. The Sixth Amendment to the United States Constitution states, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

3. This terminology, of course, comes from the doctrinal regime overthrown by *Crawford*, found in *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny. One district court even stated, "*Crawford v. Washington* . . . has superseded the Federal Rules of Evidence in barring all out-of-court statements made by an unavailable witness whom a defendant has not had the chance to cross examine, with exceptions only for dying declarations and forfeiture by wrongdoing." United States v. Hendricks, No. CRIM.2004-05 F/R, 2004 WL 1125143, at *1 (D. Virgin Islands Apr. 27, 2004), *rev'd*, 395 F.3d 173 (3d Cir. 2005). Although this extreme evidentiary ruling was later overturned by the Third Circuit, it is still a good example of the chaos occurring in lower courts as they try to apply *Crawford* to the myriad exceptions to the hearsay rule.

4. *See Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."); *see also id.* at 53 ("The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.").

5. *See id.* at 75-76 (Rehnquist, C.J., concurring) ("[T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers . . . [as to what is "testimonial"] now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.").

6. The co-conspirator exception is based on principles of agency. As Judge Learned Hand once stated, "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all." Bourjaily v. United States, 483 U.S. 171, 188 (1987) (citing Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926)). The FRE exclude co-conspirator statements from the definition of hearsay in Rule 801(d) rather than treat them as exceptions to the rule in Rule 803. This is, however, a mere semantic difference, and this Article will use the common parlance of "hearsay exception" when referring to such statements.

dant's co-conspirators during the course and in furtherance of the conspiracy—so vital to the prosecution of sophisticated drug rings, corporate and white collar crime, public corruption, and other law enforcement priorities of the twenty-first century—would still be admissible against the defendant.

Almost without exception, lower courts have followed the Supreme Court's lead.[7] In the several years since *Crawford* was handed down, every court of appeals to consider the issue has determined that co-conspirator statements are not testimonial. They have come to this conclusion either by applying one of the definitions for "testimonial" set out in *Crawford* or by looking to the pertinent dicta in that opinion. As a result, the "bright line" rule of admission for co-conspirator statements that the *Crawford* majority apparently desired has come to fruition.

Drawing bright lines in the law can be extremely desirable; they are an exceptionally efficient way of dividing cases in accordance with policy goals. However, the efficiency of a bright line rule is counterproductive if the rule is divorced from the underlying policy it is supposed to serve. We contend that the latter situation exists in this instance. In short, the Supreme Court was too quick to suggest, and the lower courts have been too quick to hold, that co-conspirator statements can *never* be testimonial for Confrontation Clause purposes. Indeed, if one examines the test for what constitutes "testimony" that the Court began to define in *Crawford* and continued to flesh out in the later case of *Davis v. Washington*,[8] it becomes clear that this categorical approach to co-conspirator statements is erroneous.

This Article takes the position that co-conspirator statements must be examined on a case-by-case basis to determine whether they are testimonial and thus subject to exclusion under the Confrontation Clause. This position is supported by (1) the language of *Crawford* itself, (2) the Supreme Court's own interpretation of *Crawford* in *Davis*, and (3) a careful application of the interests that ought to be protected by the Confrontation Clause. Further, in light of the fact that the author of the majority opinions in *Crawford* and *Davis* was Justice Antonin Scalia, this Article examines whether interpreting the Sixth Amendment as a bar to the admission of certain co-conspirator statements would violate an originalist interpretation of that provision.[9] The conclusion reached is that it would not.

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7. One authority notes that courts have "rushed" to declare co-conspirator statements nontestimonial. *See* 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6371.2 n.174 (Supp. 2006); *see also infra* notes 108-27 and accompanying text.

8. 126 S. Ct. 2266 (2006).

9. *See infra* notes 183-200 and accompanying text.

The Article does not stop with a mere claim that case-by-case analysis is warranted. Rather, it proceeds to propose the requisite methodology. In a nutshell, given the Supreme Court's identification of the key characteristics of "testimonial" statements, particularly as described in its *Davis* opinion, a co-conspirator statement will fit that definition whenever (1) it is made to an undercover agent or other undercover operative acting under the supervision of law enforcement and (2) the statement is the product of sustained questioning by the undercover operative designed to elicit information from the co-conspirator about past criminal activity. In other words, the statement fits the definition if the conversation amounts to government interrogation of an unwitting witness.

Part II of this Article provides a brief preliminary history of the development of both the Confrontation Clause and the co-conspirator exception to the hearsay rule. Though these historical recitations have become relatively ubiquitous,[10] we believe some foundation is necessary to support our later analysis. This Part includes a review of the *Crawford* opinion and a summary of the scholarly commentary it spawned. In Part III, we examine in some detail the response of state and lower federal courts to the *Crawford* decision, specifically focusing on their application of *Crawford* to co-conspirator statements. Part IV begins with an analysis of the recent *Davis* decision, which sheds much additional light on the meaning of "testimonial" in the context of police interrogations, and continues with an examination of the places where interrogation and co-conspirator statements intersect.

The heart of the Article is Part V, wherein we set out and defend our proposed test for determining when co-conspirator statements ought to be excluded on confrontation grounds. In Part VI, we engage in originalist analysis, not because we are necessarily proponents of it, but because Justice Scalia is. Thus, we think it necessary to establish that his favored analytical approach to constitutional interpretation is not an impediment to the adoption of our proposal. In Part VII, we apply our proposed test to the facts of several important co-conspirator statement cases, including *United States v. Stewart*,[11] to demonstrate its operation. Part VIII is a brief conclusion.

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10. *See, e.g.*, Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 568-86 (1992); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022-26 (1998); John Robert Knoebber, *Say That to My Face: Applying an Objective Approach to Determine the Meaning of Testimony in Light of* Crawford v. Washington, 51 LOY. L. REV. 497, 501-02 (2005); *see also Crawford*, 541 U.S. at 36, 43-50 (2004).

11. 433 F.3d 273 (2d Cir. 2006). This case involved the prosecution of Martha Stewart for making false statements to government officials, as well as other charges.

## II. CONFRONTATION AND THE CO-CONSPIRATOR EXCEPTION: HISTORICAL DEVELOPMENT

The admissibility of an out-of-court statement against a criminal defendant that would otherwise be excluded as hearsay because it was made by a co-conspirator during and in furtherance of the conspiracy is a principle deeply embedded in American jurisprudence. To understand why, a short review of confrontation, hearsay, and the co-conspirator exception is required.

### *A. Confrontation*

The right of an accused to confront witnesses against him at trial dates back at least to Roman times,[12] but in a more modern setting it developed in England during the early seventeenth century.[13] Most historical authorities agree that it came into demand in the English system at least in part from the backlash following the trial of Sir Walter Raleigh,[14] which has gone down in infamy.[15] Raleigh was tried for treason based upon statements that were obtained from one of his alleged co-conspirators, Lord Cobham.[16] Judicial officials obtained these statements from Cobham outside Raleigh's presence, and they were later offered verbatim as evidence against him.[17] Raleigh insisted that if the court would just produce[18] his accuser for questioning, he could make Cobham recant[19]—but the court re-

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12. *See* Coy v. Iowa, 487 U.S. 1012, 1015 (1988).

13. *Crawford,* 541 U.S. at 44 (2004).

14. Reference to the Raleigh trial in cases and authorities is prolific, and the authorities generally agree that Raleigh's trial was *a factor* in the development of confrontation law, but to what extent is debated. *Compare* Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 712 (1971) (citing Raleigh as the "historical origin" of the Confrontation Clause), *with* Michael Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4 (1972) (referring to Raleigh's impact on confrontation as being "a convenient but highly romantic myth").

15. One of the judges in Raleigh's case later lamented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." *Crawford*, 541 U.S. at 44 (quoting 1 D. JARDINE, CRIMINAL TRIALS 435, 520 (1832)).

16. 30 WRIGHT & GRAHAM, *supra* note 7, § 6342 n.549.

17. *Id.* at n.560 ("[T]he case against Raleigh was entirely based on a series of confessions of Lord Cobham while he was being interrogated by some of the same judges who sat at Raleigh's trial.").

18. *Id.* at n.567. Raleigh said,

> But, my Lords, I claim to have my accuser brought here face to face to speak; . . . If you proceed to condemn me by bare inferences, without an oath, without a subscription, upon a paper accusation, you try me by the Spanish inquisition. If my accuser were dead or abroad, it were something; but he liveth, and is in this very house. Consider, my Lords, it is no rare case for a man to be falsely accused; aye, and falsely condemned too.

*Id.*, text at n.567.

19. The historical record suggests that Raleigh might have been right. *See id.* at n.562.

fused.[20] Raleigh was then sentenced to death and later executed.[21] The result of this "trial" was a heightened awareness of confrontation's importance, which then took hold in English statutes and common law.[22]

For all the reforms that were adopted in England, defendants in the American Colonies were not treated much differently than Sir Walter Raleigh.[23] British courts trying Americans in violation of the Stamp Act[24] and the Navigation Act[25] routinely employed harsh methods to extract sworn statements from witnesses, which were then introduced against accused Colonists as unimpeachable evidence.[26] The American Colonies in turn raged against these heavy-handed practices, and the historical record leaves little doubt that as a result they demanded a confrontation right be included in their fledgling Constitution.[27]

Later, the Supreme Court unanimously held in 1965 that the Confrontation Clause was applicable to the states via the Fourteenth Amendment,[28] and in doing so it said—as though merely reaffirming a presumption—that "[i]t cannot seriously be doubted at this late

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20. *Id.* at n.580. The judge refused, relied on reasons of state to deny Raleigh confrontation, and said "I marvel, Sir Walter, that you being of such experience and wit, should stand on this point; for many horse-stealers would escape if they may not be condemned without witnesses." *Id.*, text at n.581.

21. Raleigh was sentenced to death, but that was not the end of the story. The following passage says it best:

> Reprieved on the eve of execution, Raleigh spent 13 years in the Tower, writing a history of the world and puttering with alchemy. Paroled to go on a gold-seeking expedition to Guyana that not only failed but raised the wrath of the Spanish, Raleigh was executed on the original sentence on October 29, 1618. Thus, in what may well be the most ironic moment in the history of the right of a confrontation, a man who had gained fame fighting the Spanish, then was convicted of conspiring with them against his own government, was finally put to death to satisfy their demands. It is a fitting close to this chapter of the story.

*Id.* at nn.616-19 (internal citation omitted).

22. For a discussion of these reforms, see *Crawford v. Washington*, 541 U.S. 36, 44-45 (2004).

23. *See id.* at 47-48 ("Controversial examination practices were also used in the colonies."). *See generally* 30 WRIGHT & GRAHAM, *supra* note 7, § 6344, text at n.564.

24. *Crawford*, 541 U.S. at 47-48.

25. 30 WRIGHT & GRAHAM, *supra* note 7, § 6345 n.509.

26. These extrajudicial statements, sometimes referred to as "ex-parte affidavits," were often procured by torturous methods. *See* Robert M. Pitler, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1, 2-3 (2005).

27. *See* 30 WRIGHT & GRAHAM, *supra* note 7, § 6345 n.507 (setting forth a letter from George Mason). As noted, after excoriating the British for their civil-law ex-parte examinations, Mason later became the author of the first American Confrontation Clause. *Id.*, text at n.510. Furthermore, at the 1788 Massachusetts convention to decide whether or not to ratify the Federal Constitution, it was said that omission of the right to confrontation would pave the way for future governments to resemble "a certain tribunal in Spain . . . the Inquisition." *See* Pitler, *supra* note 26, at 3 n.7.

28. U.S. CONST. amend. XIV.

date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him."[29]

### *B. Co-Conspirator Statements*

Although the hearsay exception for co-conspirator statements existed in American common law in 1791,[30] it was not squarely approved by the Supreme Court until 1827.[31] John Gooding, owner of the vessel General Winder, went on trial for violation of the Slave Trading Act.[32] The indictment alleged that he knowingly outfitted his boat, hired a captain and crew, and dispatched the vessel for the purpose of procuring Africans and taking them to Cuba and the West Indies for sale as slaves, in contravention of the Act.[33] The Government sought to introduce conversations between Captain Hill, who Gooding had hired to run the ship, and another man named Coit, whom Hill was attempting to hire as a ship's mate. The conversations laid out the general slave-trading operation and the payment plan and named the defendant as being the overall master.[34] The defense objected to the introduction of this testimony, arguing in essence that the theory of imputing statements made by an authorized agent to the principal should only apply in civil cases, not criminal ones.[35] Rejecting this claim, Justice Story articulated the idea that once a conspiracy is established, the acts of each conspirator are considered acts by all of them and are evidence against them all.[36] Thus, the groundwork was laid in case law for the co-conspirator exception, which was—for better or worse—based on agency theory.[37]

The co-conspirator exception has been attacked on appeal frequently over the years, which has resulted in a few points of settled law. First, the prosecutor has the burden of proving by a preponderance of the evidence that (1) there was a conspiracy, (2) the defendant and the declarant were involved in it, and (3) the statements were made during and in furtherance of the conspiracy.[38] Second, "during" the conspiracy, according to the FRE (as construed by the Supreme Court), means that once the criminal aim of the conspiracy

29. Pointer v. Texas, 380 U.S. 400, 404 (1965).

30. Patton v. Freeman, 1 N.J.L. 113 (1791). Note, however, that the contour of the exception as it existed in 1791 is open to further analysis. *See infra* text accompanying notes 193-95.

31. United States v. Gooding, 25 U.S. 460 (1827).

32. *Id.* at 461-64. The Act referred to was the Slave Trading Act of the 20th of April, 1818.

33. *Id.* at 461-62.

34. *Id.* at 464.

35. *Id.* at 469.

36. *Id.*

37. This was as opposed to any innate reliability, like most other hearsay exceptions. *See* David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384 (1972).

38. Bourjaily v. United States, 483 U.S. 171, 175 (1987).

terminates, the conspiracy is over, and statements made thereafter during attempts to conceal the conspiracy are inadmissible.[39] Finally, determining whether the prosecutor has met his burden is within the province of the judge,[40] who may consider the hearsay statement itself, but the statement alone is not sufficient to establish the conspiracy.[41]

### *C. Confrontation and Hearsay: Preliminary History*

A literal application of the Sixth Amendment's Confrontation Clause would operate to bar all hearsay, but the Court has never interpreted this to be the Framers' intent.[42] The Court's rejection of such a broad reading is supported by the fact that many of the hearsay exceptions in existence at common law in 1791 were left undisturbed by the courts after the Sixth Amendment's adoption. In *Mattox v. United States*,[43] the Court addressed whether the Confrontation Clause was violated when the trial court allowed statements from two deceased witnesses (who had testified against the defendant at his own previous trial) to be read into evidence.[44] The Court marshaled the weight of common law authority and affirmed the conviction, agreeing that "the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read."[45] In dicta, *Mattox* also referenced the dying declaration exception as being a good reason not to read the Confrontation Clause too strictly, because dying declarations had been recognized as competent evidence "from time immemorial."[46]

For more than a half century after *Mattox*, the Supreme Court continued to struggle with drawing a line between confrontation-barred and admissible hearsay. Finally, in the landmark 1980 deci-

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39. Federal prosecutors have fought unavailingly to expand the window of time during which these statements must be made if they are to fall within the exception, but the Supreme Court—wary of the "far-reaching results" that would come from expanding the co-conspirator exception too greatly—has always read FRE 801(d)(2)(e) as only conferring admissibility on statements made up until the point at which the criminal aim of the conspiracy has been achieved. *See* Krulewitch v. United States, 336 U.S. 440, 444 (1949). Notably, in 1970, the Court had the opportunity to strike down a state co-conspirator exception which *did* admit statements made during the "concealment phase," but declined to do so. *See* Dutton v. Evans, 400 U.S. 74 (1970). In this manner, the FRE may be slightly more favorable to a defendant than the Sixth Amendment demands.

40. It is a preliminary decision made by the judge under FRE 104(a). *Bourjaily*, 483 U.S. at 175.

41. This concept is more informally known as "bootstrapping." For a more thorough discussion of this concept, see *Glasser v. United States*, 315 U.S. 60 (1942).

42. *See* Ohio v. Roberts, 448 U.S. 56, 62 (1980) (noting that such a point of view has been "long rejected as unintended and too extreme").

43. 156 U.S. 237 (1895).

44. *Id.* at 240.

45. *Id.* at 242.

46. *Id.* at 243.

sion *Ohio v. Roberts*,[47] the Court appeared to set itself on a solid path. The Court sketched an overarching blueprint for analyzing whether introduction of hearsay evidence offends the Confrontation Clause: first, the declarant must be unavailable; second, the statement in question must exhibit sufficient "indicia of reliability."[48] Reliability could be proven by showing that the statement falls within a "firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness."[49]

Two post-*Roberts* cases dealt specifically with co-conspirator statements. The first was *United States v. Inadi*.[50] In *Inadi*, the defendant and a crew of unindicted co-conspirators were involved in a scheme to manufacture and sell methamphetamine.[51] Local police and the DEA began investigating in May 1980, and eventually five telephone conversations between co-conspirators were lawfully intercepted and taped. These conversations were later introduced at trial over the defendant's objection as co-conspirator statements under FRE 801(d)(2)(E), and he was convicted.[52] The Supreme Court held that where otherwise qualifying co-conspirator statements are at issue, the government need not demonstrate the declarant's unavailability.[53]

In *Bourjaily v. United States*,[54] the prosecution introduced recorded conversations between the defendant's co-conspirator and a government informant at trial. After being convicted and receiving a fifteen-year sentence that was confirmed on appeal, Bourjaily successfully petitioned the Supreme Court for certiorari. The Court held that because the co-conspirator exception to the hearsay rule was firmly rooted, trial courts need not make an inquiry into a co-conspirator statement's independent indicia of reliability before de-

47. 448 U.S. 56 (1980).
48. *Id.* at 65-66.
49. *Id.* at 66.
50. 475 U.S. 387 (1986).
51. *Id.* at 389.
52. *Id.* at 390-91.
53. *Id.* at 391. The Court then went on to distinguish why unavailability was required in the line of cases dealing with introduction of prior testimony, but should not be required for the introduction of co-conspirator statements. One key difference, according to the Court, was that whereas prior testimony was almost always disfavored as a "weaker substitute for live testimony," co-conspirator statements are made *in the very context* of the criminal enterprise that the fact-finder seeks to explore, making them indispensable. *Id.* at 394-95. The Court drove the final nail into the coffin when it reasoned that such an unavailability rule would accomplish very little and simultaneously impose great burdens on the prosecution. *Id.* at 396-99.

Despite a strong dissent by Justice Marshall, *id.* at 401-11, the 7-2 majority concluded that it would "continue to affirm the validity of the use of co-conspirator statements, and . . . decline to require a showing of the declarant's unavailability as a prerequisite to their admission." *Id.* at 400.
54. 483 U.S. 171 (1987).

ciding that the Confrontation Clause does not warrant its exclusion.[55]

Taken together, *Inadi* and *Bourjaily* added up to the categorical acceptance of co-conspirator statements under *Roberts*' framework for interpreting the Confrontation Clause.

### *D. Paradigm Shift:* Crawford v. Washington

On August 5, 1999, Michael Crawford was arrested for the nonfatal stabbing of Kenneth Lee. Crawford had sought Lee out and stabbed him in the latter's apartment because Lee allegedly tried to rape Crawford's wife.[56] The police arrested Crawford later that night and interrogated both him and his wife Sylvia.[57] Crawford's version of events implied that it may have been a case of self-defense, but Sylvia's version, while substantially similar, indicated that the victim may not have actually had a weapon.[58] Her statement to that effect was tape-recorded, and after Michael invoked the marital privilege to prevent her from testifying at trial, the State offered her statement pursuant to Washington's hearsay exception for statements made against penal interest.[59] The trial court, finding that the statement possessed "particularized guarantees of trustworthiness," admitted the statement over Crawford's Confrontation Clause objection, and he was convicted of assault.[60] The Washington Court of Appeals applied its own nine-factor test to determine trustworthiness and reversed.[61] Then, the Washington Supreme Court examined the statements yet again and determined that, because of their interlocking nature, the conviction should be reinstated.[62]

The Supreme Court granted certiorari and reversed in a 7-2 majority opinion delivered by Justice Scalia.[63] Justice Scalia set forth the facts of the case, laid out the historical context that brought about the inclusion of the Confrontation Clause within the Sixth Amendment, and made two inferences from this history. First, Justice Scalia claimed history showed that the Confrontation Clause was aimed at barring the use of *ex parte* examinations as evidence against the accused, such as were employed in the Raleigh trial.[64] Second, Justice Scalia asserted that the Framers would have rejected

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55. *Id.* at 183-84.
56. Crawford v. Washington, 541 U.S. 36, 38 (2004).
57. *Id.*
58. *Id.* at 38-40.
59. *Id.* at 40. Apparently she exposed herself to criminal liability as an accomplice by showing Michael where her alleged rapist lived.
60. *Id.* at 40-41.
61. *Id.* at 41.
62. *Id.* at 41-42.
63. *Id.* at 42.
64. *Id.* at 50-53.

the admission of testimonial statements unless the declarant was unavailable for trial and the defendant had a previous opportunity for cross-examination.[65]

The majority contended that the reliability doctrine set out in *Roberts* and elaborated in its progeny was misguided and, as a result, the Court had been generally arriving at the right answers for the wrong reasons.[66] Furthermore (and worse), lower courts had been applying *Roberts*' reliability standard haphazardly, sometimes reaching the wrong results.[67] Ultimately, the Court held, "[w]here *testimonial* evidence is at issue . . . the Sixth Amendment demands what the common law [of 1791] required: unavailability and a prior opportunity for cross-examination."[68] The Court further held that statements elicited from "police interrogations" are clearly testimonial[69] and that Sylvia's interaction with the police qualified as an interrogation "under any conceivable definition."[70]

Although leaving "for another day any effort to spell out a comprehensive definition of 'testimonial,'" the Court provided some clues.[71] It set forth three possibilities: (1) *ex parte* in-court testimony or its functional equivalent that declarants would reasonably expect to be used prosecutorially,[72] (2) extrajudicial statements contained in formalized testimonial materials,[73] and (3) statements made under circumstances that would lead an objective witness reasonably to be-

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65. *Id.* at 53-56.

66. *Id.* at 60.

67. *Id.* at 63.

68. *Id.* at 68 (emphasis added). The Court left open the question whether nontestimonial out-of-court statements would still be subject to the *Roberts* test. 541 U.S. at 61 (noting that it did not need to address what confrontation analysis would apply, if any, to nontestimonial statements). It answered this question in *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006), where it held that the Confrontation Clause's sole concern is testimonial statements, declaring that testimonial statements constituted "not merely [the] 'core,' but [the] perimeter" of the Confrontation Clause.

69. *Crawford,* 541 U.S. at 68. The term "testimonial" applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

70. *Id.* at 53 n.4.

71. *Id.* at 68.

72. *Id.* at 51-52. This was Mr. Fisher's proposed definition in his brief on behalf of Michael Crawford, and it included "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements."

Interestingly, the idea that statements made "in contemplation of legal proceedings" are subject to the Confrontation Clause was actually advanced in 1992 by the government in an amicus brief to the Court in *White v. Illinois*, 502 U.S. 346 (1992). *See id.* at 364 (Thomas, J., concurring in part and concurring in the judgment).

73. *Crawford*, 541 U.S. at 51-52 (citing Justice Thomas' concurrence in *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment) and including affidavits, depositions, prior testimony, and confessions).

lieve that the statements would be available for use at a later trial.[74] In addition, the Court noted that testimonial statements clearly include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations. These are the modern practices with closest kinship to the abuses that had motivated the enactment of the Confrontation Clause."[75]

Chief Justice Rehnquist concurred in the *Crawford* result, but disagreed with the majority's decision to overrule *Roberts*, criticizing the distinction between testimonial and nontestimonial statements as being "no better rooted in history than our current doctrine."[76] He contended that the case could have been properly decided by further application and refinement of the *Roberts* test.[77] Justice Scalia conceded that the Court could have allowed *Roberts* to continue governing testimonial statements and simply made its own "particularized guarantees of trustworthiness" determination in order to find Sylvia's statements inadmissible.[78] The way that the lower courts treated Sylvia's statements, however, had revealed to Justice Scalia and the majority "a fundamental failure . . . to interpret the Constitution in a way that secures its intended constraint on judicial discretion."[79]

In effect, the Chief Justice's claim was that the majority's approach, which distinguished "testimonial" from "nontestimonial" out-of-court statements, would be just as vague and arbitrary as *Roberts*' reliability test. This claim caused Justice Scalia and the majority to react by suggesting that most pre-*Crawford* confrontation jurisprudence would survive despite the paradigm shift. The *Crawford* majority thus cited with approval the results in *Ohio v. Roberts*,[80] *Lilly v. Virginia*,[81] *Bourjaily v. United States*,[82] *White v. Illinois*,[83] and *Lee v. Illinois*.[84] In addition, faithful to his originalist approach to this and other questions, Justice Scalia noted that there were recognized nontestimonial hearsay exceptions at the time the Confrontation Clause was enacted, with the plain implication being that these ex-

74. *Id.* at 52. This definition was proposed by the National Association of Criminal Defense Lawyers as *amicus curae*, *see id.*, and therefore it is not surprising that it is the broadest of the three definitions.

75. *Id.* at 68.

76. *Id.* at 69 (Rehnquist, C.J., joined by O'Connor, J., concurring in judgment).

77. *Id.* at 76.

78. *Id.* at 60.

79. *Id.* at 67.

80. 448 U.S. 56 (1980).

81. 527 U.S. 116 (1999).

82. 483 U.S. 171 (1987).

83. 502 U.S. 346 (1992). It is worth noting that even though the *Crawford* Court cited *White* with approval, it did mention in a footnote that the admission of the child's statement to the policeman in that case was "arguably in tension" with its holding. *Crawford*, 541 U.S. at 58 n.8.

84. 476 U.S. 530 (1986).

ceptions should be recognized as nontestimonial today as well. These hearsay exceptions include business records and statements made in furtherance of a conspiracy.[85]

### *E. Scholarly Commentary on the Definition of "Testimonial"*

In the aftermath of *Crawford*, scholarly commentary erupted seeking to divine the essence of a testimonial statement.[86] Generally, the analysis focused on one of three perspectives: the declarant's intent, the government's involvement, or an objective assessment of the statement itself. Although commentators did not necessarily advocate that one of these factors was definitive, debate was heavy (especially between those who lean pro-defense and those who lean pro-prosecution) regarding which factor was "most indicative" of a statement's testimonial nature.[87]

The declarant-centered approach found considerable support among scholars and lower courts.[88] Professor Richard Friedman, for example, was a leading commentator in support of an approach that focused on the declarant's intent. The *Crawford* opinion supported such an approach in two ways: first, it suggested that a statement should be considered testimonial when the declarant would reasonably expect his statement to be used prosecutorially; second, it noted that someone making an accusatory statement is "bear[ing] testimony in a sense that a person who makes a *casual remark to an acquaintance* does not."[89]

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85. *Crawford*, 541 U.S. at 56. The Court also noted that one arguably testimonial hearsay exception was also recognized in 1791, namely dying declarations. *See id.* at 56 n.6.

86. *See, e.g.*, WRIGHT & GRAHAM, *supra* note 7, § 6371.2 (identifying multiple approaches, including declarant-centered approach, government-involvement-centered approach, and approaches analyzing the statement's formality and resemblance to disfavored civil-law methods); Brooks Holland, *What Makes Testimony . . . Testimonial?* 71 BROOK. L. REV. 281 (2005); Robert P. Mosteller, *"Testimonial" and the Formalistic Definition—The Case for an "Accusatorial" Fix*, 20 CRIM. JUST. 14 (2005) (declarant-centered approach that views the accusatory nature of the statement as dispositive).

87. *See* Michael H. Graham, *Special Report:* Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004)*, 42 CRIM. L. BULL. 4, nn.10-11 (2006) (identifying "declarant's objective intent" and "governmental involvement" as the two main indicators and analyzing lower court decisions in terms of whether they view those requirements disjunctively or conjunctively).

88. *See* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1240-41 (2002); *see also* Transcript of Oral Argument, Hammon v. Indiana, 2006 (No. 05-5705), *available at* 2006 WL 766741 (Professor Friedman's oral argument before the Supreme Court in *Hammon v. Indiana*, argued in tandem with *Davis v. Washington*). For lower court decisions embracing the declarant-centered approach, see United States v. Hendricks, 395 F.3d 173, 182 (3d Cir. 2005), and United States v. Saget, 377 F.3d 223, 228-29 (2d Cir. 2004).

89. *Crawford*, 541 U.S. at 51 (2004) (emphasis added).

An approach focusing on the government's participation in the development of the out-of-court statement was also widely touted.[90] Supporters of this view argued that *Crawford* is not merely (or even primarily) concerned with the intent of the declarant; instead, the opinion appears to concentrate on the "involvement of government officers in the production of testimonial evidence."[91] Indeed, the historical recitation in *Crawford* is replete with warnings against the governmental abuse potentially facilitated by testimony that is not subject to the protection of cross-examination.[92] Justice Scalia specifically stated, "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."[93] One of the scholars taking this language to heart and advocating a government-involvement approach was Professor Michael Graham. He suggested measuring the depth of government involvement by looking at the formality surrounding the making of the statement and the methodology of the questioning itself.[94] Another prominent academic, Professor Margaret Berger, had anticipated this approach to confrontation analysis in her 1991 article that argued for a "prosecutorial restraint" model of Confrontation Clause protection.[95]

A student observer, Ariana Torchin, urged a combination of the declarant-focused and government-involvement tests. She suggested that the critical issue was whether circumstances indicated that the declarant had made a "solemn, purposeful statement"[96] implicating the accused and contended that government involvement was an "*essential*, though *insufficient*, element" in the inquiry.[97] Further, she asserted that "[i]f the accusatory statement was a solemn declara-

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90. *See e.g.*, Kenneth Graham, *The Revolution Revised: A Guided Tour of* Davis v. Washington, UCLA PUBLIC LAW SERIES, 2006, http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1031&context=uclalaw.

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

92. *Id.* at 43-50 (discussing history); *id.* at 67 ("The Framers . . . knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory.").

93. *Crawford*, 541 U.S. at 56 n.7.

94. Graham, *supra* note 90, at 22-24.

95. *See* Berger, *supra* note 10, at 607-09 (taking the position that a co-conspirator's statements should be presumed inadmissible unless the government introduces a recording that demonstrates by a preponderance of the evidence that the questioning was nonsuggestive).

96. Ariana J. Torchin, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under* Crawford v. Washington, 94 GEO. L.J. 581, 598 (2006) ("[F]or a court to find an out-of-court statement testimonial, the declarant need not anticipate that his incriminating statements will be used as evidence in criminal investigations or judicial proceedings. Rather, all the court needs to ascertain is whether or not the declarant made a solemn, purposeful statement as defined [earlier in her article].").

97. *Id.* at 607 (emphasis added).

tion, and the nondeclarant witness was an agent of the government . . . the statement should still not be testimonial unless . . . the statement was elicited for the purpose of proving or establishing facts in a judicial proceeding or criminal investigation."[98]

Another student commentator, John Robert Knoebber, noted the shortcomings of all three "formulations" of testimonial statements listed in *Crawford* and advanced what he called the "expanded broad objective witness" approach.[99] His approach embraced the definition promulgated by Professor Friedman on behalf of the NACDL as *amicus* in *Crawford*, but expanded it to include as testimonial statements those that "a reasonable declarant *or a reasonable recipient* would understand . . . would be used at a later criminal trial."[100] He noted that under his proposed formulation, all co-conspirator statements made to undercover law enforcement operatives would be testimonial, because "the reasonable undercover officer either knew or should have known that the statement would be used at a later trial." The fact that the declarant would be providing information unwittingly would be irrelevant under Knoebber's definition.[101]

The third mode of analysis focused on the nature of the statement itself. This "categorical approach" attempted to rope off certain types of statements as being either testimonial or nontestimonial. One authority identified two methods of categorization: "situational" (e.g., "all statements made during a pleas allocution are testimonial") or "doctrinal" (e.g., "all business records are nontestimonial").[102] Categorical analysis, of course, is a bright line approach: once statement types are identified as testimonial or not, case-by-case examination is unnecessary.

## III. POST-*CRAWFORD* APPELLATE COURT RULINGS ON CO-CONSPIRATOR STATEMENTS AND THE CONFRONTATION CLAUSE

Since *Crawford* was decided, many appellate courts have addressed challenges from defendants asserting that co-conspirator statements were introduced against them in violation of their right to confrontation. These courts have used different rationales to arrive

98. *Id.* at 598-99. Thus, Torchin's test for determining whether a statement produced by government interrogation is perhaps the closest to our own.

99. Knoebber, *supra* note 10, at 535-36.

100. *Id.* Insofar as Knoebber asserts that his formulation can render statements to government agents as listeners testimonial, we agree. His thesis also suggests that the intent of a listener who is *not* associated with the government can render the statement testimonial; we are not ready to go quite that far.

101. *Id.*

102. Graham, *supra* note 90, at 37.

at their decisions, but one thing has been constant: none of them has determined that it was error to admit a co-conspirator statement.[103]

### *A. Courts Using Some Form of Blanket Approach*

In *United States v. Saget*,[104] the Second Circuit squarely held that "a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*."[105] In *Saget*, the defendant and his co-conspirator, Beckham, were paying strippers to purchase handguns for them in Pennsylvania and then were transporting the guns to New York and selling them on the black market.[106] In mid-2001, Beckham had two conversations with a man whom he thought was a friend and potential co-conspirator, but was actually a confidential informant (CI) who recorded the conversations.[107]

After indicting Saget for conspiracy to traffic in firearms and firearms trafficking, the Government introduced at trial the recorded statements between the CI and Beckham.[108] Saget was subsequently convicted, and he appealed.[109] In holding that these types of statements were not testimonial, the Second Circuit based its reasoning on two portions of the *Crawford* opinion: first, it examined *Crawford*'s examples of what types of testimony comprise the "core class" of testimonial statements and determined that the nucleus common to all was the declarant's "knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be

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103. For the uniformity of the Circuit Courts of Appeal, see United States v. Underwood, 446 F.3d 1340, 1348 n.2 (11th Cir. 2006) (collecting authorities); United States v. Hendricks, 395 F.3d 173, 181 (3d Cir. 2005) (collecting authorities); United States v. Heijnen, No. CR 03-2072 JB, 2006 WL 1228949, at *4 (D.N.M. Feb. 16, 2006) (collecting post-*Crawford* rulings that co-conspirator statements are nontestimonial and declaring, "The Court has found no Circuit that has taken a contrary view."); *see also* United States v. Johnson, 440 F.3d 832 (6th Cir. 2006); United States v. Franklin, 415 F.3d 537 (6th Cir. 2005); United States v. Stewart, 433 F.3d 273 (2d Cir. 2006); United States v. Holmes, 406 F.3d 337 (5th Cir. 2005); Saget, 377 F.3d at 223; United States v. Reyes, 362 F.3d 536 (8th Cir. 2004). For scholarly commentary on point, see WRIGHT & GRAHAM, *supra* note 7, § 6371.2 nn.174-79 (collecting authorities).

104. 377 F.3d 223 (2d Cir. 2004).

105. *Id.* at 229.

106. *Id.* at 225.

107. *Id.*

108. *Id.* Actually, the prosecutor offered the statements as against penal interest pursuant to FRE 804(b)(3) rather than as co-conspirator statements under FRE 801(d)(2)(E), probably because he was concerned that the statements may not have satisfied the "in-furtherance" requirement. Nevertheless, the holding would appear to apply to any statements made unwittingly to an undercover operative.

109. *Id. Crawford* was decided after *Saget*'s appeal was filed, but before oral arguments were conducted, so the Second Circuit ordered supplemental briefings on whether *Crawford* demanded the suppression of Beckham's statements.

used in future judicial proceedings."[110] The court then applied this declarant-centered reasoning[111] to Beckham and determined that because Beckham was *unaware* that the confidential informant was taping their conversations, his statements were not testimonial.[112]

In *United States v. Hendricks*,[113] the Third Circuit addressed a similar situation and ruled in a similar fashion. In *Hendricks*, the defendant and several others were indicted by a federal grand jury sitting in the United States Virgin Islands on multiple counts of conspiracy, narcotics possession and distribution, and money laundering.[114] The Government had developed evidence through authorized wiretaps and from conversations recorded between some of the defendants and a confidential informant, who was murdered before the trial.[115]

The Government sought pretrial rulings on the admissibility of the recordings and appealed to the Third Circuit when the district court relied on *Crawford* to exclude them. In doing so, the district court stated that *Crawford* had barred "all out-of-court statements made by an unavailable witness whom a defendant has not had the chance to cross-examine, with exceptions only for dying declarations and forfeiture for wrongdoing."[116] In response to this extremely expansive reading of *Crawford*, the Third Circuit followed the Second Circuit's lead from *Saget*, reasoning that unwitting statements to a confidential informant were not testimonial.[117]

In *United States v. Reyes*,[118] the Eighth Circuit followed an even more direct route to deflect the defendant's confrontation claim. It

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110. *Id.* at 228. This interpretation was also relied upon by the Eleventh Circuit, which cited *Saget* with approval on this point. United States v. Underwood, 446 F.3d 1340, 1347 (11th Cir. 2006).

111. *Saget*, 377 F.3d at 229 ("[T]he Court would use *the reasonable expectation of the declarant* as the anchor of a more concrete definition of testimony." (emphasis added)).

112. *Id.* ("Beckham's statements [do] not constitute testimony, [because] it is undisputed that he had no knowledge of the CI's connection to investigators and believed that he was having a casual conversation with a friend and potential co-conspirator.").

113. 395 F.3d 173 (3d Cir. 2005).

114. *Id.* at 174.

115. *Id.* at 175-76. The government maintained that the defendants murdered the informant after the indictment was returned.

116. *Id.* at 176. This would have been almost as favorable to the defendant as the "broad view" of the Confrontation Clause's scope, noted as being "unintended and too extreme," *supra* note 42.

117. *Id.* at 181 ("Even considered in perspective of the broad[est] definition [of "testimonial"], the [wiretap] recordings cannot be deemed 'testimonial' as the speakers certainly did not make the statements thinking that they 'would be available for use at a later trial.' ") (internal citations omitted); *id.* at 182 n.9 ("[T]he . . . defendants . . . certainly did not realize that their statements were going to be used prosecutorially. And [therefore] because they constitute admissions unwittingly made, the defendants and coconspirators' portions of the CI Rivera conversations are clearly nontestimonial statements and are thus not subject to the *Crawford* rule." (citing *Saget*, 377 F.3d at 229-30)); *see also* United States v. Peak, No. 05-510, 2006 WL 1030226 (E.D. Pa. Apr. 18, 2006) (relying on *Hendricks*).

118. 362 F.3d 536 (8th Cir. 2004).

cited the language in *Crawford* in which the majority specifically referred to co-conspirator statements as an example of nontestimonial exceptions to confrontation at the time of the Founding Fathers[119] to support its assertion that "the Confrontation Clause does not give the defendant the right to cross-examine a person who does not testify at trial and whose statements are introduced under the co-conspirator hearsay exclusion."[120] The court then succinctly stated in a footnote that "*Crawford* does not support [the defendant's] argument . . . because co-conspirator statements are nontestimonial."[121] In *United States v. Underwood*,[122] the Eleventh Circuit also identified this language from *Crawford* as supporting the conclusion that a co-conspirator's statements are nontestimonial.[123]

As noted above, other dicta in *Crawford* insinuates that casual remarks to an acquaintance are not testimonial in nature.[124] To this end, a number of lower courts have concluded that co-conspirator statements resemble such remarks more than they resemble formal statements to government actors, even when they are surreptitiously recorded by the authorities, and thus they are not testimonial.[125]

Finally, the reader will recall that, in its effort to lessen the impact of its opinion, the *Crawford* majority favorably cited the outcome of *Bourjaily v. United States*.[126] A number of circuit courts have cited this treatment of *Bourjaily* in reasoning that the co-conspirator exception does not offend the Sixth Amendment.[127]

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119. *See* Crawford v. Washington, 541 U.S. 36, 56 (2004).

120. *Reyes*, 362 F.3d at 541.

121. *Id.* at 540 n.4; *see also* United States v. Brooks, No. 04-1894, 2006 WL 839024, at *7 (1st Cir. Mar. 31, 2006) ("[W]e find statements of co-conspirators to be nontestimonial and thereby not subject to *Crawford*.").

122. 446 F.3d 1340 (11th Cir. 2006).

123. *Id.* at 1347; *see also* Wiggins v. State, 152 S.W.3d 656, 659 (Tex. App. 2004) ("Co-conspirator statements made in the furtherance of a conspiracy are nontestimonial.").

124. *Crawford*, 541 U.S. at 51.

125. *See* United States v. Hendricks, 395 F.3d 173, 181 (3d Cir. 2005) ("A witness '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.' The [wiretap] recordings here at issue are much more similar to the latter than the former." (citation to *Crawford* omitted)); United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004).

In a 2006 decision, the Fifth Circuit also observed *Crawford*'s guidance as to the "core class" of testimonial statements and to the distinction between formal statements and casual remarks as grounds for ruling that exchanges between CI and co-conspirators were properly admitted against defendant. United States v. Crespo-Hernandez, No. 05-10461, 2006 WL 1307562, at *5-6 (5th Cir. May 9, 2006).

126. 483 U.S. 171 (1987).

127. *See Underwood*, 446 F.3d at 1347; *Hendricks*, 395 F.3d at 183; *Saget*, 377 F.3d at 229; United States v. Reyes, 362 F.3d 536, 541 (8th Cir. 2004).

### *B. Courts Treating Co-Conspirator Statements as Potentially Testimonial*

Some courts considering the issue have indicated the belief that, in the right circumstances, a co-conspirator statement may be testimonial. The first of the cases indicating a crack in the armor was *United States v. Stewart*.[128] In this infamous case, Martha Stewart was convicted on multiple counts of conspiracy, making false statements, and obstruction of justice stemming from events on December 27, 2001.[129] Essentially, Peter Bacanovic was broker to both Stewart and Sam Waksal, CEO of Imclone, a company in which Stewart held some stock.[130] Informed from inside sources that Imclone's promising anticancer drug was not going to receive FDA approval, Waksal called Bacanovic and directed him to dump all of his Imclone stock. Through his assistant, Bacanovic then alerted Stewart to Waksal's attempted trading, and Stewart instructed Bacanovic to sell her Imclone stock as well. The next day, the bad news about Erbitux was announced and Imclone's stock declined by eighteen percent.[131] An investigation was launched by the Securities and Exchange Commission, the Federal Bureau of Investigation, and the U.S. Attorney for the Southern District of New York.[132] On appeal, Stewart argued that *Crawford* barred the admissibility of Bacanovic's various statements to investigators. These statements, allegedly designed to further a coordinated plan to thwart the investigation, had been received into evidence under the co-conspirator exception to the hearsay rule.[133]

These facts presented what appeared to be a unique situation, and one that was certainly not contemplated by the *Crawford* Court: Bacanovic's statements were simultaneously testimonial and conspiratorial.[134] So, should they be barred by *Crawford* or not? Faced with this riddle, the Second Circuit first noted that Stewart did not contest the admissibility against her of the alleged lies Bacanovic told the investigators because these were certainly not offered for "the truth of the matter asserted"; the Supreme Court had made clear in *Crawford* that statements offered for a nonhearsay purpose are not barred by the Confrontation Clause.[135] The court was less certain

128. 433 F.3d 273, 279 (2d Cir. 2006).
129. *Id.* at 279.
130. *Id.* at 281-83.
131. *Id.*
132. *Id.* at 281.
133. *Id.* at 291. Bacanovic made the identical claim regarding the admission of Stewart's statements against him; for purposes of simplicity, we address only Stewart's contention.
134. *Id.* at 292.
135. *See* Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (citing Tennessee v. Street, 471 U.S. 409, 414 (1985))).

about what to do with those parts of Bacanovic's statements that were truthful. It finally held that "when the object of a conspiracy is to obstruct justice . . . truthful statements made to [investigating] officers designed to lend credence to the false statements and hence advance the conspiracy are not rendered inadmissible by the Confrontation Clause."[136] The court reasoned that to rule otherwise would "def[y] logic, human experience and even imagination" and would be "unacceptably ironic."[137] So, though the Second Circuit recognized that a co-conspirator statement may, indeed, be testimonial, in the end it did Martha Stewart no favor.

A second noteworthy case is *People v. Redeaux*.[138] In *Redeaux*, an undercover agent posing as a drug purchaser solicited drugs from an individual named Johns.[139] As the investigation developed, the undercover agent recorded numerous conversations with Johns in which Johns repeatedly referenced his "source." At some point, Johns told the agent that the source wanted to be present for the transaction, and the agent suggested that the source sit in Johns' car while the deal went down.[140] The person who showed up in Johns' car to consummate the transaction turned out to be Redeaux. At trial, the agent's conversations with Johns were offered and accepted against Redeaux as co-conspirator statements.[141]

The Illinois Appellate Court authored a thoughtful opinion addressing the question whether Johns' statements were testimonial under *Crawford* and therefore barred by the Confrontation Clause. The court noted that because the conversations at issue were between a conspirator and an undercover agent, they possibly amounted to interrogation by the police and therefore might have been testimonial.[142] Citing *Massiah v. United States*,[143] the *Redeaux* court pointed out that an interrogation can take place even when the subject is unaware of the questioner's law enforcement status.[144] The court then explored the definition of interrogation—which the *Crawford* Court did not do because it determined that the questioning in that case "qualifie[d] [as interrogation] under any conceivable definition."[145] The Illinois court referenced *Merriam-Webster's Collegiate Dictionary* for the proposition that to interrogate is "to question for-

136. *Stewart*, 433 F.3d at 293.
137. *Id.* at 292-93.
138. 823 N.E.2d 268 (Ill. App. Ct. 2005).
139. *Id.* at 269-70.
140. *Id.* at 269.
141. *Id.* at 270.
142. *Id.* at 271.
143. 377 U.S. 201, 206 (1964).
144. *Redeaux*, 823 N.E.2d at 271-72.
145. Crawford v. Washington, 541 U.S. 36, 53 n.4 (2004).

mally and systematically."[146] The court held that because the conversations between the agent and Johns never even came close to structured police questioning, Johns' resulting statements were not testimonial. The court went on:

> The two were merely trying to arrange the details of a drug transaction. Although [the agent] asked questions during the conversations, they were merely to facilitate the sale of the cocaine. [The agent] did not press Johns for information beyond what was necessary for that purpose. Notably, although Johns repeatedly referred to his "source," [the agent] did not question him about the source's identity. Johns' statements were more like casual conversation and not in response to "interrogation."[147]

Thus, the *Redeaux* court left open the real possibility that co-conspirator statements made in the right context might, indeed, be barred by the Sixth Amendment.

## IV. *DAVIS V. WASHINGTON*[148]

### *A. Facts and Holding*

The Supreme Court finally gave some additional insight into its definition of testimonial in the case of *Davis v. Washington*. The *Davis* opinion addressed two separate lower court cases involving domestic disturbances. In *Davis*, a 911 emergency operator received a call that was immediately terminated.[149] The operator called back and Michelle McCottry answered. During the ensuing conversation, the operator ascertained that McCottry's boyfriend was creating a domestic disturbance. McCottry's answers were all in the present tense, including reporting that "[h]e's here jumpin' on me again" and "[h]e's usin' his fists."[150] The operator proceeded to elicit the defendant's name, after which McCottry reported that he had run out the door. While the police were still traveling to the scene, the operator obtained more information from McCottry about Davis and the assault.[151]

The other case addressed in *Davis* was *Hammon v. Indiana*.[152] In *Hammon*, police arrived at the home of Amy Hammon in response to a report of a domestic disturbance. Amy was on the front porch when they arrived, claiming that nothing was wrong. The police entered the house and found her husband Hershel inside. After seeing some

146. *Redeaux*, 823 N.E.2d at 271 (citing Merriam-Webster's Collegiate Dictionary 611 (10th ed. 2001)).
147. *Id.*
148. 126 S. Ct. 2266 (2006).
149. *Id.* at 2270.
150. *Id.* at 2271.
151. *Id.* at 2270.
152. 829 N.E.2d 444 (Ind. 2005).

damage to the interior, they investigated further. Eventually, Amy filled out an affidavit in which she reported, *inter alia*, that Hershel had broken the furnace, shoved her into the broken glass, hit her in the chest, and attacked her daughter.[153]

Neither McCottry nor Amy Hammon testified at the criminal trial of their abusers. Instead, McCottry's 911 conversation and Amy's conversation with the police, as well as her subsequent affidavit, were admitted at trial. In both cases, lower courts ruled that the admission of the conversations did not violate the Confrontation Clause because they were not testimonial. In the *Hammon* case, the Indiana Supreme Court also held that Amy's affidavit was, in fact, testimonial, but that its admission was harmless beyond a reasonable doubt.[154]

*Davis* thus required the Supreme Court, with Justice Scalia once again writing for the majority, to answer an oft-asked question left open by *Crawford*: when does the interaction between a hearsay declarant and law enforcement officers constitute interrogation that is testimonial for Sixth Amendment purposes? The Court answered this question in the following manner:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[155]

The Court went on to justify this distinction by referring back to the definition of testimony found in the 1828 edition of *Webster's Dictionary*, which was quoted in *Crawford*: "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[156] It explained that the kind of interrogations it had in mind in *Crawford* were ones "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator."[157] The Court pointed out that the solemnity of such a statement is "established by the severe consequences that can attend a deliberate falsehood."[158] It contrasted this with the moments during a 911 call when the declarant is describing "events *as they were actu-*

153. *Davis*, 126 S. Ct. at 2272.
154. *Id.* at 2273.
155. *Id.* at 2273-74.
156. *Id.* at 2275.
157. *Id.*
158. *Id.* at 2276.

*ally happening*," rather than past events.[159] As the Court noted, "[n]o 'witness' goes into court to proclaim an emergency and seek help."[160]

*Davis* provides considerable help in determining the appropriate tack to take in analyzing co-conspirator statements for purposes of confrontation analysis. Significantly, the *Davis* court makes clear that Confrontation Clause protection is not directed *solely* against government involvement in the development of out-of-court statements or against a declarant's accusatory state of mind.[161] Rather, the Clause is concerned with cases in which either or both factors result in an out-of-court declarant giving the equivalent of "testimony" implicating the accused. Whether the declarant's statement amounts to testimony is to be judged objectively, and the test is whether the declarant is providing information regarding past events that is potentially relevant to future criminal prosecution.[162] If "the purpose of the exercise [is] to nail down the truth about past criminal events,"[163] the statement is testimonial. On the other hand, if the primary purpose of an interrogation is to obtain information for some other reason—in *Davis*, to obtain help in an ongoing emergency—then it is not testimonial.[164]

Unfortunately, in addition to this careful analysis, the *Davis* opinion once again provides fodder for courts and commentators who believe that no conceivable set of circumstances could lead to a co-conspirator statement being considered testimonial. In dicta, the Court again cited *Bourjaily* for the proposition that a statement made unwittingly to a government informant is nontestimonial.[165] We believe that this blanket blessing of co-conspirator statements by the Court does not match the test set forth in *Davis* and that the Court will narrow its dicta when faced with the right case.

### *B. The Nature of Co-Conspirator Statements*

Co-conspirator statements are conversations among members of a conspiracy, and between conspirators and outsiders, that further the

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159. *Id.*
160. *Id.* at 2277.
161. *Id.* at 2276-77.
162. *Id.* at 2273-74.
163. *Id.* at 2278.
164. *Id.* at 2273-74. The *Davis* Court refused to consider whether a statement could be testimonial absent any governmental involvement. *See id.* at 2274 n.2. This is a difficult question. Obviously, the lack of governmental involvement in the creation of the statement precludes the kinds of government overreaching the Confrontation Clause is designed to fend off. On the other hand, a defendant who faces conviction based on an out-of-court statement made in response, say, to an extended interrogation by persons other than government officials still loses the protection of cross-examination of his accuser. Like the *Davis* Court, we leave the resolution of this issue for another day.
165. *Id.* at 2275.

objectives of the conspiracy. Because of the in-furtherance requirement, many co-conspirator statements make sense only in context; they are operative rather than informational. Operative statements would include those made by a conspirator arranging a meeting, purchasing the items necessary to commit a crime, or buying or selling valuable contraband. Out of context, such statements make no sense. Thus, one would not get on the witness stand and arrange a conspiratorial meeting or place an order for burglars' tools or offer to sell a kilogram of cocaine. Operative statements, which are the bread and butter of co-conspirator communications, are likely what the Supreme Court had in mind when citing *Bourjaily* to support the conclusion that co-conspirator statements are not testimonial.[166] Indeed, under the *Davis* test, operative statements are clearly *not* testimonial; like the emergency portion of 911 calls and police reports, the purpose of an operative statement is to accomplish an important task, not provide information about past criminal activity.

However, the in-furtherance requirement is actually very broad, encompassing far more than operative statements. A statement is in furtherance of a conspiracy if it contributes *in any way* to the possible success of the conspiracy in achieving its objectives.[167] This includes not only obviously conspiratorial statements, such as those surrounding the planning of the crime, but also more tangential statements, such as those made to reassure shaky members or to recruit prospective members to join the criminal enterprise.[168] Essentially, courts find the statement to be "in furtherance" if it is more than "idle chatter."[169] Statements in furtherance thus might identify the big players in the conspiracy, brief a member about the group's past successes, or brag about the sheer scope of the criminal activity.[170] Such statements are routine and are routinely admitted pursuant to FRE 801(d)(2)(E) or a state's equivalent.[171]

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166. *See generally id.*; *see also* Crawford v. Washington, 541 U.S. 36, 58-59 (2004).

167. *See* Ethel R. Alston, Annotation, *Admissibility of Statement by Co-Conspirator Under Rule 801(d)(2)(E) of Federal Rules of Evidence*, 44 A.L.R. FED. 627 (1979) (In §10: "[C]ourts . . . have indicated that a broad construction must be given to the requirement in Rule 801(d)(2)(E) that a co-conspirator's statement be made in furtherance of the conspiracy."); *see also* United States v. Garcia-Torres, 280 F.3d 1, 5 (1st Cir. 2002) ("So long as the statement is made during the conspiracy, the ' "in furtherance" ' requirement is administered flexibly."); United States v. Fahey, 769 F.2d 829, 839 (1st Cir. 1985) ("Because of the in furtherance limitation on the admissibility of coconspirator's statement, a damaging statement is not admissible under 801(d)(2)(E) unless it tends to advance the objects of the conspiracy *as opposed to thwarting its purpose*." (emphasis added)).

168. *See* United States v. Rivera, 22 F.3d 430, 436 (2d Cir. 1994) ("providing information or reassurance to a coconspirator" satisfied the in-furtherance requirement).

169. *See* 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 259, text at n.47 (6th ed. 2006).

170. *See, e.g.*, United States v. Saget, 377 F.3d 223, 225 (2d Cir. 2004) (holding "in-furtherance" statements by a co-conspirator that "extolled the benefits of the [illegal] scheme, relay[ed] [past] . . . gun-running practices, profits, and past exploits in a manner that implicated both himself and [the defendant]"); United States v. Salgado, 250 F.3d 438,

It is not so clear that informational co-conspirator statements should never be treated as testimonial for Confrontation Clause purposes. Under the *Davis* test, the pertinent questions become: (1) Is the statement the result of an "interrogation?" and (2) Is the primary purpose of the interrogation to establish or prove past events potentially relevant to later criminal prosecution? These questions are taken up in turn.

## V. WHEN INFORMATIONAL CO-CONSPIRATOR STATEMENTS ARE THE EQUIVALENT OF TESTIMONY

One common investigative tool to develop evidence against members of a conspiracy is to infiltrate it with either undercover agents or undercover witnesses acting under the supervision of law enforcement agents. The job of the undercover operative is to learn all he can about the conspiracy—such as its members and their various roles, its methods and goals, its assets, and the locations where it meets or carries out operations. For such conversations to be admissible, of course, they must be in furtherance of the conspiracy. But, as noted above, that is usually an easy hurdle for the government to clear, since the unwitting conspirator is revealing the information because he believes, for one reason or another, that such revelations will help the conspiracy meet its objectives.

In common sense terms, an undercover operative seeking to pump information out of a conspirator is conducting a clandestine interrogation. To the extent the questions are aimed at prior criminal activity, in answering them the declarant is providing information regarding "past events [that are] potentially relevant to [future] criminal prosecution."[172] Undoubtedly, "the purpose of the exercise [is] to nail down the truth about past criminal events."[173]

The main difference between an undercover interrogation and an overt one is that in the latter case the declarant knows he is bearing witness and in the former case he does not. But the *Davis* Court goes to great lengths to make clear that the subjective intention of neither the interrogator nor the declarant controls whether the resulting statement is testimonial.[174] The objective purpose of the questioning

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450 (6th Cir. 2001) (conversations informing coconspirator of criminal enterprise's progress were "in furtherance").

171. *See* 2 BROUN, *supra* note 169, § 259 (discussing how the in-furtherance requirement has been construed by courts to admit more evidence than a literal reading of the rule would suggest).

172. Davis v. Washington, 126 S. Ct. 2266, 2274 (2006).

173. *Id.* at 2278.

174. The *Davis* Court looked not to the declarant's subjective intent but to the intent of an objective listener ("any reasonable listener would recognize that [the declarant] was facing an ongoing emergency") and not to the questioner's subjective intent but to an objective

is what matters.[175] Thus, the unwitting nature of the declarant's action should not change the outcome.

Another difference, perhaps more significant, is that within the definition of "testimony" is a notion of solemnity. According to the Supreme Court, in the context of police interrogation, the solemnity of "even an oral declaration [or statement] of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood."[176] In the case of a covert interrogation, the declarant is not aware of any official consequences of falsehood and thus arguably is not providing information on a solemn occasion. Courts and observers who wish to avoid applying *Davis* to co-conspirator statements as a categorical matter will likely point to this distinction as crucial.

We believe, however, that it is not. It cannot be argued that an individual who believes he or she is speaking to a co-conspirator is going to treat the occasion as solemn based upon the possibility of lawful sanctions for mistruth. However, that does not mean the occasion lacks all solemnity. Rather, when one conspirator briefs another about facts pertinent to the success of the conspiracy, it is a solemn event because the consequences of lying are likely to be quite dramatic—perhaps even death, if the conspiracy enforces internal norms in a violent manner. In this sense, then, the co-conspirator can be said to be bearing witness.

Moreover, determining that co-conspirator statements made to undercover agents can be testimonial avoids giving law enforcement the perverse motive to obtain as much information as possible through undercover means to avoid the constraints of the Sixth Amendment.[177] If the Court were to hold otherwise, it is not difficult to imagine prosecutors purposefully instructing law enforcement agents to conduct "undercover interrogations," because no matter how intrusive the government conduct, the pre-arrest statements of one conspirator would be admissible against all others. This would be the case although the harm to the defendant—the use at trial of a government-induced out-of-court statement that provides inculpatory evidence against the accused—is the same whether the statement is obtained from a witting or unwitting witness.

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analysis of the questioning ("the nature of what was asked and answered") as barometers of whether the statement was testimonial. *Id.* at 2276.

175. *See id.* at 2273-74 ("[Statements] are testimonial when . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

176. *Id.* at 2276 (citation omitted).

177. *See* Torchin, *supra* note 96, at 596 ("[C]oncentrating on whether the statement was given during formal 'interrogation' . . . gives investigating officers and prosecutors precisely the wrong incentive, inviting them to avoid 'whatever procedure is deemed to be a critical aspect of formality.' " (citation omitted)).

To think that prosecutors will not take advantage of the holes left open to them by *Davis* is to be naïve. They have already started doing so on other fronts. One commentator has noted the proliferation of "guidance questionnaires" that are being published and disseminated by victim's advocacy groups.[178] These questionnaires (for crime-scene witnesses, presumably) are checklists that prosecutors can use to measure how "testimonial" a battered wife's statement (for example) may be for confrontation purposes. Identifying the relationship between prosecutors and investigators as two players on the same team, Torchin notes that "*[t]he effect* of such a checklist for prosecutors, designed for direct examination or pretrial hearings of police officers, *is to teach the law-enforcement community* how to act at a crime scene in order to have victim statements be deemed nontestimonial and hence admissible."[179]

Not all questioning by undercover operatives of co-conspirators about past criminality should be considered interrogation, however. The Court in *Davis* made clear that in certain circumstances, a declarant's answer to just one question—or his voluntary statement made without any questioning at all—might still be testimonial.[180] This is a point with which we have no general disagreement. We contend, however, that when the declarant is unwitting, the nature of the questioning itself is critical in determining whether a testimony-producing interrogation has taken place. Occasional answers to random questions among purported acquaintances are a mundane part of routine, casual conversation—the kind explicitly singled out as not constituting testimony by the *Crawford* Court.[181] This makes sense: there is no solemnity implicit in routine conversation. For a conversation about past crime to become serious in nature, the declarant's answers must be given in response to sustained questioning by the undercover agent or witness.

To summarize, our reading of *Crawford* and *Davis* leads us to advocate a nuanced rule for the admission of co-conspirator statements under the Confrontation Clause. First, all operational statements, and those aimed at future events, should be admissible—they are akin to requests for emergency assistance. Second, casual remarks by conspirators should also be admissible, due to *Crawford*'s specific exclusion of "casual remark[s] to an acquaintance" from the reach of the Confrontation Clause.[182] Even isolated answers to occasional questions asked by an undercover agent or witness about the identity of conspirators or past events should not be excluded. But when sus-

178. *Id.* at 596-97.
179. *Id.* at 597 (emphasis added).
180. *Davis*, 126 S. Ct. at 2274 n.1.
181. Crawford v. Washington, 541 U.S. 36, 51 (2004).
182. *Id.*

tained questioning of one or more co-conspirators amounts to an interrogation objectively designed to gather evidence about past events, any statements given in response should be classified as testimonial, and thus their admission should be barred by the Confrontation Clause. This test is not perfectly neat and clean, but it is faithful to the Supreme Court's recent jurisprudence and to the Confrontation Clause itself.

## VI. HISTORICAL ISSUES

One potential roadblock that could completely derail the above confrontation analysis would be an originalist interpretation of the Constitution. This is especially true because Justice Scalia, author of both *Crawford* and *Davis*, is probably the most faithful adherent to originalist thinking of any Justice ever to serve on the Supreme Court.[183] In short, an originalist approach to the issue would examine whether an exception to confrontation existed for co-conspirator statements at the time of the enactment of the Sixth Amendment in 1791. If so, the assumption would be that, by its silence on the matter, the constitutional provision was intended by the Framers to leave such an exception intact. If that was the original intention of the Framers, it cannot be disturbed absent constitutional amendment.

This issue was alluded to by the Court in *Crawford*. According to *Crawford*, business records and statements in furtherance of a conspiracy were, in fact, well-established exceptions to the general rule of exclusion of hearsay by 1791.[184] Justice Scalia states that these exceptions were not considered to be in conflict with the Confrontation Clause because they "cover[ ] statements that by their nature were not testimonial."[185] Thus, the matter would seem to be closed.

But it is not. Professor Graham, for one, has taken Justice Scalia to task for using what has been dubbed "law office history" to support the conclusions reached in *Crawford*.[186] Regardless of the accuracy of that proposition, it appears that Justice Scalia did not undertake a

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183. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (speech in which Justice Scalia promotes originalism and defends it against its critics, arguing that originalism is effectively the only legitimate method of judicial review); *see also* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 186-89 (2005) (discussing Justice Scalia's originalist philosophy); Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 385 (2000) (generally taking issue with Justice Scalia's jurisprudence, but recognizing that "Justice Scalia's unique contribution to constitutional theory has been his jurisprudence of 'original meaning.' ").

184. *Crawford*, 541 U.S. at 56.

185. *Id.*

186. *See* 30 WRIGHT & GRAHAM, *supra* note 7, § 6371.2 nn.24-26.

close enough examination of the co-conspirator exception to support his open-ended claim. This exception did not mean to the Framers what it means to law enforcement, criminal practitioners, and courts today, and it is debatable whether the Framers would condone it in its current form. *United States v. Burr*[187] is illustrative. As far as historically controversial figures go, Walter Raleigh had nothing on Aaron Burr. Three years after fatally wounding Alexander Hamilton in a duel, Burr was indicted and tried for treason in 1807, and the central evidence against him was a letter of a supposed co-conspirator.[188] The theory of the prosecution's case was that Burr was organizing a private army to aid in the overthrow of the United States by attacking New Orleans as a means to cleave the Western States from the Eastern ones and that his claims that they were "just going to attack Mexico" were merely a cover story.[189] In a case that hinged on the introduction of co-conspirator statements against the accused, Justice Marshall noted the dangers posed to the confrontation right by some of the exceptions developing at common law that admitted hearsay:

> [A] man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.[190]

Notably, Chief Justice Rehnquist keyed on this language in his *Crawford* concurrence, citing from this passage in *Burr* to underscore his skepticism of the majority's newfound distinction between testimonial and nontestimonial hearsay.[191] Just before citing from *Burr*, the Chief Justice noted, "It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled."[192]

Even though there was a hearsay exception for co-conspirator statements in the early stages of the Republic, it could not be called "well settled," as was the exception for dying declarations identified in *Crawford*.[193] Without question, the historical record shows that an

187. 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,964).

188. *Id.* at 193; 30 WRIGHT & GRAHAM, *supra* note 7, § 6356 n.750 ("The precise issue before Marshall in Burr's trial was the admissibility of the statements of an alleged co-conspirator, one Herman Blennerhasset.").

189. United States v. Burr, 25 F. Cas. 201, 203 (C.C. Va. 1807) (No. 14,964A).

190. *Burr*, 25 F. Cas. at 193.

191. Crawford v. Washington, 541 U.S. 36, 73 (2004) (Rehnquist, C.J., concurring).

192. *Id.*

193. *Id.* at 56 n.6.

agency-theory-based co-conspirator exception had existed for some time in English law.[194] Justice Marshall's ruling in *Burr*, however, was that the co-conspirator statements in that case were inadmissible because the exception is appropriate *only if conspiracy is actually charged in the indictment*.[195] Justice Marshall looked to English common law to support his decision:

> I have not been able to find in the books a single decision, or a solitary dictum which would countenance the attempt that is now made to introduce as testimony the declarations of third persons, made in the absence of the person on trial, under the idea of a conspiracy, where no conspiracy is alleged in the indictment.[196]

This limitation on use of the co-conspirator exception is, of course, no longer in effect.[197] Thus, while a certain version of the co-conspirator exception was settled around the time when the Framers adopted the Sixth Amendment, it was much more limited than that which exists today. One response to an originalist argument against treating some co-conspirator statements as testimonial, therefore, is that a thorough historical analysis reveals that the modern use of the co-conspirator exception is far more extensive than that contemplated or condoned by the Framers.[198]

The second reason that originalism is no bar in this instance is that the modern undercover investigation was unforeseeable during the founding of the Republic. In the Framers' day, there was essentially no such thing as an undercover investigation;[199] indeed, organized, professional police forces did not come onto the scene until

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194. *See, e.g.*, S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 94-98 (1829); JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 399-413 (1863).

195. *Burr*, 25 F. Cas. at 195.

196. *Id.* at 194. In a later opinion, Justice Marshall reiterated that "in the English books generally, the position that the declarations of a person not on trial may be given in evidence against a man proved to have been connected with him, is laid down only in cases of conspiracy, where the crime is completed without any other open deed." *Id.* at 204.

197. *See* Alston, *supra* note 167 (In §3: "[C]ourts . . . have recognized that Rule 801(d)(2)(E) is applicable to a co-conspirator's statement made during the pendency of a conspiracy regardless of whether conspiracy has been charged in the indictment" and collecting authorities).

198. The majority's response to Chief Justice Rehnquist's mention of *Burr* in his concurrence left something to be desired: it merely mentioned in a footnote that the majority "disagree[d] with the Chief Justice's reading of the case." *Crawford*, 541 U.S. at 59 n.9.

For disregarding what is considered to be one of the more important historical Confrontation Clause cases, the majority earned Professor Grahams' ire. *See* Graham, *supra* note 90, at 41 ("Apparently the Court is 'unaware' that in 1807, Chief Justice Marshall in the trial of Aaron Burr 'invoked' the right of confrontation as a ground for excluding the declarations of Herman Blennerhasset, one of Burr's supposed co-conspirators.").

199. *See* GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 24-25 (1988) (explaining that undercover police work in the United States did not get underway until the early twentieth century); *see also* Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GA. ST. U. L. REV. 395, 414-16 (2002).

around the Civil War.[200] In the minds of the Framers, therefore, co-conspirator statements did not, by their very nature, entail any measure of government involvement in their creation; thus, there was no need to protect against official interrogation of unwitting conspirators. Additionally, co-conspirator statements were almost all operative in nature and could not be recreated on the witness stand. To the Framers, then, the idea of a co-conspirator "bearing witness" was just silly. That is not, of course, the case in the present day.

## VII. APPLICATION OF THE PROPOSED RULE TO PRIOR CASES

Thus, the rule proposed in Part V survives originalist analysis. We believe that it is also a workable rule, and one that will leave undisturbed the government's ability to ferret-out crime through the use of undercover investigative tools. First, it simply will not come into play unless the statements at issue were elicited by an agent of the government. Second, it does not bar the admission of operative statements, which constitute a large part of co-conspirator communication in furtherance of the criminal activity. Finally, it will only impede the admission of co-conspirator statements that are the product of sustained interrogation by an undercover operative attempting to ascertain facts about past criminal activity.

Applying the proposed rule to the facts of prior cases helps to clarify its operation. Therefore, this task is carried out below.

### *A.* United States v. Inadi

The reader will recall that *Inadi*[201] was the first post-*Roberts* case to uphold the constitutionality of admitting co-conspirator statements.[202] In *Inadi*, the defendant was convicted of conspiring to manufacture and distribute methamphetamine. The evidence showed that his role in the conspiracy was to supply cash and chemicals for the manufacture of the drug and to oversee its distribution. Local police obtained a warrant to search a manufacturing site and surreptitiously remove two pans of the drug. Later, they lawfully wire-tapped a phone and intercepted participants in the conspiracy speculating about how the methamphetamine had disappeared. These conversations were offered against Inadi at trial. The trial court ruled that the statements in them were admissible because they were made during the course and in furtherance of the conspiracy under FRE 801(d)(2)(E).[203]

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200. See MARX, *supra* note 199, at 23 (noting that large American cities did not have uniformed municipal police departments until the 1850s).

201. 475 U.S. 387 (1986).

202. *See supra* text accompanying notes 50-53.

203. *Inadi*, 475 U.S. at 390.

The statements in *Inadi* would not be testimonial under our proposed rule for two reasons. First, they were not made to law enforcement; second, they were all apparently operational—trying to figure out what had happened for the purpose of protecting the conspiracy from detection. Thus, *Inadi* would be an easy case, decided the same way under our *Crawford*-based rule as under *Roberts*.

### *B.* Bourjaily v. United States

*Bourjaily*,[204] of course, is the case the Supreme Court cited in both *Crawford* and *Davis* for the proposition that co-conspirator statements are nontestimonial.[205] It thus deserves special attention, as our test would be that much stronger if it comports with existing Supreme Court dicta.

In *Bourjaily*, an informant working for the FBI arranged to sell a kilogram of cocaine to Angelo Lonardo. Lonardo agreed to find individuals to distribute the drug. In a conversation that was recorded by the FBI, Lonardo stated that he had a "gentleman friend" who had some questions about the cocaine. Later, the informant spoke to the friend about the cocaine's quality and price. They arranged for the sale to take place in a designated hotel parking lot, with Lonardo accepting the drug and then transferring it to the friend. The deal went down, and the "friend" turned out to be Bourjaily.[206]

At trial, the Government introduced Lonardo's recorded conversations about the "friend" over Bourjaily's objection. They were admitted as co-conspirator statements.[207]

*Bourjaily* presents a slightly closer case than *Inadi* because the statements at issue were made to an informant acting under the supervision of law enforcement. But it is still an easy case, for two reasons: (1) the statements are clearly operative, all relating to a future transaction and not past criminal conduct, and (2) the statements are not the result of sustained questioning by the informant. Thus, our proposed test is consistent with the Court's reference to *Bourjaily* as a case in which the co-conspirator statements were not testimonial in nature.

### *C.* People v. Redeaux

The facts of *People v. Redeaux*[208] are set out above.[209] *Redeaux* presents essentially the same situation as *Bourjaily*. As in *Bourjaily*, the statements in *Redeaux* were made to an undercover agent. Although they were extensive, they were all operational, encompassing

204. 483 U.S. 171 (1987).
205. *See supra* text accompanying notes 54-55.
206. *Bourjaily*, 483 U.S. at 173-74.
207. *Id.* at 174.
208. 823 N.E.2d 268 (Ill. App. Ct. 2005).
209. *See supra* text accompanying notes 139-41.

the negotiation and consummation of a drug deal. Moreover, they were not made in response to structured questioning, and they were not aimed at learning about prior criminal activity. Thus, they were not testimonial. The *Redeaux* court reached this conclusion, but it intimated that just a little bit of questioning by the agent—such as inquiring about the name of Johns' source—might have produced a different outcome.[210] We would beg to differ. To preserve the government's ability to investigate and prosecute criminal enterprises through infiltration, our test makes clear that before questioning in the undercover setting becomes an interrogation, it must be sustained, structured, and directed to the past. Even if the agent sought to learn the identity of Johns' source, this would not come close to being an interrogation under our analysis.

### *D.* United States v. Stewart

The *Stewart* case presents perhaps the most interesting Confrontation Clause/co-conspirator statement challenge. As set out in detail above,[211] the statements in that case were made in response to formal law enforcement interrogations. At the same time, they constituted co-conspirator statements because they were designed to advance a preconceived agreement to obstruct and impede the due administration of justice. The Second Circuit held that even the truthful portions of the statements were admissible without offending the defendant's confrontation rights because, in the unique setting in which the answers to the interrogation are part and parcel of the crime itself, it would defy common sense to hold otherwise.[212]

We believe that the Second Circuit decided the *Stewart* case correctly, but for the wrong reasons. Bacanovic's statements were classically testimonial and, in the right circumstances, their use against a criminal defendant who lacked the opportunity to cross examine him would undoubtedly offend the Constitution. Consider, for example, the situation in which an individual who is being interrogated about a homicide laces his answers with lies to further a predetermined scheme to obstruct justice and protect the murderer. Nevertheless, authorities put the alleged murderer on trial. Prosecutors believe that, despite the lies, portions of the co-conspirator's out-of-court statement implicate the defendant. They offer these in evidence. Should they be permitted because they are part and parcel of the obstruction crime?

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210. *See Redeaux*, 823 N.E.2d at 271 ("[The undercover agent] did not press [the coconspirator] for information beyond what was necessary [to facilitate the sale of the cocaine.]").

211. *See supra* text accompanying notes 129-33.

212. *Stewart*, 433 F.3d at 292-93.

The answer, of course, is no. The reason is that in the murder trial, the statements are being used solely for the truth of the matters asserted and they were made in a setting that leaves no doubt about their testimonial nature. The fact that they also happen to be co-conspirator statements is irrelevant. To be faithful to *Crawford*, the defendant must have the opportunity to cross-examine the declarant.

How is the *Stewart* case different? The reason is this: none of Bacanovic's out-of-court statements, even the truthful portions, were offered for the truth of the matters asserted therein. Presumably, the government proved all necessary facts—other than the defendants' lies—through witnesses other than Stewart and Bacanovic themselves.[213] The truthful portions of Bacanovic's statements were offered for a variety of nonhearsay purposes: at the very least, to put the lies into context, to show how Bacanovic and Stewart were savvy enough to interlace lies with truth, and to demonstrate how Bacanovic's and Stewart's stories matched each other. None of these is a hearsay purpose, and so none offends the Confrontation Clause. Note, however, that if the prosecution *had* attempted to use a fact elicited from Bacanovic against Stewart for the truth it asserted, its admission *would have* offended the Clause—just as in the case of the murder prosecution discussed above.

The Second Circuit came ever so close to understanding why its instincts were right when it stated:

> The essence of a[n obstruction] conspiracy necessarily contemplates that the conspirators would provide false information to government agencies during the course of their investigation and during interrogations that would produce testimonial statements of one or the other of them. It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. . . . The truthful portions of statements in furtherance of the conspiracy . . . are intended to make the false portions believable and the obstruction effective.[214]

The court's next sentence is where it went astray: "Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice."[215] The word

213. *See id.* at 294-95 (refusing to reverse even if challenged statements had been erroneously admitted because of overwhelming weight of other evidence against defendants).

214. *Id.* at 292.

215. *Id.*

"merely" is the problem. The court seems to think that simply because it is addressing truthful portions of the declarant's testimony, part of the purpose in offering such portions must be for their truth. But that, of course, is not the case. Even a truthful statement, offered for something other than the truth of the matter asserted, is not hearsay. Indeed, it is probably safe to say that most statements offered for a nonhearsay purpose are truthful.

## VIII. CONCLUSION

*Crawford* and *Davis* mark a monumental shift in the Supreme Court's Confrontation Clause analysis. Although the outcome has not brought the certainty promised by the *Crawford* opinion, it appears that the new paradigm will do a good job in protecting core confrontation values—a much better job than the malleable *Roberts v. Ohio* test accomplished by essentially mimicking the hearsay rule and its exceptions. However, the full promise of *Crawford* will not be achieved if courts seek to short-cut serious analysis by setting up and applying arbitrary bright lines to distinguish testimonial from nontestimonial out-of-court statements. This is true not only for co-conspirator statements, but for statements traditionally admitted through other hearsay exceptions as well.[216] The task of applying the test set forth in *Davis*—and new ones that are inevitably going to surface if the courts do their job—is well worth the effort. It will result in meaningful protection for criminal defendants against being accused by individuals whose stories cannot be tested by cross-examination. In the current era of ever-narrowing rights for criminal defendants, reaffirming the law's commitment to this one layer of protection whenever warranted seems to be the least we can do to promote justice.

This Article does not propose that all—or even most—co-conspirator statements are testimonial—only that they can be, and should be, given individualized analysis. If, and only if, a co-conspirator statement is the product of sustained questioning by an undercover agent or other government operative and it contains information about prior criminal activity, should it be considered testimonial and thus subject to exclusion under the Sixth Amendment.

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216. *See* Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under* Crawford v. Washington*: Some Good News, But . . .* , 28 OCT. CHAMP. 16 (2004); Knoebber, *supra* note 10, at 521 ("The categorical approach has failed to produce consistent results in at least eight of the following areas that Crawford left unresolved [including] co-conspirator statements to undercover officers or informants.").