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THE STATUS OF IMPLIED ASSERTIONS UNDER *CRAWFORD*

by

Morgan R. Cherry

Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Craig R. Callen
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INTRODUCTION*

The Supreme Court signaled a major shift in Confrontation Clause analysis in 2004, with its decision in *Crawford v. Washington*, which effectively overruled the *Ohio v. Roberts* framework. With the focus shifting from hearsay to testimonial, the Court left many questions unanswered. Of the utmost importance is the determination of whether an out-of-court statement is testimonial. Also, what is the status of implied assertions in this new era? Courts have developed different approaches to determine whether implied assertions are hearsay; will this varied approach have an effect on whether implied assertions are found to be testimonial? The varied approaches that have been developed to determine whether implied assertions fall within the scope of the hearsay rule should not be carried into the Confrontation Clause arena. Implied assertions should be subject to the protections of the Confrontation Clause.

Part I will discuss the Confrontation Clause and how its framework has been developing since the Supreme Court reinterpreted it in *Crawford v. Washington*. With “testimonial” now being the key term in Confrontation Clause analysis, there will be a brief discussion of the broader concept of testimony and how it relates to testimonial, as well as a discussion of hearsay’s continued role in the analysis.

Part II will analyze the different approaches court have previously taken when determining whether an implied assertion is hearsay. Because a *Crawford* footnote stated that a statement is not testimonial if not offered to prove the truth of the matter that the statement asserts, it is important to understand how courts will determine what the statement is asserting.

* The author extends her sincere thanks to Professor Craig R. Callen for his invaluable insight and thoughtful comments.

Part III examines two cases decided post-*Crawford*, and argues that examining an implied assertion for its hearsay dangers is a more appropriate way to ensure the Supreme Court’s goal of being “faithful to the original meaning of the Confrontation Clause.”¹

I. THE CONFRONTATION CLAUSE

The Sixth Amendment’s Confrontation Clause states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”² In examining the historical record, Justice Scalia found support for two inferences about the meaning of the Sixth Amendment and what the Framers intended it to protect.³ “First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.”⁴ The Confrontation Clause is also meant to protect against the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁵

Prior to 2004, the admission of prior statements of witnesses who did not testify at trial, and therefore were not subject to cross-examination by the defendant, was determined according to the rule outlined in *Ohio v. Roberts*.⁶ *Roberts* held that these prior statements could be admitted at trial if the witness was unavailable to testify and the prior statement bore adequate “indicia of reliability.”⁷ The Court reasoned that a statement had “indicia of reliability” if the

¹ *Crawford v. Washington*, 541 U.S. 36, 60 (2004).

² U.S. CONST. amend. VI.

³ *Crawford*, 541 U.S. at 43-50 (Justice Scalia reviewed the original intent behind the Confrontation Clause and the common law of hearsay).

⁴ *Id.* at 50.

⁵ *Id.* at 53-54.

⁶ 448 U.S. 56, 66 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004), *and* *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2274-75 (2006). *See* RONALD JAY ALLEN, JOSEPH J. HOFFMANN, DEBRA A. LIVINGSTON & WILLIAM J. STUNTZ, *COMPREHENSIVE CRIMINAL PROCEDURE* 1393 (2d ed. 2005).

⁷ *Roberts*, 448 U.S. at 66. *See* ALLEN ET AL., *supra* note 6, at 1393.

prior statement fell within a “firmly rooted” hearsay exception, or if the prior statement was supported by “particularized guarantees of trustworthiness.”⁸

The petitioner in *Crawford v. Washington* urged the Supreme Court to reconsider the *Roberts* test. The petitioner asserted that the current framework did not adequately protect the interests that the Confrontation Clause was meant to protect.⁹ Commentators had argued that the Confrontation Clause had been reduced to an exclusionary rule for unreliable hearsay, which made the Clause redundant and useless as a constitutional protection.¹⁰ The Court concluded that the *Roberts* test departed from the historical principles behind the Confrontation Clause, in that it was both too broad and too narrow.¹¹ Consequently, the Court established the rule that the Confrontation Clause bars testimonial statements of witnesses absent from trial unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination.¹² The Court construed *witness* to mean anyone who makes out-of-court “testimonial” statements; accordingly the scope of the Confrontation Clause is determined by what is considered “testimonial.”¹³

While the Court’s opinion in *Crawford* shifted the analysis to testimonial, the Court failed to “spell out a comprehensive definition of ‘testimonial.’”¹⁴ In doing so, the Court

⁸ *Roberts*, 448 U.S., at 66. See ALLEN ET AL., *supra* note 6, at 1393.

⁹ *Crawford*, 541 U.S. at 42.

¹⁰ John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1853 (2001). See also John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 203-19 (1999); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 662 (1988). *Id.*

¹¹ *Crawford*, 541 U.S. at 60. “This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.” *Id.*

¹² *Id.* at 59.

¹³ *Davis*, 126 S. Ct. at 2274 (citing *Crawford*, 541 U.S. at 51).

¹⁴ *Crawford*, 541 U.S. at 68.

acknowledged that its “refusal to articulate a comprehensive definition...[would] cause interim uncertainty.”¹⁵ However, the Court did lay a basic foundation in holding that, at a minimum, ‘testimonial’ “applies to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”¹⁶ The Court also offered three possible interpretations of ‘testimonial’ statements: 1) “*ex parte* in-court testimony or its functional equivalent,” 2) “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” and 3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”¹⁷ Ultimately, the Court chose not to provide a precise articulation of the term ‘testimonial.’

Two years later, in *Davis v. Washington*, the Court made an effort to clarify ‘testimonial’ with regard to police interrogations.¹⁸ The Court concluded that not all statements made to police are testimonial.¹⁹

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.²⁰

In both *Crawford* and *Davis*, the Court evaluated the statements to see if they served a testimonial function – “in particular, whether the statements functioned as a substitute for live

¹⁵ *Id.* at 68 n. 10.

¹⁶ *Id.* at 68.

¹⁷ *Id.* at 51-52.

¹⁸ 126 S. Ct. 2266 (2006).

¹⁹ *Davis*, 126 S. Ct. at 2273-74.

²⁰ *Id.*

trial testimony.”²¹ The meaning of testimonial is crucial to a proper analysis of what evidence will be admitted against a defendant. As the framework under the testimonial approach may be developing somewhat haphazardly, courts must still decide cases, perhaps before they have a full understanding of what ‘testimonial’ means.²²

A. ‘Testimony’

The Confrontation Clause is concerned with the admission of out-of-court statements in which witnesses bear testimony against the accused. The text of the Confrontation Clause applies to “witnesses” against the accused; witnesses are those who “bear testimony” and “testimony” is typically a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”²³ This focus suggests that not all hearsay implicates the Confrontation Clause’s concerns.²⁴ In essence, an out-of-court statement must be analyzed to see if it is the functional equivalent of in-court testimony, and thus subject to the Confrontation Clause.

The general concept of testimony underlies the issue of whether an out-of-court statement is serving as the equivalent of in-court testimony, therefore, an understanding of testimony required.²⁵ The concept of testimony has two aspects: “a speaker perspective and a hearer perspective.”²⁶ “To testify, a speaker must intend to convey information to an audience with a

²¹ Michael S. Pardo, *Testimony*, 82 TUL. L. REV. 119, 171 (2007) (citing *Davis*, 126 S. Ct. at 2277, and *Crawford*, 541 U.S. at 51).

²² See Richard D. Friedman, *Grappling with the Meaning of “Testimonial”*, 71 BROOK. L. REV. 241, 242 (2005) (“But now that [the Supreme Court] has adopted the testimonial approach, actual cases must be decided under it, and many of them. Pretty quickly, we are going to have to get a much fuller understanding of the meaning of ‘testimonial.’”). *Id.*

²³ 2 N. Webster, *An American Dictionary of the English Language* (1828).

²⁴ *Crawford*, 541 U.S. at 51.

²⁵ For an in-depth discussion of the epistemology of testimony, see Pardo, *supra* note 21.

²⁶ Pardo, *supra* note 21, at 171-72. See Jennifer Lackey, *The Nature of Testimony*, 87 PAC. PHIL. Q. 177, 186-87 (2006).

communicative act.”²⁷ “Also, when the speaker intends to communicate, a hearer can take the content of that communicative act as testimony even when the speaker did not intend to convey information to that hearer.”²⁸ The latter is the concern of the Confrontation Clause, with the added requirement that the testimony be given or taken for criminal prosecution.²⁹ Michael Pardo suggests the following questions to help make the concept of testimony explicit and determine its scope:

(1) which person’s perspective is relevant for determining whether a statement is testimonial: speaker, hearer, both, either; (2) whether the hearer must be a government agent; (3) whether the speaker must know whether the hearer is a government agent; and (4) whether the Court’s distinctions of present vs. past and emergency vs. nonemergency are coherent.³⁰

Pardo suggests that a statement ought to be considered testimonial for confrontation purposes if it is testimonial from either the speaker or the hearer’s perspective.³¹ While *Davis* emphasized that the “primary purpose of the investigation” makes the government actor’s perspective relevant for the determination whether a statement is testimonial,³² “both *Davis* and *Crawford* emphasize that it is the declarant’s statements that are being analyzed for their testimonial qualities.”³³ Essentially, if the speaker is intending to communicate information, and the statement is being either offered, by the speaker, or gathered, by the hearer, for use in a criminal prosecution, the statement is testimonial.

²⁷ Pardo, *supra* note 21 at 172. See Charles W. Collier, *Speech and Communication in Law and Philosophy*, 12 LEGAL THEORY 1, 2 (2006); Peter J. Graham, *What is Testimony?*, 47 PHIL. Q. 227 (1997).

²⁸ Pardo, *supra* note 21 at 172. See Lackey, *supra* note 26, at 188.

²⁹ Pardo, *supra* note 21, at 172.

³⁰ *Id.* at 171.

³¹ *Id.* at 172; See *State v. Bobadilla*, 709 N.W.2d 243, 253 (Minn. 2006) (“Whether a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial is determined by asking whether a reasonable government questioner or declarant in the relevant situation would exhibit that purpose.”).

³² *Davis*, 126 S. Ct. at 2273-74.

³³ Pardo, *supra* note 21, at 172 (citing *Davis*, 126 S. Ct. at 2274 n.1; *Crawford*, 541 U.S. at 51-56).

Pardo addresses the relevance of the involvement of government actors in his second and third questions. It is clear that the hearer need not be a government agent, in order for the witness' statements to be testimonial.³⁴ Regardless of who the hearer is, anytime a speaker bears testimony, meaning they intend to convey information to an audience, under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, the statement is testimonial.³⁵ Admittedly, the number of incidences in which a speaker will be conveying information to someone other than a government actor with the expectation that it may reasonably be used for criminal prosecution are few.³⁶ Also, the speaker need not know that he is in fact communicating with a government agent, in order for the statement to be testimonial.³⁷ "If a speaker is conveying information and a government agent is gathering the content of the speaker's communication for use in a criminal prosecution, then the content is testimony."³⁸

Court decisions regarding the Confrontation Clause turn on the meaning of testimonial.³⁹ "Under the Sixth Amendment, a defendant's right to confront a speaker who made an out-of-

³⁴ *Id.* at 174; See Richard D. Freidman, Crawford, Davis, and Way Beyond, 15 J.L. & POL'Y 553, 573 (2007). *But see* State v. Moua Her, 750 N.W.2d 258 (Minn. 2008), vacated 129 S. Ct. 929 (2009) ("But statements made to non-government questioners who are not acting in concert with or as agents of the government are considered nontestimonial. State v. Scacchetti, 711 N.W.2d 508, 514-15 (Minn. 2006). We hold that Vang's statements to family members were nontestimonial and that their admission therefore did not violate Her's right to confrontation under the United States Constitution.").

³⁵ Pardo, *supra* note 21, at 174; See Freidman, *supra* note 34, at 573.

³⁶ Pardo's example is that of a letter to a local newspaper accusing someone of a crime.

³⁷ Pardo, *supra* note 21, at 174. *But see* Robert P. Mosteller, *Testing the Testimonial Concept and Exception to Confrontation: "A Little Child Shall Lead Them"*, 82 Ind. L. J. 917, 966 (2007) (author suggests that the Supreme Court may define the confrontation right to require that speakers communicating with government agents know that the hearer is a government agent). *Id.*

³⁸ Pardo, *supra* note 21, at 174. See Friedman, *supra* note 34, at 573.

³⁹ Pardo, *supra* note 21, at 121 (citing Davis v. Washington, 126 S. Ct. 2266, 2270, 2273-76 (2006); Crawford v. Washington, 541 U.S. 36, 51 (2004)).

court statement that is admitted against the defendant depends explicitly on whether the statement was testimonial.”⁴⁰

B. Hearsay’s Continuing Role

The *Crawford* Court made clear that the Confrontation Clause would not be left to the “vagaries of the rules of evidence,”⁴¹ however, hearsay continues to play an important role in the analysis, “[b]ecause hearsay statements usually function as a substitute for formal testimony, [and courts must analyze] which hearsay statements were made to serve a testimonial function.”⁴² However, it is incorrect to say that a statement is testimonial for confrontation purposes only if it first falls under the definition of hearsay,⁴³ as states are free to develop their own rules of evidence,⁴⁴ or dispose of hearsay rules altogether. The law of evidence, as a statutory creation, cannot define the boundaries of a constitutional right. *Crawford* recognizes that the previous reliance on hearsay left the Confrontation Clause ineffective to protect against the harms it was intended to.⁴⁵

For Confrontation Clause purposes, testimonial hearsay is of particular concern, because “hearsay statements are typically not made under oath, nor subject to cross-examination, nor are they made in front of the fact finder, who can evaluate demeanor.”⁴⁶ “The court’s opinion in *Crawford* stresses heavily that cross-examination should be the test of the ultimate evidentiary

⁴⁰ Pardo, *supra* note 21, at 121 (citing *Davis*, 126 S. Ct. at 2270, 2273-76; *Crawford*, 541 U.S. at 51-52).

⁴¹ *Crawford*, 541 U.S. at 61.

⁴² Pardo, *supra* note 21, at 122.

⁴³ Pardo, *supra* note 21, at 176.

⁴⁴ *Crawford*, 541 U.S. at 68.

⁴⁵ See *Crawford*, 541 U.S. at 51; Pardo, *supra* note 21, at 177.

⁴⁶ Pardo, *supra* note 21, at 150 (citing Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 Minn. L. Rev. 367, 370 (1992)).

value of statements.”⁴⁷ The Federal Rules of Evidence defines hearsay as any statement not “made by the declarant while testifying at the trial or hearing” and “offered in evidence to prove the truth of the matter asserted.”⁴⁸ A declarant is someone who makes a statement,⁴⁹ and a statement can consist of either “oral or written assertion[s]” or “nonverbal conduct of a person, if it is intended by the person as an assertion.”⁵⁰

In a footnote, *Crawford* did say that “[t]he Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street*, 471 U.S. 409, 414 (1985).”⁵¹ Courts have interpreted this statement to mean that if statements are being offered for a purpose other than to prove their truth, thereby not falling within the definition of hearsay, they do not raise Confrontation concerns. However, in *Tennessee v. Street*, an accomplice’s confession was admitted into evidence for comparison after the defendant testified that his own confession was a coerced copy of the accomplice’s.⁵² This nonhearsay purpose of comparing the two confessions did not violate the Confrontation Clause.⁵³ More importantly, the statement in *Tennessee v. Street* presented no hearsay dangers. In comparing the two confessions, the factfinder was concerned with the similarities and differences between them, rather than the perception, memory, narration, or sincerity of the declarants. Admitting a statement that is absent of hearsay dangers does not offend the Confrontation Clause, because cross-examination would be of limited benefit. However, the

⁴⁷ Craig R. Callen, *An Interdisciplinary and Comparative Device for Teaching Hearsay and Confrontation*, in *INNOVATIONS IN EVIDENCE AND PROOF: INTEGRATING THEORY, RESEARCH AND TEACHING* 159, 174 (Paul Roberts & Mike Redmayne eds., 2007).

⁴⁸ FED. R. EVID. 801(c).

⁴⁹ *Id.* at 801(b).

⁵⁰ *Id.* at 801(a). Statements which are not hearsay are categorized at FED. R. EVID. 801(d).

⁵¹ *Crawford*, 541 U.S. at 59 n. 9 (2004).

⁵² See *Tennessee v. Street*, 471 U.S. 409 (1985).

⁵³ *Id.* at 412-13.

same is not always true of statements containing implied assertions, even if not offered to prove the truth of the matter asserted.

1. *Implied Assertions*

Implied assertions illustrate the danger of taking the Court's statement at face value that "[t]he Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."⁵⁴ Implied assertions are statements "that imply (but do not explicit assert) the proposition that the proponent wishes the factfinder to draw from the evidence."⁵⁵ Courts have such a varied approach at determining whether implied assertions fall within the scope of the hearsay rule;⁵⁶ this lack of uniformity should not be carried into the Confrontation Clause arena thereby depriving some criminal defendants of their confrontation rights and not others. Additionally, the real concern in admitting statements that contain implied assertions is whether there are hearsay dangers present in the statement, and whether the evidentiary value of the statement would benefit from cross-examination. "The fact that [the Court] relied solely on *Tennessee v Street* [when it said that a statement is not testimonial if not offered to prove the truth of the matter that the statement asserts] suggests that the court did not intend to place implied assertions beyond the reach of the Confrontation Clause."⁵⁷

Problems arise when attempting to define the scope of a statement and what is in fact asserted by a given verbal act.⁵⁸ "[C]onsiderable difficulty arises when the relevance of verbal utterances is not to prove what is explicitly asserted but rather is to prove unstated, often implied, propositions."⁵⁹

⁵⁴ *Crawford*, 541 U.S. at 59 n. 9 (2004) (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

⁵⁵ Richard B. Kuhns, *Implied Assertions and the Hearsay Rule*, 16 MISS. C. L. REV. 139, 141 (1995).

⁵⁶ See Section II *infra*.

⁵⁷ Callen, *supra* note 47, at 174.

⁵⁸ Pardo, *supra* note 21, at 151.

⁵⁹ *Id.* (citing *United States v. Reynolds*, 715 F.2d 99, 103 (3d Cir. 1983)).

Examples include statements such as “I didn’t tell [the police] anything about you” to prove that the hearer was involved in the crime; “Nice to meet you” to prove that the speaker and hearer had not met previously; and a phone call making a bet to prove betting took place at the called location.⁶⁰

As we communicate through assertions, much more information is conveyed than what is explicitly stated.⁶¹ Further, the validity of evidence, offered as an implied assertion, depends on the belief of the declarant, who if not present at trial, cannot be cross-examined.⁶² Courts continue to struggle in “deciding whether to treat out-of-court statements as hearsay when offered to prove matters that they suggest, but do not explicitly communicate (the problem of ‘implied assertions’).”⁶³

The status of implied assertions, and whether or not they are testimonial, is not clear under the Federal Rules of Evidence, the Supreme Court has never decided the question, and lower federal courts are divided.⁶⁴ The problem of implied assertions “is not small” and “shows no promise of going away.”⁶⁵ The danger in receiving implied assertions as nonhearsay is that it

subjects the opposing litigant to the jeopardy of an adverse litigation impact without the opportunity of subjecting the declarant to contemporaneous cross-examination directed toward disproving the basis for the assertion, demonstrating an intended meaning of the assertion different from that suggested by the proponent, or in any other meaningful way ameliorating or eliminating the adverse impact.⁶⁶

⁶⁰ Pardo, *supra* note 21, at 151-52 (citing *United States v. Reynolds*, 715 F.2d 99, 103 (3d Cir. 1983); *United States v. Palma-Ruedas*, 121 F.3d 841, 857 (3d Cir. 1997), *rev’d*, 526 U.S. 275 (1999); *United States v. Zenni*, 492 F. Supp. 464, 465 (E.D. Ky. 1980)).

⁶¹ See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26 (1989).

⁶² Paul F. Kirgis, *Meaning, Intention, and the Hearsay Rule*, 43 WM. & MARY L. REV. 275, 278 (2001-2002).

⁶³ Callen, *supra* note 47, at 160.

⁶⁴ Pardo, *supra* note 21, at 152. “Compare *United States v. Jackson*, 88 F.3d 845, 848 (10th Cir. 1996) (adopting a broad scope in favor of admissibility), and *United States v. Long*, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990) (holding that nonassertive statements made over the phone are not hearsay and therefore admissible), with *Reynolds*, 715 F.2d at 104 (finding that even statements offered as implied assertions may be hearsay).” *Id.*

⁶⁵ Mueller, *supra* note 46, at 413.

⁶⁶ David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Continuing Quandary for Federal Courts*, 16 MISS. C. L. REV. 33 (1995).

These same dangers are present when statements containing implied assertions are admitted into evidence as nontestimonial.

How a court determines whether a statement containing an implied assertion is being offered for the truth of the matter asserted is important for both hearsay and Confrontation Clause analysis. Courts that take a narrow view of the statement containing the implied assertion, and consider it hearsay only if offered to show the truth of a matter that it directly or explicitly asserts are also likely to consider the statement non-testimonial for Confrontation Clause purposes and admit the statement. However, the risk of ambiguity is still present, because without cross-examination the party opposing the admission of the statement cannot demonstrate “an intended meaning of the assertion different from that suggested by the proponent.”⁶⁷ Consequently, under this approach, statements continue to be admitted against defendants which deprive them of their Confrontation rights.

II. DIFFERENT APPROACHES TO IMPLIED ASSERTIONS

Courts have varied approaches for determining whether an implied assertion is hearsay. These approaches include an intent test, a literal test, and a common law test. As courts look to the *Crawford* footnote, which asserts that “[t]he Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street*, 471 U.S. 409, 414 (1985),”⁶⁸ they are likely to continue to apply these varied approaches to determine whether a statement containing an implied assertion is subject to the Confrontation Clause. Implied assertions should not be placed beyond the reach of the Confrontation Clause. Courts should adopt an approach that recognizes that the real concern in admitting statements that contain implied assertions is whether there are hearsay dangers present in the statement, and

⁶⁷ *Id.*

⁶⁸ *Crawford*, 541 U.S. at 59 n. 9 (2004).

whether the evidentiary value of the statement would benefit from cross-examination. With the exception of the common law test, which is not widely used, the approaches to implied assertions do not adequately address the concerns of the Confrontation Clause.

A. Intent Test

Some courts apply an intent test to determine whether a statement containing an implied assertion is hearsay. This test “considers the statement hearsay only when the declarant intended to communicate the unstated, implied proposition.”⁶⁹

In *United States v. Reynolds*,⁷⁰ the United States Postal Inspection Service was conducting an investigation into Parran and Reynolds who were under suspicion of stealing unemployment compensation checks from the mail. After unsuccessfully attempting to cash an unemployment check at a bank, Reynolds was arrested. Parran later approached Reynolds after his arrest, and Reynolds said to Parran, “I didn’t tell them anything about you.”⁷¹ At their joint trial, postal inspectors testified as to this statement, which Parran contended was inadmissible hearsay.⁷²

The court began its analysis of whether or not Reynold’s statement was hearsay by discussing the theory of the hearsay rule.

The theory of the hearsay rule ... is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference.... Thus, when an utterance is used for the truth it asserts, its reliability is generally considered suspect unless the declarant is testifying in court and available for cross-examination...because his credibility determines the reliability of the inferential journey one necessarily takes from the declarant's utterance to the ultimate fact it is alleged to reflect. Allowing a jury to draw inferences from an out-of-court statement admitted for the truth of a fact it

⁶⁹ Pardo, *supra* note 21, at 152.

⁷⁰ 715 F.2d 99 (3d Cir. 1983).

⁷¹ *Reynolds*, 715 F.2d at 101.

⁷² *Id.*

asserts when the declarant is not available for cross-examination can lead to inaccuracies.⁷³

The court went on to explain that the potential errors in admitting an out-of-court statement include ambiguity, sincerity, perception and memory of the declarant.⁷⁴ The declarant's presence for in-court cross-examination helps to alleviate these potential errors by permitting the logic and inferences of the declarant to be explored in front of the jury, rather than having the jury project its own inferences based solely on the statement.

The government attempted to avoid the hearsay problem by asserting that the statement "I didn't tell them anything about you" was not hearsay, because it was allegedly not being offered for the express truth of the matter asserted, namely that Reynolds didn't say anything about Parran. Rather, the government argued, the statement was being offered to prove the conspiracy and joint participation in the charged offense.⁷⁵ The Third Circuit didn't accept the government's narrow view of Reynolds' statement and reasoned that

[t]his argument ignores what legal commentators have expressly recognized and what the courts have implicitly recognized. That is, statements containing express assertions may also contain implied assertions qualifying as hearsay and susceptible to hearsay objections. This situation arises when the matter which the declarant intends to assert is different from the matter to be proved, but the matter asserted, if true, is circumstantial evidence of the matter to be proved. In this situation too, the statement is subject to a hearsay objection.⁷⁶

Rather than taking a sterile view of the statement, and ignoring realities of communication, the court aptly stated that "[a]s the government uses it, the statement's probative value depends on the truth of an assumed fact it implies."⁷⁷ The court recognized that the statement would not be useful to the government's case, "[u]nless the trier assumes that the statement implies that

⁷³ *Id.* at 101-102 (internal citations omitted).

⁷⁴ *Id.* at 102.

⁷⁵ *Id.*

⁷⁶ *Id.* at 103.

⁷⁷ *Id.*

Reynolds did not tell the postal inspectors that Parran was involved in the conspiracy to defraud, even though Parran was in fact involved.”⁷⁸ The court further went on to note that the admission of the statement was particularly prejudicial “because the defendant was unable to dispel this prejudice by cross-examination.”⁷⁹

In *United States v. Jackson*,⁸⁰ a man was carjacked while talking on a pay phone. As the carjacker sped away, the police were notified and they gave chase when they spotted the stolen car. The carjacker eluded the police by abandoning the car and escaping on foot. The police recovered a pager from inside a jacket the carjacker had abandoned during the foot chase. Sometime later, the pager went off; upon calling the number that was displayed, the officer heard a female voice say, “Is this Kenny?” This statement was admitted at trial over the defendant’s hearsay objection.⁸¹ The 10th Circuit court held that the evidence was admissible because it was non-hearsay under Rule 801(a)(1) and (c).⁸² The court reasoned that:

The question, “Is this Kenny?” cannot reasonably be construed to be an intended assertion, either express or implied. Were we to construe this question completely in Mr. Jackson's favor, it might be possible to imply that the declarant believed Mr. Jackson was in possession of the pager and therefore he was the person responding by telephone to the declarant's message. The mere fact, however, that the declarant conveyed a message with her question does not make the question hearsay.⁸³

In coming to this conclusion, the court relied on the same reasoning the D.C. Circuit used in *United States v. Long*,⁸⁴ and focused on whether the declarant intended her statement to be an

⁷⁸ *Id.*

⁷⁹ *Id.* at 105.

⁸⁰ 88 F.3d 845 (10th Cir. 1996).

⁸¹ *Jackson*, 88 F.3d at 846.

⁸² *Id.* at 848.

⁸³ *Id.*

⁸⁴ *United States v. Long*, 905 F.2d 1572 (D.C. Cir. 1990).

assertion.⁸⁵ “We find it hard to believe in this case that the declarant intended to assert that Mr. Jackson was in possession of the pager and that he was responding to her call.”⁸⁶

In *United States v. Long*,⁸⁷ during the valid search of an apartment, a police officer answered a ringing telephone.

An unidentified female voice asked to speak with “Keith.” The officer replied that Keith was busy. The caller then asked if Keith “still had any stuff.” The officer asked the caller what she meant, and the caller responded “a fifty.” The officer said “yeah.” The caller then asked whether “Mike” could come around to pick up the “fifty.” Again, the officer answered yes.⁸⁸

Keith Long was subsequently convicted for possessing cocaine with the intent to distribute and contended that the phone call was inadmissible hearsay and erroneously admitted into evidence.⁸⁹ Long contended that the declarant’s questions plainly revealed assumptions that were the functional equivalent of direct assertions, and the declarant “in effect asserted that ‘Keith has crack and sells it out of [the] apartment.’ He argues that the government introduced this testimony to prove the truth of precisely these assertions, and that the testimony, thus, should have been excluded as hearsay.”⁹⁰

In upholding the admission of the phone call, the D.C. Circuit used the Advisory Committee’s Note⁹¹ to hold that “[t]he caller’s words...cannot be characterized as an ‘assertion,’ even an implied one, unless the caller intended to make such an assertion.”⁹²

With our inquiry focused on the *intent* of the caller, we have little trouble disposing of Long’s theory about implied assertions. Long has not provided any evidence to suggest that the caller, through her questions, intended to assert that he was involved in drug dealing. The caller may indeed have conveyed messages

⁸⁵ *Jackson*, 88 F.3d at 848.

⁸⁶ *Id.*

⁸⁷ 905 F.2d 1572 (D.C. Cir. 1990).

⁸⁸ *Long*, 905 F.2d at 1579.

⁸⁹ *Id.* at 1574-75, 1579.

⁹⁰ *Id.* at 1579.

⁹¹ FED. R. EVID. 801(a) advisory committee’s note.

⁹² *Long*, 905 F.2d at 1579.

about Long through her questions, but any such messages were merely incidental and not intentional.⁹³

“Because the caller's questions were nonassertive, they fall outside the scope of the hearsay rule, and the trial judge did not err in admitting the testimony concerning the questions.”⁹⁴

1. *Under Crawford*

These examples help to illustrate why it was necessary to remove the hearsay analysis from the Confrontation Clause. The court attempted to determine what the declarant’s intentions were at the time they made the statements, in order to decide whether the statements containing implied assertions should be classified as hearsay. However, as the Confrontation Clause recognizes, the best way to determine a declarant’s intentions is through cross-examination. So, while these statements were admissible as they were non-hearsay,⁹⁵ if decided today, the *Crawford* analysis would likely prohibit these statements from being admitted as they are testimonial.

In *Reynolds*, the defendant’s statement, “I didn’t tell them anything about you,” to his co-conspirator, Parran, was made at the police station in the presence of the postal inspector officers who were investigating them. Under these circumstances, the statement should be considered testimonial, as the statement was “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁹⁶

Whereas the hearsay analysis focused on the intent of the declarant, *Davis* emphasized that the point of view of the government actor is important to the analysis of the “primary

⁹³ *Id.* at 1580.

⁹⁴ *Long*, 905 F.2d at 1580.

⁹⁵ Because these cases were decided under the *Ohio v. Roberts* framework, the determination that these statements were nonhearsay required the courts to go no further in determining whether they were subject to the Confrontation Clause.

⁹⁶ *Crawford*, 541 U.S. at 52.

purpose of the investigation”,⁹⁷ and under Pardo’s analysis, the statement need only be testimonial from either person’s perspective.⁹⁸ In both *Jackson* and *Long*, the police officers’ primary purpose was to establish events potentially relevant to later criminal prosecution of the suspects. The officers answered the phone in *Jackson* and responded to the pager in *Long* with a mind toward gathering evidence; there was no ongoing emergency. From the officers’ perspective, the statements they were collecting were for use at a later trial. Under this view then, the statements the officers collected were testimonial and thus subject to the Confrontation Clause.

B. Literal Test

Some courts apply a literal test to determine whether a statement containing an implied assertion is hearsay. This test considers “the statement hearsay only when offered to prove what is explicitly stated and not hearsay to prove anything else.”⁹⁹

In *United States v. Zenni*,¹⁰⁰ while government agents were searching the defendant’s premises for evidence of bookmaking activity they answered the phone several times.¹⁰¹

The unknown callers stated directions for the placing of bets on various sporting events. The government proposes to introduce this evidence to show that the callers believed that the premises were used in betting operations. The existence of such belief tends to prove that they were so used. The defendants object on the ground of hearsay.¹⁰²

The court held that the phone calls were nonassertive verbal conduct, and the statements were relevant for the implied assertion that bets could be placed by calling this number.¹⁰³

“Relying on Rule 801(a) and (c) and the Advisory’s Committee Note, the court concluded that

⁹⁷ *Davis*, 126 S. Ct. at 2273-74.

⁹⁸ Pardo, *supra* note 21, at 172.

⁹⁹ Pardo, *supra* note 21, at 152.

¹⁰⁰ 492 F. Supp. 464 (E.D. Ky. 1980).

¹⁰¹ *Zenni*, 492 F. Supp. at 465.

¹⁰² *Id.*

¹⁰³ *Id.* at 469.

such implied assertions were no longer hearsay, even though ‘the prevailing common law view’ would have treated the assertions as hearsay and excluded them.”¹⁰⁴ The court reasoned that the statements were offered to show the declarants’ belief that the defendant was a bookmaker, rather than for the truth of the words uttered,¹⁰⁵ and because the language is not an assertion on its face, it is not hearsay.¹⁰⁶

This approach defies the realities of communication and ignores the way in which jurors will interpret the statements. David Seidelson argues that the presence of several phone calls, all of persons attempting to place bets, does not eliminate the possibility that the multiple declarants may have been mistaken about their implied assertions that the defendant was a bookmaker.¹⁰⁷ The Confrontation Clause was effectively circumvented under this approach, and the jury was permitted to entertain this evidence without the defendant having an opportunity to confront or cross-examine these unknown declarants.

In *United States v. Lewis*,¹⁰⁸ a police investigation revealed that Wade had attempted to accept a package in the mail containing a large quantity of crack cocaine;¹⁰⁹ Lewis arrived shortly after the delivery and as the two men attempted to leave the house where the cocaine had been delivered to, they were both arrested.¹¹⁰ At the time of their arrest, Wade and Lewis each had a pager in their possession, which were seized by police.¹¹¹

Later that day, at the police station, the pager associated with Lewis began beeping. Officer Jerry Price called the number displayed on the pager and identified himself as Lewis. The person on the other end asked Price “Did you get

¹⁰⁴ Seidelson, *supra* note 66, at 36 (footnotes omitted).

¹⁰⁵ *Zenni* at 466.

¹⁰⁶ *Id.* at 469.

¹⁰⁷ Seidelson, *supra* note 66, at 37.

¹⁰⁸ 902 F.2d 1176 (5th Cir. 1990).

¹⁰⁹ The police intercepted the package before delivering it to Wade and substituted paraffin wax for the crack cocaine. *Lewis*, 902 F.2d at 1178.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1179.

the stuff?” Price answered affirmatively. The unidentified person then asked “Where is Dog?” Price responded that “Dog” was not available...The evidence at trial revealed that “Dog” is Wade's nickname.¹¹²

Over the hearsay objections of Lewis and Wade, Officer Price was allowed to testify as to the questions asked by the unknown caller.¹¹³ The 5th Circuit held that the officer’s testimony was not hearsay because the unknown caller’s questions were not “statements.”¹¹⁴ The court reasoned that the questions were removed from the definition of hearsay because “like most questions and inquiries, ...they do not, and were not intended to, assert anything.”¹¹⁵

Lewis and Wade argued, unsuccessfully, that while the questions were not direct assertions, there were implied assertions in the questions. “For example, they argue that implicit in the question ‘Did you get the stuff?’ is an assertion that Lewis and/or Wade were expecting to receive some ‘stuff’.”¹¹⁶ The court, in relying solely on Rule 801’s definition of statement, held that this argument was foreclosed because implied assertions were removed from the coverage of the hearsay rule.¹¹⁷

Is the fact that the words end in a question mark rather than a period really dispositive of the ‘statement’ being characterized as hearsay?¹¹⁸ “It seems to me that the question, ‘Did you get my stuff?’ is in every rational respect simply another way of asserting, ‘I want to know if you got the stuff.’ To attempt to distinguish between that question and that assertion is to engage in a fool’s errand.”¹¹⁹

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing *United States v. Groce*, 682 F.2d 1359, 1364 (11th Cir. 1982); *United States v. Zenni*, 492 F. Supp. 464, 469 (E.D. Ky. 1980); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(a)[01] (1988)).

¹¹⁸ Seidelson, *supra* note 66, at 43.

¹¹⁹ *Id.*

Because this case was decided pre-*Crawford*, the court’s determination that the testimony was not hearsay also foreclosed any argument that the admission of the statement of a co-conspirator violated their Sixth Amendment confrontation clause rights.¹²⁰

1. *Under Crawford*

Similar to the intent test,¹²¹ the cases decided under the literal test highlight the problems inherent in placing implied assertions outside the reach of the Confrontation Clause. The implied assertions in the above two cases were analyzed to determine whether the words uttered by the declarant were “statements” and if so whether those “statements” were being offered for the truth of the words uttered. By characterizing the words uttered by the unknown declarants as non-statements or as statements that did not assert the matter to be proven, the courts ignored the potential for hearsay dangers.

The *Crawford* framework, with its emphasis on cross-examination, should focus on the hearsay dangers present in a statement.

Whereas the hearsay analysis focuses on whether the words uttered are a “statement” and whether that statement “asserts” what is trying to be proven, *Crawford* and *Davis* emphasize that the point of view of the government actor is important to the analysis of the “primary purpose of the investigation,”¹²² and under Pardo’s analysis, the statement need only be testimonial from either person’s perspective.¹²³ In both *Zenni* and *Lewis*, the police officers’ primary purpose was to establish events potentially relevant to later criminal prosecution of the suspects. The officers answered the phone and responded to the pager with a mind toward gathering evidence; there

¹²⁰ *Lewis*, 902 F.2d at 1179 n. 3.

¹²¹ See *infra* Section II. A.

¹²² *Davis*, 126 S. Ct. at 2273-74.

¹²³ Pardo, *supra* note 21, at 172.

was no ongoing emergency. Under this view then, the statements the officers collected were testimonial and thus subject to the Confrontation Clause.

C. Common-Law Test

Today, very few courts apply a common-law test to determine whether a statement containing an implied assertion is hearsay. However, this test would be most appropriate to determine whether a statement containing an implied assertion should be subject to the Confrontation Clause analysis. This test considers “the statement hearsay when the probative value of the statement depends on the perception, memory, sincerity, or narration of the declarant.”¹²⁴

In *State v. Dullard*,¹²⁵ police officers from the Des Moines police department went to the home of Brett Dullard to investigate reports of a methamphetamine lab in the home. Dullard’s mother gave the officers permission to search the residence and the detached garage.¹²⁶ In the garage, officers found numerous materials used to manufacture methamphetamine. Also in the garage was a notebook containing a handwritten note from an unknown person, stating

B - I had to go inside to pee + calm my nerves somewhat down. When I came out to go get Brian I looked over to the street North of here + there sat a black + white w/the dude out of his car facing our own direction-no one else was with him.¹²⁷

Dullard was charged with possession of ephedrine with intent to use it as a precursor and with possession of ether with the intent to use it as a precursor. At trial, the State introduced the handwritten note into evidence over Dullard's hearsay objection. “The State argued the note was

¹²⁴ Pardo, *supra* note 21, at 152.

¹²⁵ 668 N.W.2d 585 (Iowa 2003).

¹²⁶ *Id.* at 588.

¹²⁷ *Id.*

not offered to prove the truth of the matters it asserted but to connect Dullard to the items in the garage used to manufacture methamphetamine.”¹²⁸

The Iowa court of appeals found the note contained an implied proposition by the writer that Dullard possessed the methamphetamine materials, and determined the note was hearsay because it was offered to show the declarant's belief in this implied proposition, and the declarant was not available at trial to be cross-examined about the proposition.¹²⁹

After a lengthy discussion, the Iowa supreme court upheld the court of appeals, and determined that the implied assertions in the note constituted hearsay. In so holding, the court focused on the hearsay dangers present in the statement.

Four dangers are generally identified to justify the exclusion of out-of-court statements under the hearsay rule: erroneous memory, faulty perception, ambiguity, and insincerity or misrepresentation. . . . Yet, the distinction drawn between intended and unintended conduct or speech only implicates the danger of insincerity, based on the assumption that a person who lacks an intent to assert something also lacks an intent to misrepresent. The other “hearsay dangers,” however, remain viable, giving rise to the need for cross-examination. Moreover, even the danger of insincerity may continue to be present in those instances where the reliability of the direct assertion may be questioned. If the expressed assertion is insincere, such as a fabricated story, the implied assertion derived from the expressed assertion will similarly be unreliable. Implied assertions can be no more reliable than the predicate expressed assertion.¹³⁰

1. *Under Crawford*

The reasoning expressed by the Iowa supreme court in *Dullard*, is an excellent explanation as to why implied assertions should not be placed beyond the reach of the Confrontation Clause. The common-law approach recognizes that hearsay dangers may be present, regardless of the intent of the declarant or the literal statement. Even though in this case

¹²⁸ *Id.* at 589.

¹²⁹ *Id.* at 590.

¹³⁰ *Id.* at 594.

the statement would likely be non-testimonial, the reasoning still holds true that implied assertions are not free of hearsay dangers. The note in *Dullard* would be non-testimonial, because it is relatively clear that the author of the note did not anticipate that it would be used in criminal prosecution.

III. CASES OF PARTICULAR CONCERN

In each of the following cases, which were decided after *Crawford*, the defendant asserted that his Confrontation rights were violated by the admission of statements which contained implied assertions. The analysis conducted by the Circuit courts is troublesome, as it appears that the defendant's legitimate Confrontation concerns went unchecked.

A. *United States v. Cesareo-Ayala*¹³¹

Alejo Cesareo-Ayala was convicted by a jury of possession of cocaine, conspiracy to distribute cocaine, and distribution of marijuana.¹³² Cesareo-Ayala appealed his convictions on multiple theories, including challenging the “admission into evidence of statements made to him by an associate who had just been apprehended and was cooperating with the police.”¹³³ Cesareo-Ayala asserted that the statements “were inadmissible hearsay and their use at trial violated the Confrontation Clause.”¹³⁴ The Sixth Circuit affirmed the convictions and held that “the statements made by Mr. Cesareo-Ayala's associate were not offered into evidence for the truth of the matter asserted, so they were not hearsay and did not implicate the Confrontation Clause.”¹³⁵

¹³¹ 576 F.3d 1120 (10th Cir. 2009).

¹³² *Cesareo-Ayala*, 576 F.3d at 1122.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1122-23.

1. *Background*

At Cesareo-Ayala's trial, the key witness against him was Charles Klepac. As a result of prior dealings that Klepac had with Edward Mendez, a cocaine dealer, Klepac had agreed to connect Mendez with cocaine buyers. Two buyers that Klepac connected with Mendez engaged in several transactions involving quantities exceeding one kilogram of cocaine. Klepac testified that at six or seven of these large quantity transactions, Cesareo-Ayala was also present. Several times Cesareo-Ayala handed the cocaine to Mendez, and in return Mendez handed the majority of the money proceeds to Cesareo-Ayala. This lead Klepac to believe that "Cesareo-Ayala was Mendez's superior and was 'in control of the cocaine.'"¹³⁶

When Steward, a buyer of small quantities of cocaine, was arrested, he agreed to cooperate with police and directed them to Klepac. On the police's instructions, Steward contacted Klepac to purchase one kilogram of cocaine. While conducting surveillance of Klepac's residence during the arranged meeting time, officers observed Mendez arrive. Steward was instructed to call Klepac and tell him the deal was off; when Mendez exited the house, he was arrested with one kilogram of cocaine on his person.

Now in custody, Mendez also agreed to cooperate with the police to set up a bust of his supplier. After about one hour in custody, Mendez received a call on his mobile phone. The phone was in walkie-talkie mode, which permitted Officer Nunez to hear the conversation. The officer contemporaneously wrote down an English translation of the conversation as follows:

[Mendez]: What's going on, Primo?

[Cesareo-Ayala]: What happened?, Are you ready?

[Mendez]: Nothing, I had trouble at the gas station[.]

[Cesareo-Ayala]: Do you have my stuff?

¹³⁶ *Id.* at 1123.

[Mendez]: Yes. I've got your money.

[Mendez]: Do you want to meet at 7th and Central? I need two more.

[Cesareo-Ayala]: Two more. Alright.

[Mendez]: Yeah, two more of the Stuff. I'll give you your stuff and you give me two more.

[Cesareo-Ayala]: I don't like 7th and Central.

[Mendez]: Well, you tell me where. I'll meet you where ever. You tell me and I'll be there.

[Cesareo-Ayala]: Remember where we played billiards? There..

[Mendez]: Okay. How much time?

[Cesareo-Ayala]: 15 minutes.

[Mendez]: Okay.¹³⁷

Officers, along with Mendez, set out for the place identified by Mendez. En route, Mendez received a second call on his mobile phone, which Officer Nunez again heard, this time committing it to memory and writing out the English translation approximately 30 minutes later.

[Mendez]: What's going on?

[Cesareo-Ayala]: Where are you?

[Mendez]: I'm almost there; I am at the gas station.

[Cesareo-Ayala]: Who do you have with you?

[Mendez]: A friend I ran into at the fuel station.

[Cesareo-Ayala]: Oh. I'm not there yet, I'm 7 minutes away.

[Mendez]: Okay, me to[o]. I'll be pulling in right behind you then.

[Cesareo-Ayala]: Okay.¹³⁸

¹³⁷ *Id.* at 1124.

¹³⁸ *Id.*

Conducting surveillance of the agreed upon parking lot, officers observed a man, later identified as Cesareo-Ayala, walk to the rear of the building with a red bag, and return minutes later without the bag, at which point officers arrested him. The red bag was recovered and found to contain about 920 grams of marijuana. Cesareo-Ayala was then indicted for conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, possession with intent to distribute 500 grams or more of cocaine, and distribution of marijuana.¹³⁹

Prior to trial, “Mendez’s attorney had indicated that Mendez would invoke his Fifth Amendment right to refuse to testify if called by either side as a witness.”¹⁴⁰ Cesareo-Ayala then filed a motion in limine to exclude any testimony about Mendez’s statements based on the Confrontation Clause.¹⁴¹ The trial court provisionally admitted the phone conversations “subject to the government’s making the showing required for admission of coconspirator statements under Federal Rule of Evidence 801(d)(2)(E).”;¹⁴² the statements were admitted without the government ever asking the court to determine whether it had made such a showing.¹⁴³

2. Appellate Court’s Analysis

On appeal to the Tenth Circuit, Cesareo-Ayala asserted that Mendez’s statements were inadmissible hearsay and barred by the Confrontation Clause of the Sixth Amendment.¹⁴⁴ The government changed tactics from asserting that the statements fell under the coconspirator hearsay exception, to asserting that the statements were not offered in evidence to prove the truth of the matter asserted.¹⁴⁵ By relying on the *Tennessee v. Street* footnote in *Crawford*,¹⁴⁶ the

¹³⁹ *Id.* at 1125.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1127.

¹⁴⁵ *Id.* at 1127-28.

government was able to claim that the offered statements were not hearsay and did not implicate the Confrontation Clause; the Tenth Circuit agreed.¹⁴⁷

The court proceeded in its analysis by taking each sentence uttered by Mendez separately and determining what that sentence asserted, if anything.¹⁴⁸ The court, taking each sentence one by one, came to several conclusions: 1) that a statement asserted nothing; 2) that the admission of statements asserting Mendez's location or proposed meeting time and place was harmless; and 3) that a statement was not offered for the truth, because in fact, Mendez was lying. These conclusions lead the court to conclude that the entire conversation was properly admitted.

Cesareo-Ayala countered that Mendez's statements

make indirect implied assertions and were so intended by Mendez. Comments such as "I've got your money" were intended to make the inculpatory assertion that the person on the other end of the telephone was engaged in a business transaction with Mendez. "I need two more" is intended to assert that Mendez wished to have the person on the other end deliver additional drugs and that this was in addition to drugs delivered in the past....Mendez, knowing that law enforcement was listening to his conversation, was intending to make assertions for their benefit about the identity of the person on the telephone and the nature of their relationship. It was these implicit assertions and the truth of those assertions which made these conversations relevant and useful to the Government's case.¹⁴⁹

The court claimed that Cesareo-Ayala's argument misconceived what it means to say that a statement is offered to prove the truth of the matter asserted. The court asserted that the conversation "helped prove that the two men had a business relationship,...without regard to the truth of anything that either man asserted."¹⁵⁰ The probative value was not the conversations themselves, but the fact that Cesareo-Ayala initiated the conversations and his responses to

¹⁴⁶ See *Crawford*, 541 U.S. at 59 n. 9 "(The Clause...does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.)" *Id.*

¹⁴⁷ *Cesareo-Ayala*, 576 F.3d at 1128.

¹⁴⁸ See *id.* at 1128-29.

¹⁴⁹ *Id.* at 1129.

¹⁵⁰ *Id.*

Mendez.¹⁵¹ The court reasoned that Mendez’s portion of the conversation was included merely for context, and that “[i]n context, Mr. Cesareo-Ayala’s statements strongly suggest that he was involved in the (aborted) transaction with Steward and wanted to get together with Mendez to obtain the proceeds.”¹⁵² The court further went on to hold that

[t]he role of the hearsay rule (and the related component of the right to confrontation) is to protect against statements that cannot be challenged by cross-examining the speaker. Cross-examination can expose problems with the speaker’s perception, memory, or truthfulness. But Mendez’s perception, memory, and truthfulness were irrelevant to the purpose for which the government offered his statements.¹⁵³

3. *The Jeopardy of the Court’s Decision*

The reasoning employed in *Cesareo-Ayala* seems to be an attempt by the Tenth Circuit to again tie the Confrontation Clause to the “vagaries of the rules of evidence.”¹⁵⁴ The statements of Mendez, whether offered for their truth or, as the court suggests, merely as context, were used to imply the guilt of Cesareo-Ayala.¹⁵⁵ Mendez’s statements containing express assertions not offered for their truth, “may contain implied assertions that qualify as hearsay because the truth of the implied assertions is at issue and relevant to guilt.”¹⁵⁶ In particular, the statements “Yes. I’ve got your money.”; “I need two more.”; “Yeah, two more of the Stuff. I’ll give you your stuff and you give me two more.”,¹⁵⁷ are circumstantial evidence of the matter to be proved, namely that Mendez and Cesareo-Ayala were involved in an on-going drug business, including the attempted cocaine transaction with Steward. The result reached by the Tenth Circuit seems to bolster the argument that “[t]he fact that [the *Crawford* Court] relied solely on *Tennessee v Street*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 1130.

¹⁵⁴ *Crawford*, 541 U.S. at 61.

¹⁵⁵ *See McGlory*, 968 F.2d at 332-33.

¹⁵⁶ *Id.* at 332.

¹⁵⁷ *Cesareo-Ayala*, 576 F.3d at 1124.

in [stating that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted,]...suggests that the court did not intend to place implied assertions beyond the reach of the Confrontation Clause.”¹⁵⁸

Further, because of the *Crawford* Court’s footnote¹⁵⁹ which stated that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted, the Tenth Circuit did not even entertain the notion that Mendez’s statements might be testimonial. Mendez’s statements to Cesareo-Ayala appear to have all the elements of a testimonial statement. It seems clear that Mendez, working essentially as a government informant, was communicating with Cesareo-Ayala in such a manner as to be useful for later criminal prosecution against Cesareo-Ayala. Mendez was caught red-handed with a large quantity of cocaine, and likely believed that his cooperation with the police was critical to a more favorable disposition of his future criminal prosecution. Mendez was aware that government agents were listening to his conversation, he was aware his statements were being memorialized by Officer Nunez, and he certainly must have been aware that the police intended to use his statements against Cesareo-Ayala in future criminal prosecution.

In noting that the scope of the Confrontation Clause cannot be limited to a very formal category of proceedings, the *Davis* Court stated that “[i]n any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant...”¹⁶⁰ That is precisely what happened in *Cesareo-Ayala*, and the admission of Mendez’s statements violated Cesareo-Ayala’s Confrontation rights.

¹⁵⁸ Callen, *supra* note 47, at 174.

¹⁵⁹ *Crawford*, 541 U.S. at 59 n. 9.

¹⁶⁰ *Davis*, 126 S. Ct. at 2276.

Whereas *Crawford* emphasizes the import of cross-examination as the best means for determining reliability, the Tenth Circuit admitted Mendez’s statements “untested by the adversary process.”¹⁶¹ The process by which the Tenth Circuit determined to admit the statements was too analogous to the reasoning employed under the *Ohio v. Roberts* framework. Implied assertions are prone to hearsay dangers, and the Confrontation Clause aims to protect an accused from those dangers by affording cross-examination. To say that a statement avoids Confrontation concerns if it falls outside the definition of hearsay must be incorrect, because that would again reduce the Confrontation Clause to an exclusionary rule based on the definition of hearsay, making the Clause redundant as a constitutional protection.¹⁶² To tie “testimonial” to the definition of hearsay would be a misstep because a constitutional right would depend on how broadly or narrowly courts define hearsay, rather than addressing the possible hearsay dangers present in the statement.

B. *United States v. Rodriguez-Lopez*¹⁶³

Francisco Rodriguez-Lopez was charged with conspiring to distribute heroin. Prior to trial, Rodriguez filed a motion in limine to exclude evidence of phone calls made to his mobile phone and answered by the police. The district court held that the calls were inadmissible hearsay and excluded the evidence, at which point the government filed an interlocutory appeal. The Sixth Circuit then held “that because the government did not seek to prove the truth of any matter asserted by the callers, the district court erred in excluding evidence of the calls.”¹⁶⁴

¹⁶¹ *Crawford*, 541 U.S. at 62.

¹⁶² Douglass, *supra* note 10.

¹⁶³ 565 F.3d 312 (6th Cir. 2009).

¹⁶⁴ *Rodriguez-Lopez*, 565 F.3d at 313.

1. *Background*

An undercover DEA agent made arrangements to purchase heroin from Omar Robles-Manguia in a shopping center parking lot. While conducting surveillance, prior to the pre-arranged meet time, agents observed a man in a pick-up truck slowly circling the parking lot. After Robles-Manguia completed the sale of heroin to the undercover agent, other agents moved in and arrested the man in the pick-up truck as he attempted to drive away. Upon his arrest, Robles-Manguia told the agents that the man in the pick-up truck, Rodriguez-Lopez, had agreed to act as a lookout.

Special Agent Perryman questioned Rodriguez-Lopez, who claimed he knew nothing about the drug transaction. During this interrogation, Rodriguez's mobile phone rang repeatedly, and Agent Perryman answered the phone ten times. Each time he answered the phone, Agent Perryman heard the caller request heroin.¹⁶⁵

2. *Appellate Court's Analysis*

The Sixth Circuit concluded that the statements were admissible nonhearsay, because the government did not offer them for their truth.¹⁶⁶ Although the records did not reveal the exact content of what the callers said to Agent Perryman, the court reasoned that “if the statements were questions or commands,¹⁶⁷ they could not...be offered for their truth because they would not be assertive speech at all. They would not assert a proposition that could be true or false.”¹⁶⁸ The court further concluded that even if the statements were assertions, the government was offering them as evidence that the calls were made, not for their truth, and ‘the fact that

¹⁶⁵ *Id.* at 314.

¹⁶⁶ *Id.*

¹⁶⁷ For example, “Can I get some heroin?” or “Bring me some heroin.”

¹⁶⁸ *Rodriguez-Lopez*, 565 F.3d at 314 (citing *United States v. Wright*, 343 F.3d 849, 865 (6th Cir. 2003) (“[A] question is typically not hearsay because it does not assert the truth or falsity of a fact.”); *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir. 2006) (“Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay.” (citations omitted))). *Id.* at 314-15.

Rodriguez received ten successive solicitations for heroin is probative circumstantial evidence of his involvement in a conspiracy to distribute heroin.”¹⁶⁹

The district court had held that the statements contained implied assertions about the callers’ alleged desire to buy heroin and their belief that the defendant could supply heroin.¹⁷⁰

But, the court of appeals reasoned that although the calls supported an inference that Rodriguez-Lopez was a heroin dealer, that inference did not depend on the caller’s truthfulness, memory, or perception.¹⁷¹

3. *The Jeopardy of the Court’s Decision*

The implied assertions of the callers, that the defendant was a heroin dealer, were used to imply the guilt of Rodriguez-Lopez. “[W]hen the matter which the declarant intends to assert is different from the matter to be proved, but the matter asserted, if true, is circumstantial evidence of the matter to be proved...the statement is subject to a hearsay objection.”¹⁷² Here, the Sixth Circuit should have held that the content of the phone calls was inadmissible hearsay, because the implied assertions present in the statements were circumstantial, if not direct, evidence of the matter to be proved, namely that Rodriguez-Lopez was involved in a conspiracy to distribute heroin.

Also, how did the court come to the conclusion that the inference that Rodriguez-Lopez was a heroin dealer did not depend on the caller-declarant’s truthfulness, memory, or perception? Although perhaps far-fetched, it is possible that while high, a heroin-user mistakenly wrote down the phone number of Rodriguez-Lopez, which was one digit different from the user’s actual supplier, and then shared this phone number with all of his heroin-user friends. Confrontation

¹⁶⁹ *Id.* at 315.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Reynolds*, 715 F.2d at 103.

and cross-examination of the declarants was the only effective way to ensure that the evidence admitted against the defendant to prove his guilt is reliable.

The Confrontation Clause problem was not raised or addressed on appeal, however, it is relatively safe to assume that because the Sixth Circuit held the statements to be admissible because they were not offered for their truth, they would have similarly held that the admission of the statements did not violate the Confrontation Clause like the court in *Cesareo-Ayala*. This conclusion would be erroneous. *Davis* emphasized that the point of view of the government actor is important to the analysis, when determining the primary purpose of the investigation.¹⁷³ Similar to both *Jackson* and *Long*, discussed *supra*, the police officers' primary purpose in answering Rodriguez-Lopez's phone was to establish events potentially relevant to later criminal prosecution. The officer answered the phone with a mind toward gathering evidence; there was no ongoing emergency. The statements of the various callers requesting heroin were testimonial and thus subject to the Confrontation Clause.

CONCLUSION

To say that a statement is non-hearsay and therefore avoids the Confrontation Clause analysis is an oversimplification, and does not add anything meaningful to the determination of whether a statement is testimonial. *Crawford's* reference to *Tennessee v. Street* is being misused. As courts continue to approach implied assertions in a variety of ways to determine whether or not they fall within the definition of hearsay, the same varied approach should not carry over into the testimonial inquiry of the Confrontation Clause analysis. A better way to interpret the limitation on the Confrontation Clause is to say that the Confrontation Clause does not bar the use of testimonial statements for purposes for which there are no hearsay dangers. The Court should recognize that when the truth of an implied assertion is at issue and relevant to

¹⁷³ *Davis*, 126 S. Ct. at 2273-74.

the accused's guilt, it should be determined whether or not that statement is testimonial, so as to protect that person's Confrontation rights.