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Dying Declarations and the Confrontation Clause

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by

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INTRODUCTION

In 2001, Detroit, Michigan police responded to a shooting in which the victim fled the scene and collapsed in a gas station parking lot.[1] Upon coming to the scene, the police found the victim with a gunshot wound to the abdomen.[2] After asking the victim what happened, he responded that "'Rick' shot him."[3] The victim died hours later in the hospital.[4]

During the preliminary examination before the district court, the prosecutor sought to introduce the deceased victim's hearsay statements regarding the killer under the state rules of

[1] Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011).
[2] *Id.*
[3] *Id.*
[4] *Id.*

evidence as both a dying declaration and an excited utterance.[5] During the ensuing proceeding of the examination, however, the prosecutor abandoned the argument that the statements were a dying declaration and relied solely on the excited utterance argument.[6] The defendant was ultimately convicted of murder and his case was appealed to the Michigan Supreme Court,[7] arguing that the victim's statements were testimonial under *Crawford v. Washington*[8] and therefore inadmissible under the Confrontation Clause because the defendant did not have an opportunity to cross-examine the victim.[9] The case was eventually appealed to the United States Supreme Court.[10] At oral argument before the United States Supreme Court, Justice Ginsberg asked the attorney representing the state if, in hindsight, the prosecutor should have pressed the dying declaration argument further.[11] The attorney responded with one word: "Absolutely."[12]

That the dying declaration is an exception to the Confrontation Clause,[13] however, is not as clear as the attorney appeared to believe. When the Court, in *Crawford v. Washington*, overruled the reliability standard for the admissibility of unconfronted testimonial statements,[14] it

[5] People v. Bryant, 768 N.W.2d 65, 76-77 (Mich. 2009), *vacated*, 131 S. Ct. 1143 (2011).
[6] *Id.* at 77.
[7] *Id.* at 67-68.
[8] Crawford v. Washington, 541 U.S. 36 (2004).
[9] *Bryant*, 131 S. Ct. at 1151.
[10] Michigan v. Bryant, 130 S. Ct. 1685 (2010) (granting certiorari).
[11] Transcript of Oral Argument at 20, Michigan v. Bryant, 131 S. Ct. 1143 (2011) (No. 09-150).
[12] *Id.* The Court ultimately held in favor of the state, thus sidestepping the thorny question of whether the prosecutor should have been allowed to raise the dying declaration argument once more. *Bryant*, 131 S. Ct. at 1167.
[13] In this article, the phrase "dying declaration exception to the Confrontation Clause" is used. This phrase is used as a short hand to refer to a possible exception to the rule under the Sixth Amendment that testimonial statements must be subject to confrontation by the defendant. Under *Crawford*, if a dying declaration is testimonial, the statement is inadmissible unless the defendant has the opportunity to cross-examine the statement in court. Dicta in Crawford and other cases suggest, however, that this rule regarding testimonial statements may not apply to testimonial dying declarations.
[14] In Ohio v. Roberts, 448 U.S. 56, 66 (1980), the Supreme Court held that hearsay statements were admissible under the Confrontation Clause so long as they bore a sufficient indicia of reliability. A hearsay statement would be admissible under the Confrontation Clause if it was a well-established hearsay exception or if the statement had a "particularized guarantee[] of trustworthiness." *Id.*

left unresolved the issue of whether statements made under the dying declaration exception were admissible under the Sixth Amendment's Confrontation Clause.[15]

This article explores the issue of whether the Sixth Amendment's guarantee, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,"[16] is satisfied when the prosecution admits statements under the dying declaration exception to the hearsay requirement. Under the Court's modern jurisprudence of the Confrontation Clause, statements that are testimonial are subject to confrontation by the accused, meaning the only way to admit those statements is through live testimony in court or a showing of a prior opportunity to cross-examine.[17] Given that many declarants who make statements under the belief of impending death will not be available for cross-examination in an ensuing trial, these statements, if testimonial, are not subject to cross-examination, i.e., confrontation. Part I discusses *Crawford* and its partial overruling of *Ohio v. Roberts*,[18] as well as the subsequent cases from the Court following the decision in *Crawford*. Part II discusses the dying declaration exception, with particular emphasis on its use during the time of the enactment of the Bill of Rights. Part III analyzes a representative set of state and lower federal court cases post-*Crawford* dealing with the issue of the dying declaration and the Confrontation Clause. Finally, Part IV argues that given the fact that the great weight of cases has recognized a dying declaration exception to the Confrontation Clause, and given the fact that dying declarations are likely not testimonial, the dying declaration is likely to be found to be an exception to the right to confrontation under the Sixth Amendment.

[15] Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004) ("We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.").

[16] U.S. CONST. amend. VI.

[17] *Crawford*, 541 U.S. at 53-54.

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

I. CRAWFORD AND THE REJECTION OF THE RELIABILITY STANDARD

A. *Ohio v. Roberts* and the Reliability Standard

Prior to Crawford v. Washington, the admissibility of unconfronted statements under the Confrontation Clause was governed by *Ohio v. Roberts*.[19] In *Roberts*, the defendant was arrested for forgery of checks and possession of stolen credit cards.[20] During the preliminary hearing, the defendant's counsel called as a witness the daughter of the man under whose names the defendant forged the checks.[21] In response to questions from the defendant's counsel, the daughter denied giving the checks to the defendant and denied giving him permission to use the checks.[22] Although the daughter was subpoenaed five times to appear at the defendant's trial, she never appeared.[23] Her preliminary hearing testimony was read in court by the prosecution, however, to rebut the defendant's testimony that she gave the checks to him to use.[24] Although the defendant objected to the use of the transcript at trial, he was convicted.[25]

Although the Court stated that the "Confrontation Clause reflects a preference for face-to-face confrontation at trial,"[26] the Court held that the introduction of the preliminary hearing statements from the daughter during the defendant's trial did not violate the defendant's right to confrontation.[27] In coming to this decision, the Court stated that statements from unavailable witnesses would only be deemed admissible if the statement bore "adequate indicia of reliability."[28] Reliability, the court stated, would be inferred if the evidence fell "within a firmly rooted

[19] Ohio v. Roberts, 448 U.S. 56 (1980).
[20] *Id.* at 58.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 59.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 63.
[27] *Id.* at 77.
[28] *Id.* at 66 (internal quotes omitted).

hearsay exception" or a "showing of particularized guarantees of trustworthiness."[29] Because the defendant's counsel had the opportunity to cross-examine the daughter's statements during the preliminary hearing, and indeed took advantage of that opportunity, the Court held that the transcript introduced at the defendant's trial "bore sufficient indicia of reliability."[30] Thus, there was no violation of the Confrontation Clause.[31]

For twenty-four years, the decision in *Ohio v. Roberts* controlled the Court's Confrontation Clause jurisprudence.[32] Lower federal and state courts would ultimately devise a lengthy list of factors in determining whether an unavailable witness's statement sufficiently reliable to satisfy the Confrontation Clause.[33] It was not until 2004 that the Court reexamined its Confrontation Clause jurisprudence adopting the new "testimonial" approach.[34]

B. *Crawford v. Washington* and the New Testimonial Standard

In *Crawford v. Washington*, the Court was presented with an opportunity to reassess its Confrontation Clause jurisprudence with respect to the *Roberts* "indicia of reliability" standard.[35] According to Professor Thomas Reed, the underpinnings of the *Roberts* standard began to erode

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[29] *Id.*

[30] *Id.* at 73.

[31] *Id.* at 77.

[32] *Roberts* was adopted in 1980 and was not overruled until 2004 in *Crawford*.

[33] *See*, *e.g.*, People v. Jordan, No. E026530, E026544, 2002 WL 50594, at *5 (Cal. Ct. App. Jan. 15, 2002) (statement made during business hours; not under the influence when statement made); State v. Bintz, 650 N.W.2d 913, 918 (Wis. Ct. App. 2002) (demeanor during interview); Stevens v. People, 29 P.3d 305, 318 (Colo. 2001) (not mentally instable); People v. Thomas, 730 N.E.2d 618, 626 (Ill. App. 2000) (voluntary statement); People v. Schutte, 613 N.W.2d 370, 376 (Mich. 2000) (not under arrest); Holiday v. State, 14 S.W.3d 784, 786-87 (Tex. App. 2000) (against penal interest); People v. Campbell, 721 N.E.2d 1225, 1230 (Ill. App. 1999) (attorney present and statement made against friend).

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

[35] *See* Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 216 (2004) ("In [*Crawford*], the United States Supreme Court finally overruled [*Roberts*], divorcing the Confrontation Clause and the hearsay rule because of an irreconcilable breakdown of the relationship."). Professor Reed posits that the case of Lilly v. Virginia, 527 U.S. 116 (1999) was the turning point in the Supreme Court's shift in its Confrontation Clause analysis. *Id.* at 212-216. In *Lilly*, the Court held that the admission of an accomplice's confession violated the Confrontation Clause because it was neither based on a firmly rooted hearsay exception nor found to have particularized guarantees of trustworthiness. 527 U.S. at 133-36. Justice Scalia tipped his hat to the opinion he would write five years later in Crawford when he briefly concurred in the opinion in Lilly, stating only that the introduction of the evidence against the defendant "is a paradigmatic Confrontation Clause violation." *Id.* at 143 (Scalia, J., concurring).

with the case of *Williams v. United States*,[36] a case dealing strictly with statements against penal interest under the Federal Rules of Evidence, and continued through *Lilly v. Virginia*,[37] a case dealing with accomplice confessions under the Confrontation Clause.[38] Those two cases forced the Court to look at the *Roberts* standard once again and pushed the Court farther away from *Roberts*.[39]

1. Crawford *and Its Holding*

In *Crawford*, the Court examined a case where the defendant had been convicted for assault based partly upon his wife's unconfronted statements to police following his arrest.[40] The defendant's wife, who was a witness to the assault, gave statements to police in response to their questions but did not testify at trial due to state law restricting the ability of the prosecution to call a spouse as an adverse witness.[41] Notwithstanding the law regarding adverse spousal testimony, the state was able to introduce the wife's taped statements to the police over Confrontation Clause objections by the defendant as statements against the defendant's penal interest, and he was convicted.[42] Relying on *Ohio v. Roberts*, the Washington Supreme Court affirmed the defendant's conviction.[43] That court concluded that the wife's statement "bore guarantees of trustworthiness" given the interlocking nature, or similarity, between her statements and the defendant's statements.[44]

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[36] Williams v. United States, 512 U.S. 594, 599 (1994).
[37] *Lilly*, 527 U.S. at 133-136.
[38] Reed, *supra* note 35, at 210-13.
[39] *See id.* at 216-17 ("The *Lilly* decision virtually guaranteed a reexamination of *Roberts* the next time a Confrontation Clause case came before the Court, and thus compelled the Court to grant certiorari in the case of Michael D. Crawford on his conviction for assault and attempted murder.").
[40] *Crawford*, 541 U.S. at 40-41.
[41] *Id.* at 40.
[42] *Id.* at 40-41.
[43] *Id.* at 41.
[44] *Id.*

The Court began its analysis with the historical roots of the Confrontation Clause. The Court identified the case of Sir Walter Raleigh, who was executed after being found guilty of treason, as the case that typified the pre-confrontation right abuses that prompted the development of the right.[45] Raleigh's accuser (and alleged accomplice) implicated Raleigh in the treasonous acts through given statements to the Privy Council but was not present at Raleigh's trial.[46] Raleigh demanded that his accuser be called, stating that "Law is by witness and jury. . . . Call my accuser before my face. . . ."[47] Although Raleigh's accuser was never called and Raleigh himself was executed, England developed confrontation rights to guard against a trial like Sir Walter Raleigh's in the future.[48]

The Court continued by examining American law at the time of the Declaration of Independence and Revolutionary War.[49] The Court noted that many state declarations of rights included a right to confrontation.[50] Post-war cases from the states also recognized and "shed light upon the original understanding of the common-law right."[51] From these sources the Court concluded that at the time of the adoption of the Bill of Rights, testimonial statements of a non-appearing witness would be inadmissible unless it was shown that the witness "was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[52] As for testimonial statements, the Court defined "testimony" as a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[53]

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[45] *Id.* at 44.
[46] *Id.*
[47] *Id.* (internal quotations and citations omitted).
[48] *Id.*
[49] *Id.* at 47-48.
[50] *Id.* at 48.
[51] *Id.* at 49.
[52] *Id.* at 53-54.
[53] *Id.* at 51 (quoting Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1828)).

In adopting the testimonial standard, the Court rejected the reliability standard of *Roberts* for testimonial statements and abrogated that case.[54] *Roberts*, said the Court, broke from the historical roots of the Confrontation Clause in two ways.[55] First, the case was too broad because it applied the reliability standard whether or not the particular statement consisted of ex parte testimony.[56] And second, the case was too narrow because it would admit "ex parte testimony on a mere finding of reliability."[57] For testimonial statements, the Confrontation Clause required, according to the Court, unavailability of the witness and a prior opportunity to cross-examine.[58]

Importantly, the Court also expressed its view on the common-law exceptions to the right of confrontation. Though dicta, the Court gave an indication that any hearsay exception to the right of confrontation would necessarily have to have been an exception that was established before and during the adoption of the Confrontation Clause.[59] One such hearsay exception, the Court suggested, was the dying declaration.[60] Although the Court stated that authority exists for admitting testimonial dying declarations notwithstanding the Confrontation Clause, it found no occasion to make such a conclusion in *Crawford*.[61]

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[54] *Id.* at 53-54.

[55] *Id.* at 60.

[56] *Id.*

[57] *Id.*; see also Stephen J. Cribari, *Is Death Different? Dying Declarations and the Confrontation Clause After Crawford*, 35 WM. MITCHELL L. REV. 1542, 1547 (2009) ("Put in the language of the case, we can say that where a declarant is unavailable, hearsay may be admitted without violating the Sixth Amendment if the relevant hearsay exception is 'firmly-rooted' or, if not, that the relevant hearsay exception provides circumstantial guarantees of trustworthiness equivalent to those provided by the firmly-rooted exceptions.").

[58] *Id.* at 68.

[59] *Id.* at 54 (stating that the confrontation right "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.").

[60] *Id.* at 55 n.6.

[61] *Id.*

2. Giles v. California: *The Exceptions Matter*

The second case[62] to pick up where *Crawford* left off was *Giles v. California*.[63] Although *Giles* did not address the dying declaration as a part of its holding, the language of the case indicated that the majority of the Court was willing to examine the historical understanding of the Confrontation Clause to determine whether any testimonial exceptions to the right to confrontation exist.[64]

In *Giles*, the Court was faced with determining whether the California forfeiture by wrongdoing rule was consistent with its holding in *Crawford*.[65] The defendant in the case was charged with murder after he shot his girlfriend in his garage.[66] At trial, the defendant claimed that he was acting in self-defense, stating that "he was afraid she had something in her hand."[67] The prosecution attempted to undermine the defendant's defense by introducing statements that the girlfriend had made to police weeks before the shooting occurred regarding the defendant's physical abuse of the girlfriend.[68] These hearsay statements from the girlfriend were admitted based upon their reliability, as the trial occurred prior to the Court's decision in *Crawford v. Washington*.[69] During the appeal, however, the Court decided *Crawford*, and the state appellate courts affirmed the conviction based upon the state's forfeiture by wrongdoing rule.[70] The state courts reasoned that the defendant forfeited his right to confrontation "because he had committed

[62] In between *Crawford* and *Giles*, the Court decided Davis v. Washington, 547 U.S. 813 (2006). In *Davis*, the Court held that a statement made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" is not testimonial, and thus not subject to confrontation. 547 U.S. at 822.

[63] Giles v. California, 554 U.S. 353 (2008).

[64] *See* Cribari, *supra* note 57, at 1549 (explaining that Giles was written to "reflect a strong originalist approach to constitutional decision-making").

[65] *Giles*, 554 U.S. at 355.

[66] *Id.* at 356.

[67] *Id.*

[68] *Id.* at 356-57.

[69] *Id.* at 357.

[70] *Id.*

the murder for which he was on trial, and because his intentional criminal act made [the girl-friend] unavailable to testify."[71]

The court began its analysis by acknowledging, as it did in *Crawford*, that there were testimonial statements admitted at common law even though the statements were unconfronted.[72] Pertinent to the case before the Court was the common law doctrine of forfeiture by wrongdoing, which allowed the introduction of testimonial statements of a witness who was "kept away" from trial by the acts of the defendant.[73] Though dicta, the Court, in the same breath, acknowledged that the dying declaration was also a common law exception to the right to confrontation.[74]

Although the Court acknowledged that these common law exceptions existed, and posited that they would continue to exist under the Court's modern jurisprudence, the Court held that the California rule was not in accord with the traditional forfeiture by wrongdoing doctrine.[75] The Court reasoned that a defendant cannot forfeit his right to confrontation with respect to testimonial statements made by the victim because such a defendant would not have killed the victim in order for the victim to be unavailable to testify at the murder trial.[76] In the words of the Court, this would be akin to "'dispensing with jury trial because a defendant is obviously guilty.'"[77] The Court could not find, and the state was unable to provide, any example of the state's forfeiture rule prior to 1985.[78]

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[71] *Id.*
[72] *Id.* at 358.
[73] *Id.* (internal quotations omitted).
[74] *Id.*
[75] *Id.* at 358-59.
[76] *Id.* at 365.
[77] *Id.* (quoting *Crawford*, 541 U.S. at 62).
[78] *Id.* at 367.

The significance of the case, however, extends beyond the Court's holding with respect to the forfeiture doctrine.[79] At multiple points throughout the opinion, the Court, in dicta, referred to and recognized the dying declaration as a common law exception to the hearsay bar.[80] Citing cases from England and the early American states, the Court stated that the common law courts at the time of turn of the 19th Century recognized the dying declaration as an exception to the confrontation right even though those statements were testimonial.[81] The Court placed particular emphasis on the case of *King v. Woodcock*, an English case decided in 1789.[82] In that case, the defendant was accused of killing his wife, who gave statements to the police regarding the crime just prior to her death.[83] The judge in the *Woodcock* case would not admit the statements from the wife unless they were subject to confrontation or unless it was shown that the wife gave the statements under the belief of impending death.[84]

Thus, in the Court's view, there was strong evidence that there were common law exceptions to the right to confrontation.[85] This view, however, has not come without criticism. For example, Professor Thomas Davies argues that the *Crawford* and *Giles* majority "fundamentally misdescribed and understated the Framers' understanding of the confrontation right."[86] According to Professor Davies, the forfeiture doctrine was not an exception known to the colonists at

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[79] *See* Peter Nicholas, *"I'm Dying to Tell You What Happened": The Admissibility of Dying Declarations Post-Crawford*, 37 HASTINGS L.Q. 487, 492 (2010) (explaining that the Court's holding in *Giles* had a large impact on the lower courts' treatment of dying declarations in Confrontation Clause cases).

[80] *Giles*, 554 U.S. at 358, 362-63.

[81] *Id.* at 358. It is true, however, that at the time of the adoption of the Sixth Amendment, confrontation rights and rights protected under hearsay rules were merged.

[82] *Id.* at 358, 362.

[83] *Id.* at 362 (citing King v. Woodcock, 168 Eng. Rep. 352, 352 (1789)).

[84] *Id.*

[85] *See* Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles's Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding"*, 13 LEWIS & CLARK L. REV. 605, 608 (2009) (explaining that the *Giles* majority "purported to read the Clause 'as a reference to the right of confrontation at common law' and thus endorsed limiting exceptions to the confrontation right to only those that were 'established at the time of the founding.'").

[86] *Id.* at 608-09.

the time of the writing of the Bill of Rights.[87] Although Professor Davies criticized the Court's characterization of late 18th and early 19th Century American legal history, he did acknowledge that the dying declaration was a recognized exception to the right of confrontation at that time.[88] Nevertheless, the question remains as to whether the extensive dicta from the Court in *Crawford* and *Giles* regarding common law exceptions to confrontation are compatible with the Court's actual holding in *Crawford* regarding testimonial statements: unavailability and an opportunity to cross-examine.[89]

II. THE HISTORY OF THE DYING DECLARATION

According to Professor Davies, the use of the dying declaration as an exception to the ban on hearsay was first established in England in the 1720s.[90] Those early cases held that "'[i]n the case of murder, what the deceased declared after the wound given, may be given in evidence.'"[91] As shown below, the modern dying declaration exception to the hearsay ban is changed very little since the 1720s.

A. The Dying Declaration Under the Rules of Evidence

The dying declaration is defined under the Federal Rules of Evidence as "a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances."[92] Under the federal rules, the dying declaration is only applicable "[i]n a prosecution for homicide or in a civil case."[93] Thus, if the declarant is unavailable as a witness, hearsay

[87] *See id.* at 638 (the only two common law exceptions to the right of confrontation were Marian depositions and dying declarations).
[88] *Id.*
[89] *Crawford*, 541 U.S. at 68.
[90] Davies, *supra* note 85, at 636.
[91] *Id.* (citing 12 Charles Viner, General Abridgment of Law and Equity 118 (London, G.G.J. & J. Robinson, 2nd ed. 1792).
[92] Fed. R. Evid. 804(b)(2).
[93] *Id.*

statements made that satisfy the dying declaration under the federal rule are not excluded as hearsay.[94]

The declarant must be aware of impending death at the time the statement is made, which may be shown "'from the nature and extent of the wounds inflicted being obviously such that he must have felt or known that he could not survive.'"[95] Thus, there is a requirement that the statement be given at a time of hopelessness "'in the shadow of impending death.'"[96] The common justification for the admission of the dying declaration as an exception to the hearsay bar is that the impending belief of death obviates any motive to lie presumably because the declarant would want to go to his grave with a clear conscience.[97] Additionally, the dying declaration is admitted due to the "compelling need for the statement."[98]

State law is generally in accord with the federal rule. For example, under California's rules of evidence, "[e]vidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death."[99] Likewise, Massachusetts closely tracks the federal language regarding dying declarations, allowing such statements as a hearsay exception: "In a prosecution for homicide, a statement made by a declarant-victim under the belief of imminent death and who died shortly after making the statement, concerning the cause or circumstances of what the declarant believed to be the declarant's own impending death or that of a co-victim."[100]

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[94] *See id.* § 804(b).

[95] United States v. Mobley, 421 F.2d 345, 347 (5th Cir. 1970) (quoting Mattox v. United States, 146 U.S. 140, 151 (1892)).

[96] United States v. Angelton, 269 F. Supp. 2d 878, 883 (S.D. Tex. 2003) (quoting Shepard v. United States, 290 U.S. 96, 99 (1933).

[97] United States v. Thevis, 84 F.R.D. 57, 63 (N.D. Ga. 1979).

[98] *Id.*

[99] CAL. EVID. CODE § 1242 (West 2012).

[100] MASS. GEN. LAWS § 804(b)(2) (West 2012).

That the dying declaration is admissible under the rules of evidence and hearsay does not necessarily mean, however, that such a declaration is admissible under the Confrontation Clause of the Sixth Amendment.[101] Under the Court's modern Confrontation Clause jurisprudence, testimonial statements are inadmissible under the Confrontation Clause unless the declarant is unavailable to testify and the defendant was given a prior opportunity to cross-examine the declarant.[102] Non-testimonial hearsay statements, on the other hand, are not subject to confrontation and are only subject to the jurisdiction's hearsay rules.[103]

Thus, two issues are readily apparent as to whether a dying declaration is admissible under the Confrontation Clause. First, assuming the dying declaration is testimonial in a given case, the issue arises as to whether the declaration is a common law exception to the right of confrontation.[104] In both *Crawford v. Washington*[105] and *Giles v. California*,[106] the Court indicated in dicta that a testimonial declaration made under belief of impending death is such a common law exception. And second is the issue of whether a particular statement made is testimonial. As explained in *Giles*, non-testimonial statements are not subject to confrontation and therefore are only controlled by the jurisdiction's rules regarding hearsay.[107] To address the first issue – whether a testimonial dying declaration is admissible notwithstanding a defendant's right to con-

[101] *Crawford*, 541 U.S. at 50 (stating that the Court "reject[s] the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon the law of Evidence for the time being") (internal quotations omitted).

[102] *Id.* at 53-54.

[103] *Giles*, 554 U.S. at 358.

[104] *See Crawford*, 541 U.S. at 56 n.6.

[105] *Id.*

[106] *Giles*, 554 U.S. at 358.

[107] *Id.* 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.").

front witnesses because of its use as a hearsay exception at common law – an examination of the use of the dying declaration at the time of the Bill of Rights is necessary.[108]

B. The Dying Declaration at Common Law

The Court in *Crawford* and *Giles* appeared to be reasonably certain that the common law at the time of the founding allowed for the admission of a dying declaration as a hearsay exception even if unconfronted.[109] The *Crawford* court favorably cited to *Mattox v. United States*[110] and *State v. Houser*[111] for this proposition.[112] The Court in *Mattox* was confronted with the issue of whether the testimony of an unavailable witness was admissible if the defendant had a prior opportunity to cross-examine the witness.[113] In explaining that the definition of witness under the Sixth Amendment was not meant to be read narrowly as to only include those who give testimony in court, the Court stated as an example that "there could be nothing more directly contrary to the letter of the [the Sixth Amendment] than the admission of dying declarations" which are nonetheless admitted "as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice."[114] Importantly, the *Mattox* court, like the Court in *Crawford* and *Giles*, stated that the scope of the Constitution was only as broad or narrow "as it existed at the time it was adopted."[115] The Missouri Supreme Court case of *Houser* likewise pointed to the admissibility of the dying declaration, notwithstanding the confrontation right, at common law.[116] The court stated that "[t]he admissibility of dying declarations has not been questioned"

[108] Ancillary to this question, but crucial to the resolution of whether the dying declaration is an exception to the confrontation right, is the question of whether it matters at all that the common law rule was that there was such an exception to the right to confrontation. This question will be addressed below.

[109] *See* Davies, supra note 85, at 605 ("In [*Giles*], as previously in [*Crawford*], Justice Scalia's majority opinion purported to follow the Framers' design for the Confrontation Clause.").

[110] Mattox v. United States, 156 U.S. 237 (1895).

[111] State v. Houser, 26 Mo. 431 (Mo. 1858).

[112] *Crawford*, 541 U.S. at 54.

[113] *Mattox*, 156 U.S. at 240.

[114] *Id.* at 244.

[115] *Id.* at 243.

[116] *Houser*, 26 Mo. at 438.

and to exclude them on the basis of a violation of the right to confrontation under the Sixth Amendment "would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety."[117] Even Professor Davies, who is critical of the *Crawford* and *Giles* Court's "selective originalism," recognized that the dying declaration was an exception to the right of confrontation at the time of the writing of the Bill of Rights.[118]

Assuming that the dying declaration was indeed a common law exception to the right to confrontation, it is still necessary to examine the underlying rationales for the admission of the statement at that time. If the statement's purposes are no longer valid or are undercut by current precedent, the fact that the statement was admitted at common law is less persuasive. It appears that at common law, the rationale for the admission of the dying declaration was due to the statement's inherent reliability given that the statement was the equivalent to an oath before God.[119] Thus, the dying declaration of the deceased was the legal equivalent of live, in-court, and sworn testimony.[120]

III. THE DYING DECLARATION POST-*CRAWFORD*

Although not unanimous, many lower federal and state courts that have addressed the issue of whether the dying declaration serves as an exception to the right to confrontation post-*Crawford* have determined that such an exception exists.[121] The courts that have found the ex-

[117] *Id.*
[118] *See* Davies, *supra* note 84, at 637-38.
[119] Howard L. Smith, *Dying Declarations*, 3 WIS. L. REV. 193, 203 (1925).
[120] *Id.*
[121] *See* Peter Nicolas, *'I'm Dying to Tell You What Happened': The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS L.Q. 487, 497-98 (2010) (noting that only two federal courts have declined to hold that the dying declaration serves as an exception to the right to confrontation).

ception exists mostly rely on the Court's language in *Crawford* and *Giles* as well as the California Supreme Court decision in *People v. Monterroso*.[122]

A. Cases In Which the Court Held Dying Declarations Were Not Subject to Confrontation

One of the first state court cases to address the issue of the dying declaration under the Confrontation Clause was *People v. Monterroso*.[123] In *Monterroso*, the defendant was charged with murder after he went to two convenient stores and shot both store clerks.[124] One of the clerks he shot survived for some time after the shooting and described to police the description of the shooter.[125] This statement was offered during trial, and the defendant was convicted for both murders.[126] Although the defendant never objected to the statement made by the clerk in the trial court or intermediate appellate court, the California Supreme Court nonetheless entertained the defendant's Confrontation Clause objection.[127]

The Court began its analysis by rejecting the defendant's contention that *Crawford* abrogated the use of the dying declaration as a hearsay exception if such a statement was testimonial and unconfronted.[128] The court in *Monterroso* relied heavily on Footnote 6 of Crawford, which indicated the Supreme Court's belief that the dying declaration was a common law exception to the right to confrontation.[129] The *Monterroso* court also examined historical treatises and cases in concluding the right to confrontation is not violated by admission of dying declarations.[130] Quoting the 1858 Missouri case of *State v. Houser*, the court stated, "'dying declarations, made under

[122] *Id.* at 494-97.

[123] People v. Monterroso, 101 P.3d 956 (Cal. 2004), *cert. denied*, 546 U.S. 834 (2005). *Monterroso* was decided on December 13, 2004, approximately nine months after the Court's decision in *Crawford*, decided March 8, 2004. *See also* Nicolas, *supra* note 121, at 494 (positing that *Monterroso* was the first case to directly address the issue post-Crawford).

[124] *Monterroso*, 101 P.3d at 963-64.

[125] *Id.* at 964.

[126] *Id.* at 971.

[127] *Id.*

[128] *Id*. at 972.

[129] *Id.* (citing *Crawford*, 541 U.S. at 56 n.6).

[130] *Id.*

certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished.'"[131] Thus, the court in *Monterroso* concluded that the language in *Crawford*, coupled with its own understanding of the common law, dictated a finding that the dying declaration of the store clerk was admissible notwithstanding the Confrontation Clause.[132]

One question not resolved by *Monterroso* was whether a dying declaration would be testimonial, and thus potentially subject to confrontation, if the declarant made the statement to a witness or friend, rather than a police investigator.[133] None of the Supreme Court's cases directly addressed this issue, as all of its Confrontation Clause cases from *Crawford* on involved statements made to police or 911 operators.[134] At least one court to address the issue of dying declarations made to non-police personnel concluded that the statements made were non-testimonial and thus not subject to confrontation.

In *People v. Ahib Paul*, the New York appellate court was faced with a challenge to the admission of a dying declaration made to a witness to a murder.[135] The defendant and the victim got into an argument over a drug sale, and the defendant shot the victim.[136] Two neighbors who witnessed the murder and who ran to the victim after the shooting testified that the victim identified his killer as the defendant.[137] Although the court declined to review the merits of defendant's argument that the admission of the victim's statement violated his right to confrontation under *Crawford* because the defendant did not preserve that argument, the court did state in dicta that

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[131] *Id.* (quoting *Houser*, 26 Mo. at 438).

[132] *See id.*

[133] *Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.").

[134] *See*, *e.g.*, *id.*, 541 U.S. at 38 (wife's statement made to police interrogators); *Davis*, 547 U.S. at 817, 819-20 (statements made to 9-11 operators and police detectives); *Giles*, 554 U.S. at 356-57 (girlfriend's statement made to police); *Bryant*, 131 S. Ct. at 1150 (victim's statement made to police).

[135] People v. Ahib Paul, 803 N.Y.S.2d 66, 67 (N.Y. App. Div. 2005).

[136] *Id.* at 68.

[137] *Id.*

the defendant would nonetheless lose.[138] The court recognized that there was disagreement among scholars as to whether a statement is testimonial even if given to non-police personnel.[139] Ultimately the court concluded that statements without "the presence of the formalities that surround statements prepared for in-court use" were not testimonial and thus not subject to confrontation.[140] Thus, the court stated that the statement of the victim to the neighbors was not testimonial and not subject to confrontation.[141]

State courts have been fairly uniform in following *Monterroso* and finding that even testimonial dying declarations are not subject to the confrontation right; i.e., testimonial dying declarations that satisfy the jurisdiction's hearsay exception are admissible regardless of the Sixth Amendment.[142] Professor Peter Nicolas has noted that no state courts have held that a testimonial dying declaration is subject to the confrontation right.[143] Quite a few state courts have found the opposite however. For example, in *State v. Beauchamp*, the Wisconsin Supreme Court held that a testimonial dying declaration is admissible notwithstanding the Confrontation Clause.[144] The *Beauchamp* court assumed without analysis that the statements made by the victim in that case were testimonial.[145] Citing *Giles* as persuasive language indicating the Supreme Court's likely view on the subject, the court held that the dying declaration was an exception to the right to confrontation because "the exception was not merely in existence but was centuries old" at the time of the founding.[146]

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[138] *Id.* at 69.
[139] *Id.* ("At least two distinct schools of thought exist, based upon the divergent views contained in two scholarly discussions which were both cited in *Crawford*").
[140] *Id.*
[141] *Id.* at 70.
[142] *See* Nicolas, *supra* note 121, at 497-98.
[143] *See id.*
[144] State v. Beauchamp, 796 N.W.2d 780, 795 (Wis. 2011).
[145] *Id.* at 790.
[146] *Id.* at 792.

Additionally, in *State v. Jones*, the Kansas Supreme Court held that statements made to paramedics were not improperly admitted as they were not subject to confrontation under the Sixth Amendment.[147] The *Jones* court likewise relied heavily on the dicta in *Crawford* and *Giles* referring to the forfeiture doctrine and dying declaration as exceptions to the right to confrontation.[148] The court was "confident that, when given the opportunity to do so, the Supreme Court would confirm that a dying declaration may be admitted into evidence, even when it is testimonial in nature and is unconfronted."[149] Thus, the statements made to the paramedics in Jones were admissible even though they were testimonial and unconfronted.[150]

B. Cases Where the Court Held that a Testimonial Dying Declaration is Subject to Confrontation

There are only two identified cases where a court has held that a testimonial dying declaration is subject to confrontation.[151] One of those cases, *United States v. Mayhew*, declined the invitation to hold that the dying statement was admissible notwithstanding the fact it was unconfronted.[152] That court, however, held that the defendant had forfeited his right to confrontation by making the declarant unavailable, and thus did not analyze the reasons for its dying declaration holding.[153] In *United States v. Jordan*, however, that court did hold that a testimonial dying declaration was subject to the confrontation right and gave its reasons for so holding.[154]

In *Jordan*, the defendant was charged with murder after it was alleged that he stabbed a fellow inmate at the Florence Penitentiary.[155] The victim was rushed to the hospital and was

[147] State v. Jones, 197 P.3d 815, 822 (Kan. 2008).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *See* Nicolas, *supra* note 106, at 497-98.
[152] United States v. Mayhew, 380 F. Supp. 2d 961, 965-66 (S.D. Ohio 2005).
[153] *See id.*
[154] United States v. Jordan, No. CRIM. 04-CR-229-B, 2005 WL 513501, at *4 (D. Colo. Mar. 3, 2005).
[155] *Id.* at *1.

asked twice by a bureau of prisons agent who stabbed him.[156] On both occasions, the victim identified the defendant by name as his attacker.[157] At trial, the government sought to introduce these statements under the dying declaration exception to the hearsay rule, to which the defendant objected on Confrontation Clause grounds.[158]

The court in *Jordan* rejected the government's argument that the statements made to the agent were non-testimonial.[159] The court stated that the victim's statements were "patently testimonial" because the victim "identified the perpetrator of the attack and its motive."[160] The court then turned to whether the testimonial statements were admissible given the *Crawford* court's language suggesting that the dying declaration was a common law exception to the right to confrontation.[161]

The court identified two rationales underpinning the dying declaration: reliability based upon the idea that such a statement was "an oath before God," and necessity due to the compelling need for the statement given that in most cases, the victim would not be able to testify in court.[162] *Crawford*, the court stated, rejected both of these rationales as reasons for dispensing with the need for confrontation.[163] The *Crawford* court rejected the idea that reliability could be substituted for the need for confrontation.[164] Additionally, the court pointed to academic research concluding that dying declarations were inherently unreliable due to impaired perception[165] and

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[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at *2.
[160] *Id.*
[161] *Id.* at *3.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at *4 (citing Charles Neeson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1374 (1985)).

the experience of pain.[166] The court also rejected the idea that dying declarations were admissible without confrontation at the time of the writing of the Bill of Rights.[167] Curiously, the court cited *Crawford* itself for this statement of fact.[168]

It appears that the great weight of authority from the lower courts interpreting the effect of *Crawford* regarding hearsay dying declarations has been to hold that such statements do not offend the Sixth Amendment.[169] Nevertheless, an independent examination of the history and justifications for the dying declaration is necessary.

IV. DOES THE DYING DECLARATION SATISFY THE SIXTH AMENDMENT?

There are multiple questions to be addressed in determining whether a dying declaration hearsay statement is an exception to the right of confrontation. First is whether such a statement is testimonial. Under *Crawford*, if a statement is non-testimonial, it is not subject to confrontation.[170] The second question is whether, assuming a dying declaration is testimonial, the statement satisfies the Sixth Amendment's right to confrontation. This second question reveals a tension between the holding of *Crawford*[171] and the Court's language indicating it believes the dying declaration to be a common law exception to the right to confrontation and thus a modern exception under *Crawford*.[172]

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[166] *Id.* (citing *Dying Declarations*, 46 IOWA L. REV. 356, 376 (1961)).
[167] *Id.*
[168] *Id.*
[169] *See* Nicolas, *supra* note 121, at 497-98.
[170] *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.").
[171] *Id.* ("Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").
[172] *Id.* at 56 n.6; *see also Giles*, 554 U.S. at 358.

A. Is the Dying Declaration Testimonial?

The Court's cases relating to the testimonial standard first set out in Crawford all consisted of statements made to police or police personnel (e.g., 911 operators).[173] Thus, the Court has not had the occasion to examine whether a statement made to witnesses or other non-police personnel would still be testimonial.

As described above, there is lower court precedent that indicates a reluctance to hold a statement made to witnesses as testimonial.[174] This conclusion likely comes from the Court's language in Crawford that "[a]n off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."[175] Additionally, the Court stated 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."[176] Thus, it appears from the Court's language that statements made to witnesses would not fall under the testimonial definition and would thus not be subject to confrontation because those statements would not be made for the primary purpose "to establish or prove past events potentially relevant to later criminal prosecution."[177]

There is an argument that even those dying declarations to police and police personnel are non-testimonial. The Court's decision in *Davis v. Washington*, which further defined the testimonial standard, held that statements made "to describe *current* circumstances requiring police assistance" are not testimonial.[178] The Court in *Crawford* cryptically indicated that "many dying

[173] *See supra* note 131 and accompanying text.
[174] *See supra* Part III.A.
[175] *Crawford*, 541 U.S. at 51.
[176] *Id.*
[177] *Davis*, 547 U.S. at 822.
[178] *Id.* at 827.

declarations may not be testimonial."[179] Although Justice Scalia, *Crawford*'s author, was likely not referring to the Court's later opinion in *Davis* when those words were expressed,[180] the Court appears to have some leaning towards believing that "many" dying declarations are not testimonial statements.

In *Bryant*, described in the Introduction, the prosecutor never seriously attempted to establish that the statement of the victim in the gas station parking lot was a dying declaration.[181] Instead, the prosecutor sought to introduce the statement as an excited utterance.[182] Assuming the prosecutor would have been able to establish the victim's statement regarding his shooter was a dying declaration, the outcome of the case would not have been substantively different. That is, in *Bryant*, the Court held that the statement regarding the victim's attacker was non-testimonial because the primary purpose of the statement was to enable the police to meet an ongoing emergency.[183]

Therefore, there is reason to assert that even dying declarations made to the police will not be testimonial because the primary purpose of the statement is to aid the police in an ongoing emergency. If, as in *Bryant*, the police are unaware of the location of the assailant or unaware of where the assault took place, a court would have a solid foundation upon which to base a holding that the statement was not testimonial.

B. Does the Testimonial Dying Declaration Comport with *Crawford*?

If a court were to hold as a preliminary matter that a certain dying declaration was testimonial and therefore presumably subject to confrontation, the issue still exists as to whether the statement would be admissible without confrontation. This issue is broken down into two further

[179] *Crawford*, 541 U.S. at 56 n.6.

[180] Given Justice Scalia's dissent in *Bryant*, it is unlikely that he was referring to the *Davis* rule. The statement given in *Bryant* would very likely have been accepted under the hearsay rules as a dying declaration.

[181] *See Bryant*, 768 N.W.2d at 77.

[182] *Id.*

[183] *Bryant*, 131 S. Ct. at 1166-67.

questions: (1) was there a common law exception to the right of confrontation for a dying declaration; and (2) even if there was such an exception, should it matter? As to the first question, it appears that the courts and scholars agree that during the time the Bill of Rights was written, dying declarations were not subject to the right of confrontation.[184] Thus, the real question is whether the fact that there was such an exception should make any difference.

The Court made clear in *Crawford* that testimonial statements required two separate showings for the statements to be admissible: unavailability of the witness and the prior opportunity for cross-examination.[185] In so holding, the Court rejected the *Ohio v. Roberts* reliability standard that had been in place for twenty-four years.[186] The Court criticized the *Roberts* holding, stating, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."[187]

Yet, reliability is exactly what the dying declaration is based upon. According to Professor Cribari, the dying declaration is reliable because the "motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth."[188] The dying declaration has also been deemed reliable because it is a solemn oath to God.[189] But if the reliability of a statement is no longer a justification for admitting an unconfronted statement, the fact that the dying declaration is the legal equivalent of live, in-court testimony is immaterial.[190] There is also evidence that dying declarations are not reliable to begin with. According to Professor Charles

[184] *See*, *e.g.*, *Giles*, 554 U.S. at 361-62; *Crawford*, 541 U.S. at 56 n.6; Cribari, *supra* note 56, at 1154.
[185] *Crawford*, 541 U.S. at 68.
[186] *Id.* at 60.
[187] *Id.* at 61.
[188] Cribari, *supra* note 56, at 1550.
[189] Smith, *supra* note 116, at 203.
[190] *Id.*

Nesson, "[p]erception, memory, comprehension, and clarity of expression are likely to be impaired."[191]

V. CONCLUSION

When the Supreme Court decided *Crawford v. Washington*, it arguably created a conflict between its holding and its suggestion that dying declarations are an exception to the right to confrontation. The Court has yet to resolve this conflict; however, almost every lower state and federal court to address the issue has found that dying declarations pose no Sixth Amendment problems. Courts may be able to avoid the issue entirely if there are sufficient facts to justify holding that the statement is non-testimonial. However, should a court find that a statement is testimonial, *Crawford* would seem to necessitate a finding that the dying declaration is subject to the right to confrontation. Nevertheless, the Court is likely to hold that a testimonial dying declaration hearsay statement is not subject to the right to confrontation. This is so because of the Court's (perhaps misplaced) reliance on its interpretation of the common law hearsay exception of dying declarations and its reliance on outdated cases such as *Mattox* and *Houser*. Because the Court appears to conflate the common law dying declaration hearsay exception as an exception to the confrontation right, the Court has justifications in its dicta from Crawford and Giles to hold that the testimonial dying declaration is not excluded under the Sixth Amendment.

[191] Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1374 (1985).