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INTRODUCTION

Imagine that on several occasions an adult male molests a three-year-old child named Jimmy who lives in a Colorado neighborhood.[1] The man threatens Jimmy with a knife, promising to slit Jimmy's throat and kill Jimmy's parents if Jimmy ever reveals their secret. The man may do it right away or he may do it twenty years from now, but he assures Jimmy he will someday fulfill his promise. Jimmy is terrified. Local law enforcement eventually becomes aware of the situation after Jimmy musters the courage to confide in his parents. A physician examines Jimmy. During their investigations, police officers and social workers interview Jimmy, gaining sufficient details about the molestations to obtain an arrest warrant. An expert in child molestation cases interviews Jimmy, his friends, and his family, determining that changes in Jimmy's behavior since the alleged molestations began are typical of a sexually abused child. The police arrest the man, charging him with several counts of sexual assault. The case proceeds to trial.

Because of Jimmy's youth and the defendant's threats against Jimmy and his parents, Jimmy cannot speak when called to the witness stand. The court rules Jimmy incompetent, and, thus, Jimmy is unavailable to testify at trial.[2] The prosecution then moves to admit hearsay statements by Jimmy via testimony from police officers, the physician, social workers, and Jimmy's parents. The prosecution notes that in cases of unlawful sexual offenses against children, the court may accept these hearsay statements into evidence under Colorado's child hearsay exception provided the presence of "sufficient safeguards of reliability" and

1. The criminal acts against "Jimmy" are hypothetical and presented here for illustrative purposes. Although this Comment focuses on the effects of *Crawford v. Washington* on a trial of the defendant for alleged sexual abuse of Jimmy, the effects are the same if the alleged acts solely consisted of physical abuse.

2. *See* COLO. REV. STAT. § 13-90-106 (2004) ("The following persons shall not be witnesses: Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly."). The hypothetical scenario assumes that Jimmy was not "able to describe or relate in language appropriate for a child of that age the events or facts respecting which the child is examined." *Id.* Alternatively, a court could find Jimmy unavailable ahead of trial if it determines that testifying might harm him emotionally or physically. *See* People v. Diefenderfer, 784 P.2d 741, 750 (Colo. 1989) (holding that "unavailability . . . can be met when the court makes a particularized finding that the child's emotional or psychological health would be substantially impaired if she were forced to testify and that such impairment will be long standing rather than transitory in nature.").

"corroborative evidence."[3] The prosecution argues that the independent findings of the child molestation expert support these two criteria.

Objecting, the defense claims that admission of the statements under Colorado's child hearsay exception would violate the defendant's right of confrontation as outlined in *Crawford v. Washington*.[4] Specifically, the Confrontation Clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[5] *Crawford* declares, "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[6] According to *Crawford*, "[the Confrontation Clause] commands . . . that reliability be assessed in a particular manner: by . . . cross-examination."[7] Because the defense considers all the statements at issue "testimonial," they claim that the trial court cannot admit Jimmy's hearsay statements, regardless of any "safeguards of reliability" and "corroborative evidence," because they could not cross-examine him.

This Comment analyzes *Crawford v. Washington*[8] with particular emphasis on determining what constitutes a testimonial statement and whether Colorado courts must now refuse to admit hearsay statements by child molestation victims if they cannot testify in open court before their alleged abusers. Part I describes key precedent cases. Part II recites *Crawford*'s facts and procedural history. Part III summarizes the majority and concurring opinions. Part IV analyzes critical parts of *Crawford*, attempting to predict whether a Colorado trial court will consider Jimmy's various hearsay statements testimonial and, thus, refuse to admit them into evidence. Included in the discussion is a summary of post-*Crawford* Colorado state court decisions. In conclusion, Part V predicts that for testimonial statements the Colorado child hearsay exception, enacted to protect alleged victims of sexual offenses against children, may not withstand constitutional scrutiny under the *Crawford* approach to the Confrontation Clause.

I. KEY PRECEDENT CASES

For more than one hundred years, the United States Supreme Court has attempted to define the precise rules for the admissibility of hearsay statements made by witnesses rendered unavailable to testify against a

3. COLO. REV. STAT. § 13-25-129 (2004).
4. 541 U.S. 36 (2004).
5. U.S. CONST. amend. VI.
6. *Crawford*, 541 U.S. at 68.
7. *Id.* at 61. *See also* California v. Green, 399 U.S. 149, 158 (1970) (stating that confrontation "forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth.").
8. 541 U.S. 36 (2004).

criminal defendant at trial.[9] Because a literal reading of the Confrontation Clause bars the admission of any hearsay statements, these rules represent exceptions to a defendant's confrontation right.[10] The following summarizes key Supreme Court Confrontation Clause decisions leading up to *Crawford v. Washington*.[11]

The first significant Supreme Court case dealing with exceptions to a literal reading of the Confrontation Clause is *Mattox v. United States*.[12] In *Mattox*, an 1895 decision, the Court approved the admission at trial of the official transcripts of testimony from two deceased witnesses based on the defendant's prior opportunity to cross-examine them fully.[13] Prior to their deaths, the two witnesses testified in the defendant's initial federal first-degree murder trial.[14] The defendant, however, successfully appealed his conviction, and the two witnesses died before his new trial.[15] The Court ruled that admission of the transcripts at the new trial did not violate the defendant's Confrontation Clause right because "[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination."[16] The Court noted further, "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."[17] Over the next one hundred and nine years leading up to and including *Crawford*, much of the Court's Confrontation Clause jurisprudence sought to articulate the appropriate circumstances under which the Confrontation right "gave way" to these considerations.

The Court widened the right of Confrontation through two opinions issued in 1965. In *Pointer v. Texas*,[18] the Court invoked the Fourteenth Amendment's Due Process Clause to expand the Confrontation Clause to include state court criminal proceedings.[19] In *Douglas v. Alabama*,[20] the Court stated "that a primary interest secured by [the Confrontation Clause] is the right to cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical

9. *See* Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 556-91 (2003) (discussing the history of Confrontation Clause jurisprudence from 1895 to 2003).
10. Ohio v. Roberts, 448 U.S. 56, 63 (1980).
11. 541 U.S. 36 (2004).
12. 156 U.S. 237 (1895).
13. *Mattox*, 156 U.S. at 238-40, 250.
14. *Id.* at 240, 251.
15. *Id.* at 238, 240.
16. *Id.* at 244.
17. *Id.* at 243.
18. 380 U.S. 400 (1965).
19. *Pointer*, 380 U.S. at 403.
20. 380 U.S. 415 (1965).

confrontation."[21] These decisions, however, did not address exceptions to the Confrontation Clause for unavailable witnesses.

In two subsequent opinions, the Court focused on the circumstances under which a court may appropriately consider a witness "unavailable" and, thus, invoke exceptions to the Confrontation Clause. In a 1968 decision, *Barber v. Page*,[22] the Court stated, "a witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[23] The Court provided further guidance as to the meaning of "unavailable" in a 1970 case, *California v. Green*.[24] In *Green*, Justice Harlan's concurring opinion deemed unavailability "a question of reasonableness."[25] In addition to providing guidelines for unavailability, the Supreme Court's Confrontation Clause jurisprudence leading up to *Crawford* dealt almost entirely with determining the appropriate degree of reliability required for the admission into evidence of a statement given by an unavailable witness.

In its most significant Confrontation Clause decision preceding *Crawford*, the Supreme Court addressed the issue of reliability in a 1980 case, *Ohio v. Roberts*.[26] In *Roberts*, the Court summarized its Confrontation Clause philosophy by stating:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a *firmly rooted hearsay exception*. In other cases, the evidence must be excluded, at least absent a showing of *particularized guarantees of trustworthiness*.[27]

The phrases, "firmly rooted hearsay exception" and "particularized guarantees of trustworthiness," essentially comprise a two-part test for admissibility of statements by unavailable declarants.[28] At issue in *Roberts* was the admissibility at trial of testimony given by an unavailable witness against the defendant at a preliminary hearing.[29] "The Court found guarantees of trustworthiness in the accouterments of the preliminary hearing itself" because the defendant was represented by counsel and had already had an adequate opportunity to cross-examine the wit-

21. *Douglas*, 380 U.S. at 418.
22. 390 U.S. 719 (1968).
23. *Barber*, 390 U.S. at 724–25.
24. 399 U.S. 149 (1970).
25. *Green*, 399 U.S. at 189 n.22 (Harlan, J., concurring).
26. 448 U.S. 56 (1980).
27. *Roberts*, 448 U.S. at 66 (emphasis added).
28. *Id.*
29. *Id.* at 58–62.

ness.[30] Given a "firmly rooted hearsay exception" or "particularized guarantees of trustworthiness," the Court allowed for the admissibility of statements by unavailable declarants without cross-examination.[31] Both of these phrases, in addition to "unavailability," acquired further clarification in the Court's subsequent decisions.

Six years later in *United States v. Inadi*,[32] the Court rejected a literal reading of its *Roberts* holding, stating, "*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."[33] In *Inadi*, the court affirmed admission of a co-conspirator's out-of-court statement despite an inadequate showing of the witness's unavailability under the hearsay exemption for statements by a co-conspirator in furtherance of a conspiracy.[34] Because statements in furtherance of a conspiracy are "usually irreplaceable as substantive evidence [because their admission] . . . furthers the Confrontation Clause's very mission which is to advance the accuracy of the truth-determining process in criminal trials,"[35] the Court declined to apply an unavailability rule to them.[36] Furthermore, the rule for co-conspirator statements would "place[] a significant practical burden on the prosecution" because of the practical difficulties in identifying and locating such declarants.[37] Since trial courts do not admit many co-conspirator statements to prove the truth of the matter asserted,[38] the Court reiterated a position it took one year previous in *Tennessee v. Street*[39] that "admission of nonhearsay raises no Confrontation Clause concerns."[40] Given a valid hearsay statement, the question remained as to whether a particular hearsay exception qualifies as "firmly rooted" under *Roberts*.

In *Idaho v. Wright*,[41] a 1990 decision, the Court further clarified "firmly rooted hearsay exception" by saying such an exception "[is] so trustworthy that adversarial testing [can be expected to] add little to [its]

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30. *Id.* at 73.
31. *Id.* at 66.
32. 475 U.S. 387 (1986).
33. *Inadi*, 475 U.S. at 394.
34. *Id. See also* FED. R. EVID. 801(d)(2)(E) ("A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.").
35. *Inadi*, 475 U.S. at 396.
36. *Id.* at 394–95.
37. *Id.* at 399.
38. *Id.* at 398 n.11.
39. 471 U.S. 409 (1985).
40. *Inadi*, 475 U.S. at 398 n.11 (quoting Tennessee v. Street, 471 U.S. 409, 414 (1985)). Valid non-hearsay purposes include: questions, verbal acts, clarifications of conduct, state of mind (including knowledge of the declarant, notice of the recipient, intent, motive, beliefs, thoughts, or other states of mind), acquaintance, or connection. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 801.11 (2d ed. 2004). *Crawford* maintained *Street*'s approach. 124 S. Ct. at 1369 n.9. *See also infra* note 170 and accompanying text.
41. 497 U.S. 805 (1990).

reliability."[42] In *Wright*, a pediatrician asked a two and one-half year old girl a series of questions about alleged acts of molestation against her.[43] After determining that the girl could not communicate with the jury and, therefore, was unavailable, the trial court allowed the pediatrician to testify as to the girl's statements via Idaho's residual hearsay exception.[44] Pointing to the "ad hoc" nature of the residual hearsay exception, the Court did not consider it "firmly rooted."[45] Thus, under the *Roberts* doctrine, the statement was admissible only if it bore "particularized guarantees of trustworthiness."[46] The Court said that these guarantees are "shown from the totality of the circumstances, but . . . the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief."[47] The Court carefully noted, however, that in order to avoid "bootstrapping" on other evidence at trial, corroborating evidence plays no role in determining "particularized guarantees of trustworthiness."[48] After *Wright*, the Court returned to the "unavailability rule" and the hearsay exceptions for which to apply it.

The Court applied the *Inadi* rationale in *White v. Illinois*,[49] a 1992 decision, by refusing to apply an "unavailability rule" to the hearsay exceptions for spontaneous declarations and statements made in the course of receiving medical care.[50] The Court noted that "such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness [and that] . . . the statements' reliability cannot be recaptured even by later in-court testimony."[51] The Court also provided some guidance as to whether the two hearsay exceptions in question were "firmly rooted," referring to their respective age, enumeration in the Federal Rules of Evidence, and acceptance among the states.[52] Justices Thomas and Scalia, however, strongly disagreed with this philosophy.

Justice Thomas' concurring opinion in *White*, joined by Justice Scalia,[53] foreshadows *Crawford* by hinting at the key *Crawford* term,

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42. *Wright*, 497 U.S. at 821.
43. *Id.* at 808–11.
44. *Id.* at 805.
45. *Id.* at 817.
46. *Id.* at 818. *See Roberts*, 448 U.S. at 66; *see also supra* text accompanying note 27.
47. *Wright*, 497 U.S. at 818.
48. *Id.* at 823.
49. 502 U.S. 346 (1992).
50. *White*, 502 U.S. at 348–49. Rule 803(2) excludes from the hearsay rule "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" even though the declarant is available as a witness. FED. R. EVID. 803(2); Rule 803(4) excludes from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" even though the declarant is available as a witness. FED. R. EVID. 803(4).
51. *White*, 502 U.S. at 355–56.
52. *Id.* at 356 n.8.
53. Justice Scalia wrote the majority opinion in *Crawford*.

"testimonial."[54] Justice Thomas stated that he believed the "federal constitutional right of confrontation extends to any witness who actually testifies at trial."[55] As for the admissibility of statements made by those who do not testify, Justice Thomas opined, "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized *testimonial* materials, such as affidavits, depositions, prior testimony, or confessions."[56] Justice Thomas suggested that this narrowing of the Confrontation Clause "would greatly simplify the inquiry in the hearsay context."[57] Justice Thomas offered his point of view because he reasoned "the Confrontation Clause was [not] intended to constitutionalize the hearsay rule and its exceptions."[58] Nevertheless, through *White*, the Court continued to hold to the *Roberts* "firmly rooted hearsay exception" and "particularized guarantees of trustworthiness" two-part test.

In *Lilly v. Virginia*,[59] a 1999 opinion representing the Court's final pre-*Crawford* Confrontation Clause decision, the Court exhibited the uncertainties inherent in the two-part *Roberts* test, as well as philosophical differences amongst the nine Justices.[60] In *Lilly*, a witness invoked his Fifth Amendment privilege against self-incrimination in the separate criminal trial of one of his accomplices.[61] Given his unavailability, the trial court admitted the witness's tape-recorded confession to the police pursuant to Virginia's hearsay exception for statements against penal interest.[62] On appeal, the Virginia Supreme Court affirmed, finding this hearsay exception "firmly rooted" and reliable.[63] All nine Justices of the United States Supreme Court agreed that "[t]he admission of the untested confession . . . violated petitioner's Confrontation Clause rights."[64]

Despite their agreement that a Confrontation Clause violation occurred, the Court nevertheless issued a plurality opinion plus four different concurring opinions to describe its reasoning. In the plurality opinion, Justices Stevens, Souter, Ginsburg, and Breyer did not consider the hearsay exception for statements against penal interest "firmly rooted" because of the tendency for such statements to shift blame to a criminal

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54. *White*, 502 U.S. at 365 (Thomas, J., concurring).
55. *Id.* at 365 (Thomas, J., concurring).
56. *Id.* (Thomas, J., concurring) (emphasis added).
57. *Id.* (Thomas, J., concurring).
58. *Id.* at 366 (Thomas, J., concurring). *See also* Richard P. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1020 (1998) (stating that "[a] near synonym for 'firmly rooted,' it seems, is in the Federal Rules of Evidence."). Although *Crawford* ultimately adopted Justice Thomas's position, it did so as part of a much broader philosophy of what constitutes "testimonial." *Crawford*, 541 U.S. at 51–52. *See also infra* text accompanying notes 157-159.
59. 527 U.S. 116 (1999).
60. *See Lilly*, 527 U.S. at 116.
61. *Id.* at 120-21.
62. *Id.* at 121.
63. *Id.* at 122. *See also* Lilly v. Virginia, 499 S.E.2d 522, 534 (Va. 1998).
64. *Lilly*, 527 U.S. at 119, 139.

defendant.[65] The Justices termed the exception "presumptively unreliable."[66] They also stated that the witness's "statements were [not] so inherently reliable that cross-examination would have been superfluous."[67] Justice Breyer indicated in his concurring opinion a willingness to "reexamine the current connection between the Confrontation Clause and the hearsay rule" but declined to do so because "the statements at issue violate the Clause regardless."[68] Justice Scalia, writing separately, considered use of the tape-recorded confession without cross-examination "a paradigmatic Confrontation Clause violation."[69] Justice Thomas, also writing alone, reiterated his belief first presented in *White* that the Confrontation Clause applies to witnesses testifying at trial and to four specific types of extra-judicial statements, one of which is confessions.[70] Finally, Chief Justice Rehnquist along with Justices O'Connor and Kennedy agreed that the hearsay exception was not firmly rooted, but they feared that the approach of Justices Stevens, Souter, Ginsburg, and Breyer would place a "blanket ban on the government's use of accomplice statements that incriminate a defendant."[71] Rather than considering the exception "presumptively unreliable," Chief Justice Rehnquist preferred to "limit our holding to the case at hand."[72] Based on the plurality opinion and four concurring opinions, *Lilly* illustrates the problems with *Roberts* due to the difficulty in grasping the meaning behind "firmly rooted hearsay exception" and "particularized guarantees of trustworthiness."

The Colorado Supreme Court, as well as courts in other states, adopted specific guidelines for determining the "particularized guarantees of trustworthiness" of a given statement.[73] In *People v. Farrell*,[74] the Colorado Supreme Court, after noting "a statement against interest made by a co-defendant during custodial interrogation does not fall within a firmly rooted hearsay exception,"[75] applied an eight-factor test to find the statement bore "particularized guarantees of trustworthiness."[76] The Colorado Supreme Court justified these factors based on

65. *Id.* at 131 (plurality opinion) (Stevens, J., Souter, J., Ginsburg, J., Breyer, J., joining).
66. *Id.*
67. *Id.* at 139 (plurality opinion) (Stevens, J., Souter, J., Ginsburg, J., Breyer, J., joining).
68. *Id.* at 142 (Breyer, J., concurring).
69. *Id.* at 143 (Scalia, J., concurring).
70. *Id.* at 143 (Thomas, J., concurring).
71. *Id.* at 147 (Rehnquist, C.J., O'Connor, J., Kennedy, J., concurring).
72. *Id.*
73. *Crawford*, 541 U.S. at 60.
74. 34 P.3d 401 (Colo. 2001), *overruled in part* by People v. Fry, 92 P.3d 970 (Colo. 2004).
75. *Farrell*, 34 P.3d at 406 (quoting Stevens v. People, 29 P.3d 304, 313 (Colo. 2001)).
76. The eight factors were:

(1) whether the statement was truly self-inculpatory; (2) whether the statement was detailed; (3) whether police officers threatened or coerced the defendant to make the statement; (4) whether the confession was offered in exchange for leniency; (5) whether the declarant was likely to have personal knowledge of the events in the statement; (6) whether the declarant made the statement shortly after the described events; (7) whether

the United States Supreme Court's opinion in *Wright*, giving "a court . . . considerable discretion in determining what factors may enhance or detract from the statement's reliability."[77]

Thus, *Lilly* and *Farrell* illustrate the status of the Confrontation Clause just prior to *Crawford* as it pertains to the admissibility of statements made by unavailable declarants: apply the *Roberts* two-part test according to the Court's guidance in its post-*Roberts* opinions. The next two parts of this Comment contain a detailed discussion of *Crawford*.

II. FACTS AND PRIOR HISTORY: *CRAWFORD V. WASHINGTON*[78]

On August 5, 1999, police arrested petitioner Michael Crawford for allegedly stabbing Kenneth Lee.[79] Mr. Crawford believed Mr. Lee had previously tried to rape his wife, Sylvia Crawford.[80] Mrs. Crawford led Mr. Crawford to Mr. Lee's apartment, where she witnessed the stabbing.[81] Following the altercation, Mr. Crawford claimed self-defense.[82] Accounts given by Mr. and Mrs. Crawford of the fight between Mr. Lee and Mr. Crawford differed "with respect to whether Lee had drawn a weapon before [Mr. Crawford] assaulted him."[83] Mrs. Crawford's account suggested the stabbing was not an act of self-defense.[84]

At trial, the State sought testimony from Mrs. Crawford against Mr. Crawford, but the state of Washington's marital privilege barred her testimony.[85] The statutory privilege, however, "[did] not extend to spouse's out-of-court statements admissible under a hearsay exception."[86] Alternatively, the State sought to admit into evidence previously recorded statements from Sylvia Crawford to the police.[87] Because Mrs. Crawford led Mr. Crawford to Mr. Lee's apartment, the court admitted these statements under the hearsay exception for statements against penal interest.[88]

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the declarant had a reason to retaliate against the defendant; and (8) whether the declarant was mentally or physically unstable at the time of the confession.

Id. at 406-07 (citations omitted).

77. *Id.* at 406. *See also Wright*, 497 U.S. at 822. The United States Supreme Court even hinted at a four-factor test in *Wright* for determining "particularized guarantees of trustworthiness." *Wright*, 497 U.S. at 821–22 (stating that "spontaneity and consistent repetition . . . mental state of the declarant . . . use of terminology unexpected of a child of similar age [and] lack of motive to fabricate [are] factors relat[ing] to whether the child declarant was particularly likely to be telling the truth when the statement was made."(citations omitted)).

78. 541 U.S. 36 (2004).

79. 541 U.S. at 38.

80. *Id.*

81. *Id.* at 40.

82. *Id.*

83. *Id.* at 39.

84. *Id.* at 40.

85. *Id.* at 39.

86. *Id.* at 40.

87. *Id.*

88. *Id.*; *see* WASH. ER 804(b)(3) ("A statement which was at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in his position would not have made the statement unless he believed it to be true."). *See also* FED. R. EVID. 804(b)(3).

Mr. Crawford objected, claiming admission of the evidence violated his rights under the Confrontation Clause.[89] The trial court nevertheless admitted Mrs. Crawford's statements based on a reliability analysis under *Ohio v. Roberts*.[90] The court determined that her statements bore "particularized guarantees of trustworthiness."[91] The jury convicted Mr. Crawford, and he appealed.[92]

Mr. Crawford's appeal hinged on the determination of "trustworthiness."[93] In reversing, the Washington Court of Appeals applied a nine-factor test to determine the trustworthiness of Mrs. Crawford's recorded statements.[94] Ultimately, the Court of Appeals ruled that her statements failed the test.[95] The Washington Supreme Court, however, restored Mr. Crawford's conviction, finding that Mrs. Crawford's statements were indeed trustworthy.[96]

In petitioning for certiorari to the United States Supreme Court, Mr. Crawford asked the Court to reconsider its holding in *Roberts* regarding the admissibility of statements by unavailable hearsay declarants.[97] The Court "granted certiorari to determine whether the State's use of [Mrs. Crawford's] statement violated the Confrontation Clause."[98]

III. UNITED STATES SUPREME COURT OPINION: *CRAWFORD V. WASHINGTON*[99]

While refashioning its Confrontation Clause doctrine, effectively overturning *Roberts*, the Court reversed the Washington Supreme Court's decision to uphold Mr. Crawford's conviction and remanded the case for further proceedings.[100] While all nine Justices supported reversing the conviction in its March 8, 2004 opinion, Chief Justice Rehnquist

89. *Crawford*, 541 U.S. at 40.
90. *Id.*; Ohio v. Roberts, 448 U.S. 56, 66 (1980); *See also supra* text accompanying note 27.
91. *Crawford*, 541 U.S. at 40.
92. *Id.* at 41.
93. *Id.* at 41–42.
94. *Id.* at 41. The nine factors were:

> [1] whether the declarant had an apparent motive to lie . . . [2] whether the declarant's general character suggests trustworthiness . . . [3] whether more than one person heard the statement . . . [4] whether the declarant made the statement spontaneously . . . [5] whether the timing of the statements and the relationship between the declarant and the witness suggests trustworthiness . . . [6] whether the statement contained express assertions of past fact . . . [7] whether cross-examination could help to show the declarant's lack of knowledge . . . [8] whether the declarant's recollection was faulty because the event was remote . . . [9] whether the circumstances surrounding the statement suggest that the declarant misrepresented the defendant's involvement.

Washington v. Crawford, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, at *13–16 (Wash. Ct. App. July 30, 2001).
95. *Id.* at *16; *Crawford*, 541 U.S. at 41.
96. Washington v. Crawford, 54 P.3d 656, 663 (Wash. 2002); *Crawford*, 541 U.S. at 41–42.
97. *Crawford*, 541 U.S. at 41.
98. *Id.* at 42.
99. 541 U.S. 36 (2004).
100. *Crawford*, 541 U.S. at 69.

and Justice O'Connor disagreed with the Court's new Confrontation Clause doctrine.[101]

A. Justice Scalia's Majority Opinion: The Reliability of Testimonial Statements Will Be Evaluated Solely by Cross-Examination

Claiming "[t]he Constitution's text does not alone resolve this case,"[102] Justice Scalia's majority opinion began with an extensive history—spanning from Roman times to the mid-nineteenth century—of a defendant's right to confront his or her accuser.[103] Particularly noteworthy are discussions of the 1603 trial of Sir Walter Raleigh for treason,[104] English cases following the Raleigh decision supporting the right of cross-examination,[105] adoption of a confrontation right in the declarations of rights of eight colonies during the initial phase of the American Revolution,[106] and early state court decisions in the new United States.[107] From this historical perspective, the Court derived two inferences about the meaning of the Sixth Amendment.[108]

The first inference was that "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."[109] After the Court carefully pointed out that the Confrontation Clause applies to both in-court and out-of-court witness statements, it noted that not all hearsay statements bear "resemblance to the civil-law abuses the Confrontation Clause targeted."[110] To distinguish out-of-court statements that fall under the scrutiny of hearsay rules from those that fall under the scrutiny of the Confrontation Clause, the Court fashioned a term, "testimonial statement."[111] Testimonial state-

101. *Id.* at 70.
102. *Id.* at 42.
103. *Id.* at 43–44.
104. *Id.* In many of the Supreme Court's *Confrontation Clause* decisions, the trial of Sir Walter Raleigh for treason receives mention because it dramatically illustrates the importance of confrontation. *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 141 (1999); California v. Green, 399 U.S. 149, 157 (1970); White v. Illinois, 502 U.S. 346, 361 (1992) (Thomas, J. concurring). At Raleigh's 1603 trial, an English court sentenced him to death based on a letter from Lord Cobham, Raleigh's alleged accomplice. *Crawford*, 541 U.S. at 44. During the trial, Raleigh, convinced Cobham fabricated the story to save himself, repeatedly protested the court's refusal to bring Cobham before the jury. *Id.* The judges refused and Raleigh was sentenced to death. *Id.* In *California v. Green*, Justice Harlan stated that the right of confrontation "was a common law right which had gained recognition as a result of the abuses in the trial of Sir Walter Raleigh." *Green*, 399 U.S. at 178 (Harlan, J. concurring).
105. *Id.* at 44–45.
106. *Id.* at 48–49.
107. *Id.* at 49.
108. *Id.* at 49–57.
109. *Id.* at 50.
110. *Id.* at 51.
111. *Id.*

ments fall under scrutiny of the Confrontation Clause, while non-testimonial statements do not.[112]

The second inference from the Court's historical analysis was "that the Framers would not have allowed 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."[113] Furthermore, "the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine."[114] Alluding to and refuting the reliability analysis in *Roberts*, the Court noted that cross-examination was "a necessary [] condition for admissibility of testimonial statements" with the only exception being dying declarations.[115]

In summarizing its precedent case law, the Court stated it had remained faithful to two key principles derived from the historical perspective: 1) thwarting the evil of admitting *ex parte* examinations into evidence against the accused and 2) barring out-of-court testimonial statements made without the opportunity for cross-examination.[116] With respect to *Roberts*, the Court stated that while "the results of our decisions have been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."[117] Specifically, the Court chose to reconsider its *Roberts* two-part test in order "to reflect more accurately the original understanding of the [Confrontation] Clause."[118]

In changing its approach to the Confrontation Clause, the Court indicated a preference that jurors rather than judges determine the reliability of testimonial statements.[119] Specifically, the Court stated that the Confrontation Clause is a "procedural rather than a substantive guarantee," requiring that "reliability be assessed in a particular manner: by cross examination."[120] Under *Roberts*, because a judge rather than a jury determined the reliability of statements, *Roberts* "replace[d] the constitutionally prescribed method of assessing reliability with a wholly foreign one."[121]

The Court also described the poor framework that resulted in the lower courts due to the reliability analysis dictated by *Roberts*.[122] Because various courts developed different tests for determining reliability,

112. *Id.* at 51–52.
113. *Id.* at 53–54.
114. *Id.* at 54.
115. *Id.* at 55–56.
116. *Id.* at 58–60.
117. *Id.* at 60.
118. *Id.*
119. *Id.* at 62.
120. *Id.* at 61.
121. *Id.* at 62.
122. *Id.* at 63–64.

predictability suffered.[123] Beyond unpredictability, tests for reliability under *Roberts* developed an ability to "admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[124] As an example, the Court stated that the Washington trial court found Mrs. Crawford's recorded statement reliable because, among other reasons, law enforcement was "neutral to her" during questioning.[125] The Court noted that "[t]he framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by 'neutral' government officers."[126] Because judges can "not always be trusted," the Court stated that *Roberts* may not provide meaningful protection to defendants during politically charged public trials like that of Sir Walter Raleigh.[127]

The majority summarized its position with the following:

> 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. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.[128]

The court "leaves for another day" the task of determining the definition of "testimonial."[129] The Court said, however, that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations" because they are "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[130] In closing, the Court explicitly qualified its *Roberts* holding by stating that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[131] Hence, the majority appears to have overruled *Roberts* only with respect to testimonial statements.

B. Chief Justice Rehnquist's Concurring Opinion: The Court Should Not Overturn Ohio v. Roberts

Joined by Justice O'Connor, Chief Justice Rehnquist concurred in the Court's decision to reverse and remand the decision of the Washing-

123. *Id.* at 62.
124. *Id.* at 63.
125. *Id.* at 66.
126. *Id.*
127. *Id.* at 67.
128. *Id.* at 68.
129. *Id.*
130. *Id. See infra* Section IV.A. for an extensive analysis of what constitutes "testimonial."
131. *Crawford*, 541 U.S. at 68.

ton Supreme Court.[132] However, both Justices dissented "from the Court's decision to overrule [*Roberts*]."[133] Preferring to rely on the Court's "long-established precedent," the Chief Justice stated that the majority opinion "casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case."[134]

The Chief Justice disagreed with the two-thousand-year historical summary the majority invoked to help justify its holding.[135] He presented his own historical summary and said, "[t]he Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine."[136] Because "unsworn hearsay was simply held to be of much lesser value than were sworn affidavits of depositions," the Chief Justice believed there was historical preference for statements taken under oath.[137] He reasoned that, "[w]ithout an oath, one usually did not get to the second step of whether confrontation was required."[138] The Chief Justice referred to the majority's distinction between testimonial and nontestimonial statements—outside of affidavits and depositions—as arbitrary because he was unable to find a distinction in common law between unsworn testimonial statements and nontestimonial statements.[139] Pointing out that the Court had never made such a distinction, the Chief Justice saw little value in changing precedent.[140]

The Chief Justice also suggested, "to find exceptions under the Clause is not to denigrate it as the Court suggests."[141] He noted, "some out of court statements are just as reliable as cross-examined in-court testimony due to the circumstances in which they were made."[142] On this basis, the Chief Justice argued for retention of several hearsay exceptions: co-conspirator statements, spontaneous declarations, statements made in course of procuring medical services, and "countless others."[143] Thus, the Chief Justice stated that because "a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions."[144]

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132. *Id.* at 68 (Rehnquist, C.J., concurring).
133. *Id.* at 69 (Rehnquist, C.J., concurring).
134. *Id.* (Rehnquist, C.J., concurring).
135. *Id.* at 69–76 (Rehnquist, C.J., concurring).
136. *Id.* at 69 (Rehnquist, C.J., concurring).
137. *Id.* at 71 (Rehnquist, C.J., concurring).
138. *Id.* (Rehnquist, C.J., concurring).
139. *Id.* (Rehnquist, C.J., concurring).
140. *Id.* (Rehnquist, C.J., concurring).
141. *Id.* at 73 (Rehnquist, C.J., concurring).
142. *Id.* at 74 (Rehnquist, C.J., concurring).
143. *Id.* (Rehnquist, C.J., concurring).
144. *Id.* (Rehnquist, C.J., concurring).

Aside from his preference for precedent and hearsay exceptions, the Chief Justice criticized the majority for the uncertainty the decision would create in state and federal criminal trials.[145] Specifically, he warned that the majority's failure to define "testimonial" left "thousands of federal prosecutors and the tens of thousands of state prosecutors . . . in the dark."[146] Nevertheless, the Court left an analysis of "testimonial" to others.

IV. ANALYSIS

Although the Confrontation Clause contains only eighteen words, United States Supreme Court cases spanning more than a century from *Mattox* through *Crawford* indicate an inherent complexity in articulating its proper usage. From a historical perspective, the Supreme Court obviously intended *Crawford* to restore the Confrontation Clause to a position as close to its roots as possible. Yet, from the more practical perspective of prosecution and defense attorneys, the Court replaced one generally worded doctrine, *Roberts*, with another, *Crawford*. *Roberts* challenged practitioners to determine the meaning of "firmly rooted" and "particularized guarantees of trustworthiness." *Crawford* challenges practitioners to answer a question that will undoubtedly receive considerable attention for many years to come: was that statement a *testimonial* statement?

Recall that the hypothetical case against the man who allegedly molested Jimmy hinges on the admissibility of statements Jimmy made to: 1) the police; 2) a physician; 3) social workers; and 4) his parents. Since Jimmy is unavailable for cross-examination, this analysis explores whether each of these types of statements are testimonial and reviews post-*Crawford* opinions from various jurisdictions. Section A dissects *Crawford v. Washington*[147] further, summarizing the key phrases useful to both prosecutors and defense attorneys when arguing the testimonial or nontestimonial nature of such statements. Using some of these clues and catchphrases, along with various post-*Crawford* decisions, Section B analyzes whether the four types of statements in the case against Jimmy's alleged perpetrator are testimonial. Section C predicts that Colorado's child hearsay exception, which would probably permit the admission of all four statements pre-*Crawford*, will face a difficult constitutional scrutiny post-*Crawford*. Finally, Section D describes significant post-*Crawford* decisions issued to date by Colorado state courts.

145. *Id.* at 75–76 (Rehnquist, C.J., concurring).
146. *Id.* (Rehnquist, C.J., concurring).
147. 541 U.S. 36 (2004).

A. The Meaning of "Testimonial:" Key Phrases

This Section summarizes key phrases within *Crawford* that will aid prosecutors and defense attorneys in arguing the testimonial or nontestimonial nature of Jimmy's statements. As mentioned, Jimmy will not be testifying due to his unavailability, and the defense has not had a prior opportunity to cross-examine him. Numbers (1) through (18) below list the key phrases in the order in which they appear in *Crawford*:

(1) Testimonial "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[148] Courts should interpret the term, "interrogation," in a colloquial rather than a legal sense.[149]

(2) "[T]he principal evil at which the Confrontation Clause was directed was the civil-law . . . use of *ex parte* examinations as evidence against the accused."[150]

(3) The Confrontation Clause applies to both out-of-court and in-court statements.[151]

(4) Witnesses under the Confrontation Clause are "those who bear testimony."[152]

(5) Testimony under the Confrontation Clause is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[153]

(6) "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."[154]

(7) Testimonial statements include "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[155] This is the first of three "core class" formulations of "testimonial."[156]

148. *Crawford*, 541 U.S. at 68.
149. *Id.* at 53 n.4. *See* Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2463 (2004) (Stevens, J., dissenting) (stating, "police questioning during a *Terry* stop qualifies as an interrogation, and it follows that responses to such questions are testimonial in nature.").
150. *Crawford*, 541 U.S. at 50.
151. *Id.* at 50–51.
152. *Id.* at 51.
153. *Id.*
154. *Id.*
155. *Id.* (quoting Brief for Petitioner at 23).
156. *Id.*

(8) Incorporating Justice Thomas's concurring opinion in *White v. Illinois*,[157] testimonial statements include "extrajudicial statements . . . such as affidavits, depositions, prior testimony, or confessions."[158] This is the second of three "core class" formulations of "testimonial."[159]

(9) Testimonial statements include those "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."[160] This is the third of three "core class" formulations of "testimonial."[161]

(10) Whether statements are sworn or unsworn makes no difference in determining whether they are "testimonial."[162]

(11) Business records are nontestimonial.[163]

(12) Statements in furtherance of a conspiracy are nontestimonial.[164]

(13) Dying declarations may or may not be testimonial.[165] When they are, they represent an exception to the bar against admission of testimonial statements into evidence without a prior opportunity for cross-examination.[166]

(14) When a defendant wrongfully renders a witness unavailable, a court may still admit a testimonial statement via "the rule of forfeiture by wrongdoing [which] extinguishes confrontation claims on essentially equitable grounds."[167]

(15) "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . . This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances."[168]

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157. 502 U.S. 346, 358–66 (1992) (Thomas, J., concurring).

158. *Crawford*, 541 U.S. at 51 (quoting White v. Illinois, 502 U.S. 346, 365 (Thomas, J. concurring)).

159. *Id.*

160. *Id.* at 52 (quoting Brief of Amici Curiae National Association of Criminal Defense Lawyers, et al. at 3).

161. *Id.* at 51.

162. *See id.* at 52.

163. *See id.* at 56.

164. *See id.*

165. *Id.* at 56 n.6.

166. *Id.* The Court indicated, however, that it might address the issue in a future case. "We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations." *Id.*

167. *Id.* at 62.

168. *Id.* at 56 n.7.

(16) "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."[169]

(17) "The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[170]

(18) "Plainly testimonial statements" also include: plea allocutions, grand jury testimony, and prior trial testimony.[171]

For some types of statements, phrases (1) through (18) will clearly indicate whether they are testimonial. For those in the gray area, these eighteen phrases provide only possibilities or indications. For these types of statements, the final determination of "testimonial" will likely depend in the short term on the facts of a particular case plus the argumentative skills of prosecutors and defense attorneys, and in the long term, on the development of case law.

For gray area statements, *Crawford* appears to rely on the intent of both the declarant and the listener/receiver in distinguishing testimonial statements from nontestimonial ones. From the declarant's perspective, a nontestimonial statement would be a casual remark (Phrase 6), or more broadly, a statement made without both a reasonable belief that it would be used prosecutorially (Phrase 7) and an objective reasonable belief that it would be used at a trial (Phrase 9). The likelihood of a statement being nontestimonial will increase if the declarant made it to an acquaintance rather than a government official (Phrase 6). From the listener/receiver's perspective, simply being a government official significantly decreases the likelihood of a nontestimonial designation (Phrases 1 & 6). A government official, however, can receive a nontestimonial statement so long as it was not received with "an eye towards trial." (Phrase 15).[172] Given the Court's concern with *ex parte* examinations against the accused (Phrase 2), attempts by prosecutors to argue that a government official received a statement without an eye towards trial will probably receive scrutiny. Thus, for gray area statements, the eighteen key phrases contained within *Crawford* indicate that 1) a declarant can give a testimonial statement to a nongovernmental listener; and 2) a govern-

169. *Id.* at 59 n.9.

170. *Id. See* People v. Reynoso, 814 N.E.2d 456, 465 (N.Y. 2004) (holding that admission of statement "not to establish the truth of the matter asserted, but rather to show the detective's state of mind" did not constitute a Confrontation Clause violation under *Crawford*). *See also supra* note 40 and accompanying text.

171. *Crawford*, 541 U.S. at 65.

172. Richard D. Friedman, *Adjusting to* Crawford*: High Court Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 4, 9 (stating "I do not believe that participation by government officials—either receipt of the statement as the initial audience of the statement or active procurement of the statement through interrogation—is the essence of what makes a statement testimonial.").

mental official can receive a nontestimonial statement. In the case against the defendant accused of molesting three-year-old Jimmy, several of Jimmy's statements fall into this gray area.

B. Are the Statements in the Case Against Jimmy's Perpetrator "Testimonial"?

This Section discusses whether the following statements are testimonial: Jimmy's statements to: 1) the police; 2) a physician; 3) social workers; and 4) his parents. As illustrated below, whether a court will consider each of these statements testimonial will depend on the specific circumstances surrounding the statement itself.

1. Are Jimmy's Statements to the Police "Testimonial"?

In all likelihood, *Crawford* will not allow admission of Jimmy's statements against the defendant as attested to by the police. *Crawford* explicitly referred to statements given during police interrogations as "testimonial."[173] The Court mandated the "colloquial meaning" of interrogation,[174] which could simply mean to "question formally and systematically."[175] Thus, the trial courts might determine that statements given by Jimmy to the police are "testimonial." Because the defendant lacked the ability to cross-examine Jimmy when Jimmy made his statements to the police, the *Crawford* interpretation of the Confrontation Clause explicitly bars their admission.[176] Nevertheless, a chance to admit the statements may exist if the prosecutor draws a distinction between statements made to the police by children and statements made to the police by adults.

In interpreting the Confrontation Clause, *Crawford* defines witnesses against the accused as "those who bear testimony."[177] Testimony is defined as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[178] When adult witnesses speak to the police, particularly in the wake of a crime, they usually understand the importance of their statements. They are likely to realize that their spoken words may someday become part of a judicial proceeding. One might reasonably impugn to them the knowledge that, when speaking to the police, they bear testimony. Conversely, a three-year-old child like Jimmy may not understand he is bearing testimony when speaking to anyone, much less the police. Perhaps this distinction can overcome a testimonial designation, allowing admission of his statements under the

173. *Crawford*, 541 U.S. at 68. *See also supra* text accompanying notes 130 and 148.
174. *Crawford*, 541 U.S. at 54 n.5.
175. MERRIAM-WEBSTER ONLINE DICTIONARY, *at* http://www.m-w.com/home.htm (last visited Apr. 11, 2005).
176. *Crawford*, 541 U.S. at 69; *see also* supra text accompanying note 128.
177. *Crawford*, 541 U.S. at 51.
178. *Id.* (quoting 1. N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

hearsay exception for excited utterances.[179] *Crawford* may support this position, given that testimonial statements are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[180] So far, courts have largely rejected this line of argument.[181]

In response to *Crawford*, one victim's rights advocate adjusted her police officer training program.[182] The new training suggests that officers "take notes of a victim's demeanor at the scene—such as, 'she was screaming, she was crying'—to prove that the statement was an excited utterance and not the product of interrogation."[183] Presumably, this technique will decrease the likelihood that a court will consider the victim's statement testimonial. Unfortunately, taking such notes may not produce the advocate's desired results. Under *Crawford*, if the police officer's interrogation fits within the colloquial meaning of an interrogation, the statement is testimonial regardless of the manner in which the declarant made it.[184] Furthermore, although a declarant may be screaming or crying, she may still "reasonably . . . believe that the statement would be available for use at a later trial."[185] Although the fact that the declarant is screaming or crying increases the chance that a court will deem her statement an excited utterance, *Crawford* does not guarantee that it is nontestimonial, particularly when a police officer records the statement on a notepad with an eye towards trial.[186] *Crawford* addresses the issue by stating, "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard."[187] As re-

179. *See* COLO. R. EVID. 803(2) ("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). *See also* FED. R. EVID. 803(2).

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

181. *See* People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 n.3 (Cal. Ct. App. 2004) (stating "[i]t is more likely that the Supreme Court meant simply that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial"), *petition for review denied*, No. S125799, 2004 LEXIS 8716 (Cal. Sept. 14, 2004); People v. Rolandis, 817 N.E. 2d 183, 189 (Ill. App. Ct. 2004).

> Given that the declarant must be unavailable for the confrontation clause issue to come into play, how would the speaker's subjective understanding be determined? The State merely speculates about the thought process of young children generally. The objective circumstances surrounding V.J.'s statements to Cure and Weber show that they were testimonial.

Id. But see People v. Vigil, No. 02CA0833, 2004 LEXIS 1024, at *7–9 (Colo. Ct. App. June 17, 2004) (applying test from "objective person in the child's position," but nevertheless labeling a seven-year-old child's statements testimonial due to the presence of a police officer who made statements to child indicating accused could go to jail), *cert. granted*, No. 04SC532, 2004 LEXIS 1030 (Colo. Dec. 20, 2004).

182. Wendy N. Davis, *Hearsay, Gone Tomorrow?: Domestic Violence Cases at Issue as Judges Consider Which Evidence to Allow*, 90 A.B.A. J. 22, 24 (2004).

183. *Id.* at 24.

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

185. *Id.* at 51–52.

186. *Id.* at 62.

187. *Id.* at 52.

flected by a series of decisions in New York, emergency 911 calls touch on the precise limits of this "narrow standard."

In *People v. Cortes*,[188] a New York trial judge considered a 911 call testimonial because it "was [made] for the purpose of invoking police action and the prosecutorial process."[189] In response to a 911 dispatcher's questions, an unidentified eyewitness provided information on the "location, description, and direction of movement" of a shooter.[190] Because "callers to 911 reporting crimes are likely to know the use to which the information will be put," *Cortes* considered the circumstances of this particular 911 call an interrogation.[191] To support its position, *Cortes* noted that police department internet web pages in New York City and other jurisdictions often contain a very specific list of questions for 911 callers to answer if they have observed a crime.[192] A check of similar web sites in Colorado shows that the Boulder Police Department's site contains a similar set of questions.[193] Referring to 911 calls reporting a crime as the "modern equivalent, made possible by technology" of the *ex parte* examinations frowned upon in *Crawford*, *Cortes* considered the 911 call testimonial and, thus, inadmissible.[194]

In contrast, two other New York trial judges did not consider 911 calls testimonial given the facts of their cases. In *People v. Moscat*,[195] both the prosecution and defense believed a domestic assault victim would refuse to testify and, thus, debated the admissibility of a recording of the victim's 911 call.[196] Terming a 911 call "the electronically augmented equivalent of a loud cry for help," usually made while a crime is in progress or in its immediate aftermath, *Moscat* did not consider the call testimonial.[197] Based on *Crawford*, *Moscat* stated, "[a] testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to

188. 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004).
189. *Cortes*, 781 N.Y.S.2d at 416.
190. *Id.* at 404.
191. *Id.* at 407.
192. *Id.* at 405–06. Cortes noted that the New York City Police Department's website stated:
> What should you do if you see a crime occurring?; Call 911 immediately; Are there any weapons involved?; What is the address?; Any physical characteristics such as height, weight, race, beard, or scars?; Any clothing description?; How many people involved?; Are the persons involved on foot or in a vehicle?"

Id. (citation omitted).
193. The Boulder Police website advises callers to:
> Be prepared to answer the following questions: What is happening?; When did it happen?; Where is the incident taking place?; Are there weapons involved?; What does the vehicle look like?; What is the license plate number?; What do the suspects look like?; What is the direction of travel of the suspects, either on foot or in a vehicle?

City of Boulder Police Department, The 9-1-1 Emergency Dispatch System, *at* http://www3.ci.boulder.co.us/police/reference/911.htm (last visited Apr. 11, 2005).
194. *Cortes*, 781 N.Y.S.2d at 415.
195. 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).
196. *Moscat*, 777 N.Y.S.2d at 875.
197. *Id.* at 880.

her aid."[198] In *People v. Conyers*,[199] a mother made two 911 calls within minutes of each other regarding a street fight involving her son, the defendant.[200] In the first call, the mother screamed for police assistance.[201] In the second, she screamed for an ambulance.[202] The mother never testified at trial.[203] *Conyers* did not consider the calls testimonial because, given her "panicked and terrified screams . . . her intention in placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in a future proceeding."[204]

Considered together, the three New York cases exhibit the tension created by *Crawford* between whether the question of labeling a statement testimonial properly hinges on the declarant's intent in giving it, the government's intent in receiving it, or both. From one perspective, the declarant's intent is irrelevant because *Crawford* considers statements testimonial when made with the "[i]nvolvement of government officers in the production of testimony with an eye toward trial . . . ."[205] Certainly, this is one reason jurisdictions choose to record 911 calls. They know such recordings provide valuable information for criminal proceedings. From the opposite perspective, *Crawford* also defines testimonial statements as "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."[206] Some objective 911 callers may only reasonably believe that their call will be used to acquire assistance. Hence, different circumstances and different ways of looking at the 911 call affect whether it is testimonial. Under *Crawford*, therefore, situations involving 911 calls will require a "case-by-case assessment . . . ."[207] Hence, although Jimmy's statements to police will probably be testimonial under *Crawford*, the 911 cases indicate that, depending on

198. *Id.* at 879. *But see supra* Section IV.A. (clearly *Crawford* does not limit testimonial statements to situations where the government summons a citizen to be a witness).

199. 777 N.Y.S.2d 274 (N.Y. Sup. Ct. 2004).

200. *Conyers*, 777 N.Y.S.2d at 274–75.

201. *Id.* at 275.

202. *Id.*

203. *Id.*

204. *Id.* at 277.

205. *Crawford*, 541 U.S. at 56 n.7. *See also supra* text accompanying note 168.

206. *Crawford*, 541 U.S. at 52. *See also supra* text accompanying note 160.

207. Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer, 2004, at 4, 10; *see also* Minnesota v. Wright, 686 N.W.2d 295, 302–03 (Minn. Ct. App. 2004), *rev granted in part*, No. A03-1197, 2004 Minn. LEXIS 750 (Minn. Nov. 23, 2004).

> A 911 call is usually made because the caller wants protection from an immediate danger, not because the 911 caller expects the report to be used later at trial with the caller bearing witness—rather, there is a cloak of anonymity surrounding 911 calls that encourages citizens to make emergency calls and not fear repercussion, [and] no evidence suggests . . . that . . . [the] 911 call was handled under a formalized protocol.

Id. People v. Caudillo, 122 Cal. App. 4th 1417, 1430–40 (Cal. Ct. App. 2004) (ruling that "details provided by [anonymous 911] caller were elicited in order to facilitate appropriate police response, not to provide evidence to be used at a later trial."), *rev granted/briefing deferred*, 23 Cal. Rptr. 3d 294 (Cal. 2005).

the facts of a given situation, statements to police or government officials are not automatically per se testimonial.

2. Are Jimmy's Statements to a Physician "Testimonial"?

As part of the sexual assault investigation, a physician examines Jimmy. During the examination, the physician discovers injuries indicative of molestation. When the doctor asks Jimmy who hurt him, Jimmy identifies the defendant. As indicated by three recent state court decisions, whether Jimmy's statements to the physician are testimonial will depend heavily on the specific circumstances under which they were given.

In *Nebraska v. Vaught*,[208] the Nebraska Supreme Court considered a four year-old girl's identification of the defendant as a sexual assault perpetrator to an emergency room physician.[209] *Vaught* held that the child's identification was nontestimonial because "[t]here was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination."[210] The physician testified at trial that "it is important for [the physician] . . . to know who the perpetrator was, both so that he does not release a patient into the care of a perpetrator and for purposes of treating the patient's mental well-being."[211] Although *Vaught* considered identification statements to physicians nontestimonial, other courts have not taken the same approach.

People v. T.T.[212] differentiated statements given by a seven-year-old girl to a physician for purposes of symptoms and pain from those given to the same physician for purposes of identifying the perpetrator.[213] The girl made her statements six months after the alleged assault.[214] *T.T.* considered the portion of the girl's statements "regarding the nature of the alleged attack, the physical exam, and complaints of pain or injury" nontestimonial.[215] *T.T.*, however, considered the portion of her statements that "concerned fault or identity" testimonial.[216] The doctor to whom the girl made her statements "was a member of a child abuse protection unit at the hospital and had previously testified as an expert witness in child abuse cases."[217] Although social services referred the girl to the doctor, the court in *T.T.* did not find that fact controlling.[218] Nor was

208. 682 N.W.2d 284 (Neb. 2004).
209. *Vaught*, 682 N.W. 2d at 285–87.
210. *Id.* at 291.
211. *Id.* at 287.
212. 815 N.E.2d 789 (Ill. App. Ct. 2004).
213. *T.T.*, at 804.
214. *Id.* at 803.
215. *Id.* at 804.
216. *Id.*
217. *Id* at 803.
218. *Id.*

it persuaded by the relationship between the doctor and social services under the umbrella of the hospital's child abuse protection unit.[219] Rather, *T.T.* simply considered the girl's identification statement testimonial because it was accusatory.[220]

In *People v. Cage*,[221] the California Court of Appeals determined that a fifteen-year-old boy's statement to an emergency room doctor that "he had been held down by his grandmother and cut by his mother"[222] was nontestimonial.[223] *Cage* determined that the boy's statement was nontestimonial because "[the doctor] was not a police officer or even an agent of the police [and that to use the statement against the defendant] bears little resemblance to the civil-law abuses the Confrontation Clause targeted."[224] Furthermore, *Cage* rejected the defendant's attempt to argue that the boy, as a reasonable person, made the statement with a belief that it would later be used at trial.[225] *Cage* rejected this argument even if the boy "had thought the doctor might relay his statements to the police [because] anyone who obtains information relevant to a criminal investigation might . . . pass it along to the police."[226] *Cage* did not consider this possibility enough to justify a testimonial designation for the boy's statement.[227]

Thus, because Jimmy's statements to his physician fall into a gray area rather than one of *Crawford*'s explicit definitions of "testimonial," admissibility will hinge on the specific facts of his case. As indicated by *Vaught* and *Cage*, his statements may be nontestimonial if a court does not find a reasonable expectation that his statements would be used at a trial. *T.T.*, however, seems to indicate that the mere accusatory nature of identifying one's perpetrator may be testimonial by default. Hence, the persuasive abilities of prosecutors and defense attorneys, the specific facts of Jimmy's case, and the developing case law will all determine whether his statements to his physician are "testimonial."

3. Are Jimmy's Statements to Social Workers "Testimonial"?

Admissibility of Jimmy's statements to social workers presents a similar challenge because *Crawford* did not explicitly list out-of-court statements to social workers as "testimonial." In *Crawford*, the Court

219. *Id.*
220. *Id.* at 804.
221. 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *petition for rev granted*, 99 P.3d 2 (Cal. 2004).
222. *Cage*, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004), *petition for rev granted*, 99 P.3d 2 (Cal. 2004).
223. *Id.* at 854–55.
224. *Id.* at 854.
225. *Id.* at 855. Interestingly, *Cage* opined the rather radical proposition that the three "core classes" of testimonial statements identified in *Crawford* were not adopted by the United States Supreme Court, but rather, the Court "merely noted that they exist." *Id.* at 855. *See supra* notes 155–161 and accompanying text for the three "core classes."
226. *Id.*
227. *Id.*

indicated, "an accuser who makes a formal statement to government officers bears testimony . . . ."[228] While some social workers may not be per se government officials, they all have duties imposed upon them by the government. For instance, Colorado requires social workers to report child abuse or neglect if they have "reasonable cause to know or suspect that a child has been subjected to abuse or neglect."[229] If a trial court considers the social workers to be government officials, then the process for determining admissibility follows that of Jimmy's statements to the police. If the trial court does not equate the social workers with government officials, then *Crawford* seems to indicate that the next step for the trial court is to determine whether admitting the statement is a "modern practice with close[] kinship to the abuses at which the Confrontation Clause was directed."[230]

As stated in *Crawford*'s lengthy historical analysis, the founders directed the Confrontation Clause at the evil of using *ex parte* examinations against the accused.[231] Suppose a social worker interviews Jimmy in a non-leading fashion. Eventually Jimmy tells her about the molestation committed by the defendant. A determinative factor is whether the interview resembles an *ex parte* examination against the accused.[232] If a court determines that the social worker's purpose in working with Jimmy is to ascertain for law enforcement whether the defendant committed acts of sexual molestation, the statement will be testimonial.[233] Several recent decisions in state courts reflect the difficulties in admitting testimony from social workers post-*Crawford*.

In *Maryland v. Snowden*,[234] the Maryland Court of Appeals affirmed the reversal of a defendant's child molestation conviction obtained in part on hearsay statements made by two child abuse victims to a social worker.[235] Pursuant to Maryland's "tender years statute," the social worker testified in lieu of the children.[236] The Maryland Court of Appeals based its decision on the fact that the defense did not have an opportunity to cross-examine the children and that "an ordinary person in the position of any of the declarants would have anticipated the sense that her statements to the sexual abuse investigator potentially would have been used to prosecute Snowden."[237] Snowden rejected arguments

228. *Crawford*, 541 U.S. at 51.
229. COLO. REV. STAT. § 19-3-304(1) (2004).
230. *Crawford*, 541 U.S. at 68.
231. *Id.* at 49-50. *See also supra* text accompanying note 109.
232. *Id.*
233. *Id.* at 61–62. One possible way for the social worker to testify is to confine her analysis solely to an observation of Jimmy's behavior, and later testify as an expert witness as to the likelihood that someone molested him. This possibility seems rather useless, for it requires the social worker to refrain from eliciting statements from Jimmy.
234. No. 42, Sept. Term, 2004, 2005 Md. LEXIS 35 (Md. Feb. 7, 2005).
235. *Id.* at *3.
236. *Id.* at *8–9.
237. *Id.* at *29.

made by Maryland's Solicitor General, who claimed the Maryland Court of Special Appeals decisions affirmed by *Snowden* "misconstrued *Crawford*, and that "statements of young children to a social worker are not testimonial."[238] *Snowden* indicates that unless child molestation victims testify at trial with the opportunity for cross-examination by the defense, courts may bar hearsay statements attested to by social workers.[239] In other jurisdictions, various opinions indicate a strong tendency towards considering statements to social workers testimonial.[240] Thus, because Jimmy's statements to social workers may be testimonial, and therefore inadmissible, *Crawford* could significantly change the methodologies by which social workers discuss instances of alleged sexual abuse with young children.

4. Are Jimmy's Statements to his Parents "Testimonial"?

Jimmy's parents are not government officials. In confiding to his parents, Jimmy probably did not make his statements with the intent of bearing testimony. He simply spoke to his parents. Nevertheless, admissibility of Jimmy's statements to his parents depends on whether they are "testimonial." In *Crawford*, the Court states, "[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."[241] Jimmy's statements to his parents do not conform to either extreme. He did not make them to a government official, and, given the subject matter, they certainly were not casual. His statements fall in the gray area between the two endpoints. Admissibility may, therefore, depend on the nature of Jimmy's statement. To illustrate, consider two extremes. First,

238. David L. Hudson Jr., *New Clout for Confrontation Clause: Citing U.S. Supreme Court, Maryland Overturns Sex-Abuse Conviction*, 3 No. 17 ABAJEREP 1, *at* http://www.westlaw.com (last visited Feb. 6, 2005).

239. *Snowden*, 2005 Md. LEXIS at *3.

240. *See In re T.T.*, 815 N.E. 2d 789, 803 (Ill. Ct. App. 2004) (stating "[w]e do not hold that all statements made to a social worker are per se testimonial under Crawford. We think it possible that a scenario could arise in which a report to the [social worker agency] hotline or statements of sexual abuse overheard by a social worker would be admissible as nontestimonial hearsay"); Minnesota v. Courtney, 682 N.W.2d 185, 196 (Minn. Ct. App. 2004) (ruling that statements elicited from a child during an interview by a child-protection worker monitored by the police chief via closed-circuit television were testimonial), *rev. granted in part and denied in part*, No. A03-790 and A03-791, 2004 Minn. LEXIS 575 (Sept. 29, 2004); People v. Warner, 14 Cal. Rptr. 3d 419, 429 (Cal. Ct. App. 2004) (holding that since a detective observed multi-disciplinary center specialist's interview with a minor child "it was reasonably expected the interview would be used prosecutorially and at trial"); People v. Sisavath, 13 Cal. Rptr. 3d 753 (Cal. Dist. Ct. App. 2004) (holding that a child's statements to social workers was testimonial because the "interview took place after a prosecution was initiated, was attended by the prosecutor and the prosecutor's investigator, and was conducted by a person trained in forensic interviewing." The Court declined to hold that statements to all trained interviewers are testimonial), *petition for rev. denied*, No. S125799, 2004 LEXIS 8716 (Cal. Sept. 14, 2004); *But see* People v. Geno, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (ruling that "the child's statement was made to the executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question of whether she had an 'owie' was not a statement in the nature of '*ex parte* in-court testimony or its functional equivalent.'"), *appeal denied*, 688 N.W.2d 829 (Mich. 2004).

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

Jimmy complains to his parents of pain and soreness in his private areas. Since it is unlikely Jimmy expressed his pain with any inclination towards a trial, the statements are not testimonial. Under the hearsay exception for then existing mental, emotional, or physical conditions and/or the hearsay exception for purposes of medical diagnosis or treatment, Jimmy's parents may recount their son's complaints in court.[242] Second, at another extreme, suppose Jimmy says to his parents, "that man down the street has been touching my private areas." Since this is no longer a casual remark, but rather, an accusatory statement, courts may consider it testimonial and allow the parents to describe it only if Jimmy later testifies in court with an opportunity for cross-examination by the defense. Accordingly, "whether a statement is testimonial or nontestimonial is going to depend on the circumstances of the particular out-of-court statement."[243]

Jimmy's statements to the police, to an emergency room physician, to social workers, and to his parents do not appear to conform to any explicit definition of "testimonial" found within *Crawford.* Prosecutors and defense attorneys must therefore draw from the various phrases from *Crawford*, case law, the facts of their cases, and their persuasive abilities to argue for or against the admissibility of each statement.[244]

C. The Uncertain Fate of Colorado's Child Hearsay Exception

Colorado's child hearsay exception, based on *Roberts*, provides for admission of Jimmy's out-of-court statements.[245] Similar laws protecting child victims of sex crimes, commonly referred to as "tender age laws," exist in many other states.[246] In *People v. Diefenderfer*,[247] the Colorado

242. *See* COLO. R. EVID. 803(3) ("A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition."); *See* COLO. R. EVID. 803(4) ("Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."); *See also* FED. R. EVID. 803(3); FED. R. EVID. 803(4). Even if Jimmy identifies the alleged perpetrator when talking to his doctor, his statement may still be nontestimonial. State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004) (ruling that a child's identification of the alleged molester during examination by an emergency room physician was nontestimonial because there was no "indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination." The physician testified at trial, "it is important for [the physician] . . . to know who the perpetrator was, both so that he does not release a patient into the care of a perpetrator and for purposes of treating the patient's mental well-being.").

243. David L. Hudson Jr., *New Clout for Confrontation Clause: Citing U.S. Supreme Court, Maryland Overturns Sex-Abuse Conviction*, 3 No. 17 ABAJEREP 1, *at* http://www.westlaw.com (last visited Apr. 11, 2005).

244. Justice Thomas's complaint in *White* still seems to apply post-*Crawford*: "[i]t is . . . not clear . . . whether the declarant or the listener (or both) must be contemplating legal proceedings." White v. Illinois 502 U.S. 346, 364 (1992) (Thomas, J., concurring in part and concurring in judgment).

245. COLO. REV. STAT. § 13-25-129 (2004).

246. *See* Snowden v. Maryland, 846 A.2d 36, 39 (Md. Ct. Spec. App. 2004), *aff'd* by, No. 42, Sept. Term, 2004, 2005 Md. LEXIS 35 (Md. Feb. 7, 2005); Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1059-60 (2003).

247. 784 P.2d 741 (Colo. 1989).

Supreme Court upheld Colorado's child hearsay exception under *Roberts*.[248] Specifically, the exception states that a court may admit Jimmy's out-of-court statements if:

> (a) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement *provide sufficient safeguards of reliability*; and
>
> (b) The child either:
>
> (I) Testifies at the proceedings; or
>
> (II) Is *unavailable as a witness* and there is *corroborative evidence* of the act which is the subject of the statement[249] (emphasis added).

Many approaches to determining "sufficient safeguards of reliability" exist.[250] Corroborative evidence is "evidence, direct or circumstantial, that is independent of and supplementary to the child's hearsay statement and that tends to confirm that the act described in the child's statement actually occurred."[251] In Jimmy's case, behavioral observations made by the child molestation expert may have qualified as corroborative evidence independent of and supplementary to Jimmy's hearsay statements.

Post-*Crawford*, admissibility of Jimmy's statements under the child hearsay exception will depend on whether they are testimonial. *Crawford* will not affect the admissibility of nontestimonial statements, because for those statements *Crawford* "afford[ed] the States flexibility in their development of hearsay law—as does *Roberts* . . . ."[252] If Jimmy's statements are testimonial and, thus, require cross-examination for admissibility under *Crawford*, then Colorado's hearsay exception, given its *Roberts*-based reliance on "sufficient safeguards of reliability," cannot survive constitutional scrutiny. Post-*Crawford*, Colorado's child hearsay exception should apply only to nontestimonial statements and testimonial statements coupled with an opportunity to cross-examine the child.[253]

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248. *Diefenderfer*, 784 P.2d at 746-53.

249. COLO. REV. STAT. § 13-25-129 (2004).

250. *See* People v. District Court, 776 P.2d 1083, 1089–90 (Colo. 1989) (establishing an eight-factor test for reliability in cases concerning children); Idaho v. Wright, 497 U.S. 805, 821-22 (1990) (establishing a four-factor test for reliability concerning a child's hearsay statement). *See generally* People v. Farrell, 34 P.3d 401, 406–07 (Colo. 2001) (establishing a general eight-factor test for reliability), *overruled in part by* People v. Fry, 92 P.3d 970 (Colo. 2004).

251. People v. Bowers, 801 P.2d 511, 525 (Colo. 1990).

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

253. Due to a lack of standing, the Colorado Supreme Court refused to consider the constitutionality of COLO. REV. STAT. § 13-25-129(b)(II), the portion of Colorado's child hearsay exception modeled after *Roberts*. People v. Argonamiz-Ramirez, 102 P.3d 1015, 1018-19 (Colo. 2004). In an order reversing a trial court's decision to exclude videotaped interviews of two children by the police, the Court noted that the children would be testifying at trial. *Id.* Because defense counsel could cross-examine the children, the Court declined the defendant's request to "pass . . . judgment on the constitutionality of that portion of the child hearsay statute . . . ." *Id.*

For cases like the hypothetical one involving Jimmy, *Crawford* creates a difficult situation: sometimes it may force prosecutors to put a very young and vulnerable child like Jimmy on the witness stand. In *Diefenderfer*, the decision that upheld the constitutionality of Colorado's child hearsay exception under *Roberts*, the court stated that the Colorado child hearsay exception "effects the substantive policy of protecting certain witnesses—in this case child witnesses—from the sometimes traumatizing effect of facing their abusers openly in court."[254] At least for testimonial statements, *Crawford* trumps this policy.

The potential demise of Colorado's child hearsay exception for testimonial statements carries with it a potentially increased frequency for defense attorneys to use cross-examination to manipulate very young children like Jimmy into contradicting their previous statements.[255] Of course, such tactics may backfire on the defense by creating sympathy for the child in the jury's eyes.[256] Nevertheless, Colorado does provide for in-court techniques designed to mitigate the negative impact on young children while simultaneously maintaining the defendant's confrontation rights.

Colorado law already allows for two techniques to help protect young children: videotaped depositions and closed circuit testimony. Colorado permits videotaped depositions prior to trial if a child is less than fifteen years of age and is "medically unavailable or otherwise unavailable."[257] If the child is still unavailable once trial begins, the court may admit the videotape into evidence.[258] Second, Colorado law allows testimony via closed circuit television in cases concerning alleged sexual offenses against children less than twelve years of age if the child's testimony "would result in the child suffering serious emotional distress or trauma such that the child would not be able to reasonably communicate."[259] For such testimony, only the prosecuting attorney, defense attorney, guardian ad litem, operators of the closed-circuit television equipment, a person who "contributes to the welfare and well-being of the child victim", and the jury may be in the room with the child.[260] The judge and defendant remain in the courtroom.[261] So long as trial judges allow their use, both videotaped depositions and closed circuit television

254. *Diefenderfer*, 784 P.2d at 753.

255. *See* Richard P. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1037-38 (2003).

256. *See id.*

257. COLO. REV. STAT. § 18-3-413 (2004). *See generally* COLO. REV. STAT. § 18-6-401.3 (2004) (providing videotape depositions for non-sexual child abuse).

258. *Id.* at § 18-3-413(4). Since this statute mandates that the court carry out the child's deposition according to COLO. R. CRIM. P. 15(d), prosecution and defense attorneys for both sides are present before the judge, and, thus, the deposition affords the defense an opportunity to cross-examine the child. COLO. R. CRIM. P. 15(d).

259. COLO. REV. STAT. § 18-3-413.5(1)(a)(II) (2004).

260. COLO. REV. STAT. § 18-3-413.5(2)(a) (2004).

261. COLO. REV. STAT. § 18-3-413.5(2)(b) (2004).

will continue to provide protection to alleged victims of child molestation even after *Crawford*.[262]

*D. Post-*Crawford*: An Indication of Colorado's Approach*

This section summarizes Colorado court cases issued since *Crawford*. Because a few cases represent only a marginal relationship to the hypothetical case against Jimmy's alleged perpetrator, they do not appear in detail below.[263] Instead, the following contains descriptions of the more significant cases.[264]

In *People v. Fry*,[265] the Colorado Supreme Court determined that "preliminary hearings in Colorado do not present an adequate opportunity for cross-examination."[266] In reaching this conclusion, the Court

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262. *See e.g.*, Maryland v. Craig, 497 U.S. 836, 855 (1990) (holding that "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness . . . to testify . . . in the absence of face-to-face confrontation with the defendant."); Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 588 (2003) (discussing the Supreme Court's acceptance of allowing a child to testify outside the court room in the presence of prosecution and defense counsel with the defendant, able to communicate with his attorney, watching a live television feed); Wendy N. Davis, *Hearsay, Gone Tomorrow?: Domestic Violence Cases at Issue as Judges Consider Which Evidence to Allow*, 90 A.B.A. J. 22, 24 (arguing that the trauma created in children by their abusers may allow prosecutors to argue that the defendant waived their rights to confront the children in court); *but see* United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996), *cert. denied*, 519 U.S. 973 (1996).

> [T]hat when a person who eventually emerges as a defendant (1) causes a potential witness's unavailability (2) by a wrongful act (3) undertaken with the intention of preventing the potential witness from testifying at a future trial, then the defendant waives his right to object on confrontation grounds to the admission of the unavailable declarant's out-of-court statements at trial.

Id.

263. *See generally* People v. Edwards, 101 P.3d 1118, 11124 (Colo. Ct. App. 2004) (holding that *Crawford* "does not apply retroactively to cases on collateral review where . . . the defendant's conviction became final before *Crawford* was announced."), *cert. granted*, No. 04SC565, 2004 Colo. LEXIS 1000 (Colo. Dec. 6, 2004); People v. Moore, No. 01CA1760, 2004 Colo. App. LEXIS 1354, at *9-11 (Colo. Ct. App. July 29, 2004) (holding under the rule of forfeiture that defendant cannot claim Confrontation Clause violation under *Crawford* after killing the declarant), *cert. dismissed and remanded for cause*, No. 04SC571, 2004 Colo. LEXIS 772 (Colo. Oct. 4, 2004); People v. Candelaria, No. 01CA2467, 2004 Colo. App. LEXIS 1021, at *13 (Colo. Ct. App. June 17, 2004) (holding that there was no violation of confrontation rights under *Crawford* when witness with cancer testified subject to cross-examination, but could not remember key facts); People v. Turley, No. 03CA0845, 2004 Colo. App. LEXIS 1895, at *3 (Colo. Ct. App. Oct. 21, 2004) (holding that *Crawford* does not change "the settled principles governing admission of hearsay in probation revocation proceedings"); People v. Garrison, No. 01CA0527, 2004 Colo. App. LEXIS 1819, at *3–4 (Colo. Ct. App. Oct. 7, 2004) (holding that defendant's statements to a training manager were nontestimonial because they did not fall into any of *Crawford*'s three core classes of testimonial statements); People v. Shreck, No. 02CA1413, 2004 Colo. App. LEXIS 1712, at *34–36 (Colo. Ct. App. Sept. 23, 2004) (holding that "admission of documentary evidence showing [defendant's] prior convictions [did not] violate[] his Sixth Amendment right to confrontation . . . ."); People v. King, No. 02CA0201, 2005 Colo. App. LEXIS 111, at *16 (Colo. Ct. App. Jan. 27, 2004) (holding that when "a victim makes an excited utterance to a police officer, in a noncustodial setting and without indicia of formality, the statement is nontestimonial interrogation under *Crawford*.").

264. For an alternate discussion of the effect of *Crawford* in Colorado, *see* Will Hood III & Lucia Padilla, *The Right to Confront Witnesses After* Crawford v. Washington, COLO. LAW., Sept. 2004, at 83-90.

265. 92 P.3d 970 (Colo. 2004).

266. *Fry*, 92 P.3d at 972.

took the opportunity to reject the eight-factor reliability analysis contained in *Farrell*.[267] The Court stated, "[w]e therefore change our Confrontation Clause inquiry to whether a defendant had an adequate prior opportunity to cross-examine, not whether the previous testimony is reliable."[268] Although *Fry* clearly implicated the constitutional validity of Colorado's child hearsay exception, the court never mentioned it in its decision. To date, the Colorado Supreme Court has not addressed the exception.[269]

In *People v. Compan*,[270] the Colorado Court of Appeals interpreted *Crawford* and presented its own definition of "testimonial."[271] Although this case predates *Fry* by one month, *Fry* did not cite to it. Under *Crawford*, the *Compan* defendant sought to appeal a domestic violence conviction achieved partially through the admission of hearsay statements under the excited utterances and medical diagnosis and treatment exceptions.[272] Based on their reading of *Crawford*, the Court of Appeals formulated the following "testimonial statement" philosophy:

> Thus, it appears that testimonial statements under *Crawford* will generally be (1) solemn or formal statements (not casual or off-hand remarks), (2) made for the purpose of proving or establishing facts in judicial proceedings (not for business or personal purposes), (3) to a government actor or agent (not to someone unassociated with government activity).[273]

Since "[t]he victim's statements were not made for the purpose of establishing facts in a subsequent proceeding", the statements were not testimonial.[274] Accordingly, the court affirmed the defendant's conviction.[275] For nontestimonial hearsay, *Compan* retained the *Roberts* reliability approach previously adopted in Colorado.[276]

Because *Compan* oversimplifies the meaning of the term "testimonial," *Compan* might produce results inconsistent with *Crawford*. First, *Compan* implies that testimonial statements "will generally . . . be solemn or formal statements (not casual or offhand remarks)."[277] *Crawford* did not present these two extremes as a choice between one or the other, but instead, recognized that gray area may exist between them.[278] A

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267. *Id.* at 976.
268. *Id.*
269. *See supra* note 253.
270. 100 P.3d 533 (Colo. Ct. App. 2004), *cert. granted*, No. 04SC422, 2004 Colo. LEXIS 849 (Colo. Oct. 25, 2004).
271. *Compan*, 100 P.3d at 536–37.
272. *Id.* at 535–36.
273. *Id.* at 537.
274. *Id.* at 538.
275. *Id.* at 535.
276. *Id.* at 538.
277. *Id.* at 537.
278. *Crawford*, 541 U.S. at 51; *See also supra* text accompanying note 154.

statement that is neither "solemn or formal" nor "casual or offhand" may still be testimonial under *Crawford*.[279] Jimmy's statements to his parents, for example, fall into this category. Second, *Compan* oversimplifies the "purpose" required for a statement to be testimonial by stating that a testimonial statement "will generally be . . . made for the purpose of proving or establishing facts in judicial proceedings."[280] *Crawford* does not support this. On the declarant's side, *Crawford* says that a statement is testimonial "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[281] By using the terms "made for the purpose,"[282] *Compan* has incorrectly replaced *Crawford*'s objective test with a subjective one. *Compan* ignores the listener's purpose in receiving the statement, something to which *Crawford* devoted considerable attention.[283] Under *Crawford*, if the listener is a government agent and carrying out an interrogation in the colloquial sense, the statement may be testimonial regardless of the declarant's purpose.[284] Third, *Compan* incorrectly implies that a statement to a government actor or agent is determinative in the testimonial analysis.[285] Certainly, the involvement of the government is a significant factor, but *Crawford* does not end the testimonial analysis there.[286] *Crawford* requires a deeper examination of the circumstances. In a noble attempt to do what the United States Supreme Court refused to do—define "testimonial"—*Compan* tends to gloss over the subtleties in *Crawford* itself.

Finally, two simultaneously issued Colorado Court of Appeals decisions from the same three-judge panel involved the admissibility of videotaped police interviews with sexually abused children. In *People v. Vigil*,[287] the court deemed the videotape of an interview with a seven-year-old boy testimonial.[288] The Court said that the police obtained the child's statements under an interrogation, in the colloquial sense of the word, because the interviewer had extensive training in interviewing children, identified herself as a police officer, and ascertained that the child understood what it meant to tell the truth.[289] Furthermore, the court believed that the child "reasonably expected his statements to be used prosecutorially" because the child indicated "that [the] defendant should

279. *Id.*
280. *Compan*, 100 P.3d at 537.
281. *Crawford*, 541 U.S. at 51; *see also supra* text accompanying note 160.
282. *Compan*, 100 P.3d at 537.
283. *Crawford*, 541 U.S. at 62; *see also supra* text accompanying note 168.
284. *Crawford*, 541 U.S. at 51–52.
285. *See supra* note 172 and accompanying text.
286. *Id.*
287. People v. Vigil, 104 P.3d 258 (Colo. Ct. App. 2004), *cert. granted in part and denied in part*, No. 04SC532, 2004 Colo. LEXIS 1030 (Colo. Dec. 20, 2004).
288. *Vigil*, 104 P.3d at 262.
289. *Id.* at 262.

go to jail."[290] In addition, the police officer told the child he would need to talk to her friend, the district attorney, who would "try to put [the] defendant in jail for a long time."[291] In the second case, *People v. In re R.A.S.*,[292] the court ruled on similar facts, citing *Vigil* to justify its decision.[293]

In addition to the Maryland *Snowden* case, other jurisdictions have tackled *Crawford* in the context of sex crimes against children. So far, appellate decisions in this area indicate that making a statement to a government official proves quite important in determining whether a statement made by an unavailable out-of-court child declarant is "testimonial."[294]

The *Crawford* opinion did not contain any explicit language to justify a "testimonial" label for the four types of hearsay statements in the hypothetical case against the man who allegedly molested Jimmy. To determine whether the statements were testimonial required consideration of *Crawford*'s eighteen key phrases, the circumstances in which Jimmy gave his statements, and the circumstances in which the different listeners received them. Different circumstances will lead to different results. Furthermore, as a result of *Crawford*, Colorado's child hearsay exception, due to its *Roberts* foundation, probably will not survive constitutional scrutiny as far as testimonial statements are concerned when the defendant cannot cross-examine the child.[295]

CONCLUSION

While proponents of restoring the Confrontation Clause to a position closer to its historical roots will no doubt delight in *Crawford*, the opinion challenges those wishing to protect very young sexually and physically abused children from the trauma of in-court testimony. *Crawford* may result in the elimination of "tender age laws" previously formulated with *Roberts* in mind. Less than one month after *Crawford*, the Maryland Court of Special Appeals struck down Maryland's "tender age

290. *Id.*

291. *Id.* at 263.

292. No. 03CA1209, 2004 Colo. App. LEXIS 1032, (Colo. Ct. App. June 17, 2004).

293. *R.A.S.*, at *4–12.

294. *See* State v. Casatilla, 87 P.3d 1211, 1214 (Wash. App. 2004) (ruling that "[t]he statements were extremely limited, and did not go to any disputed issue but merely asserted Nelson had been touched sexually. Further, these statements were not testimonial in nature—they were not elicited by a government official and were not given with an eye toward trial"), *petition for review deferred*, 2005 Wash. LEXIS 46 (Wash. Jan. 4. 2005); People v. Geno, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (ruling that "the child's statement was made to the executive director of the Children's Assessment Center, not to a government employee, and the child's answer to the question of whether she had an "owie" was not a statement in the nature of "'*ex parte* in-court testimony or its functional equivalent.'"), *appeal denied*, 688 N.W.2d 829 (Mich. 2004).

295. People v. Espinoza, No. H026266, 2004 Cal. App. Unpub. LEXIS 6573, at *18 (Cal. Ct. App. July 13, 2004).

law,"[296] and the survivability of Colorado's child hearsay exception is unlikely so far as testimonial statements go. Nevertheless, the proper use of videotaped depositions and testimony via closed-circuit television can mitigate the impact of *Crawford* on abused children.

Crawford will undoubtedly confound lawyers and judges for many years to come, all trying to determine whether a particular statement given by an unavailable declarant is "testimonial." The Court refrained from providing a definition of testimonial, and it may never do so. *Crawford*, like the *Lilly* decision that preceded it, is indicative of the Court's one hundred year struggle to identify the proper exceptions to a literal reading of the Confrontation Clause. Unlike the Federal Rules of Evidence, which *Crawford* places beneath the Confrontation Clause, the *Crawford* decision does not provide judges, prosecutors, and defense attorneys with the clear and definite language that they might desire. If *Crawford* provides one single lesson for lawyers and judges, it is that whether a statement receives a testimonial label will depend almost entirely on the circumstances in which the declarant gave it and the listener received it.

Finally, the effect of *Crawford* on criminal prosecutions like that of Jimmy's alleged sexual abuser cannot be understated. Given Jimmy's unavailability, prior to *Crawford* a prosecutor could still take the case to trial via Colorado's child hearsay exception. Post-*Crawford*, all testimonial statements are inadmissible without cross-examination, and the prosecutor may have to drop the charges as a result. While *Crawford* strengthens the Sixth Amendment's right of confrontation, in criminal cases like that against three-year-old Jimmy's perpetrator, it weakens the ability of prosecutors to press forward.

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296. Snowden v. Maryland, 846 A.2d 36, 39 (Md. Ct. Spec. App. 2004), *aff'd*, No. 42, Sept. Term, 2004, 2005 Md. LEXIS 35 (Md. Feb. 7, 2005).

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