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Crawford in Minnesota: The First Five Years

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I. INTRODUCTION

American criminal trials are governed by a variety of rules that protect criminal defendants. Such rules protect both innocent defendants and guilty defendants. Protection of the latter is a necessary but perhaps regrettable consequence of protecting the former. Pro-defense legal rules occasionally result in guilty defendants going free, but that result is said to be warranted because the same rules protect innocents from wrongful convictions. The tradeoff is justified by the traditional Anglo-American principle, made famous by Blackstone: "it is better that ten guilty persons escape, than that one innocent suffer."[2]

But it is one thing to accept Blackstone's principle in the abstract and quite another to adhere to it when facing the concrete and brutal reality of an actual criminal case. It is no easy thing to set a guilty defendant free. When a legal rule works to free an apparently guilty man, applying that rule fairly is extraordinarily difficult-and it is no great consolation that in some other hypothetical case, the same rule would protect an innocent man.

The pressure on judges can be overwhelming. It is no surprise that they occasionally bend the rules to accommodate accurate determinations of guilt in particular cases. Over time, if the rules are bent enough times by appellate courts, they eventually either disappear or survive only in a discretionary form, unconstrained by the rule of law.

Legal rules regarding hearsay and confrontation were until recently trending toward disappearance, or at least toward liberal admissibility, both in Minnesota and elsewhere.[3] Both the rules of evidence and the Confrontation Clause limit the use of hearsay evidence and protect the right to cross-examination. But limitations on hearsay have long been criticized by evidence scholars,[4] and courts, over time, eroded both rules.[5]

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[2] 4 Blackstone, Commentaries 352 (1765).

[3] *See* Kenneth S. Broun et. al, McCormick on Evidence § 327 (6th ed. 2006) [*hereinafter* McCormick on Evidence]; Ronald J. Allen, *A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission*, 76 Minn. L. Rev. 797, 799-800 (1992); George Fisher, *The Jury's Rise as Lie Detector*, 107 Yale L.J. 575, 708. *But see* Roger C. Park, *Hearsay, Dead or Alive?*, 40 Ariz. L. Rev. 647, 658 (1998) (arguing that while "[i]nstitutional forces may lead to a long-term decline of the hearsay rule," the rule "retains significant influence").

[4] John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 Vand. L. Rev. 741 (1961); John M. Maguire & Edmund M. Morgan, *Looking Forward and Backward at Evidence*, 50 Harv. L. Rev. 909, 921-22 (1937); Eleanor Swift, *Abolishing the Hearsay Rule*, 75 U. Cal. L. Rev. 495 (1987); Jack Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961).

[5] John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 Fordham L. Rev. 2097, 2105 & n.28 (2000).

At the level of the Rules, courts expanded certain hearsay exceptions-including the exceptions for excited utterances, statements for medical diagnosis, and the residual exception-to accommodate more out-of-court accusations.[6] These accommodations were especially common in cases of sex crimes, molestation, and domestic abuse.[7] At the level of the Constitution, courts were enabled by the loose and malleable test of *Ohio v. Roberts* to admit un-confronted testimony so long as it was deemed sufficiently reliable.[8] The combined result was to undermine criminal defendants' right to cross-examine witnesses against them.

The right was revived suddenly and dramatically in 2004 with the Supreme Court's decision in *Crawford v. Washington*.[9] Led by Justice Scalia, the *Crawford* Court scrapped the *Roberts* standard and instituted a new, more rigid rule protecting the confrontation right.[10] *Crawford*, in design and in effect, restricted the government's ability to admit out-of-court accusations against criminal defendants.[11] It is not hyperbolic to call *Crawford* a revolution.[12]

But a survey of post-*Crawford* Minnesota cases (presented below) suggests that Minnesota Supreme Court does not share Justice Scalia's zeal for the confrontation right. Its response to the *Crawford* revolution has been unenthusiastic, even intransigent. The same moral and political forces that led Minnesota courts to bend the hearsay rules in the first place now lead them to bend the *Crawford* rule.

Minnesota's resistance has already produced substantial conflict between state and federal courts. In the few years since *Crawford*, the United States Supreme Court has already overruled two key Minnesota post-*Crawford* rulings.[13] The Minnesota Supreme Court responded by finding other grounds to reach the same result or distinguishing away the holdings of the United States Supreme Court.[14] Finally, the simmering conflict reached a boiling point when one defendant named Orlando Bobadilla, after being rebuffed by Minnesota state courts, sought federal habeas relief. Federal district Judge Patrick Schiltz ruled that Minnesota's application of *Crawford* was not simply wrong, but objectively unreasonable.[15]

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[6] *See* McCormick on Evidence, *supra* note 3, §§ 272.1, 277-78, 324.

[7] *See id*; Allison C. Goodman, Note, *Two Critical Evidentiary Issues in Child Sexual Abuse Cases: Closed-Circuit Testimony by Child Victims and Exceptions to the Hearsay Rule,* 32 Am. Crim. L. Rev. 855, 876, 882 n.202 (1995).

[8] *See* 448 U.S. 56 (1980).

[9] 541 U.S. 36 (2004).

[10] *Id.* at 65-69.

[11] *See* George Fisher, Evidence 635-38 (2d ed. 2008)

[12] *See* Josephine Ross, *Crawford's Short-Lived Revolution: How Davis v. Washington Reins in Crawford's Reach,* 83 N.D. L. Rev. 387, 387-88 (2007).

[13] Moua Her v. Minnesota, 129 S.Ct. 929 (2009), *vacating* State v. Moua Her, 750 N.W.2d 258 (Minn. 2008); Wright v. Minnesota, 548 U.S. 923 (2006), *vacating* State v. Wright, 701 N.W.2d 802 (Minn. 2005));

[14] *See infra* Part II.

[15] Bobadilla v. Carlson, 570 F. Supp. 2d 1098, 1107 (D. Minn. 2008).

The ruling in Bobadilla's habeas case, if it stands on appeal, could throw Minnesota's post-*Crawford* doctrine into disarray. On the other hand, the Minnesota Supreme Court has showed no sign that it will relent. The conflict between state and federal courts regarding *Crawford* in Minnesota continues to develop, and how it will end is anything but clear.

II. THE PRE-CRAWFORD ERA IN MINNESOTA

A. THE RULES OF EVIDENCE

Pointed hearsay questions arise repeatedly in certain types of cases. In domestic violence cases, victims often report crimes and then subsequently refuse to cooperate with the prosecution, either because they have reconciled with their abuser or because they fear him, or both.[16] In child molestation cases, victims are often unable to testify effectively in the formal and frightening courtroom setting.[17] And more generally, in all cases of sex crimes, victims may be reluctant to relive their painful experiences by testifying at trial.[18]

Thus, in cases of domestic violence, molestation, and sex crimes, prosecutors often have a particularly pressing need for hearsay evidence. Such cases also often present the sort of disturbing and highly charged facts that put pressure on courts to admit inculpatory evidence. It is never easy to free an apparently guilty defendant, and it is particularly difficult when that defendant committed a heinous and depraved crime, such as a crime of child molestation. It is thus not surprising that courts have been especially willing to bend hearsay rules in such cases.

To accommodate hearsay evidence in cases of rape, molestation, and domestic violence, courts in Minnesota and elsewhere have expanded three hearsay exceptions.

First, courts have expanded the exception for excited utterances. The excited utterances exception admits hearsay statements made in response to startling events.[19] The rationale of the rule it that such spontaneous outbursts are especially reliable because excitement suspends the declarant's powers of reflection and fabrication.[20] When a declarant is not subjectively upset, or when sufficient time has passed that a declarant has had time to reflect and fabricate, there is no justification for resorting to the exception.

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[16] *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 751 (discussing the need for hearsay evidence in domestic violence cases).

[17] *See* Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 Brooklyn L. Rev. 311, 374-80 (discussing the need for hearsay evidence in molestation and child abuse cases).

[18] *See* Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 Cal. L. Rev. 159 (1996) (discussing the need for hearsay evidence in rape cases).

[19] *See, e.g.*, Fed. R. Evid. 803(2) advisory committee's note; Minn. R. Evid. 803(2) advisory committee's note.

[20] Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 8.36 (3d ed. 2003).

Minnesota courts, however, have expanded the exception to allow statements that lack spontaneity and statements made long after the startling event.[21] Although the exception was intended to cover statements blurted out in direct response to the triggering event, Minnesota courts have routinely admitted statements made in response to inquiries, including police inquiries.[22] So long as a police officer will take the stand and testify that the absent declarant was upset when she made the statement, Minnesota courts tend to admit the statement.

Second, courts have expanded the exception for statements made for medical treatment or diagnosis. Such statements are deemed especially reliable because the declarant has a powerful motive to speak truthfully to her doctor. That rationale, however, does not apply to statements of fault.[23] As a result, the rule was not intended to cover statements of fault. As the Advisory Committee to the Federal Rules put it, "a patient's statement that he was struck by an automobile would qualify, but not his statement that the car was driven through a red light."[24]

Minnesota courts, however, have expanded the exception to allow statements of fault and identification. The Minnesota Supreme Court has declined to adopt a categorical rule that statements of fault are always admissible,[25] but it has nonetheless allowed statements of fault in at least some cases.[26] It has also indicated that, in the future, given sufficient foundation, it might adopt a categorical rule of admissibility.[27] Even the current case-by-case approach has substantially broadened the traditional scope of the medical diagnosis exception.

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[21] *See, e.g.*, State v. Daniels, 380 N.W.2d 777, 782-83 (Minn. 1986) (admitting statements made an hour after event); State v. Berrisford, 361 N.W.2d 846, 850 (Minn. 1985) (holding that declarant's statement 90 minutes after a murder was an excited utterance because he was "scared," "shaky," and "very upset."); *see also* State v. Bauer, 598 N.W.2d 352, 366 (Minn. 1999) ("[T] there are no strict temporal guidelines for admitting an excited utterance . . . ."). *But see* State v. Martin 614 N.W.2d 214 (Minn. 2000) (holding that the trial court did not abuse its discretion in rejecting as hearsay a statement made a few hours after a murder, after the declarant saw a story about the murder on the evening news).

[22] *See, e.g.*, State v. Kelley, 2002 Minn. App. LEXIS 258 (admitting statement by victim to police after police arrived on the scene); Banks v. State, 2001 Minn. App. LEXIS 429 (same); State v. Kennedy, 1995 Minn. App. LEXIS 975 (same). *Cf.* Mueller & Kirkpatrick, *supra* note 20, § 8.36 (noting that admissibility as an excited utterance should depend in part on "whether the statement was made in response to questions or came from within as a direct reaction to events or conditions).

[23] McCormick on Evidence, *supra* note 3, § 277 ("In such cases, the statements lack any assurance of reliability based on the declarant's interest in proper treatment and should properly be excluded.").

[24] Fed. R. Evid. 803(4) advisory committee's note.

[25] State v. Robinson, 718 N.W.2d 400, 405 (Minn. 2006).

[26] *See* State v. Salazar 504 N.W.2d 774, 777-778 (Minn. 1993) (affirming the admission of a statement by a five-year-old child to a social worker accusing the defendant of sexual abuse); State v. Larson, 453 N.W.2d 42, 47 (Minn. 1990).

[27] *Robinson*, 718 N.W.2d at 406 ("We do not foreclose the possibility that we might in the future adopt a properly limited categorical rule of admissibility under the medical exception to hearsay for statements of identification by victims of domestic violence."); *see id*. at 406 n.3.

Third, courts have expanded the residual hearsay exception. The exception allows the admission of hearsay statements not covered by any other exception so long as the statements are necessary and especially reliable.[28] The exception is controversial and was intended to be applied "very rarely, and only in exceptional circumstances."[29]

In Minnesota, however, admissions under the residual exception are anything but rare and exceptional-on the contrary, they are entirely regular. Minnesota appellate courts have upheld the admission of hearsay against criminal defendants under the residual exception in many cases and in a wide variety of circumstances.[30] The Supreme Court has allowed admission in circumstances with virtually no real guarantees of trustworthiness.[31] Minnesota courts also rely heavily on other corroborating evidence to admit statements under the residual exception[32] even though most evidence law authorities suggest that corroborating evidence should not be considered, at least in criminal cases.[33]

In short, Minnesota courts, like many courts around the country, interpreted these three hearsay exceptions expansively to admit a wide variety of statements, including statements that did not fit comfortably within the exceptions' stated rationales. The net effect was that the hearsay rules often posed little obstacle to prosecutors seeking to admit unconfronted accusations against criminal defendants.

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[28] *See* Fed. R. Evid. 807 (new rule combining former Fed. R. Evid. 803(24) and Fed. R. Evid. 804(b)(5)); Minn. R. Evid. 807 (new rule combining former Minn. R. Evid 803(24) and Minn. R. Evid. 804(b)(5)).

[29] Fed. R. Evid. 803(24), Notes of Committee on the Judiciary, S.R. No. 93-1277; *accord* United States v. Hughes, 535 F.3d 880, 882 (8th Cir. 2008).

[30] *See, e.g.*, State v. Martinez, 725 N.W.2d 733, 737 (Minn. 2007); State v. Robinson, 718 N.W.2d 400, 410 (Minn. 2006); State v. Edwards, 485 N.W.2d 911, 915 (Minn. 1992); State v. Larson, 472 N.W.2d 120, 125 (Minn. 1991); State v. Ortlepp, 363 N.W.2d 39, 44 (Minn. 1985); State v. Langley, 354 N.W.2d 389, 398 (Minn. 1984); State v. Posten, 302 N.W.2d 638, 641 (Minn. 1981); State v. Olisa, 290 N.W.2d 439 (Minn. 1980); State v. Kadel, 2008 Minn. App. Unpub. LEXIS 1401; State v. Billingsley, 2008 Minn. App. Unpub. LEXIS 1236; State v. Lewis, 2008 Minn. App. Unpub. LEXIS 806; In re Welfare of A.B.R., 2007 Minn. App. Unpub. LEXIS 1258; State v. Alfaro, 2007 Minn. App. Unpub. LEXIS 93; State v. Langston, 2006 Minn. App. Unpub. LEXIS 1291; In re J.M.C., 2006 Minn. App. Unpub. LEXIS 1248; State v. Borsgard, 2005 Minn. App. LEXIS 47; State v. Plantin, 682 N.W.2d 653, 659 (Minn. Ct. App. 2004); State v. Rottelo, 2003 Minn. App. LEXIS 682; State v. Hollander, 590 N.W.2d 341, 346 (Minn. Ct. App. 1999); State v. Fettig, 1994 Minn. App. LEXIS 1165; State v. Burg, 1994 Minn. App. LEXIS 740; State v. Lonergan, 505 N.W.2d 349, 354-55 (Minn. Ct. App. 1993).

[31] In State v. Muoa Her, 750 N.W.2d 258 (Minn. 2008), for example, the Court upheld the admission of statements by an alleged domestic abuse victim to her family regarding the abuse. The statements were not spontaneous, they were made after a substantial lapse of time since the event, they were not under oath, they were not subject to cross-examination, they were not recorded. *Cf.* McCormick on Evidence, *supra* note 3, § 324 (listing reliability factors). The declarant also had a substantial motive to lie-any party in a failing marriage has a strong motive to lie to others about the relative fault of his or her spouse. Yet the Court held that the statements bore sufficient guarantees of trustworthiness because the statements were based on firsthand knowledge, they were never recanted, and they were specific. *Her*, 750 N.W.2d at 276.

[32] *See Robinson*, 718 N.W.2d at 409-10 & n.4 (reaffirming the use of corroborating evidence to support reliability under the residual exception).

[33] *See* McCormick on Evidence, *supra* note 3, § 324; Mueller & Kirkpatrick, *supra* note 20, § 8.81.

B. THE CONFRONTATION CLAUSE

Prior to Crawford, adjudication of Confrontation Clause claims was governed by the *Ohio v. Roberts* test.[34] Under *Roberts*, Minnesota courts required the prosecution to make a two-part showing: first, that the declarant was unavailable to testify; and second, that the declarant's statement was reliable.[35] To show reliability, the prosecution could show either that the statement fell within a "firmly rooted exception" or that it had particularized guarantees of trustworthiness.[36]

Following the guidance of the United States Supreme Court, the Minnesota Supreme Court held that both the excited utterances exception and the medical diagnosis exception were firmly rooted hearsay exceptions.[37] Thus, if the prosecution could successfully admit evidence under one of those exceptions, it also necessarily satisfied any Confrontation Clause objection (at least as long as the declarant was unavailable).

The residual exception was not firmly rooted, but the test for the residual exception was substantially the same as the *Roberts* reliability test.[38] In applying either standard, Minnesota courts would conduct a totality of the circumstances test to determine whether the statement bore adequate indicia of reliability.[39]

As with any "totality of the circumstances" test, the result was largely indeterminate.[40] No firm rules developed for exactly what circumstances should be considered, or how courts should weigh rule when different factors pointed different directions.[41] The malleability of the *Roberts* test did not always result in pro-prosecution rulings in Minnesota, but it meant that in any given case, a court could plausibly rule either way. Ultimately, if a court determined that a statement was sufficiently reliable to merit admissibility under the residual exception, it could also easily conclude that the statement was sufficiently reliable to merit admissibility under the Confrontation Clause.

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[34] *See* Crawford v. Washington, 541 U.S. 36, 40 (2004).

[35] *See, e.g.*, State v. Hansen, 312 N.W.2d 96 (Minn. 1981), *abrogated by* State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006).

[36] State v. Henderson 620 N.W.2d 688, 696-97 (Minn. 2001) (citing Ohio v Roberts, 448 U.S. 56, 66 (1980).

[37] White v. Illinois, 502 U.S. 346, 356 n.8 (1992); *see* State v. Gates, 615 N.W.2d 331, 336-37 (Minn. 2000) (excited utterance); State v. Salazar, 504 N.W.2d 774, 777 (Minn. 1993) (medical diagnosis); State v. Daniels, 380 N.W.2d 777, 785-86 (Minn. 1986) (excited utterance).

[38] *See, e.g.*, State v. Bradford, 618 N.W.2d 782, 797-98 (Minn. 2000); State v. Grube, 531 N.W.2d 484, 489-90 (Minn. 1995).

[39] *Id.*

[40] *See* John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 Geo. Wash. L. Rev. 191, 217 ("[A] test for 'reliability' under the Confrontation Clause is simply too vague to effectively limit any court that otherwise is inclined to admit a hearsay statement under the law of evidence."); Tom Lininger, *Yes, Virginia, There Is a Confrontation Clause*, 71 Brooklyn L. Rev. 401, 403 ("[A]t least in theory, the testimonial approach makes confrontation analysis more predictable than under the vague Roberts test examining 'indicia of reliability.'").

[41] *See* Crawford v. Washington, 541 U.S. 36, 63 (2004) (criticizing the malleability of the *Roberts* test).

In short, under the *Roberts* regime, the Confrontation Clause did not impose significant barriers to the admission of hearsay evidence in criminal prosecutions in Minnesota. Especially in cases involving rape, molestation, and domestic violence, much hearsay was admitted with relative ease under Minnesota Rules of Evidence, and once it was admissible under the Rules, it was typically admissible under the Constitution as well.

II. MINNESOTA'S RESPONSE TO *CRAWFORD*

Minnesota was not the only state to endorse loose doctrines that allowed broad admissibility of hearsay against criminal defendants. The changes here were part of a broad national trend.[42] Though not all jurisdictions went along, many endorsed the same liberal constructions of hearsay exceptions and loose, almost *ad hoc* applications of the *Roberts* test.

It was precisely that trend that formed the backdrop of the *Crawford* revolution. In a sense, states could no longer be trusted to protect confrontation rights, so the Supreme Court was forced to intervene with a more rigid rule. Led by Justice Scalia, *Crawford* scrapped the messy and malleable *Roberts* test for something that was intended to be more clear, more certain, and less amenable to the easy admission of hearsay against defendants.[43]

But in the five years since Justice Scalia fired the first salvo in his Confrontation Clause revolution, *Crawford* has already encountered substantial resistance. Many lower courts have avoided and evaded *Crawford* by construing the definition of "testimonial" relatively narrowly and by creating exceptions to the *Crawford* rule. The Minnesota Supreme Court has, for the most part, sided with the counter-revolutionary resistance. The Minnesota Court has issued a variety of rulings that have served to blunt the impact of *Crawford*. That resistance has produced an ongoing conflict between Minnesota courts and federal courts that has yet to be resolved. If anything, it grows more heated with each skirmish.

A. *WRIGHT* I- AUGUST 2005

The Minnesota Supreme Court's first major attempt to apply *Crawford* came in *State v. Wright*.[44] *Wright* was a domestic violence case with a recanting witness-one of the recurring types of cases where the pressure to admit hearsay evidence is especially strong. Because the victim refused to cooperate in the state's prosecution of David Wright, the state sought to admit her statements to the 911 dispatcher and to police.[45]

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[42] *See* Douglass, *supra* note 5, at 2103 ("Since enactment of the Federal Rules of Evidence in 1975, both the law of evidence and modern Confrontation Clause doctrine have evolved toward broader admission of hearsay in criminal cases.").

[43] *See Crawford*, 541 U.S. 36.

[44] State v. Wright, 701 N.W.2d 802 (Minn. 2005).

[45] *Id.*

The Minnesota Supreme Court noted-quite correctly-that the *Crawford* Court had not offered any comprehensive definition of "testimonial."[46] It therefore looked primarily to appellate decisions in sister states. Rather than adopting any single state's formulation as the best, it essentially combined all of the factors considered by other courts into a non-exhaustive eight-factor test.[47] The Minnesota Court emphasized that the ultimate determination was context-specific, to be made on a "case-by-case" basis.[48]

The *Wright* Court's approach to *Crawford* was ironic in a variety of ways. Multi-factor tests are notoriously indeterminate, and Justice Scalia had criticized the eight- and nine-factor tests that state courts had used to apply *Roberts*.[49] The Minnesota Court responded by adopting another eight-factor test.[50] Some of the factors, moreover, were nothing more than warmed-over reliability factors-the very same factors that were considered under *Roberts*. And though one of Justice Scalia's primary criticisms of Roberts was that it was too malleable, allowing judges to rule either way in many cases,[51] Minnesota responded with a no less malleable case-by-case approach.

In defending its throwback approach, the Minnesota Court noted the Supreme Court's failure to give better guidance, and suggested that until it received more specific orders, it would maintain the status quo: "We believe that the task of defining the exact parameters of what constitutes testimonial statements for purposes of the Confrontation Clause of the U.S. Constitution is best suited for the Supreme Court."[52] It thus allowed the admission of both the victim's statements to the 911 dispatcher and her statements to the police against *Wright*.[53]

B. *BOBADILLA* I- FEBRUARY 2006

Six months after *Wright*, the Minnesota Supreme Court faced an even more difficult case in *State v. Bobadilla*.[54] Orlando Bobadilla's three-year-old nephew reported to his mother that the defendant had molested him. The mother reported the allegation to police, who in turn arranged a tape-recorded interview

[46] *Id.* at 814.

[47] *Id.* at 812 & n.7.

[48] *Id.* at 812.

[49] *Crawford*, 541 U.S. at 63 ("Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.").

[50] *Wright*, 701 N.W.2d at 812-13.

[51] *Crawford*, 541 U.S. at 60, 62-64.

[52] *Wright*, 701 N.W.2d at 814.

[53] *See id.* at 815.

[54] State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006).

with a county child-protection worker.[55] The accuser was ruled incompetent to testify at trial, so the state used the tape-recorded interview to obtain a conviction.[56] As in *Wright*, the *Bobadilla* Court found the statements nontestimonial and thus admissible. But even setting aside questions about the *Wright* test, the result in *Bobadilla* was problematic.

First, several factors of the eight-factor *Wright* test seemed to cut strongly in Bobadilla's favor. For example, it was the police who had initiated the interview,[57] so the third *Wright* factor should have weighed in Bobadilla's favor.[58] Because the conversation was relatively formal, structured, and conducted pursuant to specific protocols for investigating abuse, the sixth factor should have weighed in Bobadilla's favor.[59] Finally, the conversation was recorded,[60] so the eighth factor should have weighed in Bobadilla's favor.[61]

The Court responded by modifying the *Wright* test, and holding that two of the eight factors were the "central considerations," while the remaining six factors were merely "probative of these two."[62] The *Bobadilla* court stated that the two factors had been the central considerations in *Wright*, but notwithstanding *Bobadilla*'s vague citation to *Wright* for that point,[63] *Wright* had said no such thing. In short, the *Bobadilla* Court essentially ignored the factors that favored the defendant.[64]

Second, nearly all other state courts to reach the issue had held that interviews conducted by child-protection workers were testimonial and thus generally inadmissible under *Crawford*.[65] In response to those cases, the

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[55] *See id.* at 246-47.

[56] *See id.* at 248.

[57] *See id.* at 247.

[58] *See Wright*, 701 N.W.2d at 812.

[59] *Bobadilla*, 709 N.W.2d at 247.

[60] *Id.* at 248.

[61] *See Wright*, 701 N.W.2d at 812.

[62] *Bobadilla*, 709 N.W.2d at 250.

[63] As support for the proposition that factors two and seven were the central factors in *Wright*, the Court offered the following imprecise citation to *Wright*: "*See id*. at 811, 813-14." 709 N.W.2d at 250. Neither those passages of the *Wright* opinion (nor any other, for that matter) appear to offer any support for that proposition.

[64] The next month, however, in a case where the other factors favored the state, the Court revived them. *See* State v. Scacchetti, 711 N.W.2d 508, 515-16 (Minn. 2006).

[65] *See, e.g.*, T.P. v. State, 911 So. 2d 1117 (Ala. Crim. App. Oct. 29, 2004); People v. Sisavath, 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004); Somervell v. State, 883 So. 2d 836 (Fla. Dist. Ct. App. 2004); In re Rolandis G., 817 N.E.2d 183 (Ill. App. Ct. 2004); Anderson v. State, 833 N.E.2d 119, 125-26 (Ind. Ct. App. 2005); State v. Snowden, 867 A.2d 314 (Md. 2005); State v. Romero, 133 P.3d 842, 858-60 (N.M. Ct. App. 2006); Flores v. State, 120 P.3d 1170, 1178-79 (Nev. 2005); State v. Mack, 337 Ore. 586, 101 P.3d 349 (Or. 2004).

Most courts since have similarly found that statements made in such circumstances are testimonial under *Crawford*. *See, e.g.*, United States v. Bordeaux, 400 F.3d 548, 556 (8th Cir. 2005); Hernandez v. State, 946 So. 2d 1270, 1284-85 (Fla. Ct. App. 2007); State v. Hooper, 176 P.3d 911 (Idaho 2007); People v. Rolandis G., 2008 Ill. LEXIS 1440;

Bobadilla court emphasized that it was applying the same basic test-that it was trying to determine whether either the child or the interviewer was acting "to a substantial degree" to produce evidence for trial.[66] But unlike the other state courts, the Minnesota Supreme Court applied that test in a way that allowed admission. The Court concluded that the interview was not conducted to produce evidence, even though (1) the police had arranged the interview, (2) the interview was conducted at the law enforcement center with a police officer present, and (3) the interview was recorded.[67]

The *Bobadilla* court departed both from its own prior ruling and also from the body of rulings issuing from sister states. *Bobadilla* pushed Minnesota further out on a limb.

C. *DAVIS/HAMMON*- JUNE 2006

Thus, in *Wright* and *Bobadilla*, the Minnesota Supreme Court adopted a relatively narrow definition of "testimonial," which served to blunt the impact of the new *Crawford* rule. While the rulings in *Wright* and *Bobadilla* may have been questionable, they were nonetheless understandable in light of Justice Scalia's explicit refusal in *Crawford* to provide a clearer definition of "testimonial hearsay." Arguably, all the Minnesota Supreme Court had done was answer some questions left entirely open in *Crawford*.

But after allowing lower courts to develop the law on their own for two years, the United States Supreme Court eventually re-entered the fray. It took and consolidated the two domestic violence cases of *Davis v. Washington* and *Hammon v. Indiana*.[68] The former dealt with statements to a 911 dispatcher[69] and the latter with statements to police.[70]

In *Davis*, the Court held that statements to a 911 dispatcher are nontestimonial so long as their primary purpose was to resolve an ongoing emergency.[71] In *Hammon*, by contrast, the Court held that statements made to police officers at the scene were testimonial.[72] The Court suggested that the question in *Hammon*

State v. Bentley, 739 N.W.2d 296 (Iowa 2007); State v. Henderson, 160 P.3d 776 (Kan. 2007); State v. Justus, 205 S.W.3d 872, 880 (Mo. 2006); State v. Ortega, 175 P.3d 929, 935-36 (N.M. Ct. App. 2007); State v. Blue, 717 N.W.2d 558, 564 (N.D. 2006); State v. Siler, 876 N.E.2d 534, 542 (Ohio 2007); In the Interest of S.R., 920 A.2d 1262, 1268 (Pa. Super Ct. 2007); Rangel v. State, 199 S.W.3d 523, 533-36 (Tex. App. 2006); State v. Cannon, 254 S.W.3d 287 (Tenn. 2008); State v. Hopkins, 154 P.3d 250, 257-58 (Wash. Ct. App. 2007). *But see* State v. Arroyo, 935 A.2d 975 (Conn. 2007); State v. Buda, 949 A.2d 761 (N.J. 2008).

[66] *See Bobadilla*, 709 N.W.2d at 253-54.

[67] *See id*.

[68] Davis v. Washington, 547 U.S. 813 (2006).

[69] *Id.* at 817.

[70] *Id.* at 819.

[71] *Id*. at 823-29.

[72] *Id*. at 829-32.

was not particularly close: "[d]etermining the testimonial or nontestimonial character of the statements that were the product of the interrogation in *Hammon* is a much easier task, since they were not much different from the statements we found to be testimonial in *Crawford*."[73]

The ruling in *Davis/Hammon* appeared to undermine *Wright* and *Bobadilla* in several significant ways. First, in both *Wright* and *Bobadilla*, the Minnesota Supreme Court had relied heavily on the Indiana Supreme Court's decision in *Hammon*.[74] The Indiana court's decision was then overruled-in an almost dismissive fashion-by the United States Supreme Court. Second, *Davis*/*Hammon* squarely contradicted Wright's holding that statements made by a domestic violence victim to police at her house were nontestimonial.[75] Third, the *Davis/Hammon* Court did not engage in any multi-factor test of the sort that the Minnesota Supreme Court had adopted. Rather, it simply noted that the primary purpose of the questioning in *Davis* was to resolve an ongoing emergency, whereas the primary purpose of the interrogation in *Hammon* was to investigate a crime.[76]

Davis/Hammon also undermined Minnesota law in a fourth way that was more subtle, but no less important: it disavowed the broader characterizations of purpose that Minnesota had accepted in *Wright* and *Bobadilla*. The Indiana Supreme Court had held in *Hammon* that the officer's primary purpose in interrogating the victim was not to produce evidence for trial but rather to determine "whether anything requiring police action had occurred" and to accomplish the "the preliminary tasks of securing and assessing the scene."[77] In *Bobadilla*, the Minnesota Supreme Court had similarly argued that the child-protection worker's primary purpose was "assessing whether abuse occurred, and whether steps were therefore needed to protect the health and welfare of the child."[78]

In its arguments to the United States Supreme Court, the Indiana Attorney General pressed similar arguments.[79] Justice Scalia, once again writing for the Court, rejected those characterizations.[80] Because the statements "were neither a cry for help nor the provision of information enabling officers immediately

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[73] *Id*. at 829.

[74] The totality of the circumstances approach in the *Wright* test was derived in part from *Hammon*. *See Wright*, 701 N.W.2d at 812 & n.7 (citing *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005)). In *Bobadilla*, the Court relied heavily on the Indiana court's reasoning in *Hammon*. *See Bobadilla*, 709 N.W.2d at 251 n.2 (citing *Hammon*, 829 N.E.2d at 257-58); *Bobadilla* at 252 (citing 829 N.E.2d at 257-58; *id*. at 252 n.4 (citing 829 N.E.2d at 257-58; *Bobadilla* at 253 (citing 829 N.E.2d at 257-58).

[75] *See Davis*, 547 U.S. at 840.

[76] *See id*. at 827-28, 830-31.

[77] *Hammon*, 829 N.E.2d at 458.

[78] 709 N.W.2d at 255.

[79] *See* Tr. of Oral Arg., 2006 WL 766735 *3-6.

[80] 547 U.S. at 831.

to end a threatening situation, the fact that they were given at an alleged crime scene and were 'initial inquiries' is immaterial."[81] He added pointedly: "saying that an emergency exists cannot make it be so."[82]

D. *WRIGHT* II- JANUARY 2007

Following his loss in the Minnesota Supreme Court, David Wright petitioned for certiorari.[83] In light of *Davis*, the U.S. Supreme Court vacated the opinion in *Wright I* and remanded for reconsideration.[84]

On remand, the Minnesota Supreme Court did not betray any hint that *Davis/Hammon* fundamentally altered the framework the court established in *Wright I*.[85] To the contrary, the court stated: "Our analysis in *Wright II* comports well with the Supreme Court's reasoning in *Davis/Hammon* . . . ."[86] And in applying the new (or not new) test, the Minnesota Supreme Court stretched to reach the same ultimate result.

In *Davis/Hammon*, the Court had emphasized that 911 calls are not categorically admissible, and that a call that starts out nontestimonial might turn testimonial once "the emergency appears to have ended."[87] Part of the 911 call admitted against Wright was made after he had been arrested, thus after the emergency had ended.[88] The State on remand conceded that that portion of the 911 call was testimonial and thus inadmissible.[89] Remarkably, the Minnesota Supreme Court disagreed with both parties and held that the entire call was nontestimonial.[90] In other words, it adopted an even narrower definition of "testimonial" than the one proposed by the prosecution.

The Court conceded only what it absolutely had to, namely that the statements made by the victim to police at the scene were testimonial under *Hammon*.[91] But the court nonetheless refused to order a new trial. Instead, it remanded the case to the trial court so that the state could have an opportunity to submit evidence

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[81] *Id*.

[82] *Id*. at 831.

[83] Petition for Writ of Certiorari, Wright v. Minnesota, 548 U.S. 923 (2006) (No. 05-7551).

[84] Wright v. Minnesota, 548 U.S. 923 (2006) (vacating the Minnesota Supreme Court's decision in *Wright* and remanding for reconsideration in light of *Davis/Hammon*).

[85] *See* State v. Wright, 726 N.W.2d 464 (Minn. 2007) (hereinafter *Wright II*).

[86] *Id.* at 474.

[87] *Davis*, 547 U.S. at 828.

[88] *See Wright II*, 726 N.W.2d at 474.

[89] *See id.*

[90] *Id*. at 474-75.

[91] *Id.*

to establish that Wright had waived any Confrontation Clause objection under the doctrine of forfeiture by wrongdoing.[92] It did so even though the issue of forfeiture had already been raised, and both parties agreed that the record was already sufficient to apply the forfeiture doctrine.[93]

E. *WARSANE*- JULY 2007

A year after *Davis/Hammon* was decided, the Minnesota Supreme Court decided yet another case involving similar facts: *State v. Warsame*.[94] Like the defendants in *Davis*, *Hammon*, and *Wright*, Farah Warsame was charged with domestic violence crimes. As in *Hammon* and *Wright*, the state in Warsame's case admitted statements made by the accuser after the police arrived at the scene.[95] An officer arrived on the scene, and asked the victim, who had a bump on her head and some bruising on her neck, what had happened.[96] Over the next fifteen to twenty minutes, the victim described the assault.[97]

As in *Davis/Hammon*, the officers' questions were aimed at discovering "what happened," not "what was happening." As in *Davis/Hammon*, there was no apparent ongoing threat, because Warsame had left the scene, and the police officers were present with his girlfriend.[98] Nonetheless, the Minnesota Supreme Court held that the officer's primary purpose in his interrogation was to assess the girlfriend's medical condition and to deal with the "ongoing emergency" of Warsame's whereabouts.[99]

The Court relied on cases from other jurisdictions where the defendant had fled and where there was good reason to suppose that the defendant posed a significant risk of harm to others,[100] though in Warsame's case, there was no reason to believe such a risk existed. Thus, in *Warsame*, the Minnesota Supreme Court once again distinguished United States Supreme Court holdings closely on point and limited their effect.

F. *KRASKY*- AUGUST 2007

Around the same time, the Minnesota Supreme Court was faced with an important case that tested the

[92] *Id*. at 479-82.

[93] *Wright II*, 726 N.W.2d at 480.

[94] State v. Warsame, 735 N.W.2d 684 (Minn. 2007).

[95] *Id*.

[96] *Id*.

[97] *Id.*

[98] *Id*. at 688.

[99] *Warsame*, 735 N.W.2d at 693-95.

[100] *Id.* at 694 (citing State v. Kemp, 212 S.W.3d 135 (Mo. 2007), and State v. Ayer, 917 A.2d 214 (N.H. 2006)).

meaning of *Davis/Hammon* in child molestation cases: *State v. Krasky*.[101] Like Orlando Bobadilla, Edward Krasky was charged with child molestation, and the primary evidence against him was a videotaped interview that was arranged by a police officer and conducted by a child protection worker.[102] In *Krasky*, the interview took place over a year after the alleged molestation, and at the time of the interview, the defendant was already incarcerated for unrelated reasons.[103]

After several rounds of litigation, *Krasky* ended up before the Court of Appeals in the immediate wake of *Davis/Hammon*.[104] The Court of Appeals noted that *Davis/Hammon* had implicitly disavowed the eight-factor test of *Wright I*.[105] It recognized the difference in approach:

It has become evident under *Crawford* and *Davis* that the Supreme Court has deliberately abandoned a prior, vague Confrontation Clause test in favor of a new approach that focuses on an uncomplicated study of the purpose of an interviewer who takes a statement that is later introduced as trial evidence.[106]

The Court of Appeals thus affirmed the trial court's decision to exclude the hearsay evidence.

The Minnesota Supreme Court granted review and reversed.[107] Once again, as in *Wright II*, the Supreme Court refused to concede that *Davis/Hammon* had affected its prior decisions in any significant way. It concluded, remarkably, "that the *Davis* decision leaves undisturbed our conclusions in *Bobadilla* and *Scacchetti*."[108] It suggested that the holding of *Davis/Hammon* was "limited to its facts."[109]

Finally, and most fundamentally, the *Krasky* Court once again endorsed the dubious (and impenetrable) factual characterization that the child-protection worker's primary purpose was not to investigate a past crime but rather to "assess and protect [the accuser's] health and welfare."[110] It accepted, in other words, the same sort of broad and nebulous characterization of purpose that had been accepted by the Indiana Supreme Court in *Hammon* and subsequently rejected by the United States Supreme Court.

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[101] State v. Krasky, 736 N.W.2d 636 (Minn. 2007).

[102] *Id.* at 639.

[103] *Id.* at 638 & n.1.

[104] State v. Krasky, 721 N.W.2d 916 (Minn. Ct. App. 2006).

[105] *Id.* at 920.

[106] Id. at 924.

[107] *Krasky*, 736 N.W.2d 636.

[108] *Id.* at 643.

[109] *Id.* The Minnesota Supreme Court observed that the holding of *Davis/Hammon* was not "an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them." *Id.*

[110] *Id.* at 641.

Put simply, the Minnesota Supreme Court in *Krasky* reaffirmed that even after *Davis/Hammon*, not much had changed.

G. *HER*- MAY 2008

The rulings in *Davis/Hammon*, *Wright*, *Bobadilla*, and *Krasky* all centered on the definition of "testimonial." But those cases also involved tangential discussions of the doctrine of forfeiture by wrongdoing. That doctrine holds that when a defendant procures the unavailability of a witness, he thereby forfeits any objection to that witness's prior hearsay statements.[111] The Minnesota Supreme Court finally faced that doctrine head-on in *State v. Her*.[112]

Traditionally, the forfeiture by wrongdoing doctrine was limited to cases of witness tampering.[113] Thus, in order to use the doctrine, the state had to show that the defendant committed some act with the purpose of making the witness unavailable.[114] In the *Roberts* era, the forfeiture doctrine did not often matter much because the *Roberts* test was malleable to admit a great deal of hearsay without regard to any forfeiture analysis.[115] Following *Crawford*, however, interest in forfeiture revived, and several commentators proposed a broad doctrine to mitigate the effects of *Crawford*, especially in domestic violence cases.[116]

Her was a domestic violence murder case. The state admitted the deceased victim's prior hearsay statements against the defendants.[117] Even though it found that the statements were testimonial, the Minnesota Supreme Court affirmed their admission under the forfeiture doctrine.[118] It so held even though there was no showing that the defendant had committed the acts with the purpose of causing the witness's

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[111] *See* Fed. R. Evid. 804(b)(6); Mueller & Kirkpatrick, *supra* note 20, § 8.78 (discussing the forfeiture doctrine).

[112] State v. Moua Her, 750 N.W.2d 258 (Minn. 2008).

[113] *See* Reynolds v. United States, 98 U.S. 145 (1878) (recognizing the forfeiture doctrine in a case of witness tampering).

[114] Mueller & Kirkpatrick, *supra* note 20, § 8.78 ("At the very least, the defendant must intend to make the person unavailable as a witness . . . .").

[115] *Cf.* James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 Wm. & Mary Bill Rts. J. 1193, 1208-09 (2006) (discussing the relative unimportance of *Reynolds* prior to *Crawford*).

[116] *See, e.g.,* Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 Creighton L. Rev. 441 (2006); Matthew M. Stabb, *Child's Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 108 W. Va. L. Rev. 501 (2005); Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. Rev. 1, 34 (2006); Joshua Deahl, Note, Expanding Forfeiture Without Sacrificing Confrontation After Crawford, 104 Mich. L. Rev. 599, 623-24 (2005); Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. Cal. L. Rev. 213, 248-49 (2005).

[117] *Her*, 750 N.W.2d 258.

[118] *Id.* at 269-75.

unavailability. In other words, it held that at least in murder cases, the forfeiture doctrine applies where the *effect* of a defendant's conduct is to cause unavailability, even if causing unavailability is not the defendant's *purpose*.[119]

The *Her* decision was strange in several respects. First and foremost, the United States Supreme Court had already given strong indications that it would reach the opposite conclusion. Months before *Her* was decided, the United States Supreme Court had granted certiorari in *Giles v. California*, which presented the same issue.[120] Oral argument in *Giles* had been held in April, and based on the tenor of that argument, it was fairly clear which way the Supreme Court would rule.[121] Consistent with those strong indications, the *Giles* Court ultimately held that application of the forfeiture doctrine requires a showing of motive or purpose.[122] It subsequently vacated and remanded *Her*.[123] It is unclear why the Minnesota Supreme Court did not simply wait for the United States Supreme Court to decide *Giles* rather than issuing a ruling in *Her* that was almost sure to be overturned.

Second, the *Her* court refused to give any issue any clear holding about whether the statements were testimonial.[124] The Court reversed the trial court's determination that the statements were nontestimonial, but it refused to issue any affirmative holding that the statements were testimonial.[125] In a byzantine passage, the Court explained:

For all of these reasons, we conclude that the State did not meet its burden to prove that [the victim's] statement to police was nontestimonial. . . . We, in fact, do not make a determination as to the testimonial or nontestimonial nature of the statements. We hold only that the State failed to meet its burden to show that the primary purpose of the interrogation in this case was to address an ongoing emergency.[126]

What this passage means is anyone's guess. Can a statement be nontestimonial even where the state fails to carry its burden of showing that the statement was nontestimonial? Did the Court anticipate that the forfeiture ruling was likely to be overruled by *Giles*, and therefore try to leave open another possible basis for affirming the conviction? Was the Court simply trying to limit the precedential impact of its ruling by

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[119] *Id.*at 274 ("[W]e hold that the applicability of the forfeiture-by-wrongdoing doctrine does not depend in this case on the State proving that Her murdered [his wife] with the specific intent of preventing her from testifying.").

[120] The Court granted cert in *Giles* on January 11, 2008, *see* 128 S.Ct. 976, and the case was argued on April 22.

[121] *See, e.g.,* Lyle Denniston, *Analysis: An Old Adage May Not Apply* (April 22, 2008) (*available at* <http://www.scotusblog.com/wp/analysis-an-old-adage-may-not-apply/>) (discussing the *Giles* oral argument and the likely outcome).

[122] Giles v. California,128 S.Ct. 2678 (2008). The *Her* case was vacated by the U.S. Supreme Court and was remanded the Supreme Court of Minnesota in light of *Giles. See* Moua Her v. Minnesota, 129 S.Ct. 929 (2009), *vacating* State v. Moua Her, 750 N.W.2d 258 (Minn. 2008).

[123] *See* Moua Her v. Minnesota, 129 S.Ct. 929 (2009), *vacating* State v. Moua Her, 750 N.W.2d 258 (Minn. 2008).

[124] *Her*, 750 N.W.2d at 269.

[125] *Id.*

[126] *Id.* at 269.

framing it in procedural terms?

The meaning of the Minnesota Supreme Court's holding regarding the nature of the statements is unclear. But in any event, the Minnesota Supreme Court's key holding on forfeiture was very short-lived, and *Her* stands as a strange and somewhat embarrassing chapter in the story of the Minnesota Supreme Court's response to *Crawford*.

H. *BOBADILLA* II- JULY 2008

Despite the decision in *Giles*, Minnesota's post-*Crawford* jurisprudence remained largely unscathed as of mid-summer 2008. In their effect if not their intent, the post-*Crawford* rulings of the Minnesota Supreme Court had succeeded in limiting the effect of Justice Scalia's revolution. In general, when faced with questions unresolved by the United States Supreme Court, the Minnesota Court generally resolved those questions in a way that retained the status quo, and in a way that favored the prosecution.[127] When it faced issues that very similar to the issues faced in *Crawford* and *Davis/Hammon*, the Minnesota Court used small factual differences to justify contrary results. And even when explicitly overruled by the United States Supreme Court, the Minnesota Supreme Court left open the possibility of reaching the same result by other means.[128]

In short, for several years after *Crawford*, the Minnesota Supreme Court succeeded in reaching the very same results that it had reached before Crawford-it continued to maintain broad doctrines allowing the admission of hearsay against criminal defendants. It resisted the revolution, and it resisted federal interference. But as the revolution advanced at the federal level, and Minnesota resisted at the state level, the possibility of a more direct conflict between the state and federal courts grew. That possibility was realized when Orlando Bobadilla sought federal habeas relief.[129]

Especially since 1996, when Congress passed AEDPA,[130] defendants seeking habeas relief face very long

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[127] *The* most notable exception was *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006), in which the Court held that BCA lab reports are testimonial. That decision was largely procedural, however, and is unlikely to affect the outcome in many cases.

[128] *See supra* notes 82-92 and accompanying text (discussing *Wright II*).

Her's overruling may likewise have little long-term effect on Minnesota law. The Minnesota Supreme Court could easily reach the same result in Moua Her's case by replacing the murder exception with a domestic violence exception. It could also maintain a broad forfeiture doctrine, *Giles* notwithstanding, by adopting the same sort of loose mixed motive analysis that it has used to define "testimonial." People have myriad motives for their actions. Just as it is easy to say that a child-protection worker's primary purpose is to assess a child's well-being (rather than to investigate what happened), it would be easy to say that a substantial part of Moua Her's motive was to prevent his wife from going to authorities.

[129] Bobadilla v. Carlson, 570 F. Supp. 2d 1098 (D. Minn. 2008).

[130] *See* 28 U.S.C. § 2254(d). AEDPA, the Antiterrorism and Effective Death Penalty Act, was passed in 1996 in the wake of the Oklahoma City bombings. It included a wide variety of provisions, including a deferential standard of review for federal courts reviewing state criminal convictions.

odds. AEDPA mandates a highly deferential posture of review, and the Supreme Court has repeatedly insisted that federal courts accord that deference to their state court counterparts.[131] Orlando Bobadilla's odds were made somewhat longer, perhaps, by the fact that he drew District Judge Schiltz, a conservative judge not usually known for his sympathy to criminal defendants. On the other hand, Judge Schiltz clerked for Justice Scalia, and perhaps he (unlike the Minnesota Supreme Court) shares Justice Scalia's enthusiasm for the constitutional value of confrontation.[132]

In July of 2008, Judge Schiltz granted Bobadilla's habeas petition.[133] In so doing, he sharply criticized the Minnesota Supreme Court's handling of the case.[134] Judge Schiltz found, in essence, that the Minnesota Supreme Court had ignored the overwhelming evidence in the record that the purpose of the child-protection worker's interview was to investigate a crime.[135] He found that the Court had largely invented its characterization that the purpose was to "assess the health and welfare of the child."[136]

[T]his Court holds that it was objectively unreasonable for the Minnesota Supreme Court to conclude that a recorded interview of a child that was conducted at the request of a police detective, in that detective's presence, at a law-enforcement center, by a government actor specially trained in the forensic interviewing of children, pursuant to a statutory scheme requiring the police and the social-welfare agency to combine their investigatory efforts, that took place five days after the event that was being investigated, when the child was clearly not in any immediate danger, and that involved using highly structured questioning to elicit a statement inculpating a suspect, was not a "police interrogation" within the meaning of *Crawford*.[137]

Judge Schiltz thus found that Minnesota Supreme Court's decision involved both an unreasonable determination of the facts and also an unreasonable application of law.[138] He thus granted Orlando Bobadilla a new trial.[139]

III. CONCLUSION

The future of *Crawford* in Minnesota is uncertain. The state has appealed Judge Schiltz's order in *Bobadilla*, and given the Eighth Circuit's record on habeas rulings, the state has a good chance of succeeding. If the

[131] *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003); Williams v. Taylor, 529 U.S. 362, 412-13 (2000).

[132] *See* Schiltz entry at the Federal Judicial Center, http://www.fjc.gov/public/home.nsf.hisj.

[133] *Bobadilla*, 570 F. Supp. 2d at 1113.

[134] *Id*. at 1112.

[135] *Id*. at 1112-13.

[136] *Bobadilla*, 570 F. Supp. 2d at 1112.

[137] *Id*. at 1112.

[138] *Id*. at 1112 n.10.

[139] *Id*. at 1113.

state succeeds in its appeal, it will likely leave the Minnesota Supreme Court free to continue on the path it has followed for the past five years-and *Crawford* will have only a limited effect in Minnesota.

On the other hand, if the Eighth Circuit upholds Judge Schiltz's order, Minnesota's post-*Crawford* jurisprudence will be thrown into a tumult. If Orlando Bobadilla is entitled to habeas relief, then Edward Krasky, Farah Warsame, and many others might also be entitled to habeas relief. If the Minnesota Supreme Court's decision in *Bobadilla* was clearly wrong under *Crawford* itself, then the Court's post-*Davis* rulings are even more dubious.

Most fundamentally, if the Minnesota Supreme Court's post-*Crawford* jurisprudence is not just wrong but objectively unreasonable under federal law, the Minnesota Court will be forced to relent and reform its own jurisprudence. If it fails to do so, it may face a long and potentially bitter battle with the federal courts.

But at the same time, the future of *Crawford* itself is uncertain at the federal level. Justice Scalia's decision in *Crawford* garnered strong support.[140] Since then, however, both Justices Thomas and Alito have indicated their discomfort with the Justice Scalia's approach, and they have argued for a far narrower definition of "testimonial."[141] The Court splintered further in *Giles*, where three justices (Kennedy, Stevens, and Breyer) argued for a broader forfeiture exception to *Crawford*, and two others (Ginsburg and Souter) appeared to endorse a nearly categorical domestic violence exception.[142] Justice Scalia's *Crawford* coalition is already showing signs of strain.

In the end, the moral and political pressures on judges may prove overwhelming. The same concerns that led Minnesota courts to freely admit hearsay in the *Roberts* era now lead the Minnesota courts to resist *Crawford*, and those same concerns may well lead Justice Scalia's colleagues to abandon his revolution. Asking judges to free apparently guilty men in the name of an arcane procedural right may be asking too much. And as the Minnesota Supreme Court has ably demonstrated over the last five years, even ostensibly rigid constitutional rules are always flexible enough to accommodate a substantial amount of evasion.

[140] *See Crawford*, 541 U.S. 36, 37 (2004) (Six Justices joined Scalia and two concurred in the judgment).

[141] *See* Giles, 128 S.Ct. at 2694 (Alito, J., concurring); *Davis*, 547 U.S. at 834-42 (Thomas, J., concurring in part, dissenting in part).

[142] *See* Giles, 128 S.Ct. at 2694-95 (Souter, J., concurring in part); *Id.* at 2695-2709 (Breyer, J., dissenting).