

**CRAWFORD V. WASHINGTON: A SMALL ADVANTAGE FOR
CRIMINAL DEFENSE IN CASES WHERE PROSECUTION
SEEKS TO INTRODUCE HEARSAY EVIDENCE**

Jason W. Eldridge[†]

I.	INTRODUCTION.....	1381
II.	CRAWFORD V. WASHINGTON.....	1382
	A. <i>The Facts of Crawford</i>	1382
	B. <i>The Court's Analysis</i>	1384
	C. <i>The Court's Decision</i>	1387
	D. <i>Concurrence</i>	1387
III.	THE INTERSECTION OF CRAWFORD, ROBERTS, AND THE MINNESOTA RULES OF EVIDENCE.....	1388
	A. <i>Excited Utterance</i>	1389
	B. <i>Then Existing Mental, Emotional, or Physical Condition and Statements for Purposes of Medical Diagnosis or Treatment</i>	1390
	C. <i>Former Testimony</i>	1391
	D. <i>Statement Under Belief of Impending Death</i>	1391
IV.	CRAWFORD AND CRIMINAL DEFENSE.....	1392
V.	CONCLUSION.....	1395

I. INTRODUCTION

In March 2004, the United States Supreme Court handed down a decision in the case of *Crawford v. Washington*.¹ With this decision, the Court changed the future of evidence law by restricting the admissibility of hearsay evidence to comply with an earlier, and more conservative, understanding of the Sixth Amendment's Confrontation Clause. In doing so, the Court

[†] Assistant Public Defender. J.D. William Mitchell, 2002; M.A. University of St. Thomas, 1998; B.A. University of Minnesota, 1995. Thank you to Magic Wendy for editing assistance and support.

1. 124 S. Ct. 1354 (2004).

partially overruled *Ohio v. Roberts*.²

This article will examine the *Crawford* holding and its effects on hearsay law in criminal trials in Minnesota. First, it will attempt to explain the *Crawford* holding and the Supreme Court's analysis.³ Next, it will examine *Crawford*'s general effect on the Minnesota Rules of Evidence concerning hearsay.⁴ Then, this article will consider *Crawford*'s effect upon criminal cases and some of the arguments it presents for criminal defense attorneys and prosecutors.⁵ Finally, this article will conclude that the *Crawford* decision is a small boon for criminal defense attorneys.⁶

II. *CRAWFORD V. WASHINGTON*

The issue in *Crawford v. Washington* centered on the statement of a witness to a fight. The witness gave a tape-recorded statement to law enforcement but was subsequently unavailable to testify at trial.⁷

A. *The Facts of Crawford*

In Washington state, the Petitioner, Michael D. Crawford (Crawford), and his wife, Sylvia, went to the apartment of Kenneth Lee (Lee).⁸ Crawford believed that Lee had attempted to rape Sylvia and a fight ensued.⁹ During the fight, Lee was fatally stabbed and Crawford's hand was cut.¹⁰ After the fight, Crawford and Sylvia were individually interviewed by law enforcement and gave tape-recorded statements.¹¹

In his interview with law enforcement, Crawford stated that during the fight he thought Lee had something in his hands.¹² Contrastingly, in Sylvia's interview with law enforcement, she stated that she witnessed the fight and that she did not see anything in Lee's hands.¹³ Indeed, she stated that Lee's arms were open when

2. 448 U.S. 56 (1980).

3. *See infra* Part II.

4. *See infra* Part III.

5. *See infra* Part IV.

6. *See infra* Part V.

7. *Crawford v. Washington*, 124 S. Ct. 1354, 1357–58 (2004).

8. *Id.* at 1357.

9. *Id.*

10. *Id.*

11. *See id.* at 1357–58.

12. *Id.* at 1357. This is how Crawford accounted for the cut on his own hand.

13. *Id.*

he was stabbed in the torso.¹⁴

The State charged Crawford with assault and attempted murder, and he claimed self defense at trial.¹⁵ Sylvia did not testify at trial due to the state's marital privilege.¹⁶ Although Crawford claimed that the admission of Sylvia's taped statement violated his Sixth Amendment right to confront a witness against him, the court nonetheless allowed the taped statement into evidence under the hearsay exception for statements against interest.¹⁷

The law governing the admissibility of Sylvia's statement came from *Ohio v. Roberts*.¹⁸ Under *Roberts*, the hearsay statement of a witness may be used against a criminal defendant if the statement bears "adequate indicia of reliability" by either (1) bearing "particularized guarantees of trustworthiness," or (2) falling within a "firmly rooted hearsay exception."¹⁹ The trial court found that Sylvia's statements bore adequate indicia of reliability.²⁰ The jury found Crawford guilty of assault.²¹

The Washington Court of Appeals applied a nine-factor test and reversed the trial court. The court held that Sylvia's statement did not bear "particularized guarantees of trustworthiness."²² Then, the Washington Supreme Court reinstated the conviction, holding that Sylvia's statement did indeed bear "guarantees of trustworthiness" because it "interlock[ed]" with Crawford's statement.²³ On appeal to the United States Supreme Court, the single issue was "whether the State's use of Sylvia's statement violated the Confrontation Clause."²⁴

14. *Id.*

15. *Id.*

16. *Id.* (referencing WASH. REV. CODE § 5.60.060(1) (1994), which generally bars a spouse from testifying without the other's consent). The same privilege exists in Minnesota. MINN. STAT. § 595.02, subd. 1(a) (2004).

17. *Crawford*, 124 S. Ct. at 1358. (citing WASH. R. EVID. 804(b)(3) (2003)).

18. 448 U.S. 56 (1980).

19. *Id.* at 66.

20. *Crawford*, 124 S. Ct. at 1358 (noting that Sylvia did not attempt to shift blame, corroborated Crawford's version of events, was a direct eyewitness, described recent events, and was questioned by a "neutral" law enforcement officer).

21. *Id.*

22. *Id.* (highlighting that the statement contradicted an earlier statement, was in response to specific questions, and that Sylvia admitted she shut her eyes during the stabbing).

23. *Id.* (citing the similarity of Sylvia's statement to Crawford's).

24. *Id.* at 1359.

B. *The Court's Analysis*

The Sixth Amendment to the United States Constitution states that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .”²⁵ The Supreme Court, in a majority opinion penned by Justice Scalia, began its analysis by noting that the language of the Sixth Amendment allows for two possible interpretations: (1) the term “witnesses” refers only to witnesses who testify at trial; or (2) the term “witnesses” refers more broadly to all “those whose statements are offered at trial.”²⁶ Because the language of the Sixth Amendment alone does not state which meaning was intended, the Court “turn[ed] to the historical background of the Clause to understand its meaning.”²⁷

The Court pointed out that a defendant’s right to confront an accuser dates back to Roman times.²⁸ The right to confrontation was familiar to the Framers of the United States Constitution through the common law, which contained a right to confrontation; however, the common law was unclear as to how the right should be utilized specifically.²⁹ Although the United States Constitution did not originally contain a right of confrontation, that right was added at the First Congress in the Sixth Amendment.³⁰

After illustrating the history of the right to confrontation, the Court declared two guiding principles in its decision.³¹ First, the Court declared that between the two possible readings of the Sixth Amendment, it is the broader reading that was intended by the drafters.³² Specifically, the Court declared that the Confrontation Clause “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’”³³ To arrive at this conclusion, the Court explained,

the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure,

25. U.S. CONST. amend. VI.

26. *Crawford*, 124 S. Ct. at 1359.

27. *Id.*

28. *Id.*

29. *See id.* at 1360–61.

30. *Id.* at 1363. *See generally* NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 355 (1997).

31. *See Crawford*, 124 S. Ct. at 1363.

32. *See id.* at 1364.

33. *Id.*

and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that . . . English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony. . . . Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.³⁴

The next logical question is then what it means to “bear testimony.” The Court “leave[s] for another day any effort to spell out a comprehensive definition of ‘testimonial;’”³⁵ however, the Court did provide examples. “[E]*x parte* testimony at a preliminary hearing” is testimonial.³⁶ “Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.”³⁷ In addition,

[v]arious formulations of this core class of “testimonial” statements exist: “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” Brief for Petitioner 23; “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” *White v. Illinois*, 502 U.S. 346, 365. . . (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); “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,” Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3.³⁸

For the second guiding principle in its decision, the Court once again looked to the past and held that, “[t]he historical

34. *Id.* at 1363–64.

35. *Id.* at 1374.

36. *Id.* at 1364.

37. *Id.*

38. *Id.* (citations as they appear in the opinion).

record . . . supports . . . 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.”³⁹ Finally, with two guiding principles in mind,⁴⁰ the Court turned its attention to *Ohio v. Roberts*⁴¹ and the law under which the Ohio courts based their decisions in that case.

Under *Roberts*, hearsay is admissible if it either (1) falls within a traditional hearsay exception, or (2) possesses “indicia of reliability.”⁴² In *Crawford*, the Supreme Court held that the *Roberts* test is both too narrow and too broad in relation to the historical hearsay principles described above.⁴³ First, the *Roberts* test is too broad because “[i]t applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony,” and it is too narrow because “[i]t admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability.”⁴⁴ The Court held,

[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. . . . The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.⁴⁵

Thus, the rule of *Crawford* is that “[t]estimonial statements of witnesses absent from trial [are to be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”⁴⁶

39. *Id.* at 1365.

40. *See id.* at 1367 (“Our case law has been largely consistent with these two principles.”).

41. 448 U.S. 56 (1980).

42. *Id.* at 66.

43. *Crawford*, 124 S. Ct. at 1369.

44. *Id.*

45. *Id.* at 1370–71.

46. *Id.* at 1369.

C. *The Court's Decision*

Setting aside the *Roberts* “reliability factors,” the Court concluded that Sylvia’s interview by law enforcement was testimonial and Crawford had no opportunity to cross-examine her.⁴⁷ In finding Sylvia’s statement to be testimonial, the Court considered that Sylvia’s statement was made “while in police custody,” Sylvia was a potential suspect, and Sylvia was told that her potential release from custody depended on the results of the investigation.⁴⁸ In addition, Crawford clearly had no opportunity to cross-examine Sylvia nor did he call her as a witness.⁴⁹ Therefore, Crawford’s Sixth Amendment right to confront a witness against him was violated when Sylvia’s statements were allowed into evidence at trial.⁵⁰

D. *Concurrence*

Chief Justice Rehnquist wrote a concurrence in which Justice O’Conner joined.⁵¹ The concurrence’s principal dissatisfaction with the majority opinion is that the Court’s concern with the difference between testimonial and nontestimonial statements does not find sufficient support in history to overrule *Roberts*.⁵² The concurrence believed that the Framers of the Constitution contemplated future exceptions to the hearsay exclusion rule.⁵³ Indeed, “[w]ith respect to unsworn testimonial statements, there is no indication that once the hearsay rule was developed courts ever excluded these statements if they otherwise fell within a firmly rooted exception.”⁵⁴ The purpose of the Confrontation Clause is “to ‘advance the accuracy of the truth-determining process in criminal trials.’”⁵⁵ Some of the recognized hearsay exceptions advance this purpose. For example, the statements of a co-conspirator are made while “the declarant and the accused are

47. *Id.* at 1374.

48. *Id.* at 1372.

49. *Id.* at 1374.

50. *Id.*

51. *Id.* at 1374–78.

52. *Id.* at 1374–75.

53. *Id.* at 1377 (“It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled.”).

54. *Id.* at 1376 (citations omitted).

55. *Id.* at 1377 (quoting *United States v. Inadi*, 475 U.S. 387, 396 (1986)).

partners in an illegal enterprise, [and therefore] the statements are unlikely to be false and their admission” enhances the truth-finding process of a criminal trial.⁵⁶

The concurrence concludes that it would reach the same opinion as the majority without overruling *Roberts*.⁵⁷ The concurrence notes that the Washington Supreme Court relied upon the “interlocking nature” of the statements of Crawford and Sylvia in order to find that Sylvia’s statement bore guarantees of trustworthiness and, thus, was admissible.⁵⁸ The concurrence stated that the Court unnecessarily “change[s] course;” rather, it should have followed *stare decisis* and looked to its earlier opinion, *Idaho v. Wright*, in which it held that “an out-of-court statement was not admissible simply because the truthfulness of that statement was corroborated by other evidence at trial.”⁵⁹ Therefore, “[n]o reweighing of the ‘reliability factors’ . . . is required to reverse the judgment here. A citation to *Idaho v. Wright* . . . would suffice.”⁶⁰

III. THE INTERSECTION OF *CRAWFORD*, *ROBERTS*, AND THE MINNESOTA RULES OF EVIDENCE

“Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”⁶¹ Generally, hearsay is inadmissible; however, case law and the rules of evidence provide exceptions⁶² and exemptions.⁶³ The purpose of excluding hearsay is to ensure that testifying witnesses perceived and clearly remember events about which they testify.⁶⁴ When addressing the admissibility of hearsay, courts must now look to three specific places: (1) the *Crawford* test, (2) the *Roberts* test, and (3) the Rules of Evidence.

Although the *Crawford* decision describes the failings of the

56. *Id.* at 1377.

57. *Id.* at 1378.

58. *Id.*

59. *Id.* (citing *Idaho v. Wright*, 497 U.S. 805, 820–24 (1990)).

60. *Id.*

61. MINN. R. EVID. 801(c); FED. R. EVID. 801(c).

62. MINN. R. EVID. 803; FED. R. EVID. 803.

63. MINN. R. EVID. 801(d)(1) (“Statements which are not hearsay.”); FED. R. EVID. 801(d)(1).

64. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 245 (5th. ed. 2003) (stating that “the rule against hearsay is designed to insure compliance with” perception, memory, narration, and the sincerity of the witness).

Roberts reliability test, *Crawford* did not completely overrule *Roberts*. The following is a list of some hearsay exceptions under the Minnesota Rules of Evidence and an analysis of the effect of *Crawford* on each.

A. *Excited Utterance*⁶⁵

An “excited utterance” (or spontaneous declaration) is made while the declarant is under the “stress of excitement caused by the event or condition.”⁶⁶ “The rationale supporting admission [of an excited utterance] is that the emotional stress suspends the process of reflective thought necessary for conscious fabrication, and that the recentness of the event minimizes the danger of faulty memory.”⁶⁷ The excited utterance exception to the hearsay rule is an area in which the *Crawford* decision may cause confusion.⁶⁸

When addressing an excited utterance, it is not enough that the court decides if a statement was indeed uttered during the “stress of excitement” to determine if it is admissible.⁶⁹ Rather, under *Crawford*, a court must also ask whether the statement was “testimonial.”⁷⁰ However, not only did the *Crawford* Court decline to define “testimonial,” it also cast doubt upon whether “spontaneous declarations” can be labeled categorically as non-testimonial.⁷¹ The Court considered *White v. Illinois* in which a child victim’s statements to an investigating police officer were admitted as spontaneous declarations.⁷² The Court questioned whether such testimonial statements would have been admissible under the original understanding of the Confrontation Clause.⁷³ Although the decision describes the child’s statements as “testimonial,” “the justice’s characterization turns on the specific facts surrounding the making of the proffered statement.”⁷⁴

65. MINN. R. EVID. 803(2).

66. *Id.*

67. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 61 (1978).

68. Neil P. Cohen & Donald F. Paine, *Crawford v. Washington: Confrontation Revolution*, 40 TENN. B.J. 22, 23 (May 2004) (“[T]he excited utterance . . . is illustrative of some disturbing uncertainties created by the Crawford court.”).

69. *See* MINN. R. EVID. 803(2).

70. *Crawford v. Washington*, 124 S. Ct. 1353, 1364 (2004).

71. *Id.* at 1368 n.8.

72. *Id.*

73. *Id.*

74. Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under Crawford v. Washington: Some Good News But . . .*, 28 CHAMPION 16, 16 (Oct. 2004).

Therefore, even excited utterances must be viewed in light of the facts surrounding the making of the statement to determine if the statement at issue was testimonial. As an example, a witness to a stabbing may make a statement to a police officer that is considered testimonial, while the same statement made to another citizen witness may be considered non-testimonial because, inter alia, it is not a statement that a declarant would reasonably believe would be used later at trial.

The Minnesota Court of Appeals considered the facts surrounding the making of a 911 phone call when determining if the caller's statement to the 911 operator was testimonial.⁷⁵ The court held that the caller's statement was not testimonial because she was not making "knowing responses to structured questioning."⁷⁶ This opinion seems to suggest that if 911 operators presented questions to a caller, the caller's responses could be considered testimonial.⁷⁷

*B. Then Existing Mental, Emotional, or Physical Condition and Statements for Purposes of Medical Diagnosis or Treatment*⁷⁸

Declarations of the declarant's present bodily condition and symptoms, including pain and other feelings, are admissible to prove the truth of the declarations as an exception to the hearsay rule. Special reliability is considered to be furnished by the spontaneous quality of the declarations, assured by the requirement that the declarations purport to describe a condition presently existing at the time of the declaration.⁷⁹

As with excited utterances, a court must now address the surrounding circumstances when determining whether a declarant's statement of his or her current physical condition is testimonial or non-testimonial. The surrounding circumstances of

75. State v. Wright, 686 N.W.2d 295, 301 (Minn. Ct. App. 2004).

76. *Id.* at 302.

77. See People v. Cortes, 781 N.Y.S.2d 401, 406-07 (2004) (finding statements to a 911 operator were testimonial because the operator followed a prescribed pattern of questioning the caller); see also Snowden v. Maryland, 846 A.2d 36, 47 (Md. Ct. App. 2004) (finding statements made by children to a licensed social worker to be testimonial because they were interviewed "for the expressed purpose of developing their testimony").

78. MINN. R. EVID. 803(3), (4).

79. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE, § 291 (2d ed. 1972) (citations omitted).

the statement seem particularly relevant for this exception because, while a casual remark about a person's physical condition may not be testimonial, if a victim of a sex crime or an assault goes to a doctor, the victim may be describing injuries with an eye toward catching and punishing the culprit. In the latter situation, the victim's statement could be made with prosecutorial use in mind. This flies in the face of the traditional reasoning for the hearsay exception for statements to medical personnel that, "reliability is assured by the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he provides the physician."⁸⁰ Similarly, some medical personnel may be trained in gathering evidence, in which case their questions to the victim may take on the tone of a police interrogation.⁸¹

C. *Former Testimony*⁸²

The hearsay exception for former testimony requires that the declarant be unavailable and he or she formerly gave "testimony."⁸³ Thus, former testimony does not present a *Crawford* issue.

D. *Statement Under Belief of Impending Death*⁸⁴

The dying declaration exception to the hearsay rule provides for the admission of statements "made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death."⁸⁵ In *Crawford*, the Court specifically addressed dying declarations and stated that they should be examined to determine if the statement given was testimonial or non-testimonial.⁸⁶

80. *Id.* at § 292.

81. *See* Minnesota v. Scacchetti, 690 N.W.2d 393, 395–96 (Minn. Ct. App. 2005). An alleged child victim of sexual abuse was interviewed at a facility that specializes in "diagnosing whether a child has been a victim of abuse." *Id.* at 394. The court found that the victim's statements were not testimonial because the interviewer "was not working on behalf of, or in conjunction with, investigating police officers or other government officials 'for the purpose of developing the case against [the defendant].'" *Id.* at 396.

82. MINN. R. EVID. 804(b)(1).

83. *Id.*

84. *Id.* at 804(b)(2).

85. *Id.*

86. *Crawford v. Washington*, 124 S. Ct. 1353, 1367 n.6 (2004) (stating that

After *Crawford*, when addressing a hearsay statement a court must not only ask whether a statement falls within one of the exceptions under the Rules of Evidence, it must also ask whether the statement passes the three hurdles of *Crawford*: (1) is the statement testimonial; (2) if the statement is testimonial, is the declarant unavailable; and (3) if the statement is testimonial and the declarant is unavailable, did the defendant have a prior opportunity to cross-examine the declarant.⁸⁷

Nonetheless, if a statement is non-testimonial, then a court must look to *Roberts*.⁸⁸ The *Crawford* decision did not clearly or completely overrule *Roberts*, which allows for the admission of hearsay if it falls under a recognized hearsay exception or if it bears indicia of reliability.⁸⁹ In the *Crawford* decision, the Court's disparaging language for *Roberts* may indicate that the Court is looking for an opportunity to clearly overrule it.⁹⁰

IV. CRAWFORD AND CRIMINAL DEFENSE

Arguably, the hearsay admissibility rule of *Roberts* favored the introduction of prosecution hearsay at trial. Under *Roberts*, a prosecutor could introduce "reliable" hearsay and that reliability could be satisfied by either showing that the statement fell within a traditional hearsay exception or by showing particularized guarantees of trustworthiness.⁹¹ "If a prosecutor was acute enough to identify several factors pointing to the reliability of the statement, he or she had a plausible contention that the Confrontation Clause allowed the introduction" of the statement.⁹² After *Crawford*, this minimal showing is no longer enough. "[T]he [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-

"many dying declarations may not be testimonial").

87. *See id.*

88. *Ohio v. Roberts*, 448 U.S. 56 (1980).

89. *Id.* at 66.

90. Imwinkelried, *supra* note 74, at 18–19 ("The majority's harsh criticism of *Robert's* reliability standard makes it even more likely that the Court will eventually relax the standard for admitting nontestimonial hearsay. [The Court] describes [the] standard as 'amorphous, if not entirely subjective' easily susceptible to 'inconsistent application' and 'inherently . . . unpredictable.'").

91. *See generally Roberts*, 448 U.S. 56.

92. Imwinkelried, *supra* note 74, at 17.

examination.”⁹³ In effect, the Court’s decision removes from judges the decision as to whether a statement was made under conditions suggesting reliability. Rather, if a statement is testimonial, the defendant must have had an opportunity to test its reliability before the statement can be admitted.

With *Crawford*, the pendulum has swung in the opposite direction and criminal defense attorneys find themselves in the favored position when arguing to keep out prosecution hearsay. First, the key to admissibility is now whether a statement was “testimonial.” Because a definition of “testimonial” was not provided, defense attorneys are unbounded in their debate of what testimonial is and is not. Indeed, the concurrence recognized this weakness in the majority’s decision:

[t]he Court grandly declares that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.⁹⁴

Second, even traditionally recognized hearsay exceptions are now susceptible to challenge by defense attorneys. For example, in a footnote, the *Crawford* opinion discusses the dying declaration hearsay exception and notes that, “[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are.”⁹⁵ The significance of this statement is that the Court refuses to make a blanket statement that all hearsay falls within the scope of the dying declaration exception.⁹⁶ “[This] refusal suggests that the majority contemplates that in classifying hearsay as ‘testimonial’ or ‘non-testimonial,’ the trial judge should consider the specific circumstances surrounding the making of the statement.”⁹⁷ Thus, even if a hearsay statement falls within a traditional exception, if the declarant is unavailable, there is still an argument to be made concerning whether the

93. *Crawford v. Washington*, 124 S. Ct. 1353, 1370 (2004).

94. *Id.* at 1378 (citations omitted).

95. *Id.* at 1367 n.6.

96. *Imwinkler*, *supra* note 74, at 17–18.

97. *Id.* at 18.

statement was “testimonial” before it can be introduced into evidence.

Third, the Court’s broad language may suggest that hearsay exceptions not recognized under the historical understanding of the hearsay rule should not be recognized by current courts.⁹⁸ For example, the Court stated,

[a]mdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. As the English authorities . . . reveal, the common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. *The Sixth Amendment therefore incorporates those limitations.*⁹⁹

Even though the rule of *Crawford* seems to favor the defense in criminal trials, prosecutors are not left without options. For example, *Crawford* leaves the rule of forfeiture intact,¹⁰⁰ which allows admission of evidence when a defendant has procured a witness’s absence.¹⁰¹ With *Crawford*, the rule of forfeiture may become more frequently used in assault cases and cases of domestic violence. If a prosecutor can show that a witness is absent due to the defendant’s actions, then he or she may be able to admit the absent witness’s hearsay.¹⁰² “In short, prosecutors should be on the lookout for evidence that supports the argument that a defendant has forfeited his right to confrontation by his own wrongdoing.”¹⁰³ Another key for prosecutors is that when a victim testifies on behalf of a defendant, *Crawford* does not apply because when a victim

98. *Id.* (“[T]he defense can argue that the *Crawford* majority relies so heavily on the original historical understanding of the hearsay rule that the Confrontation Clause precludes the recognition of radically new hearsay exceptions.”).

99. *Crawford*, 124 S. Ct. at 1365–66 (citations omitted) (emphasis added). See Imwinkelried, *supra* note 74, at 18.

100. Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases*, 38 PROSECUTOR 14, 15 (Dec. 2004).

101. MINN. R. EVID. 804(a) (stating that a declarant is not “unavailable” if the declarant’s absence is due to the “procurement of wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying”).

102. See *State v. Fields*, 679 N.W.2d 341, 346 (Minn. 2004) (admitting the grand jury testimony of an unavailable declarant because the defendant procured the declarant’s absence).

103. Krischer, *supra* note 100, at 15.

testifies, the victim is not “unavailable.”¹⁰⁴ Finally, because the *Crawford* Court declined to define testimonial, like defense attorneys, prosecutors are free to argue the definition of “testimonial.”

V. CONCLUSION

Crawford v. Washington restricted the admissibility of testimonial hearsay evidence. Not only does the decision partially overrule *Ohio v. Roberts*, the Court’s disparaging language of the *Roberts* reliability test may suggest that *Roberts* will be completely overruled soon.

Although *Crawford* appears to favor the defense in criminal trials, the rule more accurately reflects what the Court believes the Framers intended for the Confrontation Clause to the Sixth Amendment. Because the decision does not clearly define “testimonial,” it is likely that this is where new courtroom arguments concerning *Crawford* are likely to be.

104. *Id.* at 16.