

*Crawford v. Washington,*  
the Confrontation Clause, and Hearsay:  
A New Paradigm for Illinois Evidence Law

*Ralph Ruebner\* & Timothy Scahill\*\**

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\* Professor of Law, The John Marshall Law School.

\*\* Juris Doctor Candidate 2005, The John Marshall Law School.

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## I. INTRODUCTION

In March of 2004, the United States Supreme Court decision in *Crawford v. Washington*<sup>1</sup> revolutionized Confrontation Clause jurisprudence. For nearly a quarter century, *Ohio v. Roberts*<sup>2</sup> had provided the constitutional standards for the admissibility of evidence that had met the several states' tests for the admissibility of evidence over hearsay objections. The essence of the *Roberts* rule was that the Confrontation Clause of the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted,"<sup>3</sup> does not bar the admissibility of an unavailable declarant's out-of-court statement if the statement bears "adequate indicia of reliability."<sup>4</sup> This standard can be satisfied in one of two ways: (1) if the statement falls within a "firmly rooted hearsay exception"<sup>5</sup> or (2) if the statement bears "particularized guarantees of trustworthiness."<sup>6</sup>

With respect to the "firmly rooted hearsay exception" standard, the idea is that "hearsay rules and the Confrontation Clause are generally designed to protect similar values."<sup>7</sup> In other words, traditional hearsay exceptions rest upon such solid foundations of reliability that the admissibility of statements that fall into one of these exceptions was thought to comport with the "substance of the constitutional protection"<sup>8</sup> of the Confrontation Clause. Most, if not all, of the traditional common law hearsay exceptions fall within the description "firmly rooted."<sup>9</sup>

The second *Roberts* standard allowed for the substantive use of the uncross-examined statement of an unavailable declarant against a criminal defendant if the statement bears "particularized guarantees of

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1. *Crawford v. Washington*, 124 S. Ct. 1354 (2004).
2. *Ohio v. Roberts*, 448 U.S. 56 (1980).
3. U.S. CONST. amend. VI.
4. *Roberts*, 448 U.S. at 66 (internal quotations omitted).
5. *Id.*
6. *Id.*
7. *California v. Green*, 399 U.S. 149, 155 (1970).
8. *Mattox v. United States*, 156 U.S. 237, 244 (1895).
9. *Id.*

trustworthiness.”<sup>10</sup> The opinion of the Washington State Court of Appeals in the *Crawford* case<sup>11</sup> illustrates the process that courts used to determine whether the *Roberts* standard was satisfied. The Washington State Court of Appeals in *Crawford* applied a nine-factor test to determine whether a statement of an unavailable declarant that is against his or her penal interest bore “particularized guarantees of trustworthiness.”<sup>12</sup> This test and similar tests required a weighing of some very subjective factors to determine whether a statement was sufficiently reliable to admit as substantive evidence despite the defendant’s inability to cross-examine the declarant. In sum, the *Roberts* decision represented a determination by the United States Supreme Court that reliability and trustworthiness of the out-of-court statement of an unavailable declarant were the touchstones of the Confrontation Clause of the Sixth Amendment.<sup>13</sup>

The *Roberts* test appeared to be settled law until March of 2004 when the United States Supreme Court, in a unanimous decision in *Crawford*,<sup>14</sup> altered our understanding of the relationship between hearsay rules in criminal trials and the Confrontation Clause of the Sixth Amendment. Consequently, the Illinois courts and legislature must take a hard look at Illinois common law and statutory hearsay rules to determine whether they can withstand the new constitutional scrutiny of *Crawford*. Clearly, any Illinois statute or common law hearsay rule that conditions the admissibility of a testimonial statement in a criminal trial under a hearsay exception on a finding by the trial judge that the out-of-court statement is trustworthy is constitutionally flawed.<sup>15</sup> Equally at

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10. *Roberts*, 448 U.S. at 66.

11. *State v. Crawford*, No. 25307-1-II, 2001 Wash. App. LEXIS 1723 (Wash. Ct. App. July 30, 2001).

12. *Id.* at \*12. The factors included: (1) whether the declarant had an apparent motive to lie; (2) whether the declarant’s general character suggested trustworthiness; (3) whether more than one person heard the statement; (4) whether the declarant made the statement spontaneously; (5) whether the timing of the statement and the relationship between the declarant and the witness suggested trustworthiness; (6) whether the statement contained express assertions of past fact; (7) whether cross-examination could help to expose the declarant’s lack of knowledge; (8) the possibility that the declarant’s recollection was faulty because the event was remote; and (9) whether the circumstances surrounding the statement suggested that the declarant misrepresented the defendant’s involvement. *Id.* at \*13–16.

13. *See Roberts*, 448 U.S. at 65–66 (noting that the Confrontation Clause “countenances only hearsay marked with such trustworthiness that there is no material departure from the reason of the general rule”; and that even though a “witness [is] unavailable his prior testimony must bear some of these indicia of reliability” (internal quotations and citations omitted)).

14. *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

15. *See id.* at 1370 (noting that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection not the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability,’” and finding that “[a]dmitting

risk is the admissibility of a testimonial statement conditioned on a finding that it falls within a firmly rooted hearsay exception.<sup>16</sup> Especially at risk are the following Illinois hearsay exceptions: (1) statements of a child or retarded person in prosecutions for a physical or sexual act,<sup>17</sup> (2) statements of a person who refuses to testify despite a court order,<sup>18</sup> and (3) statements of a now-deceased person.<sup>19</sup>

Other statutory or common law hearsay exceptions that allow the admissibility of testimonial statements without affording the accused a prior or present opportunity to cross-examine the declarant are also constitutionally flawed. Examples include statements by victims of sex offenses made to medical personnel for treatment<sup>20</sup> and laboratory reports.<sup>21</sup>

In this Article, we examine each hearsay exception, common law and statutory, and provide a constitutional evaluation under the *Crawford* model. We will first discuss the *Crawford* case itself and some of the problematic nuances of the rule announced by the Supreme Court.<sup>22</sup> We will then discuss a number of Illinois cases that have interpreted the rules set forth in *Crawford*.<sup>23</sup> Finally, we will provide an analysis of *Crawford*'s potential effect on Illinois statutory and common law hearsay rules.<sup>24</sup>

## II. *CRAWFORD V. WASHINGTON*:<sup>25</sup> THE NEW RULE

The United States Supreme Court in its *Crawford* decision has

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statements deemed reliable by a judge is fundamentally at odds with the right of confrontation”).

16. See *id.* at 1369 (stating that the rationale of the *Roberts* test, which allows hearsay evidence if it falls under a “firmly rooted hearsay exception,” departs from the Framers’ understanding and is both broad and too narrow).

17. See 725 ILL. COMP. STAT. 5/115-10(a) (2002) (providing the hearsay exception for statements of a child or retarded person in prosecutions for a physical or sexual act perpetrated on the child or retarded person).

18. See 725 ILL. COMP. STAT. 5/115-10.2 (2002) (providing the hearsay exception for prior statements made by a non-testifying declarant when the declarant refuses to testify despite a court order to do so).

19. See 725 ILL. COMP. STAT. 5/115-10.4 (2002) (providing the hearsay exception for prior statements of a declarant when the declarant is deceased).

20. See 725 ILL. COMP. STAT. 5/115-13 (2002) (providing the hearsay exception for statements by victims of sex offenses made to medical personnel for diagnosis or treatment purposes).

21. See 725 ILL. COMP. STAT. 5/115-15 (2002) (providing the hearsay exception for laboratory reports).

22. See *infra* Part II (discussing *Crawford* and the Supreme Court’s analysis).

23. See *infra* Part III.A (evaluating Illinois cases interpreting *Crawford*).

24. See *infra* Parts III.B–C (examining the effect of *Crawford* on Illinois’ various hearsay rules).

25. *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

provided new guidance for complying with the Confrontation Clause of the United States Constitution.<sup>26</sup> However, the standards espoused do not answer every question, but leave some questions open for interpretation, such as when a statement qualifies as testimonial,<sup>27</sup> what constitutes an opportunity for cross-examination,<sup>28</sup> and whether the new rules should apply to cases retroactively.<sup>29</sup>

#### A. *The Facts*

On August 5, 1999, Kenneth Lee was stabbed in his own apartment.<sup>30</sup> Michael Crawford was arrested later that night.<sup>31</sup> Crawford's wife, Sylvia, was taken into custody as well.<sup>32</sup> After waiving his *Miranda* rights, Crawford confessed that he and Sylvia had gone in search of Lee because Crawford was upset over an earlier incident in which Lee had allegedly tried to rape Sylvia.<sup>33</sup> Crawford and Sylvia found Lee at his apartment and a violent physical altercation ensued.<sup>34</sup> Lee was stabbed in the torso and Crawford's hand was cut.<sup>35</sup>

Crawford was charged with assault and attempted murder.<sup>36</sup> At trial, Crawford advanced a self-defense theory.<sup>37</sup> The viability of this defense seemed to rest upon whether Crawford believed that Lee was armed at the time of the altercation.<sup>38</sup> The stories advanced by Crawford and his wife to the police seemed to differ somewhat with respect to what had actually occurred during the fight.<sup>39</sup> Crawford told the police that he thought he saw something in Lee's hands right before the fight started.<sup>40</sup>

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26. See *infra* Part II.C (explaining the Court's rationale in *Crawford*).

27. See *infra* Part II.D.1 (exploring the conditions for a testimonial statement).

28. See *infra* Part II.D.2 (discussing what constitutes an opportunity for cross-examination).

29. See *infra* Part II.D.4 (analyzing retroactive application of the *Crawford* decision).

30. *Crawford*, 124 S. Ct. at 1357.

31. *Id.*

32. *Id.*

33. *Id.* It is not clear exactly where Justice Scalia obtained support for his assertion that Lee had allegedly tried to rape Sylvia. Both the Washington State Court of Appeals and the Supreme Court of the State of Washington simply note that Lee was allegedly making "sexual advances" toward Sylvia. *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002); *State v. Crawford*, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, at \*2 (Wash. Ct. App. July 30, 2001).

34. *Crawford*, 124 S. Ct. at 1357.

35. *Id.*

36. *Id.*

37. *Id.*

38. See *id.* (reproducing Crawford's account of the fight).

39. See *id.* ("Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account was arguably different . . .").

40. *Id.*

He said that Lee was “fiddlin’ around”<sup>41</sup> in his pocket and said that he thought that Lee pulled something out. Crawford added that he thought that he grabbed for this object at that time, resulting in his cut hand.<sup>42</sup> In essence, Crawford asserted that Lee might have had something in his hand when he stabbed Lee.<sup>43</sup>

But Sylvia gave an arguably different account to the police of what transpired in the fight.<sup>44</sup> She generally corroborated Crawford’s story of how Crawford and she arrived at Lee’s apartment.<sup>45</sup> In fact, Sylvia corroborated Crawford’s story that Lee reached into his pocket before Crawford stabbed Lee.<sup>46</sup> However, in Sylvia’s tape-recorded statement to the police, she said that Lee did not have anything in his hands after Crawford stabbed Lee.<sup>47</sup> The prosecution heavily relied on this fact at trial.<sup>48</sup>

### *B. The Lower Courts’ Inconsistent Application of Roberts*

At trial, Sylvia did not testify because Crawford objected to her testimony claiming that Washington State’s marital-privilege statute<sup>49</sup> barred a spouse from testifying adversely without the other spouse’s consent.<sup>50</sup> However, Washington’s marital-privilege statute did not bar the admissibility of her out-of-court statement.<sup>51</sup> The prosecution maintained that Sylvia’s out-of-court statement was admissible under a hearsay exception and sought to introduce Sylvia’s tape-recorded statement.<sup>52</sup> The State invoked the hearsay exception for statements against penal interest under the theory that Sylvia had led Crawford to

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41. *Id.*

42. *Id.*

43. *See id.* (detailing Lee’s account of events just prior to the fight with Crawford).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1358 (noting that the prosecution played the tape of Sylvia’s interrogation for the jury and argued that it was “damning evidence”).

49. WASH. REV. CODE § 5.60.060(1) (1994).

50. *Crawford*, 124 S. Ct. at 1357.

51. In Washington, the marital privilege does not extend to a spouse’s out-of-court statements admissible under a hearsay exception. *Id.* at 1358 (citing *State v. Burden*, 841 P.2d 758, 761 (Wash. 1992)).

52. *Id.* at 1358. Washington had argued that Crawford waived his confrontation rights by making his wife unavailable through his exercise of the Washington State marital privilege statute to bar Sylvia from testifying. The Supreme Court of the State of Washington ultimately rejected this argument. Crawford would not be forced “to waive one right to preserve another.” *State v. Crawford*, 54 P.3d 656, 660 (Wash. 2002) (citing *State v. Michielli*, 937 P.2d 587 (Wash. 1997)).

Lee's apartment and facilitated the assault.<sup>53</sup>

Applying *Roberts*, the trial court admitted Sylvia's statement, finding that it bore "particularized guarantees of trustworthiness"<sup>54</sup> over Crawford's objection that to allow Sylvia's statement would violate the Confrontation Clause.<sup>55</sup> The trial court reasoned that Sylvia had corroborated Crawford's story; that she had direct knowledge of the events as an eyewitness; that she described recent events; and that a "neutral" law enforcement officer had questioned her.<sup>56</sup> A jury convicted Crawford of assault.<sup>57</sup>

The Washington State Court of Appeals reversed Crawford's conviction.<sup>58</sup> The Court of Appeals also applied the "particularized guarantees of trustworthiness" standard of *Roberts*, but reached an opposite conclusion on the admissibility question. The Court of Appeals applied a nine-factor test and concluded that Sylvia's statement did not bear "particularized guarantees of trustworthiness."<sup>59</sup> The Court of Appeals noted that Sylvia had admitted to shutting her eyes during the assault,<sup>60</sup> and that her statement was made in response to direct questions by the police rather than as a narrative.<sup>61</sup> The Court of Appeals rejected the State's argument that Sylvia's statement was reliable because Sylvia's and Crawford's statements had "interlocked."<sup>62</sup>

The Supreme Court of the State of Washington reversed the Court of Appeals.<sup>63</sup> Also applying *Roberts*, the Washington Supreme Court concluded that Sylvia's statement bore "particularized guarantees of

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53. *Crawford*, 124 S. Ct. at 1358.

54. According to the Supreme Court of the State of Washington, the hearsay exception for a statement against interest is not a firmly rooted exception to the hearsay rule. *State v. Crawford*, 54 P.3d at 662.

55. *See State v. Crawford*, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, at \*5-6 (Wash. Ct. App. July 30, 2001) (noting that the corroborating circumstances requirement of the hearsay exception satisfied the Confrontation Clause).

56. *Crawford*, 124 S. Ct. at 1358.

57. *Id.*

58. *State v. Crawford*, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, at \*21.

59. *Id.* at \*13-16. *See supra* note 12 (outlining the *Roberts* test and the nine factors utilized by the court).

60. *State v. Crawford*, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, at \*15.

61. *Id.* at \*13-14.

62. *Id.* at \*17-19. When a co-defendant's confession is virtually identical to that of a defendant, it may be deemed reliable as an "interlocking" confession. *Id.* at \*17. The Court of Appeals rejected the State's argument that Sylvia and Crawford's statements interlocked because the statements differed as to whether Lee had something in his hand when Crawford stabbed him. *Id.* at \*18-19.

63. *State v. Crawford*, 54 P.3d 656, 664 (Wash. 2002).

trustworthiness” because Sylvia’s and Crawford’s statements “interlocked” to a substantial degree.<sup>64</sup> Consequently, the court reinstated Crawford’s conviction.<sup>65</sup>

The United States Supreme Court granted Crawford’s petition for a writ of certiorari to determine whether the use of Sylvia’s statement violated the Confrontation Clause of the Sixth Amendment.<sup>66</sup> Since the *Roberts* test appeared to have been faithfully applied by the lower courts, Crawford argued that the Supreme Court should reconsider the *Roberts* test as a departure from the original meaning and intent of the Confrontation Clause.<sup>67</sup> In an opinion written by Justice Scalia, the United States Supreme Court obliged, reversing Crawford’s conviction.<sup>68</sup>

### C. The Supreme Court’s Response

Because Crawford’s position hinged on arguing that existing law had departed from the historical meaning and guarantees of the Confrontation Clause of the Sixth Amendment, Justice Scalia, writing for the majority, engaged in a lengthy historical analysis of the Confrontation Clause. Justice Scalia reached two conclusions with respect to the historical meaning of the Confrontation Clause: (1) “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure,”<sup>69</sup> particularly the use of ex parte examinations by government officials of witnesses used against criminal defendants; and (2) “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.”<sup>70</sup> Consistent with these two conclusions, Justice Scalia asserted that the *Roberts* rule was deficient in a number of ways.

#### 1. *Ohio v. Roberts* Was Not Faithful To the Historical Conception of the Confrontation Clause

The *Crawford* Court maintained that the Confrontation Clause procedurally guarantees an individual the right to confront witnesses against him or her using the specific and constitutionally-mandated tool

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64. *Id.*

65. *Id.*

66. *Crawford v. Washington*, 539 U.S. 914 (2003) (granting certiorari).

67. *Crawford v. Washington*, 124 S. Ct. 1354, 1359 (2004).

68. *Id.* at 1374.

69. *Id.* at 1363.

70. *Id.* at 1365.

of cross-examination to assess reliability.<sup>71</sup> Judicial determinations of reliability, such as *Roberts* had allowed, are a “foreign”<sup>72</sup> method of assessing reliability with respect to the constitutionally-prescribed method set forth in the Confrontation Clause.<sup>73</sup> In other words, the Confrontation Clause not only guarantees reliability but also guarantees how reliability should be assessed.<sup>74</sup> To this end, only the testing of testimonial evidence in the “crucible of cross-examination” would have satisfied the Framers.<sup>75</sup>

Consequently, the historical problem with the *Roberts* standard is that, in theory, it allowed evidence that the Confrontation Clause historically meant to exclude based solely on a judicial determination of reliability.<sup>76</sup> One example of this deficiency cited by the Supreme Court is the “routine[]”<sup>77</sup> admissibility of grand jury testimony despite the fact that the accused had not cross-examined the witness.<sup>78</sup> Another historical inconsistency cited by Justice Scalia is the “routine” admissibility of accomplice confessions that implicate the accused despite the warning in *Lilly v. Virginia*<sup>79</sup> that these were “highly unlikely”<sup>80</sup> to survive the *Roberts* reliability analysis.<sup>81</sup> He also cited

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71. *Id.* at 1370.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1371.

77. *Id.*

78. *See* United States v. Thomas, No. 01-4168, No. 01-4169, 2002 U.S. App. LEXIS 4455, at \*4 (4th Cir. Mar. 19, 2002) (per curiam) (affirming trial court’s admission of grand jury testimony of an unavailable witness thereby rejecting defendant’s Confrontation Clause argument); United States v. Papajohn, 212 F.3d 1112, 1118–20 (8th Cir. 2000) (affirming trial court’s denial of a motion for a new trial where incriminating grand jury testimony of defendant’s stepson was admitted at trial over defendant’s objections and stepson later recanted his incriminating testimony).

79. *Lilly v. Virginia*, 527 U.S. 116 (1999).

80. *Id.* at 137 (“It is highly unlikely that the presumptive unreliability that attaches to accomplices’ confessions that shift or spread blame can be effectively rebutted . . . when the government’s involved in the statements’ production, and when the statements describe past events and have not been subjected to adversarial testing.”).

81. *Crawford*, 124 S. Ct. at 1371. Justice Scalia cited a litany of cases that illustrate how lower courts “routinely” admit such evidence under *Roberts*. *Id.* (citing United States v. Photogrammetric Data Servs., 259 F.3d 229, 245–46 (4th Cir. 2001); *People v. Farrell*, 34 P.3d 401, 406–08 (Colo. 2001); *Stevens v. People*, 29 P.3d 305, 314–18 (Colo. 2001); *Taylor v. Commonwealth*, 63 S.W.3d 151, 166–68 (Ky. 2001); *People v. Schutte*, 613 N.W.2d 370, 376–77 (Mich. Ct. App. 2000); *People v. Lawrence*, 55 P.3d 155, 160–61 (Colo. Ct. App. 2001); *People v. Thomas*, 730 N.E.2d 618, 625–26 (Ill. App. Ct. 4th Dist. 2000); *State v. Hawkins*, No. 2001-P-0060, 2002 Ohio App. LEXIS 7208, at \*6 (Ohio Ct. App. Dec. 31, 2002); *State v. Marshall*, 737 N.E.2d 1005, 1009 (Ohio Ct. App. 2000); *State v. Jones*, 15 P.3d 616, 623–25 (Or. Ct. App. 2000); *State v. Bintz*, 650 N.W.2d 913, 916–18 (Wis. Ct. App. 2002)). Justice Scalia also noted

cases showing that plea allocutions<sup>82</sup> and prior trial testimony<sup>83</sup> have been admitted despite the lack of opportunity for cross-examination.<sup>84</sup> These statements would all likely be considered testimonial and excluded by the new rule that the Court announced.<sup>85</sup>

## 2. The *Roberts* Standard Is Inherently Unpredictable

The Court also found deficiency in the *Roberts* standard because of its inherently subjective and inconsistent nature.<sup>86</sup> Reliability, according to the Court, is an “amorphous, if not entirely subjective, concept.”<sup>87</sup> To support this contention, Justice Scalia cited a litany of cases that utilized similar factors in assessing reliability but applied them in opposite ways and reached opposite conclusions.<sup>88</sup> The Court indicated its distress that some courts have concluded that uncross-examined testimonial statements are reliable by using factors that make the statements testimonial.<sup>89</sup> Examples would be statements made to the police while

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that a recent study found that appellate courts admitted accomplice statements made to the authorities into evidence more than one-third of the time. *Id.* at 1372.

82. *See* *United States v. Aguilar*, 295 F.3d 1018, 1021–23 (9th Cir. 2002); *United States v. Centracchio*, 265 F.3d 518, 527–30 (7th Cir. 2001); *United States v. Dolah*, 245 F.3d 98, 104–05 (2d Cir. 2001); *United States v. Petrillo*, 237 F.3d 119, 122–23 (2d Cir. 2000); *United States v. Moskowitz*, 215 F.3d 265, 268–69 (2d Cir. 2000); *United States v. Gallego*, 191 F.3d 156, 166–68 (2d Cir. 1999).

83. *State v. McNeill*, 537 S.E.2d 518, 523–24 (N.C. Ct. App. 2000); *Bintz*, 650 N.W.2d at 918–20.

84. *Crawford*, 124 S. Ct. at 1372.

85. *See, e.g.*, *United States v. McClain*, 377 F.3d 219, 220 (2d Cir. 2004) (holding that guilty plea allocutions violated the Confrontation Clause because they were testimonial and because defendants did not have a prior opportunity to cross-examine the declarants).

86. *Crawford*, 124 S. Ct. at 1371.

87. *Id.*

88. *Id.* The Court explains:

For example, the Colorado Supreme Court held a statement more reliable because its inculcation of the defendant was “detailed” [*People v. Farrell*, 34 P.3d 401, 407 (Colo. 2001)], while the Fourth Circuit found a statement more reliable because the portion implicating another was “fleeting” [*United States v. Photogrammetric Data Servs.*, 259 F.3d 229, 245–46 (4th Cir. 2001)]. The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest) [*Nowlin v. Commonwealth*, 579 S.E.2d 367, 371–72 (Va. Ct. App. 2003)], while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect [*Bintz*, 650 N.W.2d at 918]. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given “immediately after” the events at issue [*Farrell*, 34 P.3d at 407], while that same court, in another case, found a statement more reliable because two years had elapsed [*Stevens v. People*, 29 P.3d 305, 316 (Colo. 2001)].

*Id.*

89. *Id.* at 1372.

in police custody<sup>90</sup> or statements given under oath.<sup>91</sup>

By way of analogy, the Court sought to elucidate the inherent subjectivity of the *Roberts* standard through the facts of *Crawford* itself. As noted above, the trial court and the Supreme Court of the State of Washington in *Crawford* found that the statement at issue bore “particularized guarantees of trustworthiness” to satisfy *Roberts*, while the Washington State Court of Appeals found otherwise.<sup>92</sup> Justice Scalia discussed the inconsistent application of reliability standards to the same set of facts and concluded that *Crawford* is “one of those rare cases in which the result below is so improbable that it reveals a fundamental failure [of the United States Supreme Court] to interpret the Constitution in a way that secures its intended constraint on judicial discretion.”<sup>93</sup>

#### D. *The New Rule and Its Problematic Nuances*

At first glance, the new rule announced in *Crawford* appears rather straightforward and rigid; testimonial statements of a declarant are not admissible against the accused unless: (1) the prosecution calls the declarant as a witness, thus giving the accused a present opportunity for cross-examination;<sup>94</sup> (2) the declarant is now unavailable, and the accused had a prior opportunity to cross-examine him or her;<sup>95</sup> or (3) the accused has wrongfully procured the declarant’s unavailability.<sup>96</sup> While the rule can be set forth in one sentence, it contains a number of important nuances that courts, in Illinois and elsewhere, will need to address when applying the new rule. Specifically, the following questions will eventually require attention: (1) What is a testimonial statement?;<sup>97</sup> (2) What is a sufficient opportunity for cross-examination under the *Crawford* rule?;<sup>98</sup> (3) What aspects of Confrontation Clause jurisprudence remain unaffected by the *Crawford* rule?;<sup>99</sup> and (4)

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90. *Nowlin*, 579 S.E.2d at 371–72 (finding reliable a statement made to police while in custody on pending charges).

91. *United States v. Papajohn*, 212 F.3d 1112, 1120 (8th Cir. 2000) (upholding reliability of grand jury testimony); *United States v. Gallego*, 191 F.3d 156, 168 (2d Cir. 1999) (asserting reliability of a plea allocution).

92. *See supra* Part II.B (discussing the procedural history of *Crawford*).

93. *Crawford*, 124 S. Ct. at 1373.

94. *Id.* at 1369 n.9.

95. *Id.* at 1365.

96. *Id.* at 1370 (stating that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims”).

97. *See infra* Part II.D.1 (discussing the testimonial statement requirement).

98. *See infra* Part II.D.2 (examining what qualifies as an opportunity for cross-examination).

99. *See infra* Part II.D.3 (exploring those aspects of hearsay law that remain unchanged by

Should *Crawford* be applied retroactively?<sup>100</sup>

### 1. What Is a “Testimonial Statement”?

Whether a particular statement qualifies as testimonial is the linchpin of the Court’s decision. If a statement is deemed “non-testimonial,” the rule of *Crawford* cannot be applied to exclude the statement.<sup>101</sup> Consistent with this expression, lower courts that engage in *Crawford* review continue to apply ordinary hearsay analysis, including *Roberts*, when a particular statement is deemed “non-testimonial.”<sup>102</sup>

However, beyond a few “formulations” of what may constitute a testimonial statement, the Court left “for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>103</sup> Those tests identified by the Court may not embody the exclusive “formulations” of what is testimonial. In the Court’s words, they simply “share a common nucleus and then define the [Confrontation] Clause’s coverage at various levels of abstraction around it.”<sup>104</sup> The Court’s analysis, however, does provide some clues about how future courts may find whether a given statement is testimonial for *Crawford* purposes.

#### a. Clearly Testimonial Statements

“At minimum,” the following statements are testimonial, as they are “the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed”: prior testimony at a preliminary hearing, prior testimony before a grand jury, prior testimony at a former trial, and police interrogations.<sup>105</sup>

The testimonial nature of prior testimony is generally self-evident, and even somewhat tautological. However, whether a particular statement given to the police qualifies as testimonial is less clear. The

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*Crawford*).

100. See *infra* Part II.D.4 (evaluating whether *Crawford* should apply retroactively).

101. *Crawford*, 124 S. Ct. at 1374 (“Where non-testimonial 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.”).

102. See, e.g., *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (applying *Roberts* after holding that a casual remark to an acquaintance was not testimonial); *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (applying the residual or “catch-all” exception to the hearsay rule after holding that the underlying statement was not testimonial); see *State v. Rivera*, 844 A.2d 191, 201–02 (Conn. 2004) (applying *Roberts* after concluding that a statement against penal interest to a friend was not testimonial).

103. *Crawford*, 124 S. Ct. at 1374.

104. *Id.* at 1364.

105. *Id.* at 1374.

*Crawford* Court does clearly provide that statements produced during a police interrogation are testimonial in nature.<sup>106</sup> Moreover, under the Confrontation Clause analysis, the Fifth Amendment's custody limitation does not apply.<sup>107</sup> Statements "knowingly given in response to structured police questioning, qualif[y] under any conceivable definition."<sup>108</sup> Implicitly, not every conversation with the police will qualify as a testimonial statement.

Some of the cases decided subsequent to *Crawford* have encountered this uncertainty and have held that some conversations with the police are "non-testimonial."<sup>109</sup> Whether a statement given to the police is testimonial or non-testimonial requires a fact-intensive judicial inquiry. Some factors that courts have used in deciding this question include: (1) whether the police initiated the encounter;<sup>110</sup> (2) whether the statement was made in response to "structured police questioning";<sup>111</sup> (3) whether the statement was brief or informal;<sup>112</sup> (4) whether the statement was made in a formal setting or informally at the scene of a crime;<sup>113</sup> and (5)

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106. *Id.*

107. *Id.* at 1365 n.4 (citing *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980)). Under the Fifth Amendment's custody limitation, "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Innis*, 446 U.S. at 300–01. "[T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301.

108. *Crawford*, 124 S. Ct. at 1365 n.4.

109. *See, e.g.*, *Leavitt v. Arave*, 371 F.3d 663, 683 n.22 (9th Cir. 2004) (holding that statements of an eventual murder victim to police officer responding to victim's 911 call was not testimonial because victim was not being interrogated by the police and only sought help in "ending a frightening intrusion into her home"); *State v. Barnes*, 854 A.2d 208, 211 (Me. 2004) (holding that a statement by an eventual murder victim to the police was not testimonial despite the fact that the declarant went to the police station and reported that her son assaulted and threatened to kill her); *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (holding that police officer's "informal" questioning of citizens near the scene of a crime is not testimonial); *People v. Bryant*, No. 247039, 2004 Mich. App. LEXIS 2244, \*4 (Mich. Ct. App. Aug. 24, 2004) (holding statement of a mortally wounded shooting victim in response to police asking "what happened?" not testimonial); *People v. Newland*, 775 N.Y.S.2d 308, 309 (N.Y. App. Div. 2004) (noting that a brief informal remark by a citizen to an officer conducting a field investigation is not testimonial); *State v. Forest*, 596 S.E.2d 22, 24 (N.C. Ct. App. 2004) (holding that statements of a hostage immediately after being freed from her captor to the police were "non-testimonial," although the police did ask some questions after the hostage started talking). *But see* *Moody v. State*, 594 S.E.2d 350 (Ga. 2004) (holding that a statement made in response to a police officer's field interview was testimonial).

110. *Leavitt*, 371 F.3d at 683 n.22; *Barnes*, 854 A.2d at 211; *Forest*, 596 S.E.2d at 27.

111. *Newland*, 775 N.Y.S.2d at 331 (quoting *Crawford*, 124 S. Ct. at 1365 n.4).

112. *Id.*

113. *Hammon*, 809 N.E.2d at 952. The *Hammon* court held a statement made in the field was non-testimonial despite the fact that it was made in response to a direct police question. *Id.*

whether the declarant was simply seeking “safety and aid.”<sup>114</sup> In any event, there clearly remains a significant amount of ambiguity in this standard that courts must eventually face. Questions may include whether informal police field interviews can be testimonial police interrogations, whether 911 calls are police interrogations,<sup>115</sup> and whether statements made to prosecutors or social workers constitute police interrogations under certain circumstances.

*b. Testimonial Statements are Not Limited to In-Court Testimony*

A strict and literal reading of the Confrontation Clause would support the argument that the accused’s right to confront “witnesses” means only those witnesses who actually testify at trial.<sup>116</sup> The Supreme Court, however, rejected this overly restrictive reading of the Constitution.<sup>117</sup> The Court’s interpretation of “witness” avoids a narrow construction of the Confrontation Clause and instead opts for a more inclusive conception of “witnesses” as those individuals who “bear testimony.”<sup>118</sup> Testimony, in turn, is defined as a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>119</sup> Justice Scalia did not attempt to fix the outer parameters of testimony, but he did provide an illustration of the concept: “[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.”<sup>120</sup> This illustration suggests that a certain degree of formality or government involvement is required for a statement to be deemed testimonial.<sup>121</sup> Using this formulation, some courts have enlarged the

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114. *Barnes*, 854 A.2d at 211.

115. See *infra* Part III.C.9 (discussing 911 calls in the context of the Illinois common law hearsay exception for excited utterances or spontaneous statements).

116. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

117. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004).

118. *Id.*

119. *Id.*

120. *Id.* (emphasis added).

121. “[A]ny statement made ‘casually’ rather than for the purposes of ‘going on the record’ with a government agent or agency” is clearly not testimonial. CLIFFORD S. FISHMAN, *A STUDENT’S GUIDE TO HEARSAY* 3 (2d ed. 1999 & Supp. 2004). Professor Fishman asserts that this excludes all statements admitted under Federal Rules of Evidence 801(d)(2)(B)–(D), 803(1), 803(4), and 804(b)(3) unless they are made to a police officer or other government official. *Id.* See, e.g., *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004) (holding that defendant’s confession to his mother before she had any contact with law enforcement were “casual remarks to an acquaintance” and, thus, not testimonial); *United States v. Mikos*, No. 02 CR 137-1, 2004 U.S. Dist. LEXIS 13650, \*18 (N.D. Ill. July 16, 2004) (holding that declarant’s statements to friends were not testimonial solely because there was no government involvement in making the statements); *People v. Cage*, 15 Cal. Rptr. 3d 846, 855 (Ct. App. 2004) (holding that a statement

definition of “testimonial statements” to include statements made to government officials other than police officers.<sup>122</sup>

*c. “Formalized” Testimonial Materials are Testimonial*

Another formulation of testimonial is identified by Justice Scalia as “extra-judicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”<sup>123</sup> This formulation of testimonial comes from Justice Thomas’s concurrence in *White v. Illinois*, which espoused a narrow view of testimonial that confines it to actual testimony at trial or certain formalized materials, such as affidavits, depositions, prior testimony, or confessions.<sup>124</sup> This view essentially applies the Confrontation Clause only to certain specific materials that the Framers of the Constitution would historically have deemed testimonial. As such, this represents the most rigid of the approaches taken to ascertain when *Crawford* will apply. Moreover, this view seems to preclude *any* informal statements, even those made to police, because they would not be formalized confessions or accompanied by other formal materials.<sup>125</sup>

Justice Thomas specifically rejected any standard that “[a]ttempts to draw a line between statements made in contemplation of legal proceedings and those not so made”<sup>126</sup> because this type of inquiry would “entangle the courts in a multitude of difficulties”<sup>127</sup> related to the categorization of testimonial statements.<sup>128</sup> Consequently, it seems

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to a doctor by the victim identifying the accused as the assailant was not testimonial because there was no government involvement).

122. See *United States v. Saner*, 313 F. Supp.2d 896, 902 (S.D. Ind. 2004) (holding that statements made to a Department of Justice prosecutor were testimonial); *Mikos*, 2004 U.S. Dist. LEXIS 13650, at \*17–18 (holding that statements made to a Department of Health and Human Services investigator, who was formally investigating healthcare fraud, were testimonial).

123. *Crawford*, 124 S. Ct. at 1364.

124. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

125. See, e.g., *Cage*, 120 Cal. Rptr. 3d at 855–57 (holding that statements of a victim of a battery to a police officer—who was trying to determine if a crime had been committed—at the hospital asking were not testimonial because there was very little formality in this interview, the officer was engaged in fact-gathering rather than evidence-gathering, and the interview took place in a neutral, public place). The Court in *Cage* also notes that “*Crawford* strongly suggested that a hearsay statement is not testimonial unless it is made in a relatively formal proceeding that contemplates a future trial,” and that “[w]hen people refer to a ‘police interrogation’ . . . they have in mind something . . . formal and focused.” *Id.* at 856–57.

126. *White*, 502 U.S. at 364.

127. *Id.*

128. Justice Thomas gives the examples of “a victim who blurts out an accusation to a passing police officer, or the unsuspecting social-services worker who is told of possible child abuse[.]” *Id.*

relatively clear that statements made under informal circumstances, even if made to the police or other government officials, would not fall within the heading testimonial under this approach, regardless of the expectations of a reasonable declarant.

Courts applying this stringent formulation must define a testimonial statement narrowly, including only those made at trial or contained in an affidavit, deposition, or formal confession to the police. Thus far, only one court interpreting *Crawford* has deviated from these express examples of “formalized testimonial materials”<sup>129</sup> given in *Crawford*.<sup>130</sup> It remains to be seen how much further the lower courts will extend this formulation of testimonial statements, and whether it will survive scrutiny.

The degree of formality required to meet the standard for “formalized testimonial materials” creates ambiguity.<sup>131</sup> Neither Justice Scalia in *Crawford* nor Justice Thomas’s concurrence in *White* clarified what degree of formality is required under this approach. This ambiguity is potentially ripe for interpretation. For example, the existence of trial testimony, affidavits, and depositions are self-evident, but what constitutes a “formal” confession to the police may depend on a number of factors with respect to the circumstances under which it is made. Consequently, despite Justice Thomas’s desire in *White* to avoid problematic and subjective line drawing in defining testimonial statements,<sup>132</sup> courts may still have to engage in fact-specific inquiries into what degree of formality will elevate a statement made to a government official to a testimonial one under this approach.

Furthermore, issues remain as to what degree of formality would be required to find statements other than confessions made to the police to be testimonial.<sup>133</sup> Obviously, depositions and affidavits of such non-confessing individuals would qualify as testimonial, but less formal statements made to government officials may or may not. For example, it seems unclear whether uninterested citizens reporting or describing a

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129. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment) (quoting *White*, 502 U.S. at 365).

130. *See United States v. Massino*, 319 F. Supp. 2d 295 (E.D.N.Y. 2004) (holding that guilty pleas are precisely the kind of formalized confession that constitutes testimonial material under *Crawford*).

131. *See Crawford*, 124 S. Ct. at 1364 (describing various formulations of testimonial statements).

132. *White*, 502 U.S. at 365 (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

133. One example would be citizens simply providing information to the police. *See Crawford*, 124 S. Ct. at 1364 (explaining that statements made to a police officer, even though not sworn testimony, could be testimonial).

crime to the police in statements that are not memorialized in an affidavit or deposition would be testimonial under this formulation. Certainly, these are not confessions, nor are they “formal” in the sense of being memorialized. Under other formulations of testimonial statements, these statements would be characterized as testimonial. However, since Justice Thomas’s approach rejects any such ad hoc determination of the circumstances under which the statement was made, it appears unlikely that courts applying this formulation would do so.

d. “[*Ex parte*] in-court testimony or its functional equivalent”<sup>134</sup> *Can Be Testimonial*

The *Crawford* Court identified another formulation of testimonial statements as “*ex parte* [sic.] in-court testimony or its functional equivalent.”<sup>135</sup> Justice Scalia, quoting from petitioner *Crawford*’s brief, defined “functional equivalent” as “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.”<sup>136</sup>

Beyond these specific examples of affidavits, custodial examinations, and prior testimony, it is unclear what statements would fall into the class of the catch-all category of “similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” The supporting material in the petitioner’s brief seems to indicate that the focus of this objective portion of this formulation is, at least in part, contingent on the reasonable expectations of the declarant when the statement was made.<sup>137</sup> For example, the petitioner’s brief notes that statements made “without litigation in mind”<sup>138</sup> are not testimonial. The petitioner’s brief further notes that the Confrontation Clause “does not apply to hearsay statements made unrelated to any pending or potential prosecution.”<sup>139</sup> The implication of this formulation seems to be that certain statements made in less formal circumstances could be regarded as testimonial provided that the declarant could reasonably have

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134. *Id.* at 1364 (quoting Brief for Petitioner at 23, *Crawford* (No. 02-9410)).

135. *Id.*

136. *Id.*

137. Brief for Petitioner at 23, *Crawford* (No. 02-9410) (citing *White*, 502 U.S. at 365; *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986); *Dutton v. Evans*, 400 U.S. 74 (1970)).

138. *Id.*

139. *Id.*

believed that the statements would be used in a later prosecution.<sup>140</sup>

However, the petitioner's brief sought support for the above formulation of testimonial statements in Justice Thomas's concurrence in *White*,<sup>141</sup> a view that narrowly confines testimonial statements to those actually made at trial or contained in certain specific formalized materials.<sup>142</sup> Justice Thomas's view in *White* is a distinct standard and inapposite here because he rejected any standard that "[a]ttempts to draw a line between statements made in contemplation of legal proceedings and those not so made."<sup>143</sup> The standard set forth in the petitioner's brief seems to advocate such line drawing.<sup>144</sup> Consequently, it is likely that less-formal materials (even those other than confessions made to the police) could be admitted as testimonial statements under this formulation. It remains to be seen how far courts applying this formulation will go beyond confessions made to the police.

*e. "[S]tatements 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"<sup>145</sup> are Testimonial.*

Justice Scalia also identified another formulation of testimonial statements, as proffered in the Amici Curiae, the National Association of Criminal Defense Lawyers (NACDL):<sup>146</sup> "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."<sup>147</sup> At first glance, this approach focuses on the individual who witnesses the making of the statement, rather than on the declarant. A correct reading of the Amici brief, however, states that "an out-of-court statement is testimonial only when the circumstances indicate that a reasonable *declarant* at the time would understand that the statement

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140. *See id.* (explaining that statements made with the expectation of potential use in prosecution are testimonial and must be subject to cross-examination).

141. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

142. Brief for Petitioner at 23, *Crawford* (No. 02-9410) (citing *White*, 502 U.S. at 365). *See supra* Part II.D.1.c (explaining that formalized statements, such as affidavits, depositions, prior testimony and confessions are testimonial).

143. *White*, 502 U.S. at 364.

144. *See supra* notes 137–43 and accompanying text (discussing the Petitioner's argument for refining what should be testimonial).

145. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004) (quoting Brief of Amici Curiae the National Association of Criminal Defense Lawyers et al. at 3, *Crawford* (No. 02-9410)).

146. Brief of Amici Curiae the Nat'l Ass'n of Criminal Def. Lawyers et al. at 3, *Crawford* (No. 02-9410).

147. *Crawford*, 124 S. Ct. at 1364 (citing Brief of Amici Curiae the Nat'l Ass'n of Criminal Def. Lawyers et al. at 3, *Crawford* (No. 02-9410)).

would later be available for use at a criminal trial.”<sup>148</sup>

The Court did not provide any further explanation as to the parameters of this standard. Amici provided some guidelines, however, that may assist the lower courts in applying this standard. First, statements unrelated to any criminal investigation are not testimonial.<sup>149</sup> Examples given by Amici include statements made as a medical patient rather than as a “witness” to a crime, statements of a co-conspirator made in furtherance of a conspiracy, and excited utterances.<sup>150</sup> These examples contrast with statements made by an individual who approaches a police officer and provides information that incriminates another individual or himself.<sup>151</sup> The latter would be testimonial under this standard because the individual has “assumed the role of ‘witness’” and has “spoken under circumstances which he or she should reasonably expect will lead the State to punish the accused person.”<sup>152</sup>

Amici further noted that “[b]y and large, statements made to law enforcement officials about a crime will be testimonial . . . [and that] . . . statements made to friends, relatives, accomplices, or anyone outside of the criminal justice system will not be testimonial.”<sup>153</sup> Lower courts

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148. Brief of Amici Curiae the Nat'l Ass'n of Criminal Def. Lawyers et al. at 22, *Crawford* (No. 02-9410) (emphasis added). The Appellate Court for the First District of Illinois, in one recent case, rejected the Amici formulation that 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,” noting that it “overlooks the crucial ‘witnesses against’ phrase of the [C]onfrontation [C]ause and casts too wide a net . . .” *In re T.T.*, 815 N.E.2d 789, 804 (Ill. App. Ct. 1st Dist. 2004). This dismissal, however, is premature and ill-advised. We will demonstrate that in the application of the *Crawford* rule to Illinois hearsay exceptions, there may be situations in which inquiring into the reasonable belief of an objective declarant in making a statement would serve to best effectuate the intent of the *Crawford* Court. *See infra* Part III (examining *Crawford's* effect on hearsay in Illinois).

149. Brief of Amici Curiae the Nat'l Ass'n of Criminal Def. Lawyers et al. at 23, *Crawford* (No. 02-9410) (explaining that when a statement is made at a time unrelated to any criminal investigation, the declarant is not a “witness” within the meaning of the Confrontation Clause).

150. *Id.*

151. *Id.* at 24.

152. *Id.* Using this formulation, the Minnesota Court of Appeals has held that a declarant's private recording of another person at the encouragement of law enforcement personnel made in order to obtain incriminating statements shifting blame from that individual was testimonial because it was “made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial.” *In re J.K.W.*, No. A03-1650, 2004 Minn. App. LEXIS 783, at \*9–10 (Minn. Ct. App. July 6, 2004) (quoting *Crawford*, 124 S. Ct. at 1364).

153. Brief of Amici Curiae the Nat'l Ass'n of Criminal Def. Lawyers et al. at 25, *Crawford* (No. 02-9410). Amici note some ambiguities in this approach, especially with regard to 911 calls, which could be interpreted as a form of police interrogation (which would make the statement testimonial) or simply as an electronically enhanced “loud cry for help” (in which case they would be deemed not testimonial). *Id.* *See* *People v. Cortes*, 781 N.Y.S.2d 401, 416 (N.Y. Sup. Ct. 2004) (holding that 911 calls are testimonial); *People v. Conyers*, 777 N.Y.S.2d 274, 277

interpreting *Crawford* have generally accepted this distinction.<sup>154</sup> This formulation may include statements made to individuals who are sufficiently identified with law enforcement despite the fact that they may not technically be “law enforcement officials.”<sup>155</sup>

## 2. What Is a Sufficient Opportunity for Cross-Examination for *Crawford* Purposes?

The *Crawford* majority observed that the new rule and the Confrontation Clause “place[] no constraints at all on the use of . . . prior testimonial statements” when “the declarant appears for cross-examination at trial.”<sup>156</sup> Consequently, it is “irrelevant that the reliability of some out-of-court statements ‘cannot be replicated, even if the declarant testifies to the same matters in court.’”<sup>157</sup> Justice Scalia then spoke in unequivocal terms, noting that the Confrontation Clause “does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.”<sup>158</sup> Although Justice Scalia spoke in terms of present opportunity to cross-examine the declarant at trial,<sup>159</sup> he presumably did not intend to exclude the use of an out-of-court statement if the accused had a previous opportunity to cross-examine the declarant about the out-of-court statement at a former trial or other judicial proceeding such as a preliminary hearing.<sup>160</sup>

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(N.Y. Sup. Ct. 2004) (holding 911 calls are not testimonial); *People v. Isaac*, No. 23398/02, 2004 N.Y. Misc. LEXIS 814, at \*12 (N.Y. Dist. Ct. June 16, 2004); *see also infra* Part III.9 (discussing 911 calls).

154. *See Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (finding that statements made in a private conversation were not made under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial); *see also United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004) (finding that statements against interest made to a friend are not testimonial); *People v. Deshazo*, 679 N.W.2d 69, 69 (Mich. 2004) (holding as non-testimonial a statement against penal interest made to a friend); *People v. Cervantes*, 12 Cal. Rptr. 3d 774, 783 (Cal. Ct. App. 2004) (finding a statement made to a friend seeking medical advice was not testimonial).

155. *See, e.g., People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 (Ct. App. 2004) (finding as testimonial a statement made to a forensic interview specialist); *In re T.T.*, 815 N.E.2d 789, 800–01 (Ill. App. Ct. 1st Dist. 2004) (holding that statements of a child victim of sexual abuse to a DCFS investigator and a physician were testimonial under *Crawford*).

156. *Crawford v. Washington*, 124 S. Ct. 1354, 1369 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)).

157. *Id.* at 1369 (quoting *Crawford*, 124 S. Ct. at 1377 (Rehnquist, C.J., concurring)).

158. *Id.* The First District has spoken in even more unequivocal terms, noting that “[t]here is no confrontation clause issue when the declarant is on the witness stand.” *People v. Thompson*, 812 N.E.2d 516, 521 (Ill. App. Ct. 1st Dist. 2004) (emphasis added).

159. *Crawford*, 124 S. Ct. at 1369 & n.9.

160. *See id.* at 1365–66 (claiming that the Framers intended to allow admission of testimonial evidence if the witness was unavailable to testify and the defendant had an opportunity for cross-examination before trial).

A question remains, however, whether *Crawford* requires a mere opportunity for cross-examination or whether it demands that there was, in fact, meaningful and effective cross-examination. Although the *Crawford* opinion did not address this concern, *Crawford* should be read in the context of other aspects of Sixth Amendment jurisprudence. For example, in *Kentucky v. Stincer*,<sup>161</sup> the United States Supreme Court held that the accused's Confrontation Clause rights were not violated when he was excluded from an in-chambers examination of two young victims of an alleged sex offense to determine whether they were competent to testify.<sup>162</sup> The Court refused to find a violation because defense counsel participated at the hearing, and further questions concerning their competency could be raised at trial with the defendant present.<sup>163</sup> Here, the United States Supreme Court explicitly declared that "the Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'"<sup>164</sup>

The accused must, however, be given at least a sufficient opportunity for effective cross-examination. Statements made at a preliminary hearing, for example, should be admissible so long as the accused had sufficient opportunity for effective cross-examination.<sup>165</sup> A statement is also admissible where the witness has a mere gap in memory and is available for cross-examination. In *United States v. Owens*, the victim recalled, in his trial testimony, making the out-of-court identification of the accused, but he could not recall who had assaulted him.<sup>166</sup> The United States Supreme Court found no Sixth Amendment violation in the use of an out-of-court statement of a victim, who testified at trial, and had identified the defendant as his attacker.<sup>167</sup>

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161. *Kentucky v. Stincer*, 482 U.S. 730 (1987) (per curiam).

162. *Id.* at 746-47.

163. *Id.*

164. *Id.* at 739 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

165. The Colorado Supreme Court in *People v. Fry*, for example, held that under *Crawford* the preliminary hearing testimony of an unavailable witness cannot be used against the accused because the nature of preliminary hearings in Colorado does not afford the accused a sufficient opportunity for effective cross-examination. *People v. Fry*, 92 P.3d 970, 979 (Colo. 2004). In Colorado, preliminary hearings are limited to "matters necessary to a determination of probable cause" and "the rights to cross-examine witnesses and to introduce evidence are limited to the question of probable cause." *Id.* at 977. In states such as Illinois, where preliminary hearings are in the nature of full-adversarial proceedings, *Crawford* will not likely pose a bar to the admissibility of testimonial statements at trial as long as the accused was actually afforded a sufficient opportunity to cross-examine the witness at the preliminary hearing.

166. *United States v. Owens*, 484 U.S. 554, 556 (1988).

167. *Id.* at 564. Justice Scalia, who authored the majority opinion in *Owens*, reasoned that the out-of-court declarant was present in court and was subject to cross-examination about his out-of-

There is a serious constitutional problem where the witness has no recollection at all of making the out-of-court statement. *Crawford* should bar the admissibility of the witness's out-of-court statement because, under these circumstances, there is no opportunity whatsoever to cross-examine the witness about having made the out-of-court statement.<sup>168</sup> Similarly, *Crawford* and the Sixth Amendment will be violated if the trial judge allows the admissibility of an out-of-court statement where the witness denies making the statement. Once again, there is no opportunity of any kind for the accused to cross-examine the declarant.<sup>169</sup>

### 3. What Aspects of Confrontation Clause Jurisprudence Remain Unaffected by the *Crawford* Rule?

In a footnote, the *Crawford* Court explained that the Confrontation Clause does not bar the use of testimonial statements “for purposes other than establishing the truth of the matter asserted.”<sup>170</sup> Thus, the admissibility of out-of-court statements that are offered for a non-hearsay purpose will remain unaffected by *Crawford*. Traditional non-hearsay uses of out-of-court statements—such as for impeachment,<sup>171</sup> to provide a basis for an expert's opinion,<sup>172</sup> to prove that a declarant *said*

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court statement. *Id.* at 560–61. The defendant had an opportunity to explore the gap in memory during the cross-examination of the witness. *Id.* at 559–60. According to Justice Scalia, this is all that the Sixth Amendment guarantees: an opportunity to question the witness about the making of the out-of-court statement. *Id.* at 563–64. It does not guarantee effective or successful cross-examination. *Id.* at 563–64. Justice Scalia, nonetheless, suggested that evidence of memory failure may, in fact, be effective cross-examination. *Id.* at 560. The opinion of the Illinois Appellate Court in *People v. Martinez* supports the conclusion that a mere gap in the witness' recall will not pose a constitutional bar to the admissibility of the out-of-court testimonial statement. *People v. Martinez*, 810 N.E.2d 199, 212 (Ill. App. Ct. 1st Dist. 2004). *See infra* Part III.A.2 (discussing *Martinez*).

168. *See Crawford v. Washington*, 124 S. Ct. 1354, 1369 n.9 (2004) (finding that the Confrontation Clause does not bar admission of a statement if the declarant is present to explain it).

169. *See id.* (discussing the requirement that, for admission, the defendant must have had a prior opportunity to cross-examine the declarant).

170. *Id.* (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

171. *See, e.g., People v. McPherson*, 687 N.W.2d 370, 376 (Mich. Ct. App. 2004) (holding that a statement of the declarant to a police officer, to which the officer testified, was admissible in order to impeach the accused's credibility).

172. *See, e.g., United States v. Stone*, 222 F.R.D. 334, 339 (E.D. Tenn. 2004) (holding that while statements of defendant's employees to IRS investigators may have been testimonial under *Crawford*, the statements were nonetheless admissible as a basis for the IRS investigator's expert opinion); *see also State v. Jones*, No. COA03-976, 2004 N.C. App. LEXIS 1655, at \*6 (N.C. Ct. App. Sept. 7, 2004) (admitting testimonial statements to demonstrate the basis of an expert's opinion).

something in the witness's presence,<sup>173</sup> and statements used to explain or demonstrate circumstantially a declarant's state of mind or explain conduct by an individual<sup>174</sup>—will remain admissible post-*Crawford*.

Furthermore, the *Crawford* majority accepted the fact that an accused would not be protected under the Confrontation Clause by operation of the doctrine of forfeiture by wrongdoing.<sup>175</sup> *Crawford* poses no bar to the admissibility of an out-of-court testimonial statement where the accused has silenced the testimony of an adverse witness through violence or other means.<sup>176</sup>

#### 4. Does the *Crawford* Rule Apply Retroactively?

Judicial opinions announcing new constitutional rules applicable to criminal cases are retroactive to all cases pending on direct review at the time the new constitutional rule is announced.<sup>177</sup> Beyond this general rule, the Illinois Appellate Court, First District, has expressly recognized on a number of occasions this effect of *Crawford* to cases pending on direct review when *Crawford* was decided.<sup>178</sup>

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173. See, e.g., *McPherson*, 687 N.W.2d at 376–77 (holding that statement of declarant to police officer, to which the officer testified, admissible to show the accused's knowledge of the statement).

174. See, e.g., *Delarosa v. Bissonette*, No. 03-2559, 2004 U.S. App. LEXIS 14402, at \*3 (1st Cir. July 14, 2004) (holding admissible under *Crawford* the statement of a police officer that there was going to be a delivery of drugs to the defendant's residence at a particular time because the testimonial statement was not being used to establish the truth of the matter asserted); *Waltmon v. State*, No. 08-03-00317-CR, 2004 Tex. App. LEXIS 7285, at \*18 (Tex. App. Aug. 12, 2004) (statement of an anonymous tipster reporting that accused's car was driving erratically admissible to show why responding officer was in the vicinity of accused's car).

175. *Crawford v. Washington*, 124 S. Ct. 1354, 1370 (2004).

176. *Id.* Lower courts have even permitted the operation of the rule of forfeiture by wrongdoing when the death of the declarant is the very charge that the accused faces. See *State v. Meeks*, 88 P.3d 789, 797 (Kan. 2004) (holding in a murder case that murder victim's testimonial statement to police officer that the accused shot him was nonetheless admissible because the prosecution carried its burden of showing by a preponderance of the evidence that the accused killed the victim). Lower courts have also held that a defendant forfeits the right to confront a witness when the out-of-court statement relates to an event that is entirely separate from the charged act. See *People v. Moore*, No. 01CA1760, 2004 Colo. App. LEXIS 1354, at \*10–11 (Colo. Ct. App. July 29, 2004) (holding that accused forfeited right of confrontation with respect to victim's testimonial statement about an unrelated earlier domestic violence incident). In response to an argument that the application of a forfeiture analysis is impermissible “bootstrapping” under these circumstances, Professor Richard Friedman has noted that this situation is no different than when “a defendant is accused of conspiracy charges and the prosecution argues that the hearsay rule poses no bar to admission because the statement was made by a conspirator of the defendant and in support of the conspiracy.” Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 12 (2004).

177. *People v. Ford*, 761 N.E.2d 735, 738 (Ill. 2001).

178. *In re T.T.*, 815 N.E.2d 789, 798–99 (Ill. App. Ct. 1st Dist. 2004); *People v. Thompson*,

*Crawford* should be applied retroactively in proceedings under the Illinois Post-Conviction Hearing Act,<sup>179</sup> as well.<sup>180</sup> Illinois has adopted the test set forth in *Teague v. Lane*<sup>181</sup> to ascertain whether a new rule will be given retroactive effect to subsequent cases on collateral review for the purposes of the Illinois Post-Conviction Hearing Act.<sup>182</sup> The United States Supreme Court has described this inquiry as a three-step process, which seeks to ascertain when the defendant's conviction was final, what was the "legal landscape as it then existed,"<sup>183</sup> and whether the new rule is actually "new."<sup>184</sup>

A "new rule" is one that "breaks new ground, or imposes a new obligation on the States or the Federal Government . . . [or] was not *dictated* by precedent existing at the time the defendant's conviction became final."<sup>185</sup> If a rule is not "new," it is outside the scope of *Teague* and will be applied retroactively.<sup>186</sup> Similarly, the United States Supreme Court has distinguished between new substantive rules and new procedural rules. If the United States Supreme Court announces a new substantive rule, there is a general rule of retroactivity because such rules "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him."<sup>187</sup>

If there is a new procedural rule at issue, the general view is that it

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812 N.E.2d 516, 521 (Ill. App. Ct. 1st Dist. 2004); *People v. Martinez*, 810 N.E.2d 199, 211 (Ill. App. Ct. 1st Dist. 2004); *People v. Cook*, 815 N.E.2d 879, 892–93 (Ill. App. Ct. 1st Dist. 2004).

179. 725 ILL. COMP. STAT. ANN. 5/122-1–8 (West 2004).

180. It is well settled in Illinois that a proceeding under the Post-Conviction Hearing Act is not an appeal but a collateral attack on the judgment. *People v. James*, 489 N.E.2d 1350, 1353 (Ill. 1986). The purpose of a post-conviction proceeding is to inquire into the constitutional phases of the original conviction which have not already been adjudicated. *People v. Williams*, 264 N.E.2d 697, 698 (Ill. 1970). Proceedings under the Post-Conviction Hearing Act are not meant to provide the petitioner an opportunity to relitigate his or her case. Consequently, issues that were raised on direct appeal are generally res judicata as to all issues decided. *People v. Kubat*, 501 N.E.2d 111, 116 (Ill. 1986) (citations omitted). Issues that could have been raised on direct appeal, but were not raised, are considered waived. *People v. Albanese*, 531 N.E.2d 17, 18 (Ill. 1988).

181. *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion).

182. *People v. Flowers*, 561 N.E.2d 674, 681–82 (Ill. 1990).

183. *Beard v. Banks*, 124 S. Ct. 2504, 2510 (2004) (quoting *Graham v. Collins*, 506 U.S. 461, 468 (1993)).

184. *Id.*

185. *Teague*, 489 U.S. at 301 (plurality opinion) (citations omitted).

186. *Saffle v. Parks*, 494 U.S. 484, 494–95 (1990) (rejecting appellee's contention that certain cases involving the Eighth Amendment were not "new rules").

187. *Schiriro v. Summerlin*, 124 S. Ct. 2519, 2522–23 (2004) (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)).

will not have retroactive effect.<sup>188</sup> If the United States Supreme Court has announced a “new rule of constitutional law,”<sup>189</sup> and one of two exceptions are met, a new rule may be applied retroactively to cases on collateral review.<sup>190</sup> The first exception is that a new rule should be applied retroactively “if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’”<sup>191</sup> The second exception permits retroactive application if the new rule requires the observance of those procedures that are “implicit in the concept of ordered liberty.”<sup>192</sup>

The applicable *Teague* exception for *Crawford* purposes should be the exception to nonretroactivity for a new decision that “requires the observance of ‘those procedures that . . . are implicit in the concept of ordered liberty.’”<sup>193</sup> This second exception has been interpreted to encompass “watershed rules of criminal procedure.”<sup>194</sup> Essentially, two requirements must be satisfied for a new rule to fall into this second exception: (1) the rule must improve the accuracy of the trial’s truth-finding function; and (2) the rule must also “alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.”<sup>195</sup>

The first issue that *Crawford* poses in this analysis is whether it is actually a “new” rule. The factors that have been enumerated by the United States Supreme Court in this inquiry focus on whether the rule “breaks new ground, or imposes a new obligation on the states or the Federal Government . . . [or] was not *dictated* by precedent existing at the time the defendant’s conviction became final.”<sup>196</sup> While *Crawford* has created a different paradigm for evaluating the admissibility of testimonial statements under the Confrontation Clause than has been applied over the past quarter century, it does not necessarily follow that this is a “new” rule.

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188. *Id.* at 2523; *Teague*, 489 U.S. at 305–06 (plurality opinion).

189. *Tyler v. Cain*, 533 U.S. 656 (2001) (explaining that, under 28 U.S.C. § 2244(b)(2)(A), only the United States Supreme Court can make new rules of constitutional law retroactive for cases on collateral review).

190. *Teague*, 489 U.S. at 307 (plurality opinion).

191. *Id.* (plurality opinion) (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

192. *Id.* (plurality opinion) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 795 (1969)).

193. *Id.* (plurality opinion) (quoting *Mackey*, 401 U.S. at 693).

194. *See id.* at 311 (plurality opinion) (referencing Justice Harlan’s opinion in *Mackey*, 401 U.S. at 693–94, which discusses bedrock procedural elements required before any conviction will be upheld).

195. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (internal citations omitted).

196. *Teague*, 489 U.S. at 301 (plurality opinion).

In this regard, the text of *Crawford* itself provides powerful evidence that *Crawford* is not, in fact, a “new” rule at all. First, the very issue in *Crawford* was whether *Roberts* had strayed from the *original* meaning of the Confrontation Clause.<sup>197</sup> Consequently, the issue was whether *Roberts* was a constitutionally correct “new” rule with respect to the historical meaning of the Confrontation Clause. Justice Scalia concluded that it was *Roberts* itself that had deviated from the historical understanding of the Confrontation Clause by announcing a “new” rule that premised the admissibility of evidence on an individualized judicial determination that a statement meets a standard of trustworthiness.<sup>198</sup> Justice Scalia asserted, nonetheless, that notwithstanding the rationale in *Roberts*, the results of Confrontation Clause precedent both before and after *Roberts* “have generally been faithful to the original meaning of the Confrontation Clause . . . .”<sup>199</sup> It is the *rationale* of past precedent rather than the precedent itself that *Crawford* sought to constitutionally rectify.<sup>200</sup> Thus, United States Supreme Court precedents including *Roberts* itself are an “empirically accurate” application of the *Crawford* rule.<sup>201</sup> Consequently, the *Crawford* holding was, in fact, “dictated by precedent existing at the time the defendant’s conviction became final.”<sup>202</sup> *Crawford* should therefore probably not be regarded as a “new” procedural rule at all and should be given retroactive effect.<sup>203</sup>

While some courts deem *Crawford* a “new” procedural rule,<sup>204</sup> it should nonetheless be applied retroactively because it falls under the second *Teague* exception: *Crawford* “requires the observance of those

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197. *Crawford v. Washington*, 124 S. Ct. 1354, 1359 (2004).

198. *Id.* at 1369.

199. *Id.*

200. *Id.*

201. *Id.* at 1369 n.9.

202. *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion).

203. See, e.g., *Bockting v. Bayer*, No. 02-15866, 2005 U.S. App. LEXIS 3012, at \*36–37 (9th Cir. Feb. 22, 2005) (Noonan, J., concurring) (arguing that *Crawford* does not announce a “new” rule under the *Teague* analysis but rectifies an earlier incorrect interpretation of the rule and, thus, “[r]etroactivity is not an issue”).

204. See *Brown v. Uphoff*, 381 F.3d 1219, 1226 (10th Cir. 2004) (finding *Crawford* simply established new standards for the admission of certain kinds of hearsay and did not create a “watershed rule” of criminal procedure as articulated in *Teague* and therefore should not be retroactively applied); *Garcia v. United States*, No. 04-CV-0465, 2004 U.S. Dist. LEXIS 14984, at \*8–10 (N.D.N.Y. Aug. 4, 2004) (finding *Crawford* did not alter bedrock procedural elements of criminal procedure, but simply clarified procedure, and therefore, was not a watershed rule requiring retroactive application); *Hutzenlaub v. Portuondo*, 325 F. Supp. 2d 236, 238 (E.D.N.Y. 2004) (finding *Crawford* did not require retraction in application); *Murillo v. Frank*, 316 F. Supp. 2d 744, 749–50 (E.D. Wis. 2004) (finding *Crawford* did not trigger either of the two *Teague* exceptions).

procedures that . . . are implicit in the concept of ordered liberty.”<sup>205</sup> The Illinois Appellate Court, First District, applied this rationale in the context of the Confrontation Clause in *People v. Kubik*<sup>206</sup> and held that *Cruz v. New York*<sup>207</sup> should be given retroactive effect under the Post-Conviction Hearing Act.<sup>208</sup> The Supreme Court held in *Cruz* that “where a nontestifying co-defendant’s confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant’s own confession is admitted against him.”<sup>209</sup> In *Kubik*, the defendant was tried with several co-defendants. At trial, the confessions of the co-defendants were played in front of the jury with a simple limiting instruction that the jury could only use the evidence against the confessing defendants.<sup>210</sup> While this instruction would clearly have violated the rule later announced in *Cruz*, this instruction was proper under the state of the law at the time of Kubick’s trial, exemplified by *Parker v. Randolph*.<sup>211</sup> Because *Cruz* was decided after Kubick had exhausted his direct appeals, he attempted a collateral attack on his conviction via the Illinois Post-Conviction Hearing Act, arguing that *Cruz* should be given retroactive effect.<sup>212</sup>

The First District concluded that *Cruz* should be given retroactive effect under the Post-Conviction Hearing Act.<sup>213</sup> The Illinois Appellate Court recognized that *Cruz* created a new procedural rule. The new rule met the second exception of *Teague v. Lane*<sup>214</sup> in that *Cruz* created a new procedural rule “implicit in the concept of ordered liberty.”<sup>215</sup> To qualify under this exception to the general rule of nonretroactivity, a new rule must improve the accuracy of the trial’s truth-finding function and “alter our understanding of the *bedrock procedural elements*

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205. *Teague*, 489 U.S. at 311 (plurality opinion) (internal citations omitted).

206. *People v. Kubik*, 573 N.E.2d 1337 (Ill. App. Ct. 1st Dist. 1991).

207. *Cruz v. New York*, 481 U.S. 186 (1987).

208. *Kubik*, 573 N.E.2d at 1342–43.

209. *Cruz*, 481 U.S. at 1932 (internal citations omitted).

210. *Kubik*, 573 N.E.2d at 1339.

211. *Parker v. Randolph*, 442 U.S. 62 (1979) (plurality opinion), *overruled on other grounds* by *Cruz v. New York*, 481 U.S. 186 (1987). *Parker* reaffirmed the validity of “an instruction directing the jury to consider a co-defendant’s extrajudicial statement only against its source . . . sufficient to avoid offending the confrontation right of the implicated defendant.” *Id.* at 73–74 (plurality opinion).

212. *Kubik*, 573 N.E.2d at 1339–40.

213. *Id.*

214. *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion).

215. *Kubik*, 573 N.E.2d at 1342 (quoting *Teague*, 489 U.S. at 307).

essential to the fairness of a proceeding.”<sup>216</sup> To meet the “accuracy” element, the court found that *Cruz*’s direct impact on the admissibility of evidence at trial satisfied this.<sup>217</sup> As for the second element, the court found it was satisfied by the fact that *Cruz* extinguished the “interlocking” confession exception and, consequently, significantly changed the interpretation of the Confrontation Clause by requiring the cross-examination of certain declarants where this was not previously required.<sup>218</sup> The court also noted, in this context, that “[t]he right of cross-examination is a fundamental guarantee of liberty.”<sup>219</sup> Consequently, the new rule was essential to the “fairness and constitutional integrity of [the] criminal proceeding.”<sup>220</sup>

*Crawford* presents a strong case for retroactivity under the *Teague-Kubik* analysis. Since *Crawford* imposes a rigid requirement of cross-examination concerning testimonial out-of-court statements not required by *Roberts*, *Crawford* improves the accuracy of the truth-finding function of the trial.<sup>221</sup> The “accuracy” element is satisfied because there is a significant effect on the admissibility of testimonial statements which ultimately benefits the fairness of the trial.

Secondly, *Crawford* unquestionably “alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”<sup>222</sup> The very essence of the *Crawford* opinion is that *Roberts*<sup>223</sup> created an unacceptable ad hoc standard of admissibility of evidence that is highly subjective. That standard, which is premised on a judicial determination of trustworthiness of the statement, violates the bedrock procedural guarantee of the Confrontation Clause that “reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>224</sup>

Moreover, since *Crawford* has generally changed how *all*

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216. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (internal citations omitted).

217. *Kubik*, 573 N.E.2d at 1342.

218. *Id.*

219. *Id.* at 1340 (citing *Pointer v. Texas*, 380 U.S. 400, 404–05 (1965)).

220. *Id.* at 1342.

221. *See, e.g.*, *People v. Miles*, 815 N.E.2d 37, 43 (Ill. App. Ct. 4th Dist. 2004). The Illinois Appellate Court for the Fourth District in *Miles* announced, in dicta, that *Crawford* applies retroactively “because [*Crawford*’s] change in (or return to) constitutional doctrine enhances the truth-finding function of trial . . .” *Id.* at 44 (finding that *Crawford* holds “testimonial statements of witnesses assent from a criminal trial are admissible only if: (1) the declarant is unavailable; and (2) the defendant had an opportunity to cross-examine the declarant at the time of the statement”).

222. *Sawyer v. Smith*, 497 U.S. 227, 243 (1990) (internal citations omitted).

223. *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled in part by Crawford v. Washington*, 124 S. Ct. 1354 (2004).

224. *Crawford v. Washington*, 124 S. Ct. 1354, 1370 (2004).

Confrontation Clause issues must be resolved (beyond simply the use of a co-defendant's confession as was at issue in *Cruz*), it has dramatically changed the face of the Confrontation Clause, more so than *Cruz*. Consequently, *Crawford* unquestionably altered our understanding of the procedural elements implicit in the Confrontation Clause. Applying *Kubik* as precedent, it seems difficult to see how *Crawford* could not be applied retroactively when *Cruz* clearly was.

The United States Supreme Court has held that significant changes in Confrontation Clause jurisprudence warrant retroactive application on collateral review on a number of occasions. Most notably, both *Cruz*<sup>225</sup> and *Bruton v. United States*<sup>226</sup> have applied retroactively on federal habeas corpus review.<sup>227</sup> Moreover, Illinois courts have applied both of these cases retroactively in collateral review under the Illinois Post-Conviction Act.<sup>228</sup> Accordingly, *Crawford* should also apply in this manner as well.

But should *Crawford* be applied retroactively in federal habeas corpus proceedings? Federal courts have split on this issue.<sup>229</sup> In

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225. *Cruz v. New York*, 481 U.S. 186 (1987). See *supra* note 209 and accompanying text (discussing the holding in *Cruz*).

226. *Bruton v. United States*, 391 U.S. 123 (1968) (finding a violation of the Confrontation Clause where the co-defendant's confession was admitted at a joint trial, and the co-defendant did not testify).

227. See *Roberts v. Russell*, 392 U.S. 293, 294 (1968) (per curiam) (applying *Bruton* retroactively to cases on habeas review due to the serious risk that the issue of guilt or innocence might not have been reliably determined).

228. See *People v. Kubik*, 573 N.E.2d 1337, 1343 (Ill. App. Ct. 1st Dist. 1991) (listing Illinois cases retroactively applying *Bruton* and *Cruz*). See, e.g., *People v. Somerville*, 245 N.E.2d 461, 465 (Ill. 1969) (recognizing that *Bruton* is applicable in Illinois); see also *People v. Davis*, 264 N.E.2d 140, 142-43 (Ill. 1970) (recognizing that *Bruton* is applicable to Illinois, but not applicable to statements made in furtherance of a conspiracy since these statements are an exception to the hearsay rule); *People v. Ikerd*, 265 N.E.2d 120, 121 (Ill. 1970) (recognizing that *Bruton* is applicable in Illinois, but distinguishing *Bruton* from a situation where a co-defendant testifies and denies the confession).

229. See *Bockting v. Bayer*, No. 02-15866, 2005 U.S. App. LEXIS 3012, at \*14 (9th Cir. Feb. 22, 2005) (finding that *Crawford* merits retroactive application because it implicates the fundamental fairness and accuracy of criminal proceedings and it "reworks our understanding of bedrock criminal procedure"); *Brown v. Uphoff*, 381 F.3d 1219, 1226 (10th Cir. 2004) (finding *Crawford* simply established new standards for the admission of certain kinds of hearsay and did not create a "watershed rule" of criminal procedure as articulated in *Teague* and therefore should not be retroactively applied); *Garcia v. United States*, No. 04-CV-0465, 2004 U.S. Dist. LEXIS 14984, at \*8-10 (N.D.N.Y. Aug. 4, 2004) (finding *Crawford* did not alter bedrock procedural elements of criminal procedure but simply clarified procedure and, therefore, was not a watershed rule requiring retroactive application); *Hutzenlaub v. Portuondo*, 325 F. Supp. 2d 236, 238 (E.D.N.Y. 2004) (finding *Crawford* did not require retroactivity in application); *Murillo v. Frank*, 316 F. Supp. 2d 744, 749-50 (E.D. Wis. 2004) (finding *Crawford* did not trigger either of the two *Teague* exceptions).

*Murillo v. Frank*,<sup>230</sup> for example, the United States District Court for the Eastern District of Wisconsin held that *Crawford* is a “new” rule under *Teague*<sup>231</sup> because it essentially overruled *Roberts*<sup>232</sup> with respect to testimonial statements.<sup>233</sup> The court reasoned that *Crawford* failed to fit into any of *Teague*’s exceptions to non-retroactivity. The *Murillo* court, however, recognized that whether *Crawford* fit into any of these exceptions was a close question because of Justice Scalia’s assertions that the *Crawford* rule has actually been accurately applied with respect to the outcomes of precedent.<sup>234</sup> As argued above,<sup>235</sup> there are many reasons why *Crawford* should be applied retroactively under *Teague* and its progeny. The Ninth Circuit essentially has adopted the analysis set forth above to apply *Crawford* retroactively to federal habeas corpus proceedings.<sup>236</sup> This analysis of *Teague*, *Summerlin*, and *Crawford* provide the better interpretation. Thus, despite the holdings of post-*Crawford* cases that reject its retroactive application, *Crawford* should be given retroactive effect in federal habeas corpus proceedings as well.

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230. *Murillo v. Frank*, 316 F. Supp. 2d 744 (E.D. Wis. 2004).

231. *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion).

232. *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled in part by Crawford v. Washington*, 124 S. Ct. 1354 (2004).

233. *Murillo*, 316 F. Supp. 2d at 749–50.

234. *Id.* at 749–50 n.4. The *Murillo* court considered it a close call because while “*Crawford* rejected the application of *Roberts* to testimonial statements, the [Supreme] Court had never explicitly applied *Roberts* to such statements.” *Id.*

235. *See supra* notes 179–84 and accompanying text (discussing whether *Crawford* should be given retroactive effect to Illinois post-conviction proceedings).

236. *Bockting v. Bayer*, No. 02-15866, 2005 U.S. App. LEXIS 3012, at \*4 (9th Cir. Feb. 22, 2005) (holding that the *Crawford* rule is both a “watershed rule” and one “without which the likelihood of an accurate conviction is *seriously* diminished” and therefore retroactive) (quoting *Schiro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004)). In large part because Justice Scalia in *Crawford* had repeatedly asserted that *Crawford* remained “faithful to the original meaning” of the Confrontation Clause and that even cases decided under *Roberts* were an “empirically accurate” application of the *Crawford* rule, the *Bockting* court struggled with whether *Crawford* created a new rule at all. *Id.* at \*9–13. In the end, the court held that *Crawford* was indeed a “new” procedural rule it was necessary to determine retroactivity. *Id.* at \*13. The court held that *Crawford* fell into the *Teague* exception of “bedrock rules of criminal procedure.” *Id.* at \*14. The court held that “[h]undreds of years of tradition have embedded [*Crawford*’s unequivocal requirement of cross-examination of testimonial statements] as . . . fundamental.” *Id.* at \*16. The court, citing nearly the United States Supreme Court’s entire Confrontation Clause jurisprudence, further held that *Crawford* unquestionably implicates the fundamental fairness and accuracy of the criminal proceeding because the very purpose of the Confrontation Clause is to promote accuracy. *Id.* at \*18–20. Furthermore, the central concern with *Roberts*, according to the court, was that evidence was being admitted for which there was not a sufficient procedural guarantee of reliability. *Id.* at \*20–23. Consequently, the *Bockting* court held *Crawford* should be applied retroactively to federal *habeas corpus* proceedings. *Id.* at \*28.

### III. HOW DOES *CRAWFORD* AFFECT ILLINOIS HEARSAY RULES?

*Crawford* may have little or no effect on some Illinois hearsay rules, but it will significantly affect others. Whether *Crawford* will impact Illinois hearsay rules, and to what extent, will likely depend on two considerations. First, it will depend upon whether the United States Supreme Court decided definitively that the Confrontation Clause and *Crawford* apply *only* to testimonial statements, thus leaving all other hearsay statements to regulation by state hearsay law.<sup>237</sup> This appears to be the view of Justices Scalia, Thomas, and Breyer but remains dictum.<sup>238</sup> Second, it will also depend upon how broadly the lower courts, and eventually the United States Supreme Court will formulate a definition of what is a testimonial statement for Confrontation Clause purposes.<sup>239</sup>

At present, neither of these concerns can be answered definitively. The Illinois Appellate Court, First District, has followed the *dictum* of the Supreme Court and held that non-testimonial statements “do not trigger enhanced protection under the Confrontation Clause.”<sup>240</sup> The First District has also endorsed language in *Crawford* that seemed to advocate approaches that allowed states greater flexibility in addressing non-testimonial hearsay or that exempted such non-testimonial hearsay from Confrontation Clause scrutiny altogether.<sup>241</sup> This conclusion captures the essence of *Crawford*’s limits.<sup>242</sup> Consequently, Illinois courts should use ordinary state rules of evidence to test the admissibility of non-testimonial statements.

The second issue is a bit more tricky and speculative. As set forth above,<sup>243</sup> the United States Supreme Court was less than clear as to what

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237. *Crawford v. Washington*, 124 S. Ct. 1354, 1374 (2004). *See also supra* notes 101–04 and accompanying text (exploring the result of a statement’s categorization as testimonial on confrontation clause analysis).

238. *Crawford*, 124 S. Ct. at 1374 (discussing the concept of testimonial evidence).

239. *See supra* Part II.D.1 (discussing various formulations for what constitutes testimonial statements).

240. *See In re T.T.*, 815 N.E.2d 789, 804 (Ill. App. Ct. 1st Dist. 2004) (holding that statements made by an unavailable out-of-court declarant for the purpose of medical diagnosis and treatment were not testimonial and, consequently, did not implicate the Sixth Amendment).

241. *People v. Martinez*, 810 N.E.2d 199, 212 (Ill. App. Ct. 1st Dist. 2004) (citing *Crawford*, 124 S. Ct. at 1374). The *Crawford* Court noted that “[w]here non-testimonial 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.” *Crawford*, 124 S. Ct. at 1374.

242. *See id.* (finding “[w]here non-testimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law”); *see also supra* note 101 and accompanying text (discussing the issue of non-testimonial hearsay).

243. *See supra* Part II.D.1 (discussing the various formulations of testimonial statements).

standards lower courts should employ in deciding what is testimonial. Consequently, lower courts have applied different formulations. While the Illinois Appellate Court, First District, recently gave some indication of what constitutes a testimonial statement,<sup>244</sup> Illinois courts may end up applying any one of the many formulations of what is a testimonial statement or simply crafting a formulation of their own.

A. *What Do the Illinois Cases Interpreting Crawford Tell Us?*

Illinois courts have addressed *Crawford* in substance on four occasions<sup>245</sup> thus far.

1. *People v. Patterson*

The Illinois Appellate Court, Fourth District, decided *People v. Patterson*<sup>246</sup> on May 4, 2004. In *Patterson*, a murder case, the State was allowed to introduce incriminating grand jury testimony of the defendant's girlfriend after she refused to testify on Fifth Amendment grounds.<sup>247</sup> The testimony was admitted under the hearsay exception that allows as substantive evidence the prior statements of a grand jury witness when the witness refuses to testify at trial despite being ordered by the court to do so.<sup>248</sup> The defendant was convicted in a jury trial.<sup>249</sup> The Fourth District affirmed, finding that it was error (albeit harmless error under the circumstances of the case) to admit the girlfriend's grand jury testimony in light of *Crawford*, which had been decided while the defendant's appeal was pending.<sup>250</sup> While not engaging in any broad formulation of what may constitute a testimonial statement, the court noted that "the term includes testimony given before a grand jury."<sup>251</sup>

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244. *In re T.T.*, 815 N.E.2d at 800 (agreeing with *Crawford* that "governmental involvement in some fashion in the creation of a formal statement is necessary to render the statement testimonial in nature").

245. *See infra* Part III.A.1 (discussing *People v. Patterson*, 808 N.E.2d 1159 (Ill. App. Ct. 4th Dist. 2004)); Part III.A.2 (discussing *People v. Martinez*, 810 N.E.2d 199 (Ill. App. Ct. 1st Dist. 2004)); Part III.A.3 (discussing *People v. Thompson*, 812 N.E.2d 516 (Ill. App. Ct. 1st Dist. 2004)); Part III.A.4 (discussing *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 1st Dist. 2004)). Illinois courts have discussed *Crawford* in a number of other cases not discussed in length in this section. These cases, where notable, are discussed fully in the body of the article.

246. *People v. Patterson*, 808 N.E.2d 1159 (Ill. App. Ct. 4th Dist. 2004).

247. *Id.* at 1163–64.

248. *Id.* at 1164. *See* 725 ILL. COMP. STAT. 5/115-10.2 (2002 & Supp. 2004) (providing a statutory hearsay exception for prior statements when the witness refused to testify despite a court order to testify).

249. *Patterson*, 808 N.E.2d at 1163.

250. *Id.* at 1165; *see supra* Part II.D.4 (discussing the retroactive application of *Crawford* to a case on appeal).

251. *Patterson*, 808 N.E.2d at 1164.

Furthermore, the court called the continuing validity of chapter 725, section 5/115-10.2 of the Illinois Compiled Statutes into question in light of *Crawford*, because the statute, “focusing as it does on a judicial determination of trustworthiness, can no longer be said to incorporate the relevant constitutional standard.”<sup>252</sup>

## 2. *People v. Martinez*

The second important Illinois decision that has applied *Crawford* principles is *People v. Martinez*.<sup>253</sup> Here, the defendant was convicted of first-degree murder and aggravated battery in a bench trial.<sup>254</sup> The *Crawford* issue in *Martinez* involved an eyewitness to a fatal gang beating.<sup>255</sup> The witness first identified the defendant in a photo array and then picked the defendant out of a line-up.<sup>256</sup> After the line-up, she gave a statement to an Assistant State’s Attorney.<sup>257</sup> At trial, the witness testified and was subjected to cross-examination.<sup>258</sup> When the witness testified, she stated that she only remembered about half of the incident but was certain of the events when she gave a statement to the Assistant State’s Attorney.<sup>259</sup> The State was subsequently allowed to introduce the witness’s prior written statement as a prior inconsistent statement.<sup>260</sup>

The Illinois Appellate Court, First District, affirmed the conviction and the admissibility of the witness’s prior statement to the State’s Attorney under *Crawford*.<sup>261</sup> The court noted that the statement given to the State’s Attorney was clearly testimonial within the meaning of *Crawford*.<sup>262</sup> However, since the defendant was able to fully cross-examine the witness at trial, *Crawford* and the Confrontation Clause “place[d] no constraints at all on the use of [the witness’s] prior

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252. *Id.*; see *infra* Part III.B.6 (discussing section 5/115-10.2). The *Patterson* decision also tells us that Illinois courts are willing to engage in “harmless error” analysis, as was suggested in the *Crawford* opinion. The *Crawford* majority officially expressed no opinion on whether courts should engage in harmless error analysis. *Crawford v. Washington*, 124 S. Ct. 1354, 1359 n.1 (2004). However, Chief Justice Rehnquist, in concurrence, notes that the majority has implicitly recognized this. *Id.* at 1378 (Rehnquist, C.J., concurring).

253. *People v. Martinez*, 810 N.E.2d 199 (Ill. App. Ct. 1st Dist. 2004).

254. *Id.* at 203.

255. *Id.* at 204.

256. *Id.* at 204–05.

257. *Id.* at 205.

258. *Id.*

259. *Id.*

260. *Id.* at 209. See 725 ILL. COMP. STAT. 5/115-10.1 (2002) (providing a statutory hearsay exception for prior inconsistent statements).

261. *Martinez*, 810 N.E.2d at 212.

262. *Id.*

testimonial statements.”<sup>263</sup> The court noted that the defendant was able to test the witness’s ability to recall the circumstances surrounding her prior statement and to impeach her credibility.<sup>264</sup> The court distinguished the present case from *People v. Yarbrough*,<sup>265</sup> where the witness was not able to recall making the prior statement at all.<sup>266</sup> According to the court, the present statement was closer to a gap in the witness’s memory.<sup>267</sup> Under the authority of *People v. Flores*<sup>268</sup> and *United States v. Owens*,<sup>269</sup> therefore, the admissibility of the prior statement did not violate the Confrontation Clause.<sup>270</sup> *Martinez* illustrates that *Crawford* will not generally prohibit the use of prior uncross-examined testimonial statements when the declarant actually testifies at trial and is subject to present cross-examination.<sup>271</sup>

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263. *Id.* (citing *Crawford v. Washington*, 124 S. Ct. 1354, 1369 n.9 (2004)).

264. *Id.* at 211.

265. *People v. Yarbrough*, 520 N.E.2d 1116 (Ill. App. Ct. 5th Dist. 1988).

266. *Id.* at 1120 (finding a claim by a witness of a loss of memory makes cross-examination impossible and admission of the witness’s out-of-court statements a violation of the Confrontation Clause).

267. *Martinez*, 810 N.E.2d at 210.

268. *People v. Flores*, 538 N.E.2d 481, 488 (Ill. 1989) (finding a witness’s prior testimony does not have to directly contradict testimony at trial to be considered inconsistent).

269. *United States v. Owens*, 484 U.S. 554, 559 (1988) (reaffirming that the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is actually effective in the eyes of the defendant).

270. *Martinez*, 810 N.E.2d at 211.

271. *Id.* The court did not address the issue of whether *Crawford* would pose an obstacle to the use of a witness’s prior testimonial statement if the witness denies making the statement at all or does not remember making the statement. This question was left open by the *Owens* decision. *See generally Owens*, 484 U.S. at 554 (failing to address how *Crawford* would impact the use of testimonial statements in such a situation). *Crawford* itself makes the unequivocal statement that “when the declarant appears for cross-examination at trial, the Confrontation Clause places *no constraints at all* on the use of his prior testimonial statements.” *Crawford v. Washington*, 124 S. Ct. 1354, 1369 n.9 (2004) (emphasis added). Therefore, it seems unlikely that *Crawford* would permit prior testimonial statements that the witness denies making or does not recall making to be admitted against the accused. Arguably, under these circumstances, the use of such evidence would not afford any opportunity to the accused for cross-examination. However, whether this would theoretically be admissible under *Crawford* may be irrelevant because the *Martinez* court noted that:

[I]n determining whether a prior out-of-court statement is admissible, the proponent of the statement first must meet the requirements of the applicable statutory hearsay exception as set out in 725 ILCS 5/115-10 . . . [and] *Crawford* should be considered only after the court determines the proffered statement complies with the requirements of the applicable statute.

*Martinez*, 810 N.E.2d at 212. Consequently, there will be no *Crawford* inquiry unless the requirements of chapter 725, section 5/115-10 *et seq.*, of the Illinois Compiled Statutes are satisfied. *Id.* As noted in *Martinez*, Illinois distinguishes between situations where the declarant/witness forgets the circumstances or basis for a prior statement and situations where the declarant/witness forgets ever making the statement in the first place. *Id.* at 210. The former could satisfy section 5/115-10.1(b)’s requirement that the witness be subject to cross-examination

### 3. *People v. Thompson*

The Illinois Appellate Court, First District, decided *People v. Thompson*<sup>272</sup> on June 22, 2004. *Thompson* involved a prosecution for aggravated domestic battery, aggravated battery, and unlawful restraint.<sup>273</sup> The defendant was charged with tying up and beating his fiancée because of a suspected affair.<sup>274</sup> While the defendant had twice confessed to the police that he beat his fiancée, at trial, he denied that he told the police that he beat her or tied her up.<sup>275</sup> The defendant also testified that he never threatened to physically harm her and that he never had a “domestic violence issue” with her.<sup>276</sup> The State then sought to challenge the factual basis of the defendant’s testimony by introducing statements that the victim had made in an application for an order of protection related to this incident.<sup>277</sup> In that application, she said that the defendant had tied her up and beaten her.<sup>278</sup> It appears from the court’s opinion that the victim had then changed her story and for that reason, the prosecution did not call her as a witness.<sup>279</sup> The trial court permitted the use of the prior statement, and the jury ultimately convicted the defendant.<sup>280</sup>

On appeal, the First District overturned the convictions and found the use of the victim’s statements in the application for an order of protection violated the defendant’s Confrontation Clause rights because the defendant never had an opportunity to cross-examine the declarant.<sup>281</sup> Applying *Crawford*, the court held that the statements were testimonial.<sup>282</sup> The court reasoned that the defendant never had an

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concerning the statement. The latter could not, under the authority of *Yarbrough*, because there would be no sufficient opportunity to cross-examine the witness about the truth or falsity of the statement. See *supra* notes 265–71 and accompanying text (discussing *Yarbrough*).

272. *People v. Thompson*, 812 N.E.2d 516 (Ill. App. Ct. 1st Dist. 2004).

273. *Id.* at 517.

274. *Id.* at 518–19.

275. *Id.*

276. *Id.* at 519.

277. *Id.*

278. *Id.* at 520.

279. *Id.* at 521. The defendant’s fiancée testified at the sentencing hearing that the defendant was the “perfect provider” and that he had not beaten her or tied her up and that another person was responsible for those acts. *Id.* at 520.

280. *Id.* at 519–20.

281. *Id.* at 520. Although the court referred to the statement as impeachment evidence, it was used substantively against the accused. *Id.* at 521.

282. *Id.* The *Thompson* court reiterated that the *Crawford* Court refused to address what specifically would be considered testimonial and refused to give any further indication of what would be considered testimonial in Illinois other than noting that a few specific examples would be testimonial, including “testimony at preliminary hearings, testimony before a grand jury or at a prior trial, in-court guilty plea statements of co-conspirators to show existence of a conspiracy,

opportunity to cross-examine the declarant.<sup>283</sup> The declarant also was not “unavailable” to the State, as evidenced by her testimony at the sentencing hearing.<sup>284</sup> The court had a relatively easy time concluding that the statement was testimonial. The court was correct because statements made in a formal court petition would fit almost any formulation of testimonial.<sup>285</sup> Additionally, *Thompson*, in dictum, clarified the issue of whether a defendant retains the right to confront himself by noting that “the [C]onfrontation [C]ause [does not] bar admission of a defendant’s inculpatory statements.”<sup>286</sup>

#### 4. In re *T.T.*

Perhaps the most significant case in Illinois that has applied *Crawford* principles is *In re T.T.*<sup>287</sup> *T.T.* involved a delinquency adjudication against the minor respondent for two counts of aggravated criminal sexual assault.<sup>288</sup> The minor respondent, T.T., allegedly sexually assaulted G.F., a seven-year-old girl for whom his mother was babysitting, on two occasions.<sup>289</sup> G.F. told her mother, P.F., of the abuse soon after it allegedly occurred, but P.F. did not contact the police or take G.F. to a doctor.<sup>290</sup> The Department of Children and Family Services (“DCFS”) eventually contacted P.F. four and a half months later regarding the abuse, in response to a report from a citizen to a DCFS hotline.<sup>291</sup> After several unsuccessful attempts to contact P.F. and G.F., DCFS investigator Lewis went to P.F. and G.F.’s home to speak with them about the alleged abuse.<sup>292</sup> Finding P.F. and G.F. leaving the home, Lewis interviewed G.F. in the front seat of her car while P.F. sat in the back seat.<sup>293</sup> Lewis introduced herself and interviewed G.F. using open-ended questions.<sup>294</sup> Without the assistance of P.F. and without any prompting by Lewis, G.F. gave Lewis a detailed account of the alleged

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and statements made during police questioning, including accomplice statements and statements against penal interest.” *Id.* (discussing *Crawford v. Washington*, 124 S. Ct. 1354 (2004)). The court also refused to comment on whether statements made to individuals who are not law enforcement agents could ever be considered testimonial. *Id.*

283. *Id.*

284. *Id.*

285. *See supra* Part II.D.1.c. (discussing extra-judicial statements).

286. *Thompson*, 812 N.E.2d at 521.

287. *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 1st Dist. 2004).

288. *Id.* at 792.

289. *Id.* at 793.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

abuse.<sup>295</sup>

A few days after Lewis interviewed G.F., G.F. was examined by Dr. Michelle Lorand, an expert in child abuse, in response to a referral by DCFS for a medical evaluation of the alleged sexual abuse.<sup>296</sup> Dr. Lorand first spoke to P.F. regarding the abuse and then spoke with G.F. alone to hear, in G.F.'s own words, what occurred.<sup>297</sup> In response to Dr. Lorand's questions, G.F. then described what was physically done to her during the alleged assault.<sup>298</sup>

Approximately two weeks after Dr. Lorand examined G.F., Detectives Dwyer and Collins of the Chicago Police Department met with P.F. and G.F. at police headquarters.<sup>299</sup> The two detectives interviewed G.F. while P.F. sat outside the open room.<sup>300</sup> They informed G.F. that they were police officers and were assigned to investigate sex crimes cases.<sup>301</sup> They then asked G.F. questions about what had occurred at the respondent's mother's house.<sup>302</sup> G.F. identified T.T. as the offender and once again gave detailed answers describing the abuse.<sup>303</sup>

Because the court anticipated that G.F. would testify at trial, the trial court held that G.F.'s statements to both Lewis and Detective Dwyer would be admissible under the hearsay exception for statements made by a child in a prosecution for physical or sexual abuse.<sup>304</sup> At trial, the parties stipulated to the prior testimony of Lewis and Detective Dwyer regarding G.F.'s statements to them at the evidentiary hearing.<sup>305</sup> Dr. Lorand testified at the trial about the statements that G.F. had made to her.<sup>306</sup> Dr. Lorand's testimony included both G.F.'s statements describing the nature of the abuse and, over the defense's objection,

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295. *Id.* at 793–94. Respondent told G.F. that they were going to “play wrestling, but took her into a bedroom and removed her pajamas, forcing her to have intercourse with him.” *Id.* Respondent also told G.F. that he would kill her if she told anyone what he did. *Id.* at 794.

296. *Id.*

297. *Id.* Dr. Lorand asked if anyone “had ever hurt her in her private parts” to which G.F. responded “yes.” *Id.* Dr. Lorand then asked G.F. who had hurt her, to which G.F. responded that it was T.T. *Id.* at 794–95.

298. *Id.* at 795.

299. *Id.* at 794.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. 725 ILL. COMP. STAT. 5/115-10(b) (2002); *In re T.T.*, 815 N.E.2d at 794.

305. *Id.* at 795.

306. *Id.* at 794.

G.F.'s identification of T.T. as the offender.<sup>307</sup>

On direct examination, G.F. testified that T.T. and she were “play-wrestling” in T.T.’s mother’s bedroom and that T.T. tried to unbutton her pants.<sup>308</sup> However, when the prosecutor asked G.F. what happened after that, she said “[n]othing.”<sup>309</sup> After a number of unsuccessful attempts (including repeated rephrasing of questions, leading questions, and assurances to G.F. that it was “okay to talk about it”<sup>310</sup>) by the prosecutor to get G.F. to repeat the story that she allegedly had told Lewis, Detective Dwyer, and Dr. Lorand, the trial court found that G.F. was unavailable as a witness.<sup>311</sup> At the close of the state’s case-in-chief, the respondent moved for a directed finding, which the court denied, stating that the admitted out-of-court statements were “reliable and corroborated by Dr. Lorand’s testimony.”<sup>312</sup> In closing, respondent argued that G.F.’s out-of-court statements testified to by Lewis, Detective Dwyer, and Dr. Lorand were inconsistent with her in-court testimony that “nothing happened.”<sup>313</sup> Nonetheless, the respondent was adjudicated delinquent.<sup>314</sup>

The respondent appealed, and during the pendency of the appeal, the United States Supreme Court decided *Crawford*.<sup>315</sup> Consequently, T.T. and the State both submitted briefs on the effect of *Crawford* on the admissibility of G.F.’s out-of-court statements.<sup>316</sup> In the end, the primary issues on appeal involved the Confrontation Clause.<sup>317</sup> The court disposed of the State’s waiver argument and then confronted

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307. *Id.* at 794–95.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 796.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*; *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

316. *In re T.T.*, 815 N.E.2d at 796–97.

317. *Id.* at 797. On appeal, the respondent initially challenged only the trial court’s determination that G.F. was unavailable. *Id.* at 797–98. On the unavailability issue, the First District had little trouble affirming the trial court’s finding. *Id.* It found that the trial court utilized the correct legal standard in finding G.F. unavailable and that the trial court applied this standard correctly in the circumstances of this case. *Id.* at 798. The First District had a particularly strong reason for affirming G.F.’s unavailability, since the respondent had taken an inconsistent stand on this question at trial by not moving to strike G.F.’s direct testimony. *Id.* Instead, the respondent had argued that G.F.’s testimony that “nothing happened” supported both a directed finding and an acquittal. *Id.* Consequently, the First District was unwilling to allow the respondent to change strategies on appeal to argue that he was prejudiced by the testimony. *Id.*

*Crawford* directly.<sup>318</sup> The court engaged in a summary of the *Crawford* opinion. It reviewed the various formulations of what may constitute a testimonial statement, noting that the *Crawford* Court had not commented on the merits of any of the formulations.<sup>319</sup> In fashioning its own approach for the present case, the court noted that Justice Thomas's formulation, in his concurrence in *White*,<sup>320</sup> cautioned against any approach that looked at the subjective intent of the declarant.<sup>321</sup> The court also noted that *Crawford* made clear the fact that ex parte testimony elicited by a government officer, neutral to the declarant, was inadmissible in the absence of unavailability and an opportunity for cross-examination.<sup>322</sup> Thus, the First District concluded that "governmental involvement in some fashion in the creation of a formal statement is necessary to render the statement testimonial in nature."<sup>323</sup> "When other factors are also present (the statement substituted for the declarant's testimony at trial, was produced ex parte, and was accusatory when made), the [C]onfrontation [C]lause's guarantee of cross-examination is triggered."<sup>324</sup>

Applying these principles, the court had no problem in finding that G.F.'s out-of-court statements to Detective Dwyer were testimonial and inadmissible due to G.F.'s unavailability.<sup>325</sup> The court noted that a "witness's recorded statement knowingly given in response to structured police questioning . . . qualifie[s] as testimonial under any conceivable definition."<sup>326</sup> In finding that the facts of the present case fit into this framework, the court noted that G.F. "knew why she was there,"<sup>327</sup> that she was asked specific, rather than open-ended questions,

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318. *Id.* at 798–99. The first issue was whether the respondent had waived any Confrontation Clause claim with respect to the testimony of Lewis and Detective Dwyer, because he had stipulated to the admissibility of their testimony given at a statutorily mandated evidentiary hearing in lieu of actual testimony at trial. *Id.* at 789. The First District rejected this argument, noting that "[j]udicial opinions announcing new constitutional rules applicable to criminal cases are retroactive to all cases pending on direct review at the time the new constitutional rule is declared." *Id.* at 798 (citing *People v. Ford*, 761 N.E.2d 735 (Ill. 2001)). The First District also noted that "a party may challenge the constitutionality of a statute at any time." *Id.* The court further noted that the respondent had stipulated to the admissibility of this testimony only "to avoid unnecessary repetition." *Id.* at 799.

319. *Id.* at 799.

320. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

321. In re *T.T.*, 815 N.E.2d at 800.

322. *Id.*

323. *Id.*

324. *Id.* (citing *Crawford v. Washington*, 124 S. Ct. 1354, 1367 n.7 (2004)).

325. *Id.* at 800–01.

326. *Id.* (citing *Crawford*, 124 S. Ct. at 1365 n.4).

327. *Id.* at 801.

and that the State filed a delinquency petition the day after the interview.<sup>328</sup>

The court also found that G.F.'s statement to DCFS investigator Lewis was testimonial and inadmissible.<sup>329</sup> This, however, posed a bit more of an analytical problem for the court. The court noted that DCFS's role in investigating child abuse has "both criminal and social welfare implications"<sup>330</sup> but that DCFS functions "as an agent of the prosecution"<sup>331</sup> under many circumstances. Consequently, to determine whether G.F.'s statements to Lewis were testimonial, it was necessary to ascertain the extent to which Lewis was working to assist a prosecutorial effort.<sup>332</sup> In doing so, the court looked both at DCFS's investigation process and the particular circumstances of this case. Citing a number of statutory and regulatory provisions, the court noted that DCFS often works in "conjunction with law enforcement in assisting the prosecutorial effort."<sup>333</sup>

In the immediate circumstances, the court observed that during Lewis's interview of G.F., there was no indication that G.F. was at "imminent risk"<sup>334</sup> and that G.F. was not taken into protective custody.<sup>335</sup> The court held that "where the focus is on whether the declarant is bearing witness against a criminal defendant when making a formal statement to a government officer with an eye toward prosecution,"<sup>336</sup> such as here, these statements are testimonial.<sup>337</sup>

In holding G.F.'s statements to Lewis testimonial, the court was particularly concerned with the State routinely using "surrogate

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328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* For example, DCFS immediately refers reports of alleged child sexual abuse to the police. *Id.* (citing 325 ILL. COMP. STAT. 5/7 (2002 & Supp. 2004); 89 ILL. ADMIN. CODE tit. 89, § 300.70 (2000)). It also may delegate an ongoing investigation to the police. *Id.* at 801 (citing 325 ILL. COMP. STAT. 5/7.3 (2002); 89 ILL. ADMIN. CODE tit. 89, § 300.80 (2000)). Furthermore, a DCFS investigator will often interview people helpful to the investigation after seeing to the safety of the child. *Id.* (citing 325 ILL. COMP. STAT. 5/7.4(b)(3) (2002 & Supp. 2004)).

334. *Id.* at 802.

335. *Id.*

336. *Id.*

337. The state argued that the fact that Lewis's interview of G.F. was "impromptu," that it was conducted in a neutral location, that Lewis asked open-ended questions, that there was no law enforcement officer present, and that the interview occurred before the filing of any delinquency petition all mitigated in favor of finding that G.F.'s statements were not testimonial. *Id.* The court found that a "court's attempt to fashion such factors into some type of litmus test for testimonial evidence would undermine the [C]onfrontation [C]lause." *Id.*

testimony of social workers”<sup>338</sup> to avoid preparing and presenting child witnesses for cross-examination. However, the court explicitly held that not all statements made to a social worker are “per se testimonial.”<sup>339</sup> Significantly, the court noted that reports via telephone call to a DCFS hotline may not be testimonial.<sup>340</sup> The court also noted that statements of sexual abuse overheard by a social worker might be non-testimonial as well.<sup>341</sup>

Finally, the court addressed the testimony of Dr. Lorand.<sup>342</sup> The court had a relatively easy time deciding that G.F.’s statements to Dr. Lorand identifying T.T. were testimonial in nature, as the statements directly accused T.T. of the crime.<sup>343</sup> The statutory source for the admissibility of these statements is the hearsay exception for a victim’s statements made to medical personnel for purposes of medical diagnosis or treatment in a prosecution of certain sexual offenses.<sup>344</sup> In finding these statements non-testimonial, the court overlooked the significance of the fact that G.F. was only seen by Dr. Lorand months after the alleged abuse because of a DCFS referral, noting that although G.F.’s mother had never had her examined after the assault, “government officials like police officers commonly take sexual assault victims to the hospital for treatment and evaluation.”<sup>345</sup> The court did not address the fact that the medical exam here took place nearly five months after the alleged abuse took place. The court also observed that although Dr. Lorand was a part of a child abuse trauma team, she was not charged with facilitating the prosecution of T.T.<sup>346</sup> and that her “primary investment in cooperating with law enforcement was in facilitating the least traumatic method of diagnosis and treatment for the alleged victim” rather than the prosecution of T.T.<sup>347</sup>

Recognizing that medical examinations of sexual assault victims involve the collection of evidence for later use at trial, the court nonetheless held that a victim’s statement regarding the “descriptions of

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338. *Id.*

339. *Id.* at 803 (finding possible scenarios, including calls to DCFS hotlines or statements of sexual abuse overheard by a social worker, would be admissible as “non-testimonial hearsay”).

340. *Id.* The court cited the New York case *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004), dealing with 911 calls, in reaching this conclusion.

341. In re *T.T.*, 815 N.E.2d at 803.

342. *Id.* As noted above, Dr. Lorand testified both to G.F.’s statements about the nature of the abuse and the identification of T.T. as the abuser.

343. *Id.*

344. 725 ILL. COMP. STAT. 5/115-13 (2002 & Supp. 2004).

345. In re *T.T.*, 815 N.E.2d at 803.

346. *Id.*

347. *Id.*

the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof<sup>348</sup> is not testimonial when it does not accuse or identify the perpetrator of the assault.<sup>349</sup> The court reasoned that these statements were made by a patient “with a selfish interest in treatment”<sup>350</sup> and were not accusatory against T.T. when made.<sup>351</sup> In so holding, the court erroneously dismissed an important formulation of what is testimonial, set forth in *Crawford*, defining a testimonial statement as one that “an objective witness would reasonably believe the statement would be available for use at a later trial,”<sup>352</sup> finding that this formulation “casts too wide a net in categorizing nonaccusatory statements by sexual assault victims to medical personnel.”<sup>353</sup>

The court also dismissed the respondent’s argument that the *Crawford* Court’s questioning of the continued validity of *White*,<sup>354</sup> which involved the admissibility of a child sexual assault victim’s statement to an examining physician made for the purpose of medical diagnosis or treatment, required a finding that such statements were intended by the *Crawford* Court to be testimonial.<sup>355</sup> The First District noted that *Crawford* questioned *White* only to the extent that the child victim’s statement to an investigating police officer was found admissible in the absence of unavailability or cross-examination.<sup>356</sup> The First District also noted that the *White* Court never reached the issue of medical testimony regarding the perpetrator’s identity.<sup>357</sup> Thus, the court found that there was no error in the admissibility of Dr. Lorand’s testimony of G.F.’s statements describing the abuse.<sup>358</sup> We agree with the appellate court’s foregoing analysis, but disagree with its legal conclusion that G.F.’s statements to Dr. Lorand describing the abuse were not testimonial.

Despite the admissibility of some of Dr. Lorand’s statements, the court found that the errors in the admissibility of the testimony of Lewis, Detective Dwyer, and Dr. Lorand’s were not harmless beyond a

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348. *Id.* at 804 (citing 725 ILL. COMP. STAT. 5/115-13 (2000 & Supp. 2004)).

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* See *supra* Part II.D.1 (discussing whether a particular statement qualifies as testimonial).

353. *Id.*

354. *White v. Illinois*, 502 U.S. 346 (1992).

355. *In re T.T.*, 815 N.E.2d at 804–05.

356. *Id.* at 804.

357. *Id.* at 805.

358. *Id.*

reasonable doubt.<sup>359</sup> Accordingly, the case was reversed and remanded.<sup>360</sup>

### B. Crawford's Effect on Illinois' Statutory Hearsay Provisions

*Crawford* will have a drastic effect on the continued validity of certain Illinois statutory hearsay provisions. Others fall outside the scope of the rule announced in *Crawford* and, thus, should not change.

#### 1. Business Records<sup>361</sup>

The hearsay exception for business records was singled out by the *Crawford* court as an example of a statement that is "by [its] very nature . . . not testimonial."<sup>362</sup> Perhaps one could argue that under one formulation of testimonial statements, namely "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

<sup>359</sup> *Id.*

<sup>360</sup> The concurrence, written by Presiding Justice O'Mara Frossard, agreed with the majority in substance. However, it emphasized that whether a statement is "testimonial . . . cannot be answered . . . in a vacuum" but must be answered with respect to the "totality of circumstances." *Id.* (Frossard, J., concurring). The concurrence pointed out the fact that the very nature of the approach in section 5/115-10 to admissibility is fundamentally at odds with *Crawford* under many circumstances. *Id.* at 806 (Frossard, J., concurring). However, the concurrence emphasized that *Crawford* should not undermine the admissibility of statements, such as 911 calls and calls to the DCFS hotline, that are more similar to a "cry for help" than a testimonial statement. *Id.* at 809 (Frossard, J., concurring).

<sup>361</sup> Illinois' hearsay exception for business records is contained at chapter 725, section 5/115-5 of Illinois Compiled Statutes and reads, in pertinent part:

(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

...

The term "business," as used in this Section, includes business, profession, occupation, and calling of every kind.

...

(c) No writing or record made in the regular course of any business shall become admissible as evidence by the application of this Section if:

(1) Such writing or record has been made by anyone in the regular course of any form of hospital or medical business; or

(2) Such writing or record has been made by anyone during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation of any kind.

725 ILL. COMP. STAT. 5/115-5 (2002 & Supp. 2004).

<sup>362</sup> *Crawford v. Washington*, 124 S. Ct. 1354, 1367 (2004). *See also supra* note 101 and accompanying text (noting that *Crawford* does not apply to non-testimonial statements).

later trial,”<sup>363</sup> would place business records within *Crawford*’s ambit. Given the very nature of business records, this argument should fail.

Business records could be considered testimonial if the organization in question is engaged in the business of preparing materials for trial.<sup>364</sup> For example, if a jurisdiction permits the admissibility of forensic reports<sup>365</sup> or police reports under a business records hearsay exception, *Crawford* would call into question the continued validity of the use of such evidence.<sup>366</sup> Illinois avoids this problem under the business records exception with respect to police reports by precluding records “made by anyone during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation of any kind.”<sup>367</sup> In sum, *Crawford* will likely leave the business records exception unchanged in Illinois.<sup>368</sup>

## 2. Limited Exception for the Use of Certain Medical Records in Criminal Trials

As a general rule, medical records are inadmissible in criminal cases unless the person who made the record testifies at trial and is subject to cross-examination.<sup>369</sup> Furthermore, Illinois precludes the admissibility of medical records as business records by statute<sup>370</sup> and by Supreme Court of Illinois Rule.<sup>371</sup> The statute provides a limited exception to the general prohibition of the use of medical records as business records in criminal trials, in the case of blood alcohol and drug tests.<sup>372</sup>

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363. *Id.* at 1364 (citing Brief of Amici Curiae Nat’l Ass’n of Criminal Def. Lawyers et al., *Crawford* (No. 02-9410)).

364. DANIEL J. CAPRA, 2004 UPDATE FOR EVIDENCE: THE OBJECTION METHOD 28 (2d ed. 2004); FISHMAN, *supra* note 121, at 207–08. *But see* Johnson v. Renico, 314 F. Supp. 2d 700, 707 (E.D. Mich. 2004) (noting that statements made to a police officer during booking by the defendant and another man contained in booking records did not implicate *Crawford* because these were admitted under the business records exception and were therefore inherently non-testimonial in nature).

365. Forensic reports, such as coroner’s records, are discussed in depth *infra* Part III.B.3.

366. *Crawford*, 124 S. Ct. at 1364.

367. 725 ILL. COMP. STAT. 5/115-5(c)(2) (2002).

368. However, other jurisdictions with a broader business records exception may very well encounter challenges to certain applications of the business records exception.

369. *People v. Giovanetti*, 387 N.E.2d 1071, 1081 (Ill. App. Ct. 1st Dist. 1979); *People v. Gargano*, 295 N.E.2d 342, 345 (Ill. App. Ct. 2d Dist. 1973); *People v. Aristole*, 268 N.E.2d 227, 230–31 (Ill. App. Ct. 1st Dist. 1971).

370. 725 ILL. COMP. STAT. 5/115-5(c)(1) (2002 & Supp. 2004).

371. ILL. SUP. CT. R. 236.

372. 625 ILL. COMP. STAT. 5/11-501.4 (2002). Section 5/11-501.4 reads, in pertinent part:

(a) Notwithstanding any other provision of law, the results of blood tests performed for the purpose of determining the content of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof, of an individual’s blood

It seems relatively clear that the outcome of a chemical test should not be considered testimonial in light of *Schmerber v. California*.<sup>373</sup> Assuming arguendo that the results of these tests are testimonial and therefore pose a Confrontation Clause issue,<sup>374</sup> *Crawford* will not create an admissibility barrier because the Illinois statute specifically excludes tests performed “at the request of law enforcement authorities.”<sup>375</sup> Furthermore, the rationale for the admissibility of evidence under this section is similar to that of business records, which the *Crawford* Court specifically precluded from the testimonial label.<sup>376</sup> Therefore, the Illinois rule as to medical records will likely remain unchanged by the *Crawford* decision.

### 3. Coroners’ Records

Chapter 725, section 5/115-5.1, contains Illinois’ statutory hearsay exception for the admissibility of coroners’ records.<sup>377</sup> Illinois courts

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conducted upon persons receiving medical treatment in a hospital emergency room are admissible in evidence as a business record exception to the hearsay rule only in prosecutions for any violation of Section 11-501 of this Code [625 ILL. COMP. STAT. 5/11-501] or a similar provision of a local ordinance, or in prosecutions for reckless homicide brought under the Criminal Code of 1961 [720 ILL. COMP. STAT. 5/1-1 et seq.], when each of the following criteria are met:

- (1) the chemical tests performed upon an individual’s blood were ordered in the regular course of providing emergency medical treatment and not at the request of law enforcement authorities;
- (2) the chemical tests performed upon an individual’s blood were performed by the laboratory routinely used by the hospital; and
- (3) results of chemical tests performed upon an individual’s blood are admissible into evidence regardless of the time that the records were prepared.

625 ILL. COMP. STAT. 5/11-501.4 (2002).

373. See *Schmerber v. California*, 384 U.S. 757, 764 (1966) (holding that the results of blood alcohol tests are physical characteristics rather than testimonial evidence). While *Schmerber* addressed what is testimonial in the Fifth Amendment sense, the results of blood alcohol tests would also not be treated as testimonial for Sixth Amendment purposes. See, e.g., *State v. Thackaberry*, 95 P.3d 1142, 1145 (Or. Ct. App. 2004) (noting that a laboratory report indicating the presence of methamphetamine was likely not testimonial).

374. See, e.g., *People v. Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (holding that the results of tests showing blood alcohol content ordered by law enforcement were testimonial).

375. 625 ILL. COMP. STAT. 5/11-501.4(a)(1) (2002).

376. *Crawford v. Washington*, 124 S. Ct. 1354, 1367 (2004).

377. 725 ILL. COMP. STAT. 5/115-5.1 (2002 & Supp. 2004). This exception allows for the coroner’s or medical examiner’s records “detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner’s office” to be received as competent evidence in criminal cases over a hearsay objection. See *id.* These reports are “admissible as *prima facie* evidence of the facts, findings, opinions, diagnoses and conditions stated therein.” See *id.* They are also admissible “as an exception to the hearsay rule as *prima facie* proof of the cause of death of the person to whom it relates.” See *id.*

should find this statute unconstitutional in light of *Crawford*.<sup>378</sup> Coroner's records under this statute are testimonial.<sup>379</sup> The Medical Examiner's Office is a governmental body that "plays a vital role in the administration of justice."<sup>380</sup> For example, the Cook County Medical Examiner purports to "investigate[]"<sup>381</sup> any human death resulting from "criminal violence"<sup>382</sup> or under "suspicious or unusual circumstances."<sup>383</sup> When a government official makes a statement about the cause of death of a citizen pursuant to a formal investigation and the state seeks to admit this into evidence for the truth of the matter asserted, this is a testimonial statement.<sup>384</sup>

Although coroners' reports may not resemble ex parte examinations, they are certainly "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,"<sup>385</sup> and they are made with substantial governmental involvement. Coroners' records are made by an arm of the state to ascertain the cause of death of a certain individual, which often is the precise question that a criminal case seeks to resolve. This is further supported by Justice Scalia's assertions in *Crawford* itself, that coroners' records were not historically given "any special status" with respect to the requirement of cross-examination.<sup>386</sup> For these reasons, coroners' records should rightly be seen as testimonial, and therefore inadmissible under *Crawford*.<sup>387</sup>

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378. See *Crawford*, 124 S. Ct. at 1364 (stating that "testimony . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact'" (quoting WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828))).

379. See FISHMAN, *supra* note 121 (noting that forensic reports should be considered testimonial because they are created with the expectation that they would be used as evidence).

380. Cook County Info Center, Office of the Medical Examiner, at <http://www.cookcountygov.com/agencyDetail.php?pAgencyID=11> (last visited Apr. 1, 2005).

381. *Id.*

382. *Id.*

383. *Id.*

384. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004).

385. *Id.* at 1367 (internal quotes omitted).

386. *Id.* at 1361 n.2.

387. Interestingly, the only cases on point in this regard have been decided, summarily, in the other direction. Two cases decided by the Alabama Court of Criminal Appeals both decided that coroner's records are not testimonial. See *Perkins v. State*, No. CR-02-1779, 2004 Ala. Crim. App. LEXIS 87, at \*18-19 (Ala. Crim. App. Apr. 30, 2004) (finding the autopsy report non-testimonial and distinguishing it from the hearsay in *Crawford*); *Smith v. State*, No. CR-02-1218, 2004 Ala. Crim. App. LEXIS 93, at \*24 (Ala. Crim. App. Apr. 30, 2004) (determining the coroner's report admissible under the business-records exception to the hearsay rule). Alabama, however, governs the admissibility of coroner's records through its usual business records hearsay exception rather than through an independent statute, as Illinois does. See *Baker v. State*,

#### 4. Statements Made By a Child or Mentally Retarded Person in a Prosecution for Physical or Sexual Abuse

Chapter 725, section 5/115-10, provides Illinois' hearsay exception for statements made by a child under the age of thirteen or a mentally retarded person in a prosecution for a physical or sexual act perpetrated on the child or mentally retarded person.<sup>388</sup> This provision allows not only the victim to testify about an out-of-court statement that he or she had made complaining about the act,<sup>389</sup> but it also allows a third person to testify about statements made to him or her by the child or mentally retarded person.<sup>390</sup> To allow a third person to testify as to these out-of-court statements, the trial court must find "sufficient safeguards of reliability,"<sup>391</sup> the victim must be unavailable as a witness, and there must be "corroborative evidence of the act which is the subject of the statement."<sup>392</sup>

*Crawford* calls the continued validity of this section into question in some circumstances.<sup>393</sup> Clearly, if the victim actually testifies at the trial, subject to cross-examination concerning the out-of-court statement, *Crawford* poses no bar to the admissibility of his or her out-of-court statement.<sup>394</sup> However, this statutory provision employs a *Roberts*-type reliability inquiry when the victim does not testify.<sup>395</sup> Thus, the question becomes whether the out-of-court statement made by the victim is testimonial or not. Statements made to law enforcement and government investigators under this statute should be characterized

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473 So. 2d 1127 (Ala. Crim. App. 1984) (holding that autopsy reports were admissible under Alabama's business records hearsay exception, which was specifically singled out by the *Crawford* majority as not testimonial). The *Crawford* majority specifically singled out coroner's records as not testimonial. *Crawford*, 124 S. Ct. at 1363.

388. 725 ILL. COMP. STAT. 5/115-10 (2002).

389. See 725 ILL. COMP. STAT. 5/115-10(a)(1) (presenting the guidelines for out-of-court statements).

390. See 725 ILL. COMP. STAT. 5/115-10(a)(2) (discussing testimony by a third person).

391. See 725 ILL. COMP. STAT. 5/115-10(b)(1) (outlining the requirement of reliability).

392. See 725 ILL. COMP. STAT. 5/115-10(b)(2)(B) (providing the conditions necessary for a third person to testify when a witness is unavailable).

393. *But see* *People v. Miles*, 815 N.E.2d 37, 46 (Ill. App. Ct. 4th Dist. 2004) (Cook, J., specially concurring) (arguing that all of section 115-10 is now invalid). Justice Cook disagreed with the *Miles* majority that section 115-10 "has any continuing validity." *Id.* (Cook, J., specially concurring). Justice Cook opposed trying to "pick out pieces of section 115-10 that might survive *Crawford*." *Id.* (Cook, J., specially concurring). Instead, he suggested that the Illinois legislature "should decide whether it wants a new section 115-10, one which will be very different from the one it enacted." *Id.* (Cook, J., specially concurring).

394. *Crawford v. Washington*, 124 S. Ct. 1354, 1369 n.9 (2004) ("[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

395. 725 ILL. COMP. STAT. 5/115-10(b)(1).

as testimonial under most circumstances under any formulation of the term.<sup>396</sup> Similarly, statements made to physicians, psychologists, or social workers pursuant to an investigation should be considered testimonial.<sup>397</sup> However, if the victim's statement is made to a physician purely for the purpose of diagnosis or treatment, it could be argued that it is admissible over a Confrontation Clause objection because it may not be testimonial in nature.<sup>398</sup> Furthermore, a statement made to a social worker during a call to a child abuse hotline may also be deemed "non-testimonial" under certain circumstances.<sup>399</sup> Even under these circumstances, however, the better analysis would look at all the circumstances surrounding the making of the statement to determine whether it is indeed testimonial, as there will be situations when even a call to a child abuse hotline or a statement made to a physician describing an assault should rightly be considered testimonial.

As far as Illinois is concerned, the First District initially noted that whether statements to non-law enforcement individuals fall within *Crawford's* ambit is "a question left open."<sup>400</sup> The issue of whether

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396. See *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 757 (Cal. Ct. App. 2004) (holding that the statement of a child victim of sexual assault "given in response to structured police questioning" was testimonial); *People ex rel. R.A.S.*, No. 03CA1209, 2004 Colo. App. LEXIS 1032, at \*10 (Colo. Ct. App. July 17, 2004) (reasoning that the statement of a child made to a police investigator asking age-appropriate questions in a question and answer format was testimonial within even the narrowest formulation" of the term); see also *In re Rolandis G.*, 817 N.E.2d 183, 188 (Ill. App. Ct. 2d Dist. 2004) (holding that statements made to a child advocacy worker were testimonial and inadmissible under *Crawford*). But see *In re T.T.*, 815 N.E.2d 789, 800 (Ill. App. Ct. 1st Dist. 2004) (noting Justice Thomas's concurrence in part and concurrence in judgment in *White* that "not even statements made to police or government officials could be deemed automatically subject to the right to confrontation").

397. See *id.* at 801, 803 (holding child victim's statement to a DCFS investigator and a physician identifying the accused testimonial); *Snowden v. State*, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004) (holding that a child victim's statements to a social worker employed by child protective services was testimonial because the victim was "interviewed for the expressed purpose of developing their testimony"); see also *Sisavath*, 13 Cal. Rptr. 3d at 756 (statements made to investigators in a facility "specially designed and staffed for interviewing children suspected of being victims of abuse" were testimonial). But see *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (holding that an interview done by a private abuse assessment organization of a child victim of sexual abuse was not testimonial because it did not resemble an ex parte examination and was not done by a government employee).

398. See *In re T.T.*, 815 N.E.2d at 803-04 (holding certain statements made by a sexual assault victim to a physician describing the assault four and a half months after the assault to a physician seeing the child in response to a referral from DCFS non-testimonial); see also *State v. Vaught*, 682 N.W.2d 284, 289-90 (Neb. 2004) (holding that a statement of a child made to an emergency room physician was not testimonial because it was made for the purpose of medical diagnosis or treatment).

399. See *In re T.T.*, 815 N.E.2d at 803 (noting that it is "possible" that a report to a child abuse hotline would be admissible as non-testimonial hearsay).

400. *People v. Thompson*, 812 N.E.2d 516, 521 (Ill. App. Ct. 1st Dist. 2004).

testimonial statements could be made to non-law enforcement officers was recently revisited in *In re T.T.*<sup>401</sup> The First District in *T.T.* characterized statements made to a DCFS investigator during an interview of the seven-year-old victim and statements to a medical doctor by the victim identifying the perpetrator as testimonial under *Crawford*.<sup>402</sup> The First District, however, cautioned that not all statements to these types of individuals would be deemed testimonial. Examples given by the court of non-testimonial statements to social workers include reports to the DCFS hotline or “statements of sexual abuse *overheard* by a social worker.”<sup>403</sup> Despite *T.T.*’s apparent willingness to find certain statements made to non-law enforcement officers testimonial, statements made spontaneously to parents, teachers, or babysitters by a child who simply seeks to ease the pain of abuse may fall outside the scope of testimonial statements that *Crawford* covers because of the absence of any “government involvement”<sup>404</sup> whatsoever. Informal statements to parents certainly do not resemble *ex parte* examinations. The best approach is to examine the totality of the circumstances to determine if a statement to a non-law enforcement officer is testimonial.

It is beyond dispute, in light of *T.T.*, that certain applications of this section that would previously have passed constitutional muster are now constitutionally flawed. Certainly, the section’s test for admissibility, which relies on an *ad hoc* judicial determination of reliability of the statement, conflicts with the very essence of *Crawford*.<sup>405</sup> If the statement at issue is deemed non-testimonial, this judicial determination of reliability will remain valid. However, testimonial statements must now be tested through the constitutional lens of *Crawford*. Consequently, the continued validity of certain applications of this section will ultimately depend on which formulation of testimonial statement Illinois courts choose to apply.<sup>406</sup>

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401. *In re T.T.*, 815 N.E.2d at 792. *See also supra* Part III.A.4 (discussing *In re T.T.*).

402. *In re T.T.*, 815 N.E.2d at 801–03.

403. *Id.* at 803 (emphasis added).

404. *See id.* at 800 (noting that “*Crawford* indicates that governmental involvement in some fashion in the creation of a formal statement is necessary to render the statement testimonial in nature”).

405. *See* 725 ILL. COMP. STAT. 5/115-10(b)(1) (2002) (stating that exceptions to the hearsay rule are admitted only if “[t]he court finds . . . that the time, content, and circumstances of the statement provide sufficient safeguards of reliability”).

406. Clearly, *T.T.* has given Illinois courts some indication of what analysis may be employed in deciding whether particular statements are testimonial. Nonetheless, there are likely to continue to be close calls in this inquiry that Illinois courts will have to address including whether statements of a child to a parent can ever be considered testimonial, whether a child’s statement to a teacher about abuse can be considered testimonial, and whether the child’s subjective intent

At present, the best that can be said about the continued validity of this hearsay exception in light of *Crawford* is that it depends on whether the statement is testimonial or not, and that determination should be made in light of the particular circumstances surrounding the making of the statement. However, *Crawford* will likely operate to exclude many statements under this section that previously would have been admissible under the statute.<sup>407</sup>

### 5. Prior Inconsistent Statements

Chapter 725, section 5/115-10.1, contains Illinois' statutory hearsay exception for the prior inconsistent statements of a witness.<sup>408</sup> This section satisfies the Confrontation Clause as interpreted by *Crawford*. Recognizing that these statements are testimonial in nature, *Crawford* does not proscribe admissibility. Section 10.1(c)(1) requires that the prior statement "be made under oath at a trial, hearing, or other

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or expectations in making the statement matters in the testimonial inquiry.

*T.T.* rejected this subjective inquiry under Justice Thomas's formulation of testimonial statements, noting that a subjective inquiry such as this would be "difficult to apply and would entangle courts in a 'multitude of difficulties.'" In re *T.T.*, 815 N.E.2d at 800. Nonetheless, the *Crawford* majority specifically recognized that the intent of the declarant may be relevant in deeming a statement testimonial under another formulation. See *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004) (citing formulation of the Brief of Amici Curiae the National Association of Criminal Defense Lawyers, 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").

407. See Patrick A. Tuite, *Ruling Signals Limits on Hearsay*, CHI. DAILY L. BULL., May 26, 2004, at 5 (noting that many statements previously admissible under section 5/115-10(a) would now be inadmissible under *Crawford*).

408. Chapter 725, section 5/115-10.1 reads:

In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

- (a) the statement is inconsistent with his testimony at the hearing or trial, and
- (b) the witness is subject to cross-examination concerning the statement, and
- (c) the statement—

- (1) was made under oath at a trial, hearing, or other proceeding, or

- (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

- (A) the statement is proved to have been written or signed by the witness, or
- (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

- (C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

725 ILL. COMP. STAT. 5/115-10.1 (2002).

proceeding,”<sup>409</sup> which is clearly testimonial. Statements admitted under section 10.1(c)(2)(B) would similarly be testimonial, as it requires an acknowledgement under oath of the making of the statement at trial.<sup>410</sup> Finally, statements under sections 10.1(c)(2)(A) and (C) may be testimonial if made to a police officer or a government agent or an individual who is sufficiently identified with the prosecution.<sup>411</sup> Nevertheless, statements under this statute will continue to be constitutionally admissible notwithstanding *Crawford* because the statute demands that the declarant be a witness at trial and subject to cross-examination concerning the statement.<sup>412</sup>

#### 6. Prior Statements of a Witness When the Witness Refuses to Testify Despite a Court Order.

Chapter 725, section 5/115-10.2 provides a hearsay exception for prior statements of a witness when the witness refuses to testify despite a court order to do so.<sup>413</sup> This section essentially allows for the

409. 725 ILL. COMP. STAT. 5/115-10.1(c)(1).

410. See 725 ILL. COMP. STAT. 5/115-10.1(c)(2)(B) (presenting the requirements for admissibility of prior inconsistent statements).

411. If a statement that is admitted under section 10.1(c)(2)(A) or (C) was made to a police officer, it would be testimonial. See 725 ILL. COMP. STAT. 5/115-10.1(c)(2)(A), (C) (outlining the conditions for the admissibility of a prior inconsistent statement). The statute does not facially limit admissibility to statements made to police officers or government officials, however. If a statement is made to a private person and is admitted under these sections, it is far more likely to be considered “non-testimonial.”

412. 725 ILL. COMP. STAT. 5/115-10.1(b). It makes no difference whether or not there was a former opportunity to cross-examine the out-of-court declarant. The statute’s requirement for cross-examination of the out-of-court declarant at trial about the making of the statement satisfies *Crawford*. See *Crawford v. Washington*, 124 S. Ct. 1354, 1369 n.9 (2004) (noting that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements”). This analysis has been adopted by the First District in Illinois and should be recognized by other courts to be correct. See *People v. Martinez*, 810 N.E.2d 199, 212 (Ill. App. Ct. 1st Dist. 2004) (holding admissible under *Crawford* a prior inconsistent statement of a testifying witness). This, of course, is notwithstanding any issues with respect to whether a testifying witness can be sufficiently cross-examined. See *supra* Part II.D.2 (analyzing what constitutes sufficient opportunity for cross-examination under *Crawford*).

413. 725 ILL. COMP. STAT. 5/115-10.2 (2002 & West Supp. 2003). This section reads, in pertinent part:

(a) A statement not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is unavailable as defined in subsection (c) and if the court determines that:

- (1) the statement is offered as evidence of a material fact; and
- (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
- (3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence.

...

admissibility of out-of-court statements not covered by any other hearsay exceptions, but which bear “equivalent circumstantial guarantees of trustworthiness”<sup>414</sup> when the declarant refuses to testify despite a court order to do so. The unavailability of the witness’s testimony precludes present opportunity to cross-examine the declarant. Because the statute employs a *Roberts*-like reliability standard for admissibility and because there is no opportunity at trial to cross-examine the declarant about that statement, the statute is constitutionally deficient under the Confrontation Clause after *Crawford*.<sup>415</sup> If the accused was afforded a prior opportunity to cross-examine the declarant concerning the statement, there is no constitutional problem for the admissibility of the statement under the Sixth Amendment.<sup>416</sup>

The validity of this statute with respect to prior grand jury testimony was already addressed in *People v. Patterson*,<sup>417</sup> which held that admissibility of grand jury testimony in the absence of a prior opportunity for cross-examination violated the Confrontation Clause under *Crawford*.<sup>418</sup> This holding is unquestionably correct and consistent with *Crawford* since there can be no dispute that grand jury testimony is testimonial under any formulation of the term. However, not all prior out-of-court statements will necessarily be considered testimonial. If the trial court determines that a statement is “non-testimonial,” *Crawford* will not obstruct the admissibility of the statement under the provisions of this statute.<sup>419</sup> At least three justices of the *Crawford* majority concluded that the *Roberts* test is valid when it comes to the admissibility of non-testimonial out-of-court statements.<sup>420</sup>

It is worth noting in this context that *Crawford* will likely not affect

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(c) Unavailability as a witness is limited to the situation in which the declarant persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.

(d) A declarant is not unavailable as a witness if exemption, refusal, claim or lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of a statement for purpose of preventing the witness from attending or testifying.

*Id.*

414. 725 ILL. COMP. STAT. 5/115-10.2(a).

415. *Crawford*, 124 S. Ct. at 1365.

416. *Id.*

417. *People v. Patterson*, 808 N.E.2d 1159 (Ill. App. Ct. 4th Dist. 2004).

418. *Id.* at 1164–65.

419. *Crawford*, 124 S. Ct. at 1374.

420. See generally FISHMAN, *supra* note 121 (discussing the concept of testimonial evidence).

section 10.2(d) at all. Subsection (d), essentially a forfeiture analysis, states that a witness is not considered unavailable for this section if the proponent of the statement has procured the witness's unavailability.<sup>421</sup> *Crawford* expressly accepted the rule of forfeiture by wrongdoing as consistent with the Confrontation Clause because wrongfully procuring unavailability "extinguishes confrontation claims on essentially equitable grounds."<sup>422</sup>

### 7. Prior Statements Used in Domestic Violence Prosecutions

Chapter 725, section 5/115-10.2a, provides Illinois' hearsay exception for the admissibility of out-of-court statements in domestic violence prosecutions when the declarant is unavailable to testify.<sup>423</sup> The underlying statement must be one made by an individual protected by the Illinois Domestic Violence Act of 1986.<sup>424</sup> This hearsay exception is similar to the hearsay exception for prior statements of a witness when the witness refuses to testify despite a court order to do so,<sup>425</sup> as discussed above,<sup>426</sup> except that section 10.2a only applies in certain domestic violence prosecutions, and section 10.2a allows for the unavailability of the witness/declarant under circumstances other than refusal to testify despite a court order to do so.<sup>427</sup> These additional grounds for unavailability include privilege, refusal to testify despite a court order to do so, lack of memory of the subject matter of the prior statement, health or mental reasons, and inability of the proponent of the statement to procure the declarant's attendance.<sup>428</sup>

The *Crawford* analysis for this exception parallels that of the exception for prior statements of a witness when the witness refuses to testify despite a court order to do so:<sup>429</sup> if the out-of-court statement is

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421. 725 ILL. COMP. STAT. 5/115-10.2(d) (2002 & West Supp. 2003).

422. *Crawford*, 124 S. Ct. at 1370. He or she who wrongfully causes the unavailability of the testimony of the out-of-court declarant cannot object to the admissibility of the out-of-court statement under this statute based on *Crawford. Id.*

423. 725 ILL. COMP. STAT. 5/115-10.2a.

424. 750 ILL. COMP. STAT. 60/201 (2002) (protecting domestic violence victims, children of domestic violence victims, and individuals who are employed or residing in homes that house a domestic violence victim).

425. 725 ILL. COMP. STAT. 5/115-10.2.

426. *See supra* Part III.B.6 (analyzing the admissibility of prior statements when the witness refused to testify, despite a court order).

427. *See* 725 ILL. COMP. STAT. 5/115-10.2a(c) (listing situations in which a declarant may be considered unavailable).

428. *See* 725 ILL. COMP. STAT. 5/115-10.2a(c)(1)-(5) (detailing the grounds for unavailability).

429. *See supra* Part III.B.6 (analyzing the admissibility of prior statements when a witness refuses to testify, despite a court order).

testimonial, *Crawford* will preclude the admissibility of the statement unless the accused has had a prior opportunity to cross-examine the declarant about the out-of-court statement.<sup>430</sup> Both sections employ the same constitutionally-flawed reliability inquiry. Statements made to police officers and other law enforcement personnel should be construed as testimonial. Similarly, statements made to governmental agencies, for example DCFS,<sup>431</sup> will often fit into the testimonial category. Statements that are deemed non-testimonial will presumably still be admissible under this section.<sup>432</sup> Also, the forfeiture provision contained in this section will remain valid.<sup>433</sup>

#### 8. Prior Statements of Elder Adults in a Prosecution for Abuse, Neglect, or Financial Exploitation.<sup>434</sup>

Chapter 725, section 5/115-10.3, excepts from the general preclusion of hearsay evidence those out-of-court statements made by an elderly

430. *Crawford v. Washington*, 124 S. Ct. 1354, 1365 (2004).

431. See *In re T.T.*, 815 N.E.2d 789, 801 (Ill. App. Ct. 1st Dist. 2004) (holding in a child sexual assault case that a child's statements to a DCFS investigator were testimonial).

432. See *Crawford*, 124 S. Ct. at 1374 (acknowledging that non-testimonial statements are admissible).

433. See *supra* notes 421–22 and accompanying text (discussing the lack of effect *Crawford* will likely have on forfeiture provisions in subsection 10.2).

434. 725 ILL. COMP. STAT. 5/115-10.3 (2002 & West Supp. 2003). This section reads, in pertinent part:

Hearsay exception regarding elder adults. (a) In a prosecution for a physical act, abuse, neglect, or financial exploitation perpetrated upon or against an eligible adult, as defined in the Elder Abuse and Neglect Act [320 ILCS 20/1 et seq.], who has been diagnosed by a physician to suffer from (i) any form of dementia, developmental disability, or other form of mental incapacity or (ii) any physical infirmity, including but not limited to prosecutions for violations of Sections [citations omitted] the following evidence shall be admitted as an exception to the hearsay rule:

- (1) testimony by an eligible adult, of an out-of-court statement made by the eligible adult, that he or she complained of such act to another; and
  - (2) testimony of an out-of-court statement made by the eligible adult, describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a physical act, abuse, neglect, or financial exploitation perpetrated upon or against the eligible adult.
- (b) Such testimony shall only be admitted if:
- (1) 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
  - (2) The eligible adult either:
    - (A) testifies at the proceeding; or
    - (B) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

*Id.*

“eligible adult” who suffers from mental or physical infirmity in a prosecution for “physical act[s], abuse, neglect, or financial exploitation”<sup>435</sup> perpetrated against the “eligible adult.” This section is similar to Chapter 725, section 5/115-10, governing the admissibility of hearsay statements of a child in a prosecution for physical or sexual abuse of the child.<sup>436</sup> Both sections contain the same infirmities with respect to *Crawford*.<sup>437</sup> If the “eligible adult” actually testifies at the trial subject to cross-examination about the out-of-court statement, *Crawford* will pose no bar to the admissibility of the statement and section 10.3 may be applied notwithstanding *Crawford*.<sup>438</sup> However, if a third person testifies about an out-of-court statement made by the “eligible adult” as section 10.3(a)(2) would allow,<sup>439</sup> *Crawford* would preclude admissibility of this testimony if the out-of-court statement is deemed testimonial and the declarant is unavailable to testify at trial.<sup>440</sup>

Section 10.3 allows for a third person to testify about the declarant’s out-of-court statement if there are “sufficient safeguards of reliability,”<sup>441</sup> the declarant is unavailable, and there is “corroborative evidence of the act which is the subject of the statement.”<sup>442</sup> This represents essentially the same constitutionally-defective, *Roberts*-type reliability inquiry that *Crawford* rejected.<sup>443</sup> Consequently, testimonial statements admitted under this section that do not provide the accused an opportunity to cross-examine the declarant about his or her statement will violate *Crawford*.<sup>444</sup>

The ultimate effect of *Crawford* on this section will depend on the formulation of what is a testimonial statement. Clearly, statements made in response to direct, structured police questioning will be inadmissible under *Crawford*, unless there has been a prior or present opportunity for cross-examination by the accused. Similarly, statements made to governmental investigators (for example, those investigating

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435. 725 ILL. COMP. STAT. 5/115-10.3(a) (2002).

436. See 725 ILL. COMP. STAT. 5/115-10 (2002) (outlining certain hearsay exceptions in Illinois); see also Part III.B.4. (discussing the section that governs the admissibility of hearsay statements of a child in a prosecution for physical or sexual abuse).

437. See *supra* Part III.B.4 (discussing the effects of *Crawford* on the section governing the admissibility of statements made by a child or mentally retarded person in a prosecution for physical or sexual abuse).

438. *Crawford v. Washington*, 124 S. Ct. 1354, 1369 n.9 (2004).

439. 725 ILL. COMP. STAT. 5/115-10.3(a)(2).

440. *Crawford*, 124 S. Ct. at 1365.

441. 725 ILL. COMP. STAT. 5/115-10.3(b)(1).

442. 725 ILL. COMP. STAT. 5/115-10.3(b)(2)(B).

443. *Crawford*, 124 S. Ct. at 1374.

444. *Id.* at 1365.

nursing homes) should be inadmissible if testified to only by the investigator. Whether statements made to non-governmental persons (for example, statements made by the “eligible adult” to family members about nursing home abuses) will survive *Crawford* would depend upon the formulation of testimonial statements that Illinois courts adopt.

### 9. Prior Statements of a Deceased Declarant

Chapter 725, section 5/115-10.4, provides a hearsay exception for the admissibility of out-of-court statements when the declarant has since died.<sup>445</sup> This section provides for the admissibility of prior statements made by a declarant “under oath at a trial, hearing, or other proceeding,”<sup>446</sup> where the declarant is presently unavailable because of his or her death.<sup>447</sup> As in section 10.2<sup>448</sup> and section 10.2a,<sup>449</sup> section 10.4 requires that the offered statement not be specifically covered by any other hearsay exception<sup>450</sup> and that it bears “equivalent circumstantial guarantees of trustworthiness.”<sup>451</sup> Once again, this statute is constitutionally flawed because it applies a *Roberts*-like analysis for admissibility.<sup>452</sup>

Some applications of this statute may remain unaffected because the accused will have had a prior opportunity to cross-examine the declarant at the prior trial, hearing, or proceeding concerning the out-of-court statement, satisfying *Crawford*.<sup>453</sup> If the accused did not have a prior opportunity to cross-examine the declarant (for example, before a grand jury), the application of this statute would violate the Confrontation Clause under *Crawford* because statements made “under oath at a trial, hearing, or other proceeding”<sup>454</sup> are testimonial under any conception of the term, and the death of the declarant would preclude any present opportunity for cross-examination. Even before *Crawford*,

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445. 725 ILL. COMP. STAT. 5/115-10.4.

446. 725 ILL. COMP. STAT. 5/115-10.4(d).

447. 725 ILL. COMP. STAT. 5/115-10.4(c).

448. See *supra* Part III.B.6 (analyzing the admissibility of prior statements of a witness who refuses to testify despite a court order).

449. See *supra* Part III.B.7 (discussing the prior statements of a witness in domestic violence prosecutions).

450. See 725 ILL. COMP. STAT. § 5/115-10.4 (providing the requirements for the admissibility of prior statements when the declarant is deceased).

451. See *id.* (codifying the “trustworthiness” standard of *Roberts* to admit evidence over a hearsay objection).

452. See, e.g., *id.* (enunciating a *Roberts*-like test).

453. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004).

454. 725 ILL. COMP. STAT. 5/115-10.4(d) (2002).

courts rarely admitted grand jury testimony that was never cross-examined under this exception.<sup>455</sup>

Statements would presumably still be admissible under this section if the accused wrongfully procured the unavailability of the declarant by causing the death of the declarant, because confrontation rights would be forfeited under these circumstances.<sup>456</sup>

#### 10. Substantive Admissibility of Prior Statements of Identification

Chapter 725, section 5/115-12, contains the hearsay exception for statements of identification by the declarant.<sup>457</sup> This section requires that the identification be made after the declarant perceives the person,<sup>458</sup> that the declarant testify at the present trial or proceeding,<sup>459</sup> and that the declarant be subject to cross-examination about the out-of-court identification.<sup>460</sup> Unlike the common law rule, this section permits statements of identification to be used for purposes other than to merely corroborate in-court identification. Under the statute, a statement of an out-of-court identification can be used substantively as a substitute for the declarant's inability to make an in-court identification or to bolster a weak in-court identification by the declarant.<sup>461</sup>

Consequently, *Crawford* will leave this exception unaffected for a number of reasons. First, the opportunity at trial to cross-examine the declarant about the out-of-court identification will cure any Confrontation Clause problems with respect to the identification, notwithstanding any lingering issues with respect to whether there has been a sufficient prior opportunity for cross-examination that satisfies the Clause.<sup>462</sup> However, where the declarant denies making the out-of-court identification or cannot recall making it, there will be a serious constitutional problem under *Owens*<sup>463</sup> as well as *Crawford*.

Situations may arise where prior identifications will not be deemed

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455. See *People v. Smith*, 776 N.E.2d 781, 793–94 (Ill. App. Ct. 1st Dist. 2002) (holding that admissibility of a deceased witness' grand jury testimony did not have sufficient guarantees of trustworthiness to satisfy the Confrontation Clause).

456. See *Crawford*, 124 S. Ct. at 1370 (discussing the admission of evidence over a hearsay bar when confrontation rights are terminated).

457. 725 ILL. COMP. STAT. 5/115-12.

458. 725 ILL. COMP. STAT. 5/115-12(c).

459. 725 ILL. COMP. STAT. 5/115-12(a).

460. 725 ILL. COMP. STAT. 5/115-12(b).

461. *People v. Bowen*, 699 N.E.2d 1117, 1121 (Ill. App. Ct. 1st Dist. 1998).

462. See *supra* note 166–67 and accompanying text (discussing *Owens* and the admissibility of statements where a witness has a gap in memory and is available for cross-examination).

463. *United States v. Owens*, 484 U.S. 554, 559–60 (1988). See *supra* Part II.D.2 (discussing *Owens* and cross-examination).

testimonial at all. While the identification of the accused in a line-up is testimonial because of the structured environment of the line-up and the governmental involvement in it, an identification made to a friend may not be testimonial.<sup>464</sup> Consequently, section 5/115-12 will likely operate unimpeded in light of *Crawford*.

#### 11. Statements to Medical Personnel by a Victim for the Purposes of Medical Diagnosis or Treatment.

Chapter 725, section 5/115-13, establishes the hearsay exception for statements made by a victim to medical personnel for purposes of medical diagnosis or treatment in a prosecution for certain sexual offenses.<sup>465</sup> This includes “descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”<sup>466</sup> Therefore, the trial court must determine whether the statements made by the victim are reasonably pertinent to the victim’s diagnosis or treatment.

*Crawford* potentially threatens the continued validity of certain applications of this statute. The primary question is whether and under what circumstances such statements qualify as testimonial. The First District in *T.T.*<sup>467</sup> recently held that statements made by a child victim of sexual abuse describing the nature of the abuse to a physician were non-testimonial under section 5/115-13.<sup>468</sup> The court noted that the statements did not accuse or identify the perpetrator, and simply explained the manner in which the abuse occurred.<sup>469</sup> The court discounted the facts that the exam occurred as a direct result of a referral by DCFS to investigate the alleged abuse, that the physician was a member of the child abuse protection unit, that the doctor asked the child specific questions about sexual abuse, and that the exam took place nearly four and a half months after the alleged abuse.<sup>470</sup> Consequently, the court held that the statements, “made by a patient with a selfish interest in treatment [and] for the purpose of medical diagnosis and treatment,”<sup>471</sup> were non-testimonial.<sup>472</sup> In so doing, the

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464. For example, under a highly formalistic formulation of testimonial, statements of identification made to private individuals would not be considered testimonial.

465. 725 ILL. COMP. STAT. 5/115-13 (2002).

466. *Id.*

467. *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 1st Dist. 2004).

468. *Id.* at 804.

469. *Id.*

470. *Id.* at 803.

471. *Id.* at 804.

court announced unequivocally that, under section 5/115-13, “a victim’s statements to medical personnel regarding ‘descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof’ are not testimonial in nature where such statements do not accuse or identify the perpetrator of the assault.”<sup>473</sup>

While many statements made to physicians for the purpose of medical diagnosis and treatment should be deemed non-testimonial, *Crawford* does not impose a per se rule with respect to these statements. A trial judge, as well as a reviewing court, should examine all the circumstances under which the statement was made to determine if it was testimonial. While there are innumerable relevant factors in this analysis, the physician’s connection with a formal investigation, the extent to which the exam seeks to gather evidence for a future prosecution, the use of specific questions about the abuse, and the time between the abuse and the examination should all be considered in the inquiry. There are clearly some statements made to medical personnel under this section that should rightly be deemed testimonial, such as an out-of-court statement of the victim identifying her abuser.<sup>474</sup>

In the past, Illinois courts have allowed the admissibility of statements made to medical personnel under this section despite the fact that the purpose in seeing the physician was to develop testimony for trial.<sup>475</sup> One court noted that the diagnostic function of a medical examination was not necessarily incompatible with an investigatory function, and that Illinois’ statute does not distinguish between examining and treating physicians.<sup>476</sup> *Crawford* casts serious doubt on the continued validity of these cases. Statements made in anticipation or solely for the purpose of litigation would clearly be “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>477</sup> Although there may not be governmental involvement in every instance of a statement made to medical personnel and the circumstances may

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472. *Id.*

473. *Id.* (quoting 725 ILL. COMP. STAT. 5/115-3 (2002)).

474. *Id.* at 803 (concluding that a statement identifying the perpetrator was testimonial).

475. *See, e.g.,* *People v. Falaster*, 670 N.E.2d 624, 629 (Ill. 1996) (holding that the hearsay exception provided by section 5/115-13 included a statement from a victim to a nurse who sought medical attention solely as a means of developing evidence for prosecution).

476. *Id.*

477. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004). *But see In re T.T.*, 815 N.E.2d at 804 (noting that focusing on whether the statement was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial “misses the mark” and “casts too wide a net”).

not always resemble an ex parte examination, a person seeking to develop evidence for trial clearly bears testimony within the meaning of *Crawford*.<sup>478</sup>

The second issue evaluates whether statements to medical personnel identifying the accused as the perpetrator are testimonial. In the past, Illinois courts have allowed identification statements as “reasonably pertinent to diagnosis or treatment” under certain circumstances, such as when the perpetrator is a member of the victim’s family, reasoning that the identification is necessary for the victim’s future well-being.<sup>479</sup> However, as evinced by *T.T.*,<sup>480</sup> many statements identifying the perpetrator of an assault are clearly testimonial.

The Nebraska Supreme Court, post-*Crawford*, held that a statement by a child to an emergency room physician was not testimonial despite the child’s identification of her uncle as the perpetrator because these statements were reasonably related to diagnosis and treatment of the child.<sup>481</sup> The court noted that the victim’s family took the child victim to the hospital for the purpose of obtaining medical treatment.<sup>482</sup> The court also noted that there was no indication that the purpose of the examination was to develop testimony for trial<sup>483</sup> and there was no indication of any government involvement in the initiation or course of treatment.<sup>484</sup> The Nebraska Supreme Court, however, did not foreclose the possibility of finding certain statements made to medical personnel to be testimonial.<sup>485</sup> This fact-specific inquiry allows courts to have flexibility to separate statements made for medical diagnosis or treatment from statements that bear testimony. Illinois should follow, in most instances, the example of the Nebraska Supreme Court, but should reject the admissibility of the identification of the abuser.

### C. Illinois Common Law Hearsay Exceptions

As with the statutory hearsay exceptions, *Crawford* will affect some of the common law exceptions, depending largely upon a determination of whether the statement is testimonial.

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478. *Crawford*, 124 S. Ct. at 1364.

479. See *Falaster*, 670 N.E.2d at 629–30 (holding that identification of the accused sexual abuser was reasonably pertinent to proper diagnosis because the accused was the victim’s father).

480. *In re T.T.*, 815 N.E.2d at 804.

481. *State v. Vaught*, 682 N.W.2d 284, 288 (Neb. 2004).

482. *Id.* at 291.

483. *Id.*

484. *Id.*

485. See *id.* at 292 (noting that the decision “does not preclude a different conclusion based on a different set of facts”).

### 1. Admissions—Defendant's Own Express Admission

A court may substantively admit a defendant's own out-of-court statement as an exception to the hearsay rule.<sup>486</sup> *Crawford* should not affect the use of a defendant's own statement against him or her, whether it is testimonial or not, because the defendant does not have a constitutional right to confront himself or herself.<sup>487</sup> Thus, even clearly testimonial statements, such as the accused's prior grand jury testimony, may be used against the accused notwithstanding *Crawford*.

### 2. Admissions by Silence or Implied Admissions

Generally, the silence of the defendant, an evasive answer, or an unresponsive reply may be introduced as a tacit or implied admission of guilt if the defendant remains silent in the face of an accusation of criminal conduct.<sup>488</sup> Before such statements are admissible, it must be shown that the defendant heard the statement, that he or she reacted by silence, and that he or she would have been expected to deny the statement.<sup>489</sup> However, silence of the accused is not an admission in a custodial interrogation setting. Defendants, through silence, may exercise their constitutional privilege against self-incrimination.<sup>490</sup> *Crawford* will not affect the admissibility of admissions by silence.

The constitutional analysis should be the same as for express admissions, since silence is viewed as an affirmative response; there is no constitutional right to confront oneself.<sup>491</sup> Alternatively, even if a

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486. *People v. Hobbs*, 79 N.E.2d 202, 206 (Ill. 1948). The statement need not be predicated on the declarant's personal knowledge; it need not be against interest when made; it may contain opinions; and it may be offered whether or not the out-of-court declarant testifies. See JOHN E. CORKERY, ILLINOIS CIVIL & CRIMINAL EVIDENCE 560, 586 (2000) (describing the defendant admission exception to the hearsay rule).

487. Professor Daniel Capra notes (in the context of the Federal Rules of Evidence) that a defendant could theoretically argue that a confession made to police is testimonial within the meaning of *Crawford* and that admitting the confession would violate his right to confrontation unless the declarant (himself) is subject to cross-examination. CAPRA, *supra* note 364, at 27. Professor Capra says that the response to this argument is that the defendant could take the stand and confront himself, thus removing any *Crawford* violation. If the defendant refuses to do so, he arguably has procured his own unavailability, which would operate as a waiver of confrontation rights. *Id.* While the success of this argument may be problematic on constitutional grounds (i.e. the defendant is being forced to choose between his Fifth Amendment self-incrimination rights and his Sixth Amendment confrontation rights). It appears unlikely that the courts will find a constitutional right to confront one's own statement.

488. *Hobbs*, 79 N.E.2d at 206.

489. RALPH RUEBNER, ILLINOIS CRIMINAL TRIAL EVIDENCE 232–33 (3d ed. 1997).

490. See U.S. CONST. amend. V (“[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . .”).

491. This view seems to be in accord with authorities commenting on Federal Rule of Evidence 801(d)(2)(B). See, e.g., FISHMAN, *supra* note 121, at 16–17 (noting that statements

constitutional right to confront oneself existed, *Crawford* should have no or minimal impact on the admissibility of such admissions because in many instances they are not testimonial. For example, silence by the accused in the face of police questioning or accusation would not qualify as an admission because the silence may be consistent with the defendant's exercise of his or her constitutional right to remain silent or with the defendant's compliance with the advice of counsel to remain silent.<sup>492</sup> At the other extreme, silence in the face of an accusation by a private citizen or an acquaintance would not fit any of the formulations of a testimonial statement as set forth by the *Crawford* Court: there is little resemblance to an ex parte examination; there is no governmental involvement; and objectively, the accused would not believe that silence could be used prosecutorially.<sup>493</sup>

### 3. Adoptive Admissions

A person may adopt the statement of another and make it his or her own statement.<sup>494</sup> *Crawford* should not affect the admissibility of adoptive admissions for the same constitutional reason that permits ordinary admissions: the accused has no constitutional right to confront himself or herself.<sup>495</sup>

### 4. Admissions of an Agent

Illinois generally applies the traditional test, set forth in *Big Mack Trucking Company, Inc. v. Dickerson*,<sup>496</sup> to assess whether an agent's

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admitted under this exception would clearly not be testimonial unless made to a police officer or other public official).

492. *People v. Murphy*, 509 N.E.2d 1323, 1327 (Ill. App. Ct. 1st Dist. 1987); *People v. Warner*, 459 N.E.2d 1053, 1056 (Ill. App. Ct. 1st Dist. 1984); *People v. Deberry*, 361 N.E.2d 632, 634 (Ill. App. Ct. 4th Dist. 1977); *People v. Owens*, 337 N.E.2d 60, 63 (Ill. App. Ct. 4th Dist. 1975).

493. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004).

494. *People v. Simpson*, 369 N.E.2d 1248, 1252 (Ill. 1977); *Pagel v. Yates*, 471 N.E.2d 946, 950 (Ill. App. Ct. 4th Dist. 1984).

495. *See supra* Part III.C.1 (discussing admissions against oneself). *But see* *Shields v. California*, 124 S. Ct. 1653 (2004) (vacating a judgment of the California Court of Appeals that allowed the admissibility of an *adoptive* admission in the absence of an opportunity for cross-examination). *Shields* may be inconsistent with the continued validity of the admissibility of admissions of the accused because adoptive admissions are treated no differently than the party's own admission. *People v. Castille*, 108 Cal. App. 4th 469, 484 (2004). On the other hand, *Shields* dealt with an adoptive admission of a co-defendant's statement made during the course of a joint police interrogation. In either event, the United States Supreme Court found this significant enough to vacate the judgment, thus casting at least some doubt on the continued validity of these types of admissions. *Shields*, 124 S. Ct. at 1653.

496. *Big Mack Trucking Co. v. Dickerson*, 497 S.W.2d 283 (Tex. 1973). *But see* *Pietruszynski v. McCluer Corp., Architects and Eng'g*, 788 N.E.2d 82, 88-89 (Ill. App. Ct. 1st Dist. 2003) (allowing admission of an employee's statement pertaining to his employment against

statement may be used as an admission against his or her principal.<sup>497</sup> Although this most often applies in the employer/employee context, traditional agency principles govern whether the statement of an agent is an admission of a principal.<sup>498</sup> For example, an attorney or a spouse may act as an agent and, consequently, make an admission against his or her principal.<sup>499</sup> Essentially, the Illinois courts apply a strict test to ascertain whether the principal had authorized the agent to make the statement.<sup>500</sup> Not surprisingly, courts generally find a lack of principal authorization for damaging statements made by agents.<sup>501</sup> This view runs contrary to the present trend which permits the admission of a statement by an agent against the principal when the agent makes the statement concerning a matter within the scope of the agency or employment and during the existence of that relationship.<sup>502</sup> Before undertaking any *Crawford* inquiry, the court must evaluate whether the underlying statement meets Illinois' strict view of agency admissions.

Assuming that the agent has express authority to make the statement, the next inquiry is the now-familiar evaluation of whether the admission made by the agent is testimonial.<sup>503</sup> If the underlying statement is testimonial, *Crawford's* effect on the admissibility of the statement is unclear. For instance, Professor Daniel Capra offers the example of statements of corporate agents made to government officials who were investigating allegations of corporate criminal misconduct.<sup>504</sup> He posits that these statements could be seen as testimonial because of the governmental involvement and the investigatory purpose in eliciting the statement.<sup>505</sup> Nonetheless, should a court find the agent's statement testimonial, the principal would find it difficult to object to the admissibility of the out-of-court statement since there is no constitutional right to confront oneself and since the admission of an agent is considered an admission of the principal.

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the defendant employer).

497. *Taylor v. Checker Cab Co.*, 339 N.E.2d 769, 775 (Ill. App. Ct. 1st Dist. 1975); CORKERY, *supra* note 486, at 467.

498. *People v. Cruz*, 643 N.E.2d 636, 665 (Ill. 1994).

499. *Id.*

500. MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 802.9 (8th ed. 2004).

501. *See id.* (discussing the relatively strict nature of the test applied by Illinois courts to determine principal authorization of agent's statements).

502. *See, e.g.*, FED. R. EVID. 801(d)(2)(D) (defining an agent's statement made within the scope of the agency of employment as admissible over a hearsay objection).

503. If it is not, obviously *Crawford* is inapplicable. *See supra* Part II.D.1 (exploring the background and definition of "testimonial statement").

504. CAPRA, *supra* note 364, at 27.

505. *Id.*

A persuasive counterargument is that considering an agency admission as the party's own statement is really just a legal fiction. The accused-principal did not actually express the words attributed to and used against him or her. Consequently, the question is whether this legal fiction should trump the defendant's constitutional right to confront the actual maker of the out-of-court statement. Rules of evidence should not be used mechanically to defeat the constitutional right of the accused.<sup>506</sup> However, perhaps the Illinois requirement that the agent-declarant have express authorization to speak for the principal-accused acts as a safeguard of the defendant's rights and may mitigate in favor of finding that the accused has no right to confront statements of his or her agent.<sup>507</sup>

### 5. Co-Conspirator's Statements as Admissions

Statements of a co-conspirator are admissible as an exception to the hearsay rule against all other conspirators if made during the course of and in furtherance of the conspiracy.<sup>508</sup> However, statements to law enforcement personnel after arrest are not in furtherance of a conspiracy.<sup>509</sup> Under this exception, any witness who has personal knowledge of the statement, including an informant, a police officer, or another member of the conspiracy, may introduce the co-conspirator's statement at trial.<sup>510</sup>

*Crawford* should have no effect on a co-conspirator's admissions because a statement cannot be both testimonial and in furtherance of a conspiracy.<sup>511</sup> By its very nature, a co-conspirator's out-of-court

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506. See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1972) (noting that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice").

507. See JACK B. WEINSTEIN, *WEINSTEIN'S FEDERAL EVIDENCE* § 802.05 (2d ed. 2004). Weinstein notes that "if the declarant has been *expressly empowered* by the party to make statements on his or her behalf, these statements should be treated as statements of the party and should still be admissible after *Crawford*." See *id.* (explaining the vicarious agency exception to the hearsay rule).

508. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *People v. Steidl*, 568 N.E.2d 837, 849 (Ill. 1991); *People v. Taylor*, 632 N.E.2d 234, 238 (Ill. App. Ct. 1st Dist. 1994); *People v. Sanchez*, 546 N.E.2d 268, 272 (Ill. App. Ct. 4th Dist. 1989).

509. *People v. Hairston*, 263 N.E.2d 840, 855 (Ill. 1970); *People v. Eddington*, 473 N.E.2d 103, 123 (Ill. App. Ct. 4th Dist. 1984).

510. GRAHAM, *supra* note 500, at § 802.10.

511. Professor Capra notes that statements of co-conspirators made to undercover law enforcement officers could arguably be both testimonial and "in furtherance of a conspiracy" because of the involvement of a government official. CAPRA, *supra* note 364, at 28. However, unless Illinois decides to adopt an extremely broad formulation of testimonial, it is unlikely that co-conspirator's admissions will ever be affected by *Crawford*. See, e.g., *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) (holding that statements between a co-conspirator and a

statement is not testimonial. It has one purpose: to advance the conspiracy, not to defeat it. The *Crawford* opinion recognizes this, noting that statements in furtherance of a conspiracy are “by their nature . . . not testimonial.”<sup>512</sup> If the statement is not testimonial, *Crawford* is inapplicable and co-conspirator admissions will be admitted against the accused under the state’s existing rules of evidence. Cases in Illinois,<sup>513</sup> as well as cases from other jurisdictions<sup>514</sup> and other authorities, are in accord with this view.<sup>515</sup>

### 6. Dying Declarations

To qualify as a dying declaration, the declarant must be unavailable because of death and the statement must: (1) relate to the cause and circumstances of the homicide;<sup>516</sup> (2) be made under a fixed belief and moral conviction that death is impending and certain to follow almost immediately, although the declarant need not have lost all hope of recovery;<sup>517</sup> and (3) the declarant must be in possession of sufficient mental faculties to understand what he or she is doing and to be able to give a true and correct account of the facts to which that statement relates.<sup>518</sup> In Illinois, dying declarations are admissible only in criminal homicide trials.<sup>519</sup> The statement must relate to the cause of the declarant’s own homicide and the declarant must actually die.<sup>520</sup>

As with other common law hearsay exceptions, the central inquiry for

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confidential government informant were not testimonial and were admissible under *Crawford* in the absence of an opportunity for cross-examination).

512. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004).

513. *See* *People v. Cook*, 815 N.E.2d 879, 893 (Ill. App. Ct. 1st Dist. 2004) (holding the statement of a co-conspirator was admissible under *Crawford*).

514. *See* *United States v. Lee*, 374 F.3d 637, 644 (8th Cir. 2004) (holding that statements made to a co-conspirator were not testimonial); *United States v. Reyes*, 362 F.3d 536, 541 n.4 (8th Cir. 2004) (concluding that the admission of statements of a co-conspirator in furtherance of conspiracy did not offend the Confrontation Clause); *Diaz v. Herbert*, 317 F. Supp. 2d 462, 481 (S.D.N.Y. 2004) (concluding that the admission of statements by a co-conspirator in furtherance of conspiracy did not offend the Confrontation Clause).

515. *See generally* FISHMAN, *supra* note 121 (noting that statements in furtherance of a conspiracy under Federal Rule of Evidence 801(d)(2)(E) are “clearly not ‘testimonial’”); *see also* CAPRA, *supra* note 364 (noting that “[i]t seems unlikely that a co-conspirator would make a qualifying statement that would result in ‘testimony’ under *Crawford*”).

516. *People v. Odum*, 188 N.E.2d 720, 723 (Ill. 1963).

517. *People v. Tilley*, 94 N.E.2d 328, 331 (Ill. 1950).

518. *People v. Georgakopoulos*, 708 N.E.2d 1196, 1203 (Ill. App. Ct. 1st Dist. 1999); *People v. Walker*, 635 N.E.2d 684, 690 (Ill. App. Ct. 1st Dist. 1994); *People v. Cobb*, 542 N.E.2d 1171, 1178 (Ill. App. Ct. 2d Dist. 1989).

519. *Georgakopoulos*, 708 N.E.2d at 1203 (defining a dying declaration as “a statement of fact made by the victim relating to the cause and circumstances of the homicide”).

520. CORKERY, *supra* note 486, at 582.

the admissibility of a dying declaration under a constitutional analysis is whether the statement is testimonial. This, in turn, depends on the court's formulation of what is a testimonial statement. For example, a statement made to a police officer in response to questioning by the officer should be considered testimonial.<sup>521</sup> On the other hand, a statement made to a friend or family member may not qualify as testimonial.<sup>522</sup> If the dying declaration is "non-testimonial," *Crawford* does not apply and the dying declaration exception will operate unimpeded.<sup>523</sup>

In either event, the *Crawford* opinion suggests that dying declarations may be a sui generis oddity.<sup>524</sup> *Crawford* envisions the admissibility of testimonial dying declarations:

The one deviation we have found [with respect to the historical trend of only admitting testimonial statements against an accused if the declarant is unavailable and the accused has been afforded an opportunity for cross-examination] involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.<sup>525</sup>

The *Crawford* dictum, consequently, leaves the question open.<sup>526</sup>

## 7. Declarations Against Interest

Statements against interest are admissible as an exception to the

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521. *See* *State v. Meeks*, 88 P.3d 789, 793–94 (Kan. 2004) (determining that police questioning a victim of a night club shooting about the identity of the shooter constituted an interrogation and thus the victim's responses would most likely be considered testimonial under *Crawford*). *But see* *People v. Bryant*, No. 247039, 2004 Mich. App. LEXIS 2244, at \*4 (Mich. Ct. App. Aug. 24, 2004) (holding a statement of a mortally wounded shooting victim in response to police asking "what happened?" was not testimonial).

522. *See* *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004) (noting that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not").

523. *Id.* at 1365.

524. *Sui generis* is defined as meaning "[o]f its own kind or class; unique or peculiar." BLACK'S LAW DICTIONARY (8th ed. 2004).

525. *Crawford*, 124 S. Ct. at 1367 n.6 (citations omitted).

526. Professor Richard D. Friedman notes, in this regard, that admitting statements under the dying declaration exception using the rationale of the United States Supreme Court "obscures the clarity and clutters the simplicity" of the *Crawford* rule. *Friedman, supra* note 176, at 12. Instead, Professor Friedman suggests an understanding of the admissibility of these statements as "a reflection of the basic principle that if the defendant renders a witness unavailable by wrongful means, the accused cannot complain validly about the witness's absence at trial." *Id.*

hearsay rule. The exception contemplates statements against the declarant's penal, pecuniary, or proprietary interest at the time of its making.<sup>527</sup> The statement must be an out-of-court declaration of a person, other than a party to the litigation, who has knowledge of the facts declared and no motive to falsify,<sup>528</sup> and the declarant must be unavailable.<sup>529</sup>

*a. Exculpatory Statements Against Interest*

A statement against interest is generally not admissible to exculpate the accused.<sup>530</sup> The reason for exclusion is that it would encourage the introduction of perjured testimony showing that an unavailable third person had inculpated himself or herself and exculpated the accused. However, there is a constitutional exception to this rule of prohibition. In *Chambers v. Mississippi*,<sup>531</sup> the United States Supreme Court recognized the superior right of the accused to defend himself using an exculpatory statement under a four-part test that takes into account the following factors: (1) whether the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) whether the statement was corroborated by other evidence; (3) whether the statement was self-incriminating and against the declarant's interest; and (4) whether the declarant was available for adequate cross-examination by the state.

*Crawford* should not affect the admissibility of statements against interest offered by the accused to exculpate himself or herself. Regardless of whether the statement is testimonial or not under *Crawford*, the fact that the accused offers the statement against the state means that the Confrontation Clause has no implication at all. The state has no Confrontation Clause rights.<sup>532</sup> Consequently, assuming that the statement meets the *Chambers* conditions of admissibility, the exculpatory statement against interest will likely have continued validity, notwithstanding *Crawford*.

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527. *People v. Lettrich*, 108 N.E.2d 488, 491 (Ill. 1952); *Buckley v. Cronkhite*, 393 N.E.2d 60, 64 (Ill. App. Ct. 2d Dist. 1979); *Merritt v. Chenowski*, 373 N.E.2d 1060, 1063 (Ill. App. Ct., 3d Dist. 1978).

528. *People v. Ward*, 609 N.E.2d 252, 269 (Ill. 1992).

529. *Levy v. Am. Auto. Ins. Co.*, 175 N.E.2d 607, 611 (Ill. App. Ct. 1st Dist. 1961).

530. *Lettrich*, 108 N.E.2d at 491-92; *People v. Williams*, 475 N.E.2d 1082, 1088 (Ill. App. Ct. 1st Dist. 1985); *People v. Bowel*, 473 N.E.2d 962, 965 (Ill. App. Ct. 3d Dist. 1985), *rev'd on other grounds*, 488 N.E.2d 995 (Ill. 1986).

531. *Chambers v. Mississippi*, 410 U.S. 284, 300-01 (1973).

532. See U.S. CONST. amend. VI ("In all criminal prosecutions, the *accused* shall enjoy the right . . . to be confronted with the witnesses against him . . .") (emphasis added).

*b. Inculpatory Statements Against Interest*

The primary use of a statement against interest is to inculcate the accused. Even before *Crawford*, there were limitations on the use of such statements. Generally, an unavailable accomplice's out-of-court confession inculcating the accused was considered inherently unreliable because of the strong motive on the part of the declarant to fabricate or shift blame from himself or herself to the accused.<sup>533</sup> A statement against interest made to the police or law enforcement personnel by an unavailable declarant that names or directly or indirectly implicates the accused is presumptively unreliable.<sup>534</sup>

*Crawford* has made it absolutely clear that, absent past or present opportunity to cross-examine the declarant, such testimonial statements are barred by the Confrontation Clause.<sup>535</sup> Even before *Crawford*, confessions or admissions of a co-defendant were inadmissible against the accused at either a joint or separate trial because they were presumptively unreliable<sup>536</sup> or not "firmly rooted" under *Roberts*.<sup>537</sup> The Supreme Court in *Williamson v. United States* suggested that such statements could still be used indirectly or circumstantially.<sup>538</sup> *Lee v. Illinois* suggested that when there are insignificant discrepancies

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533. CORKERY, *supra* note 486, at 591 (citing *Lilly v. Virginia*, 527 U.S. 116 (1999)).

534. *Lilly v. Virginia*, 527 U.S. 116, 131–32 (1999).

535. The United States Supreme Court has taken action consistent with this. See *Goff v. Ohio*, 124 S. Ct. 2819 (2004) (vacating the judgment of Court of Appeals of Ohio in *State v. Goff*, 796 N.E.2d 50 (Ohio Ct. App. 2003), which had admitted a statement against interest made to the police against the accused by an accomplice without affording the accused an opportunity to cross-examine the declarant). Authorities from other jurisdictions are in accord, as well. See, e.g., *United States v. Manfre*, 368 F.3d 832, 837 (8th Cir. 2004) (ruling that statements against interest made to declarant's girlfriend and friend implicating the defendant were not testimonial); *United States v. Saner*, 313 F. Supp. 2d 896, 902 (S.D. Ind. 2004) (holding that a statement against interest made to a government prosecutor was testimonial and inadmissible under *Crawford*); *Morten v. United States*, 856 A.2d 595, 602 (D.C. 2004) (holding that the confession of the nontestifying co-defendant was inadmissible against the accused); *People v. Deshazo*, 679 N.W.2d 69 (Mich. 2004) (holding that a statement against penal interest made to a friend and not to law enforcement was not testimonial); *State v. Allen*, 2004 Ohio 3111, \*P31 (Ohio 2004) (holding that a statement against interest made to police was testimonial and inadmissible in the absence of cross-examination); *People v. Cervantes*, 118 Cal. Rptr. 3d 744, 783 (Cal. Ct. App. 2004) (holding that a statement to an acquaintance incriminating self and co-defendant was not testimonial); *People v. Jones*, No. 246617, 2004 Mich. App. LEXIS 1457, at \*2–3 (Mich. Ct. App. June 10, 2004) (finding a statement against interest to police testimonial and inadmissible in the absence of an opportunity for cross-examination).

536. *Williamson v. United States*, 512 U.S. 594, 608 (1994); *Lee v. Illinois*, 476 U.S. 530, 541 (1986)

537. See *Lilly*, 527 U.S. at 118–19 (concluding that statements in a fifty-page confession did not satisfy the firmly rooted hearsay exception detailed in *Roberts*).

538. *Williamson*, 512 U.S. at 604 n.\* (suggesting that an accomplice's statements may be admissible under other provisions of the Federal Rules of Evidence rules 801–04).

between the confession of the accused and a co-defendant's confession, the co-defendant's statement may be admissible as a reliable "interlocking" confession.<sup>539</sup>

In light of *Crawford*, any statement or confession by a co-defendant or of an accomplice made to law enforcement personnel, whether it directly or indirectly inculcates the accused, and whether it interlocks with the accused's confession or not, should not be allowed against the accused unless the declarant is produced as a witness at trial and the accused has an opportunity to cross-examine the declarant about the out-of-court statement.<sup>540</sup> *Crawford* now clearly forecloses any constitutional exception advanced pursuant to *Williamson*, *Lee*, or *Lilly* to allow the admissibility of such statements.<sup>541</sup>

#### 8. Former Testimony

A transcript, audiotape, or videotape containing the testimony of a witness from a former trial, judicial proceeding, or an evidence deposition may be admitted as substantive evidence against an accused at a subsequent trial as an exception to the hearsay rule.<sup>542</sup> This exception requires that: (1) the prosecution demonstrate that the declarant is unavailable to testify; (2) the factual issues in the current case are substantially the same as those in the prior proceeding; and (3) a showing be made that the accused had a sufficiently similar motive and opportunity to cross-examine the declarant at the former trial or

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539. See *Lee*, 476 U.S. at 545 (noting that "when the discrepancies between ["interlocking" confessions of co-defendants] . . . are not insignificant, the co-defendant's confession may not be admitted"). The *Crawford* majority asserts that this is "merely a possible inference, not an inevitable one." *Crawford v. Washington*, 124 S. Ct. 1354, 1368 (2004).

540. *Id.* at 1369 n.9.

541. The United States Supreme Court seems to have validated this in *Prasertphong v. Arizona*, 124 S. Ct. 2165 (2004). In *Prasertphong*, the Arizona Supreme Court admitted as a statement against interest a statement of a co-defendant that incriminated the accused under language in *Lilly* that seemed to allow the admissibility of accomplice statements against the accused "when the circumstances surrounding the statements provide considerable assurance of their reliability." *State v. Prasertphong*, 75 P.3d 675, 686 (Ariz. 2003) (citing *Lilly*, 527 U.S. at 130). The Arizona Supreme Court also cited Justice Scalia's concurring opinion in *Williamson* that noted that "a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible co-defendant." *Id.* at 687 (citing *Williamson*, 512 U.S. at 606 (Scalia, J., concurring)). The United States Supreme Court predictably vacated this judgment and remanded the case. *Prasertphong*, 124 S. Ct. at 2165. As the statement was made to police and the accused was afforded no opportunity to cross-examine the declarant, *Crawford* requires that this statement be excluded. *Id.*

542. *People v. Zehr*, 469 N.E.2d 1062 (Ill. 1984); *People v. Doss*, 514 N.E.2d 502, 507 (Ill. App. Ct. 4th Dist. 1987).

proceeding.<sup>543</sup> To satisfy admissibility, the motive and focus of the cross-examination at the earlier proceeding must have been similar to what it would be at the current trial.<sup>544</sup>

Unquestionably, former testimony is testimonial under any formulation of the term.<sup>545</sup> However, *Crawford* specifically permits the admissibility of former testimony under the Confrontation Clause because this hearsay exception itself requires that the declarant be unavailable and that the accused had a sufficient opportunity to cross-examine the declarant.<sup>546</sup> The only limitation to the admissibility of such statements will require a fact specific determination focusing on whether the accused was given a prior opportunity to cross-examine the declarant and whether the accused had a similar motive to develop the testimony of the declarant.<sup>547</sup> *Crawford* should be interpreted, in this inquiry, to focus on the opportunity to develop the testimony, rather than its quality.<sup>548</sup>

### 9. Spontaneous Statements or Excited Utterances

The proponent of a spontaneous statement must prove three foundational elements: (1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) the statement must relate to the circumstances of the occurrence.<sup>549</sup> The declarant may be a participant in or a mere witness to the occurrence.<sup>550</sup> The guarantee of trustworthiness for this

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543. See *People v. Rice*, 651 N.E.2d 1083 (Ill. 1995) (holding former testimony given at a suppression hearing inadmissible because of the limited nature of the evidence introduced at the hearing); see also CORKERY, *supra* note 486, at 575 (explaining the former testimony hearsay exception found in Federal Rule of Evidence rule 804).

544. CORKERY, *supra* note 486, at 576.

545. See *supra* Part II.D.1.a (identifying clearly testimonial statements as including former testimony).

546. *Crawford v. Washington*, 124 S. Ct. 1354, 1369 n.9 (2004). See WEINSTEIN, *supra* note 507, at § 802.05(f) (noting that “[s]tatements admitted under the exception for former testimony under Rule 804(b)(1) will not violate the Confrontation Clause, because the hearsay exception itself requires that (1) the declarant be unavailable and (2) the defendant had the opportunity to cross-examine the declarant”).

547. See *supra* Part II.D.2 (defining what sufficient opportunity for cross-examination under *Crawford* entails).

548. See *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) (noting that “the Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985))).

549. *People v. Shum*, 512 N.E.2d 1183, 1191–92 (Ill. 1987); *People v. Lloyd*, 660 N.E.2d 43, 50 (Ill. App. Ct. 1st Dist. 1995).

550. *People v. Poland*, 174 N.E.2d 804, 807 (Ill. 1961).

exception is that it is made spontaneously without time to fabricate.<sup>551</sup> However, some statements may still qualify as excited utterances even if they have been made in response to brief questions.<sup>552</sup> There are a number of ways that spontaneous statements or excited utterances can be evaluated in light of *Crawford*.

The continued validity of the admissibility of spontaneous statements or excited utterances should depend on a fact-specific inquiry. If the statement is testimonial, *Crawford* precludes the use of the statement unless there was or is now an opportunity for cross-examination of the declarant by the accused.<sup>553</sup> Again, the extent to which *Crawford* will modify existing law with respect to these statements depends on how broadly Illinois courts are willing to characterize a statement as testimonial. Some applications of this exception will remain unaffected by *Crawford* because many spontaneous statements are made to a parent, friend, or acquaintance or under circumstances not likely to be considered testimonial.<sup>554</sup> On the other hand, statements made to police officers or other governmental investigators should generally be construed as testimonial.<sup>555</sup>

The Indiana Court of Appeals has expressed doubt that excited utterances could ever be deemed testimonial. It noted that “[a]n unrehearsed statement made without reflection or deliberation, as required to be an excited utterance, is not ‘testimonial’ in that such a statement, by definition, has not been made in contemplation of its use in a future trial,”<sup>556</sup> and that it is “difficult to perceive how such a statement could ever be ‘testimonial.’”<sup>557</sup> Under this rationale, courts

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551. *Id.*

552. CORKERY, *supra* note 486, at 525.

553. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004).

554. *Id.*

555. *See, e.g.*, *People v. Peay*, No. 242443, 2004 Mich. App. LEXIS 1628, at \*9–10 n.2 (Mich. Ct. App. June 17, 2004) (ruling that an excited utterance was not testimonial because it was not made to a government official); *State v. Orndorff*, 95 P.3d 406, 786–87 (Wash. Ct. App. 2004) (holding a statement made by a victim at one time to another victim as failing to meet the characteristics of a testimonial statement). The *Crawford* Court seems to be in accord, as it noted that *White v. Illinois*, 502 U.S. 346 (1992), a case that upheld the admissibility of the statement of a child victim to an investigating police officer as a spontaneous statement, was “arguably in tension” with the new rule of *Crawford*. *Crawford*, 124 S. Ct. at 1368 n.8. In this regard, *White* is of doubtful validity after *Crawford*. *See generally* FISHMAN, *supra* note 121 (noting, in the context of the Federal Rules of Evidence, that excited utterances will not likely be testimonial unless made to a police officer or other public official).

556. *See Hammon v. State*, 809 N.E.2d 945, 953 (Ind. Ct. App. 2004) (holding that a police officer’s semi-structured questioning of a domestic violence victim was not testimonial).

557. *Fowler v. State*, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004) (holding that a domestic violence victim’s statements to police on the scene were not testimonial). *See Brooks v. State*, NO. 2001-KA-01826-COA, 2004 Miss. App. LEXIS 616, at \*38 (Miss. Ct. App. Feb. 26, 2004)

have found *Crawford* inapplicable to excited utterances in the form of 911 calls,<sup>558</sup> to statements made in person to police officers on the scene of a recent crime,<sup>559</sup> and, in one case, even to a statement made to a police officer in response to questions at the police station by a declarant who went there to report an assault and death threat.<sup>560</sup> This, however, is an extreme formulation that Illinois should reject.

One particularly troublesome area in this regard is 911 calls. There is currently disagreement among courts as to where 911 calls fit into *Crawford*'s framework. Some courts interpreting *Crawford* have found 911 calls to be testimonial because they often contain formal questions posed to the caller by a government official and because the caller is generally calling to report a crime and to supply information to the police.<sup>561</sup> On the other hand, some courts view 911 calls as "non-testimonial,"<sup>562</sup> reasoning that 911 calls are not initiated by the police<sup>563</sup> and are usually placed to get help rather than to provide prosecutorial information.<sup>564</sup> In that sense, 911 calls are more akin to "an electronically augmented equivalent of a cry for help" than an ex parte examination for trial.<sup>565</sup> Under this view, 911 calls are seen as "part of the criminal incident itself, rather than as part of the prosecution."<sup>566</sup> Courts employing this view have seemed to find the very idea of a 911 call to be consistent with the requirements of an excited utterance.<sup>567</sup>

It remains unresolved which approach Illinois will employ in addressing a Confrontation Clause challenge to the admissibility of 911

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(noting that "[u]nder *Crawford*, excited utterances . . . surely are non-testimonial").

558. *People v. Moscat*, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004)

559. *State v. Forrest*, 596 S.E.2d 22, 27–28 (N.C. Ct. App. 2004).

560. *State v. Barnes*, 854 A.2d 208 (Me. 2004) (holding that a statement was not testimonial because the declarant was under stress of the alleged assault and was simply seeking safety and aid).

561. *See People v. Cortes*, 781 N.Y.S.2d 401 (Sup. Ct. 2004) (finding 911 calls made by two witnesses to report their observations of a recent shooting to be testimonial).

562. *See, e.g., People v. Isaac*, No. 23398102, 2004 N.Y. Misc. LEXIS 814, at \*6–7 (Dist Ct. June 16, 2004) (finding a 911 call was not testimonial as it was not part of the criminal incident); *People v. Conyers*, 777 N.Y.S.2d 274 (2004) (concluding two 911 calls were made to stop an assault in progress and therefore were not testimonial); *Moscat*, 777 N.Y.S.2d at 879 (holding that a 911 call was not testimonial as it was placed by a citizen who desired rescue from peril).

563. *Isaac*, 2004 N.Y. Misc. LEXIS 814, at \*7; *Moscat*, 777 N.Y.S.2d at 879.

564. *Isaac*, 2004 N.Y. Misc. LEXIS 814, at \*7; *Conyers*, 777 N.Y.S.2d at 276–77; *Moscat*, 777 N.Y.S.2d at 880.

565. *Moscat*, 777 N.Y.S.2d at 880.

566. *Isaac*, 2004 N.Y. Misc. LEXIS 814, at \*6–7 (citing *Moscat*, 777 N.Y.S.2d at 880).

567. *See Moscat*, 777 N.Y.S.2d at 880 (noting that "the 911 call qualifies as an excited utterance precisely because there has been no opportunity for the caller to reflect and falsify her (or his) account of the events").

calls. In *In re T.T.*,<sup>568</sup> the First District implicitly addressed this issue in the context of calls to a child abuse hotline. The court noted, citing the New York case of *People v. Moscat*,<sup>569</sup> that it was “possible that a scenario could arise in which a report to a DCFS hotline . . . would be admissible as non-testimonial hearsay.”<sup>570</sup> While this is far from a definitive statement on the issue, the First District seems to indicate that a call of this nature requires an ad hoc evaluation of whether the caller’s statement is testimonial. Since 911 calls (and calls to child abuse hotlines) can serve law enforcement and prosecutorial purposes or be deemed merely as cries for help, the better approach for Illinois to take is to have the trial judge make a fact specific determination in each case. In so doing, the trial court should focus on the unique circumstances surrounding the making of the call to inquire whether the call was a mere cry for help or an evidence gathering testimonial statement.

#### 10. Then-Existing State of Mind.

A declarant’s out-of-court statements about his or her then-existing state of mind, such as intent, plan, motive, design, or feeling are admissible to prove the truth of the matter asserted, as an exception to the hearsay rule.<sup>571</sup>

*Crawford*’s effect on this exception will depend upon which formulation of testimonial statement the Illinois courts employ. However, most then-existing state of mind statements should not be characterized as testimonial simply because they are normally casual remarks made to acquaintances, a circumstance inconsistent with a testimonial statement, according to *Crawford*.<sup>572</sup> For example, the Michigan Court of Appeals held that a murder victim’s statements to her mother and some friends that the defendant stalked her and that she feared for her life did not qualify as testimonial, and therefore were properly admitted under the hearsay exception for then-existing state of mind.<sup>573</sup> Commentators agree.<sup>574</sup>

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568. *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 1st Dist. 2004).

569. *Moscat*, 777 N.Y.S.2d at 875.

570. *In re T.T.*, 815 N.E.2d at 802–03.

571. *People v. Bartall*, 456 N.E.2d 59, 71 (Ill. 1983); *People v. Sanchez*, 546 N.E.2d 268, 272 (Ill. App. Ct. 4th Dist. 1989); *People v. Grabbe*, 499 N.E.2d 499, 506 (Ill. App. Ct. 4th Dist. 1986).

572. *See Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004) (noting that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not”).

573. *People v. Williams*, No. 246011, 2004 Mich. App. LEXIS 1217, at \*6–7 (Mich. Ct. App. May 13, 2004).

574. *See, e.g., FISHMAN, supra* note 121, at 4 (noting, in the context of the Federal Rules of

However, then-existing state of mind statements made to a police officer should be considered testimonial.<sup>575</sup> For example, a statement made by an eventual murder victim to the police complaining that the defendant stalked her and that she feared for her life should be deemed testimonial because the declarant has provided vital information of a law enforcement nature, beyond a cry for help. Also, the act of reporting to the police and the recording of that statement by the police department makes this a testimonial statement under some formulations of the term. This exception should be evaluated on a case-by-case basis to determine whether *Crawford* precludes admissibility of the out-of-court statement.

### 11. Past Recollection Recorded

A written document containing an out-of-court declaration is admissible as a past recollection recorded statement if the proponent establishes the following foundation: (1) the declarant appears at trial and testifies; (2) the witness has no present recollection of the incident described; (3) the document does not refresh the recollection of the witness; (4) the written document was prepared by the witness at the time of or soon after the incident that prompted him or her to record it; and (5) the witness vouches for the truth and accuracy of the document.<sup>576</sup>

These statements are allowed as an exception to the hearsay rule because they contain sufficient guarantees of trustworthiness and reliability because they were prepared at or near the time of the event while the witness's memory was clear and accurate.<sup>577</sup> The document is not admissible if the witness does not remember preparing it.<sup>578</sup> However, past-recollection-recorded statements may be records or memoranda that would be inadmissible under other exceptions as hearsay, such as police reports<sup>579</sup> and medical and hospital records.<sup>580</sup>

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Evidence, that the hearsay exception for then-existing mental, emotional, or physical condition is "clearly not 'testimonial'" unless made to a police officer or other public official); WEINSTEIN, *supra* note 507, at § 802.05 (noting that statements of existing state of mind are not likely to be testimonial in nature under *Crawford*).

575. *Crawford*, 124 S. Ct. at 1364.

576. *People v. Unes*, 493 N.E.2d 681, 685 (Ill. App. Ct. 3d Dist. 1986).

577. *Dayan v. McDonald's Corp.*, 466 N.E.2d 958, 970 (Ill. App. Ct. 1st Dist. 1984); *People v. Olson*, 375 N.E.2d 533, 536 (Ill. App. Ct. 4th Dist. 1978).

578. *People v. Carter*, 391 N.E.2d 427, 431 (Ill. App. Ct. 1st Dist. 1979); *People v. Jenkins*, 294 N.E.2d 24, 29 (Ill. App. Ct. 1st Dist. 1973).

579. *People v. Stausberger*, 503 N.E.2d 832, 834–35 (Ill. App. Ct. 2d Dist. 1987) (stating that police reports are not admissible as substantive evidence or as business reports but may be used for impeachment purposes or to refresh the recollection of a witness).

*Crawford* will substantially affect this hearsay exception if the statement is deemed testimonial. Whether past recollection recorded statements are testimonial should depend on the motivation of the declarant in making the statement. Was it created to merely memorialize an event or did the declarant have an evidentiary intent in creating it? This requires a fact specific inquiry in each case. For example, does a witness to a hit-and-run accident who takes down the offender's license plate number make a testimonial statement? Under one formulation, the declarant is writing this down with a reasonable expectation that it could and would be used for prosecutorial purposes. On the other hand, there is no government involvement in the initial making of the statement, the declarant has initiated the statement himself or herself, and there seems little resemblance to an ex parte examination. However, police reports admitted as past recollection recorded are testimonial because such reports are prepared for law enforcement purposes.<sup>581</sup>

The presence of the declarant at trial as a witness will likely not cure Confrontation Clause problems. One essential condition for the admissibility under this exception is that the witness has no present recollection of the event recorded. This foundational requirement negates a constitutional condition for the admissibility of an out-of-court statement and will deny the accused a sufficient opportunity to cross-examine the witness concerning the out-of-court statement in violation of the Confrontation Clause and *Crawford*.<sup>582</sup> The success of this argument will likely depend on how broadly Illinois courts choose to interpret the "opportunity for cross-examination" for *Crawford* purposes.<sup>583</sup>

#### IV. CONCLUSION

*Crawford* will continue to challenge Illinois courts to reevaluate its common law and statutory hearsay rules. Similarly, the Illinois legislature must vigorously reassess the various legislative hearsay rules it has enacted over the last decade. Perhaps in this process of reevaluation of Illinois evidence law, *Crawford* can serve as a clarion

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580. *Wilson v. Parker*, 269 N.E.2d 523, 524–25 (Ill. App. Ct. 2d Dist. 1971) (citing cases that disallowed the admissibility of medical records when there was no contention that the record was a past recollection recorded).

581. *Crawford v. Washington*, 124 S. Ct. 1354, 1364 (2004).

582. *But see State v. Gorman*, 854 A.2d 1164, 1171–74 (Me. 2004) (admitting grand jury testimony substantively as past recollection recorded despite the declarant's inability to recall ever having given the grand jury testimony).

583. *See supra* Part II.D.2 (elucidating what constitutes an opportunity for cross-examination).

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call to the judiciary and the legislature to conduct a comprehensive review of Illinois evidence law. A joint enterprise of the two branches of government would best serve the interests of justice in this state, and progress in this endeavor is long overdue.

TABLE OF CASE CROSS-REFERENCES

<b>Case Name</b>	<b>Regional Reporter</b>	<b>Illinois Reporter</b>
<i>Buckley v. Cronkhite</i>	393 N.E.2d 60 (Ill. App. Ct. 1979)	74 Ill. App. 3d 487 (2d Dist. 1979)
<i>Dayan v. McDonald's Corp.</i>	466 N.E.2d 958 (Ill. App. Ct. 1984)	125 Ill. App. 3d 972 (1st Dist. 1984)
<i>In re Rolandis G.</i>	817 N.E.2d 183 (Ill. App. Ct. 2004)	352 Ill. App. 3d 776 (2d Dist. 2004)
<i>In re T.T.</i>	815 N.E.2d 789 (Ill. App. Ct. 2004)	351 Ill. App. 3d 976 (1st Dist. 2004)
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<i>People v. Martinez</i>	810 N.E.2d 199 (Ill. App. Ct. 2004)	348 Ill. App. 3d 521 (1st Dist. 2004)
<i>People v. Miles</i>	815 N.E.2d 37 (Ill. App. Ct. 2004)	351 Ill. App. 3d 857 (4th Dist. 2004)
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