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Crawford v. Washington — How the Seventh Circuit Improperly Defined "Testimonial"

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CRAWFORD V. WASHINGTON- HOW THE SEVENTH CIRCUIT IMPROPERLY DEFINED "TESTIMONIAL"

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INTRODUCTION

The Supreme Court changed the landscape of admitting hearsay statements into evidence with its decision in *Crawford v. Washington*. In *Crawford* the Court held that the Confrontation Clause of the Constitution precludes the admission of out of court "testimonial" statements at trial unless either the witness is available to testify or there has been a previous opportunity for cross examination.[1] In the wake of this landmark decision, lower courts throughout the nation were left to fill in many holes, including the underlying question: what is testimonial?[2] Many federal courts of appeals, including the Seventh Circuit in *United States v. Gilbertson*, have started explaining how they define testimonial, giving guidance to trial courts.[3] Presently, not all federal courts of appeals have weighed in on

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[1] Crawford v. Washington, 541 U.S. 36, 68 (2004).

[2] *Id.*

[3] 435 F.3d 790 (7th Cir. 2006); United States v. Saget, 377 F.3d 223 (2d Cir. 2004); United States v. Cromer, 389 F.3d 662 (6th Cir. 2004); Horton v. Allen, 370 F.3d 75 (1st Cir. 2004); United States v. Summers, 414 F.3d 1287 (10th Cir. 2005); United States v. Hinton, 423 F.3d 355 (3d Cir. 2005).

the issue, but the ones that have seem to be in consensus that a statement is testimonial when a reasonable person would believe that the statement could be used at trial.[4]

This note illustrates how the Seventh Circuit has mistakenly modified this test by adding that the communication must be initiated by the government.[5] The first part of this note gives an brief overview of hearsay and the Confrontation Clause. The second part of this note analyzes the Supreme Court's *Crawford* decision. The third part of this note explains how other courts of appeals have analyzed *Crawford* and how they define testimonial. The fourth part of this note explains how the Seventh Circuit properly applies a reasonable expectation of the declarant test but also improperly asserts that the communication must be initiated by the government to be testimonial. The fourth part also explains that this addition strays from the reasoning behind *Crawford*.

I. HEARSAY AND THE CONFRONTATION CLAUSE

A. Hearsay

The Federal Rules of Evidence define hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[6] These statements are generally inadmissible at trial because they are considered inherently unreliable.[7] This unreliability is inferred because there has been no opportunity for cross-examination, nor have the judge and jury had an opportunity to see the witness to weigh the

[4] *Gilbertson*, 435 F.3d at 796; *Saget*, 377 F.3d at 229; *Cromer*, 389 F.3d at 675; *Horton*, 370 F.3d at 83-84; *Summers*, 414 F.3d at 1302; *Hinton*, 423 F.3d at 360.

[5] *Gilbertson*, 435 F.3d at 795-96.

[6] FED. R. EVID. 801(a).

[7] FED. R. EVID. 802; Whitney Baugh, *Why the Sky Didn't Fall: Using Judicial Creativity to Circumvent Crawford v. Washington*, 38 LOY. L.A. L. REV. 1835, 1845 (2005).

witness' credibility.[8] These concerns are at the heart of the Confrontation Clause.[9]

B. The Confrontation Clause

The Confrontation Clause of the United States Constitution requires that in all criminal prosecutions, "the accused shall enjoy the right . . . to be confronted with the witnesses against him."[10]

The Supreme Court has long recognized that "[i]f one were to read this language literally, it would require, on objection, the exclusion of any statement make by a declarant not present at trial," but the Court has rejected this as "unintended and too extreme."[11] Therefore, the Court has consistently allowed some hearsay exceptions to apply when the declarant is unavailable.[12] However, there is little doubt that the Confrontation Clause was intended to exclude some hearsay.[13] In fact, the Court has established that the Clause "reflects a preference for face-to-face confrontation at trial, and that a primary interest secured by [the provision] is the right of cross-examination."[14] The Confrontation Clause envisions

> a personal examination and cross-examination, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worth yof belief.[15]

[8] *See* California v. Green, 399 U.S. 149, 158 (1970).
[9] *See* Crawford v. Washington, 541 U.S. 36, 49 (2004).
[10] U.S. CONST. amend. VI.
[11] Ohio v. Roberts, 448 U.S. 56, 63 (1980).
[12] *Id.*.
[13] *Id.*; *See also Green*, 399 U.S. 149 at 156-57.
[14] *Roberts*, 448 U.S. at 63 (citing Douglass v. Alabama, 380 U.S. 415, 418 (1965)) (internal quotation marks omitted).
[15] Mattox v. United States, 156 U.S. 237, 242-43 (1895).

The Framers included the Confrontation Clause within the Constitution because one of the main "evils" that worried them when they wrote the Constitution was the English "civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[16] During the 16th and 17th centuries, England commonly used justices of the peace, magistrates, and other agents of the Crown to conduct pretrial examinations of suspects and witnesses that were then used at trial in lieu of live testimony against the defendant.[17]

For years the Court's decisions were largely consistent with this theory of the Confrontation Clause.[18] In *Mattox v. United States* the Court allowed a hearsay statement to be admitted at trial, relying on the fact that the defendant had an adequate opportunity to confront the witness.[19] The Court's later cases continued to respect the Confrontation Clause.[20] But eventually the Court's rationale departed from the original intent of the Clause and allowed lower court's decisions to do so as well.[21]

C. Pre-Crawford Analysis

For over twenty years, the Court's decision in *Ohio v. Roberts* governed the admissibility of hearsay of an unavailable witness at trial.[22] The *Roberts* Court rationalized that the Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay.[23] First, the Court said that in adherence with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes that the prosecution must either produce the witness for

[16] Crawford v. Washington, 541 U.S. 36, 49 (2004).
[17] *Id.* at 44.
[18] *Id*. at 57.
[19] 156 U.S. at 250.
[20] See *Crawford*, 541 U.S. at 57; Mancuis v. Stubbs, 408 U.S. 204, 213-16 (1972); California v. Green, 399 U.S. 149, 165-68 (1970).
[21] *Crawford*, 541 U.S. at 60.
[22] *Id.* at 60.
[23] Ohio v. Roberts, 448 U.S. 56, 65 (1980).

trial or prove that the witness is unavailable.[24] Therefore, the prosecution is generally required to produce, or demonstrate the unavailability of, the declarant of the statement it wishes to use against the defendant, whether or not there has been a prior opportunity for cross-examination.[25] Once the witness is shown to be unavailable,[26] the Court rationalized that if the declarant is unavailable, there must be assurances that the hearsay is reliable.[27] The underlying purpose of the Confrontation Clause is to enhance accuracy in the fact-finding process, therefore, it only approves of hearsay that is "marked with such trustworthiness that there is no material departure from the reason of the general rule."[28] The Court opined that the main concern has been to "insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.'"[29] Furthermore, the purpose of the Confrontation Clause is to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[30] The Court said this "indicia of reliability" requirement was applied principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection."[31]

The Court held in *Roberts* that when the proponent of an out of court statement is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is

[24] *Id.*

[25] *Id.* (citing, inter alia, Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968)).

[26] *Roberts*, 448 U.S. at 65.

[27] *Id.* at 66.

[28] *Id.* at 65-66 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)) (internal quotation marks omitted).

[29] *Roberts*, 448 U.S. at 66 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)).

[30] *Roberts*, 448 U.S. at 65-66 (quoting California v. Green, 399 U.S. 149, 161 (1920)).

[31] *Roberts*, 448 U.S.at 66 (citing Mattox v. United States, 156 U.S. 237, 244 (1895)).

unavailable.[32] Even then, however, the statement must bear adequate "indicia of reliability" to be admissible at trial.[33] The *Roberts* Court rationalized that reliability can be inferred, without more, in a case where the evidence falls within a firmly rooted hearsay exception, though the Court never defined what constituted a firmly rooted hearsay exception.[34] Therefore, as long as the statement falls within such a firmly rooted hearsay exception it could be admitted at trial whether or not the declarant is available.[35] If it does not, further inquiry is necessary to determine if the hearsay shows particularized guarantees of trustworthiness to be admitted at trial.[36] The *Roberts* Court left to the lower courts the analysis of what it meant to have these guarantees of trustworthiness.[37]

Therefore, before the Supreme Court's decision in *Crawford* a prosecutor had three ways to admit hearsay against a defendant, as long as the statement fit into one of the hearsay exceptions. First, the prosecutor could make the witness available for cross-examination at the trial.[38] Second, he could make a showing that the witness is unavailable and show that the hearsay falls into some firmly rooted exception to the hearsay rule.[39] And third, he could make a showing that the witness is unavailable for trial and convince the trial judge that the hearsay has indicia of reliability that averts a Sixth Amendment issue.[40]

II. CRAWFORD V. WASHINGTON

With its decision in *Crawford v. Washington* in 2004, the Supreme Court re-wrote the rule of evidence as it pertains to the admissibility of hearsay from an unavailable declarant. The Court

[32] *Roberts*, 448 U.S. at 66.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 56.
[38] *Id.* at 66.
[39] *Id.*
[40] *Id.*

noted that the *Roberts* Court's objective was not wrong, just the rationale.[41] For years before the *Crawford* decision many scholars and members of the Court suggested that the Court revise its Confrontation Clause doctrine.[42] Two different propositions had been suggested to the Court.[43] First, the Confrontation Clause should only be applied to testimonial statements, leaving the remainder to regulation by hearsay law.[44] Second, there should be an absolute bar to statements that are testimonial, unless there had been a prior opportunity for cross-examination.[45] The Court reiterated its rejection of the first proposal in *Crawford*, and left the *Roberts* test in place for non-testimonial hearsay evidence.[46] But the Court noted the second proposal was clearly at issue in *Crawford*.[47]

In *Crawford* the Court opined, that the *Roberts* test allowed a jury to hear evidence that was untested by the adversarial process and that was merely based on a judicial determination of reliability,[48] which was never the intent of the Founding Fathers.[49] Instead of basing admissibility of evidence on the constitutionally prescribed method, the *Roberts* test did so based on a completely foreign one.[50] The Court noted that the *Roberts* test was based upon reliability of evidence in a way that was completely amorphous and entirely subjective.[51] This was apparent to the Court by looking at the factor intensive tests used by the Courts of Appeals.[52] The Court did not

[41] Crawford v. Washington, 541 U.S. 36, 61 (2003).
[42] *Id.* at 60-61.
[43] *Id.* at 61.
[44] *Id.*
[45] *Id.*
[46] *Id.* (citing White v. Illinois, 502 U.S. 346, 352-53 (1992)).
[47] *Crawford*, 541 U.S. at 61.
[48] *Id.* at 62.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 63.
[52] *Id.* (*See* United States v. Doerr, 886 F.2d 944, 956 (7th Cir. 1989) for analysis of the seven factor test used by the Seventh Circuit. The elements of the test consist of: 1) the character of the witness for truthfulness and honesty, and the availability of evidence on the issue; 2) whether the testimony was given voluntarily, under oath, subject to cross-examination and a penalty of perjury; 3) the witness'

believe that the Framers wanted to leave the Sixth Amendment's protection "to the vagaries of the rules of evidence, much less to amorphous notions of reliability."[53] The Court admitted that though the Clause's ultimate goal is to ensure reliability of evidence, "it is a procedural rather than a substantive guarantee."[54] In other words, the Court noted that the Constitution and the Confrontation Clause do not require that evidence actually be reliable, "but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[55] In fact, under the *Roberts* test, "some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial."[56] However, it was not just the lack of reliability that bothered the Court, it was the fact that the *Roberts* test admitted "core testimonial statements that the Confrontation Clause plainly meant to exclude."[57] The Court left the *Roberts* test in place when dealing with the admissibility of nontestimonial hearsay.[58]

The Court further held that the Framers' concern at the time of drafting the Confrontation Clause was to protect against "inquisitorial practices."[59] Therefore, defendants have a right to confront people

relationship with both the defendant and the government and his motivation to testify … .; 4) the extent to which the witness' testimony reflects his personal knowledge; 5) whether the witness ever recanted his testimony; 6) the existence of corroborating evidence; and 7) the reasons for the witness' unavailability.).

[53] *Crawford*, 541 U.S. at 61 (internal quotation marks omitted).

[54] *Id.* at 61.

[55] *Id.*

[56] *Id.* at 65 (citing Nowlin v. Commonwealth of Virginia, 579 S.E.2d 367, 370-72 (Va. Ct. App. 2003) (the fact that the defendnat's statements were made while in custody on pending charges made this statement clearly against penal interest and thus more reliable).

[57] *Crawford*, 541 U.S. at 63.

[58] *See* United States v. Hinton, 423 F.3d 355, 358 n.1 (2005) (quoting *Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.")).

[59] *Crawford*, 541 U.S. at 44.

who "bear testimony" against them.[60] The Court said that "the constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement."[61] Thus, the Confrontation Clause applies to testimonial evidence, requiring unavailability of the witness combined with a prior opportunity for cross-examination.[62] Therefore, the Confrontation Clause requires the exclusion of hearsay testimony unless either the witness is available for trial or there has been a prior opportunity for cross-examination.[63] Presumably, the only possible exception is that of a dying declaration. The Court refused to decide that issue, but stated that "if this exception must be accepted on historical grounds, it is *sui generis*."[64]

A. Why the Court Found Cross-Examinations So Important

The *Crawford* decision displays why cross-examination is vitally important to the survival of our adversarial process.[65] The Confrontation Clause guarantees the right of the accused to confront hostile witnesses; therefore, it protects the right of cross-examination.[66] Defendants have the right to test the credibility of their accusers and confrontation increases the likelihood that an accusation by an adverse witness is truthful by requiring the witness to confront the accused.[67] The Court has said that "the absence of proper confrontation at trials calls into question the ultimate integrity of the

[60] *Id.* (The Court in *Crawford* quoted the definition of testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." (citing NOAH WEBSTER, 1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

[61] *Crawford*, 541 U.S. at 44.

[62] *Id.* at 69 ("Non-*testimonial*" hearsay does not implicate the Confrontation Clause and admissibility is determined by applying appropriate rules of evidence).

[63] *Id.*

[64] *Id.* at 56 n.6.

[65] *Id.* at 65.

[66] Baugh, *supra* note 7, at 1845.

[67] *Id*. at 1846 (citing California v. Green, 399 U.S. 149, 156 (1920); Mattox v. United States, 156 U.S. 237, 242-43 (1895)).

fact-finding process."[68] The Court further said that when "testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands are the one the Constitution actually prescribes: confrontation."[69] The Court went on to analogize the disposal of confrontation simply because the evidence is reliable to the disposal of a jury trial simply because the defendant is obviously guilty.[70]

When the Framers inserted the Confrontation Clause into the Sixth Amendment, they intended it to include a right of cross-examination.[71] This was obvious to the *Crawford* Court by looking at debate prior to the ratification of the Constitution. Many of the "declarations of rights adopted around the time of the Revolution" included a right to confrontation, but the proposed Federal Constitution did not.[72] This caused much of objection, specifically during the ratifying convention in Massachusetts from Abraham Holmes who said: "The mode of trial is altogether indetermined; … whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told…."[73] From this, the Court noted that the inclusion of a right to confrontation in the Federal Constitution was specifically intended to guarantee the right to cross examination.[74]

B. Definition of Testimonial

In *Crawford* the Supreme Court refused to define what makes a statement testimonial, stating that "we leave for another day any effort to spell out a comprehensive definition of testimonial."[75] All the Court explicitly stated was that the term testimonial "applies at a

[68] *Id.* (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (internal quotation marks omitted)).
[69] *Crawford*, 541 U.S. at 68-69.
[70] *Id.* at 62.
[71] *Id.*
[72] *Id.* 48.
[73] *Id.*
[74] *Id.* at 48-49.
[75] *Id.* at 68.

minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[76] Therefore, trial and appellate courts throughout the country have been left to provide their own definition of testimonial. But, even though the Court did not explicitly define testimonial, it did provide the lower courts with guidance.

The Court provided three "formulations of [the] core class of testimonial statements."[77] The first, which Crawford himself urged upon the Court, is that testimonial statements consist of "ex parte in-court testimony or its functional equivalent… such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[78] The second, which Justice Scalia took from concurring justices in past decisions, defines testimonial statements as "extrajudicial statements… in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[79] The last, which was suggested in an *amici curia* from the National Association of Criminal Defense Lawyers, describes testimonial statements as those that are made under circumstances which would "lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[80]

Since the Court refused to define testimonial it is logical to look at the schools of thought of the definition of testimonial that the Court referenced in its decision. Once one accepts what the Court articulates in *Crawford*, that testimonial evidence is not limited to in-court or sworn testimony,[81] then these two schools of thought are in complete opposition to each other. The first is a very narrow definition that has been advanced in the work of Professor Ahkil Reed

[76] *Id.*

[77] Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004) (quoting *Crawford*, 541 U.S. at 51-52).

[78] *Crawford*, 541 U.S. at 52.

[79] *Id.* (quoting White v. Ill., 502 U.S. 346, 365 (1992)).

[80] *Id.*

[81] *Id.* at 50, 52 n.3.

Amar from Yale University.[82] Professor Amar believes that a witness provides testimonial evidence when he testifies "either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like."[83] This would barely be more than the minimum standard that the Court set out in *Crawford*.[84] The second school of thought, championed by Professor Richard Friedman at the University of Michigan,[85] is much broader and encompasses a statement that is "made in circumstances in which a reasonable person would realize that it likely would be used in the investigation or prosecution of a crime."[86] It is important to note that this theory is not based upon what the speaker actually believed, but what a reasonable person would believe, which is very close to the one suggested by the National Association of Criminal Defense Lawyers.[87] Based on his proposed definition, Friedman offers five rules of thumb:

> A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business,

[82] Franny A. Forsman, Esq., Rene L. Valladares, Esq., *Grappling with what statements are testimonial under Crawford v. Washington: "The Reasonable Expectation of the Declarant" Test*, (October 2005) NEV. LAW. 26 (2005).

[83] *Id.*

[84] *Crawford*, 541 U.S. at 68.

[85] Forsman, *supra* note 82, at 26.

[86] *Id.*; Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1240-41 (2002).

[87] *Crawford*, 541 U.S. at 52.

> made before the criminal act has occurred or with no recognition that it relates to criminal activity.[88]

These two ideas examined by the Court in *Crawford* give guideposts to lower courts about the Supreme Court's intended definition of testimonial.

III. HOW SISTER CIRCUITS ARE DEFINING *TESTIMONIAL*

About half of the federal courts of appeals have given trial courts guidance about their definition of testimonial.[89] Some of these courts have utilized the "core class of testimonial statements" that the Court put forth and others have analyzed the two schools of thought referenced in *Crawford*.[90] Whichever methodology they use, the courts of appeals that have addressed the issue all agree that a statement is testimonial when a reasonable declarant would anticipate its use at trial.

A. Core Class of Testimonial Statements

In *United States v. Summers*, the Tenth Circuit Court of Appeals recognized that even though the Supreme Court did not rigidly define the term testimonial, it was not "devoid of guidance."[91] In fact, the Court provided relevant "guideposts" to frame lower courts' analyses.[92] First, the Court provided a baseline, saying "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal

[88] United States v. Cromer, 389 F.3d 662, 673-74 (6th Cir. 2004) (citing Friedman, *supra* note 86, at 1042-43).

[89] *See* United States v. Gilbertson, 435 F.3d 790 (7th Cir. 2006); United States v. Saget, 377 F.3d 223 (2d Cir. 2004); *Cromer*, 389 F.3d 662; Horton v. Allen, 370 F.3d 75 (1st Cir. 2004); United States v. Summers, 414 F.3d 1287 (10th Cir. 2005); United States v. Hinton, 423 F.3d 355 (3d Cir. 2005).

[90] *Id*.

[91] *Summers*, 414 F.3d at 1300.

[92] *Id.*

trial; and to police interrogations."[93] The court further noted that the "formulations of the core class of testimonial statements" that the Supreme Court referred to in *Crawford* constituted the rest of the guidance needed.[94] The Tenth Circuit held that the "common nucleus" in the Court's reasoning in *Crawford* was the reasonable expectations of the declarant.[95] Therefore, the Tenth Circuit said that a test that emphasizes the reasonable expectations of the declarant is most closely aligned with the original underpinnings of the Sixth Amendment.[96] Though it declined to define this test, the court ultimately said that testimony by an arresting officer relating to a statement by the co-defendant, who did not testify, was testimonial.[97]

In *Horton v. Allen*, a First Circuit case, the defendant objected to the admission of hearsay testimony from a woman who had a conversation with Horton's accomplice who was not on trial.[98] The court also looked to the three "formulations of [the] core class of testimonial statements."[99] In doing so the court said that not only were the statements made at Horton's trial not contained in formalized documents such as affidavits, depositions, or prior testimony but the statements admitted at trial were not "statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."[100]

In *United States v Hinton*, the Third Circuit also relied on the "core class of testimonial statements."[101] In doing so it recognized an appreciation for "the third formulation of testimonial offered by the Court in *Crawford*" and it endorsed this same test.[102] Even though the Sixth Circuit did not rely upon these formulations of testimonial as much, the court in *Hinton* noted that the Sixth Circuit's reasoning in

[93] *Id.* at 1301 (quoting Crawford v. Washington, 541 U.S. 36, 68 (2004)).
[94] *Summers*, 414 F.3d at 1301-02 (internal citation omitted).
[95] *Id.* at 1302.
[96] *Id.*
[97] *Id.* at 1303.
[98] Horton v. Allen, 370 F.3d 75, 83 (1st Cir. 2004).
[99] *Id.* at 84 (quoting Crawford v. Washington, 541 U.S. 36, 51-52 (2004)).
[100] Horton v. Allen, 370 F.3d at 84.
[101] United States v. Hinton, 423 F.3d 355, 359 (3d Cir. 2005).
[102] *Id.*

United States v. Cromer was instructive.[103] The court believed that the reasonable expectation of the declarant test was important because the "broader definition is necessary to ensure that the adjudication system does not effectively invite witnesses to testify in informal ways that avoid confrontation."[104]

B. Two Schools of Thought

The Sixth Circuit has done the most in depth evaluation of these two schools of thought. In *United States v. Cromer*, the court admitted into evidence statements by a confidential informant to an officer.[105] The Sixth Circuit held that the district court erred by not requiring the production of the confidential informant after admitting the hearsay statements made by the informant.[106] Just as the Tenth Circuit did in *Summers*, this court recognized that *Crawford* provided guidance on the definition of testimonial.[107] Specifically, it looked to the works of Professor Amar and Professor Friedman that the *Crawford* Court relied on when redefining the Confrontation Clause.[108]

The Sixth Circuit found that the approach put forth by Professor Friedman is the most consistent with the stated purpose of the Confrontation Clause, especially in light of the Court's emphasis, in *Crawford*, that the Clause refers to those that "bear testimony against the accused."[109] The Sixth Circuit believed that statements that are made to the authorities when the declarant knows that they will most likely be used in trial are the exact statements that the Confrontation Clause was intended to protect against, whether or not

[103] *Id.* 360 (citing United States v. Cromer, 389 F.3d 662, 674-75 (6th Cir. 2004)).

[104] *Hinton*, 423 F.3d at 360 (3d Cir. 2005) (quoting *Cromer*, 389 F.3d at 674-75 (internal quotation marks omitted)).

[105] *Cromer*, 389 F.3d at 666.

[106] *Id.* at 670.

[107] *Id.* at 673.

[108] *Id.*

[109] *Id.* at 674.

they are formal statements.[110] The court recognized that this "broader definition" is necessary to make sure that a witness does not intentionally testify in an informal way to avoid confrontation, which would eviscerate our adjudicative and adversarial process.[111] In fact, the Sixth Circuit went on to note that there is actually a greater danger to defendants to allow admission, without confrontation, of an informal statement volunteered to police as opposed to one elicited by police.[112] The court stated that "one can imagine the temptation that someone who bears a grudge might have to volunteer to police, truthfully or not, information of the commission of a crime, *especially* when that person is assured he will not be subject to confrontation."[113] The Sixth Circuit referenced an example by Professor Friedman of a rape victim that is assured by a *private* rape counselor that she is able to give a videotaped statement that can be provided to prosecutors and there is little chance that she will have to testify in court.[114] The court notes that this will only give witnesses incentive to ensure that all testimony they give is informal.[115] Therefore, the Sixth Circuit stated that the proper inquiry is "whether the declarant intends to bear testimony against the accused," and that intent can be inferred by deciding whether a reasonable person would anticipate that the statement would be used against the accused.[116] It is within this framework that the Sixth Circuit decided that a confidential informants' statement are testimonial.

The Second Circuit Court also looked to these schools of thought in its analysis of testimonial.[117] In *United States v. Saget*, the court held that a statement the defendant made to a confidential informant was not testimonial, when the defendant did not know that the person was an informant.[118] That court discussed the Supreme

[110] *Id.*
[111] *Id.*
[112] *Id.* at 675.
[113] *Id.* (emphasis added).
[114] *Id.* (emphasis added).
[115] *Id.*
[116] *Id.*
[117] United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004).
[118] *Id.* at 229-30.

Court's reference of Professor Friedman's article in *Crawford* and noted that even though *Crawford* does not explicitly endorse Friedman's views, it does suggest that the "determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial."[119]

IV. DOES THE SEVENTH CIRCUIT PROPERLY DEFINE TESTIMONIAL?

A. The Seventh Circuit: Post Crawford

For almost two years after *Crawford*, the Seventh Circuit did not provide any real guidance to the trial courts about its definition of testimonial. Instead, the court simply ruled on the facts before it, saying whether or not the hearsay at issue was testimonial. During this time the court indicated that *Crawford* does not apply to sentencing hearings,[120] police alerts,[121] or a government file containing intercepted correspondence incriminating the defendant.[122] Furthermore, the Seventh Circuit followed the many other circuits that held statements of co-conspirators are not hearsay and, therefore, are not testimonial.[123] The court also held that it is doubtless a casual conversation between two people would not be considered testimonial.[124] But the court has held that a confession of a co-

[119] *Id.* at 228.

[120] United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005) (stating that the relevant provision to sentencing is the Due Process Clause and not the Confrontation Clause).

[121] United States v. Prince, 418 F.3d 771,780-81 n.5 (7th Cir. 2005) (stating that the admission of the police alert was not for the truth of the matter asserted and therefore not hearsay and even if it was being used to establish truth of the matter asserted it would not necessarily be testimonial).

[122] United States v. Dumeisi, 424 F.3d 566, 576 (7th Cir. 2005).

[123] United States v. Jenkins, 419 F.3d 614, 618 (7th Cir. 2005); United States v. Reyes 362 F.3d 536, 540 n.4 (8th Cir. 2004).

[124] United States v. Danford, 435 F.3d 682, 687 (7th Cir. 2006) (citing Crawford v. Washington, 541 U.S. 36, 51 (2004)).

defendant, who was tried separately, was testimonial.[125] Though it could be interpreted that the court was applying the same reasonable expectation of the declarant test, the court never explicitly held either way.

That all changed when the Seventh Circuit published its recent decision in *United States v. Gilbertson*.[126] In *Gilbertson*, the defendant asserted that the admission of odometer statements from the certificates of title violated his Sixth Amendment rights.[127] In its decision, the court did not go into an abundance of detail but noted that the Supreme Court provided guidance for lower courts about the definition of testimonial.[128] The Seventh Circuit, like the Tenth, First and Third, turned to the three formulations of the "core class of testimonial statements."[129]

Because Gilbertson himself focused on the second formulation, the court first focused on that formulation of testimonial.[130] The second formulation that was mentioned by the Court in *Crawford* was based on Justice Thomas' concurrence in *White v. Illinois*.[131] The Seventh Circuit noted that the "evil" Justice Thomas referred to in his opinion "was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations against the accused."[132] The court went on to note that "reading Justice Thomas' formulation with the first and the third formulations, it is readily apparent from *Crawford* that '[o]nly statements made following government official initiated ex parte examinations or interrogation developed in anticipation of or in aid of criminal litigation are encompassed within the core meaning of the confrontation clause.'"[133]

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[125] *See* United States v. Jones, 371 F.3d 363 (7th Cir. 2004).

[126] 435 F.3d 790 (7th Cir. 2006).

[127] *Id.* at 794.

[128] *Id.* at 795.

[129] *Id.*

[130] *Id.*

[131] 502 U.S. 346, 365 (1992).

[132] *Gilbertson*, 435 F.3d at 795 (quoting Crawford v. Washington, 541 U.S. 36, 50 (2004)).

[133] *Id.* at 795 (quoting MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7032 (2d ed. Supp. 2005)).

Therefore, the Seventh Circuit adopted the same reasonable expectation of the declarant test used by many other circuits.[134] But, the court did not end there. Unlike any other circuit, the court required that communication be initiated by the government for any statements to be considered testimonial.[135]

B. Is the Seventh Circuit Correct?

Yes and no.

The decision of the Seventh Circuit as well as many other circuits to apply the reasonable expectation of the declarant test is appropriate in light of the Court's reasoning in *Crawford*. Since the Court chose not to define testimonial; individual courts were left to make that determination for themselves. As many circuits noted, in doing so, they are not without guidance from the Supreme Court.[136]

The first thing that most courts have done is look at what parameters the *Crawford* Court did draw. As the Tenth Circuit noted in *Summers*, the Court established a "baseline"[137] in *Crawford*, explicitly saying that at a minimum the term testimonial applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[138] Therefore, courts have a starting point from which to work. Furthermore, the Court did draw the line on the other side of the spectrum. The Court noted that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[139] These are not the only guideposts; the Court also gave three "core formulations" of testimonial as well as to reference two specific scholars that have debated the definition of testimonial.[140] As the Second Circuit noted, it is the common nucleus

[134] *Id.* at 796.
[135] *Id.* at 795-96.
[136] *Id.* at 795; United States v. Cromer, 389 F.3d 662, 673 (6th Cir. 2004).
[137] United States v. Summers, 414 F.3d 1287, 1301 (10th Cir. 2005).
[138] Crawford v. Washington, 541 U.S. 36, 68 (2004).
[139] *Id.* at 51.
[140] *Id.* 51-52.

present in the formulations that "centers on the reasonable expectation of the declarant."[141] The court further noted that it is the reasonable expectation of the declarant that "distinguishes the flippant remark, proffered to a casual acquaintance from the true testimonial statement."[142]

But where the Seventh Circuit went wrong was finding that for a statement to be testimonial the communication must have been initiated by the government.[143] In doing so, the court's analysis of testimonial became much more aligned with Professor Amar's definition than Professor Friedman's. But this definition is not inline with the core concerns of the Confrontation Clause. In *Cromer*, the Sixth Circuit quickly dispensed with Professor Amar's definition of testimonial.[144] It noted that "[t]he *Crawford* Court found the absence of an oath not to be determinative in considering whether a statement is testimonial" and the court noted that the other formalities identified by Professor Amar were not necessary components of a testimonial statement.[145] The court further declared that the danger to a defendant might actually be greater if the admitted statement is volunteered to police rather than elicited through formalized police interrogation, "[o]ne can imagine the temptation that someone who bears a grudge might have to volunteer to police, truthfully, or not, information of the commission of a crime, especially when that person is assured he will not be subject to confrontation."[146] The Confrontation Clause applies to witnesses who "bear testimony,"[147] therefore; the proper inquiry revolves around the intent of the declarant and not who initiates the conversation.[148] Basing the definition on who initiates the conversation would only encourage witnesses to give statements informally.[149] It is also important to note the purpose of the

[141] *Summers*, 414 F.3d at 1302.
[142] *Id.*
[143] *Gilbertson*, 435 F.3d at 795-96.
[144] United States v. Cromer, 389 F.3d 662, 674-75 (6th Cir. 2004).
[145] *Id.* at 674.
[146] *Id.* at 675.
[147] Crawford v. Washington, 541 U.S. 36, 51 (2004).
[148] See *Cromer*, 389 F.3d at 675.
[149] *Id.*

Confrontation Clause was not just to curb lying, but it was also implemented to give the judge and jury an opportunity to see the witness to weigh the witness' credibility as well as the witness' recollection of the events.[150] Therefore, even if a person who volunteers information about a crime is truthful, the defense is supposed to have the opportunity to cross-examine that witness about the accuracy of the information. Applying the Seventh Circuit's test would strip the defense of this right.

Furthermore, the Court noted that "[t]he most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries."[151] During these trials English courts refused defendants' requests that accusers be brought before them.[152] The Court used the treason trial of Sir Walter Raleigh as one of the best examples of what the Framers wanted to avoid with the implementation of the Confrontation Clause.[153] Lord Cobham, Raleigh's alleged accomplice, implicated Raleigh in both an examination and in a letter that he sent to the court without provocation.[154] Raleigh believed that Lord Cobham would recant and "demanded that the judges call him to appear, arguing that the Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it."[155] The court refused and allowed the reading of the examination and the letter into evidence.[156] One of the trial judges "later lamented that the justice of England has never been so degraded and inured as by the condemnation of Sir Walter Raleigh."[157] This case spurred reform that not only required face to face accusations at

[150] *See* California v. Green, 399 U.S. 149, 158 (1970).

[151] *Crawford*, 541 U.S. at 44.

[152] *Id.* at 43 (citing J. STEPHEN, 1 HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883); W. HOLDSWORTH, 9 HISTORY OF ENGLISH LAW 216-17, 228 (3d ed. 1944)).

[153] *Crawford*, 541 U.S. at 44.

[154] *Id.*

[155] *Id.* (quoting 2 How. St. Tr., at 15-16 (1603)) (internal quotation marks omitted).

[156] *Crawford*, 541 U.S. at 44.

[157] *Id.* (quoting D. JARDINE, 1 CRIMINAL TRIALS, 520 (1832) (internal quotation marks omitted).

arraignment, but the Court of King's Bench said that it mandated the right to cross-examine.[158]

In dispensing of the *Roberts* test, the Court noted that "[t]he Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes."[159] In that trial, the prosecution used "many of the arguments a court applying *Roberts* might invoke today: that Cobham's statement were self-incriminating, that they were not made in the heart of passion, and that they were not extracted from him upon the hopes or promise of a Pardon."[160] Furthermore, the Court went on to say that,

> It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.[161]

The main "evil" the Framers' attempted to protect against with the inclusion of the Confrontation Clause was these "civil law examinations,"[162] but this protection was not limited to government initiation communication. In fact, looking at the *Raleigh* case, that the Court relied heavily on in its *Crawford* decision, it is apparent that the Court did not intend to limit testimonial evidence to formal investigations or interrogations.[163] The Court noted in *Crawford* that one of the pieces of evidence used against Raleigh was a letter that was sent without provocation.[164] The Court used the introduction at

[158] *Crawford*, 541 U.S. at 44-45 (citing King v. Paine, 87 Eng. Rep. 584 (1696)).
[159] Crawford, 541 U.S. at 62.
[160] *Id.* (citation omitted).
[161] *Id.*
[162] *Id.* at 44.
[163] *Id.* at 45.
[164] *Id.*

trial of both the pre-trial examination and the letter as examples of what the Framers tried to avoid with the implementation of the Confrontation Clause.[165] Accordingly, it is apparent that the Court did not intend to limit the definition of testimonial to statements that were obtained through government initiated communication.

Furthermore, the Seventh Circuit misread opinions from its sister courts. In *Gilbertson*, after declaring that a testimonial statement is one in which the communication is initiated by the government; the court noted that "[o]ther circuits have come to a similar conclusion."[166] This is simply inaccurate. While it is true that the other circuits the Seventh Circuit cites all agree about the use of the reasonable expectation of the declarant test, not one of those circuits agree that the communication must be initiated by the government.

V. CONCLUSION

Since the Supreme Court handed down its *Crawford* decision, courts across the country have attempted to decipher what testimonial means. Some courts, including the Seventh Circuit, have given guidance to the trial courts, holding that the applicable test is whether a reasonable person would believe the statement would be used at trial.[167] Based on the Court's analysis of the Confrontation Clause and the guideposts it left for lower courts, this is the appropriate decision. Unfortunately, the Seventh Circuit did not end its analysis there. The Seventh Circuit further opined that for a statement to be testimonial it must be the product of government initiated communication.[168] By looking to the three formulations of testimonial statements, the two

[165] *Id.* at 44.

[166] *See* United States v. Gilbertson, 435 F.3d 790, 796 (7th Cir. 2006) (citing United States v. Saget, 377 F.3d 223 (2d Cir. 2004); United States v. Cromer, 389 F.3d 662 (6th Cir. 2004); Horton v. Allen, 370 F.3d 75 (1st Cir. 2004); United States v. Summers, 414 F.3d 1287 (10th Cir. 2005); United States v. Hinton, 423 F.3d 355 (3d Cir. 2005)).

[167]. *Gilbertson*, 435 F.3d at 796; *Saget*, 377 F.3d at 229; *Cromer*, 389 F.3d at 675; *Horton*, 370 F.3d at 83-84; *Summers*, 414 F.3d at 1302; *Hinton*, 423 F.3d at 360.

[168] *Gilberston*, 435 F.3d at 795-96.

schools of thought concerning testimonial and to trial of Sir Walter Raleigh that the Court referenced in *Crawford*, it is apparent that this formulation is simply the wrong conclusion to draw from *Crawford* and the history of the Confrontation Clause.