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IS DEATH DIFFERENT? DYING DECLARATIONS AND THE CONFRONTATION CLAUSE AFTER *CRAWFORD*

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I. INTRODUCTION

The Sixth Amendment to the United States Constitution recognizes that an accused has the right to be confronted with the witnesses against him, thus implicitly limiting government power by restricting the admission of non-confronted hearsay against an accused.¹ With *Crawford v. Washington*,² the United States Supreme Court overruled *Ohio v. Roberts*,³ and discarded its twenty-four-year-old “super-reliability” test for determining the constitutional propriety of admitting hearsay against an accused at a criminal

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1. U.S. CONST. amend. VI.
 2. 541 U.S. 36 (2004).
 3. 448 U.S. 56 (1980).

trial.⁴ Understanding the Confrontation Clause not as a substantive evidential guarantee but as a procedural right to a fair trial,⁵ the *Crawford* Court ruled that for hearsay to be admitted against a defendant in a criminal trial, the declarant must be unavailable and the hearsay must have been subjected to prior cross-examination.⁶ This holding may be as close as the Court gets to establishing black letter law in criminal procedural cases,⁷ for unavailability and prior cross-examination is the only test, and it is a dispositive test.⁸

This return to 1791 and original meaning⁹ occurred when the analytical framework of *Ohio v. Roberts*¹⁰ had crumbled and when Justices Scalia and Thomas had sufficiently explicated their Founders' Theory of constitutional decision-making in this area.¹¹

4. The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This right was held applicable against the states under the Fourteenth Amendment. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965) ("We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.").

5. *Crawford*, 541 U.S. at 61 (2004) ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.").

6. *Id.* at 59. The Court has defined "confrontation" to mean cross-examination. See *Kirby v. United States*, 174 U.S. 47, 55 (1899); *Mattox v. United States*, 156 U.S. 237, 240 (1895). See also *Crawford*, 541 U.S. at 68 (stating that the Confrontation Clause requires a "prior opportunity for cross-examination").

7. See, e.g., *New York v. Belton*, 453 U.S. 454 (1981); *Miranda v. Arizona*, 384 U.S. 486 (1966).

8. *Crawford*, 541 U.S. at 55–56 ("We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability.").

9. The Sixth Amendment was ratified in 1791. *Id.* at 46.

10. 448 U.S. 56 (1980). In the wake of *Roberts*, the Court interpreted the decision increasingly narrowly, indicating a retreat from its conceptual underpinnings. See, e.g., *Lilly v. Virginia*, 527 U.S. 116 (1999) (eschewing *Roberts*' reliability analysis); *id.* at 143 (Scalia, J., concurring) (noting that introducing testimony without the opportunity for cross-examination is a paradigmatic violation of the Confrontation Clause); *White v. Illinois*, 502 U.S. 346, 355–56 (1992) (holding that the prosecution was not required to produce the four-year-old victim of a sexual assault at trial or show the victim was unavailable before the out-of-court statements of the child could be admitted); *id.* at 362 n.1 (Thomas, J., concurring) (criticizing *Roberts* on historical grounds; joined by Justice Scalia); *United States v. Inadi*, 475 U.S. 387, 394 (1986) ("*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.").

11. See *White*, 502 U.S. at 353–54 (Thomas, J., concurring) (discussing the

In short, the *Crawford* Court¹² focused the Confrontation Clause problem addressed in 1791, articulated the solution that the Court concluded is the solution of 1791, and entrenched that solution in criminal practice today.¹³

But what exactly was the problem in 1791? Not the admission of hearsay at a criminal trial, but the admission of “testimony” at a criminal trial.¹⁴ The Sixth Amendment secures the right to be confronted with the witnesses against an accused, not the right to confront anyone who happens to have said something relevant.¹⁵ That is, *Crawford* reasoned, the Sixth Amendment is primarily, if not solely, concerned with testimonial hearsay.¹⁶

En route to its holding that testimonial hearsay is categorically inadmissible in a criminal trial against a defendant unless the declarant is unavailable¹⁷ and the testimony was subjected to prior¹⁸

conflict between the text of the clause and the historical cases in which it was originally interpreted; suggesting that the Court ought to revisit the “witness against” precedents in light of the historical understanding of the clause). *See also Lilly*, 527 U.S. at 143 (Scalia, J., concurring) (concurring in the judgment based on the rationale set forth by Justice Thomas in *White*).

12. Justices Rehnquist and O'Connor concurred in the judgment, but would not have overruled *Roberts*. *See Crawford*, 541 U.S. at 69 (2004).

13. *See Blakely v. Washington*, 542 U.S. 296, 313 (2004) (discussing “[o]ur Constitution and the common-law traditions it entrenches . . .”). The common law tradition at issue in confrontation cases is that of “live testimony in court subject to adversarial testing.” *Crawford*, 541 U.S. at 43.

14. “[N]ot all hearsay implicates the Sixth Amendment’s core concerns.” *Id.* at 51. Rather, the Sixth Amendment’s core concern is with specific types of out-of-court statements: testimonial statements, which *Crawford* describes as ex parte in-court testimony or its functional equivalent; extrajudicial statements contained in formalized testimonial materials; 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. *Id.* at 51–52.

15. U.S. CONST. amend. VI.

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

17. The Court has yet to define what “unavailability” means for purposes of *Crawford* analysis. What the Court has said is that unavailability under Federal Rule of Evidence 804(a) provides little insight into whether a witness is “available” for purposes of being subject to cross-examination under Federal Rule of Evidence 801(d)(1)(C). *United States v. Owens*, 484 U.S. 554, 564 (1988) (“Quite obviously, the two characterizations are made for two entirely different purposes and there is no requirement or expectation that they should coincide.”). Regardless of the characterization of unavailability, the *Owens* court held the admission of clearly testimonial hearsay from a declarant “unavailable” for Federal Rule of Evidence 804 purposes but subject to cross-examination for Federal Rule of Evidence 801 purposes did not violate the Confrontation Clause. *See id.*

18. *Crawford* is adamant that the cross-examination be “prior” cross-examination as opposed to prior statements subjected to cross-examination at trial. *Crawford*, 541 U.S. at 59 (“Our cases have thus remained faithful to the

cross-examination, the Court identified one possible exception to its categorical rule: dying declarations.

The one deviation we have found 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*.¹⁹

This article asks why testimonial dying declarations might be an exception to the Confrontation Clause of the Sixth Amendment.²⁰

There seem to be a few possible answers: (1) because dying declarations are so reliable that the Sixth Amendment's concern that the reliability of testimonial statements be "tested in the crucible of cross-examination"²¹ is not raised;²² (2) because dying declarations are self-confronted;²³ (3) because no dying declaration can be testimonial (and thus does not present a Sixth Amendment problem);²⁴ (4) because the Founders said so.²⁵

Before considering these four possibilities, I will make a preliminary comment on dying declarations under the Federal Rules of Evidence, and offer a summary review of *Crawford*

Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."'); *id.* at 68 ("[T]he Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). A plain reading of *Crawford* demonstrates that the admission against an accused of an in-court witness's prior testimonial hearsay statements, made at a time when the accused did not have the opportunity to confront those statements by cross-examination, would violate the Sixth Amendment even though the witness is presently available to be confronted about those prior statements.

19. *Id.* at 56 n.6 (citations omitted).

20. Nontestimonial hearsay, including nontestimonial dying declarations, may be exempt from Confrontation Clause analysis altogether. *Id.* at 68.

21. *Id.* at 61.

22. *See infra* Part III.A.

23. *See infra* Part III.B.

24. *See infra* Part III.C.

25. Testimony dying declarations might also be an exception to the Confrontation Clause because the Founders understood so and the Court in 2004 said so. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See also infra* Part III.D.

principles.

II. PRELIMINARY CONSIDERATIONS

A. *Dying Declarations Under the Federal Rules of Evidence*

Federal Rule of Evidence 804(b)(2) defines what we commonly refer to as a “dying declaration” as the statement of an unavailable declarant made under the belief of impending death:

Statements under belief of impending death. In a prosecution for a homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.²⁶

Rule 804(a) requires a finding of unavailability before 804(b)’s exception may be used, and for the purposes of this article we must assume that the unavailability at issue is the death of the declarant. Unless the declarant died and the ensuing prosecution of the defendant is for homicide,²⁷ the 804(b)(2) exception is not available in criminal cases.²⁸

The constitutional question is raised when a dying declaration as defined in Federal Rule of Evidence 804(b)(2) is offered against an accused in a homicide case and the statement is testimonial in nature.²⁹

26. FED. R. EVID. 804(b)(2).

27. The question of whether the homicide prosecution must be for the death of the declarant is beyond the scope of this article. Suffice it to say that there are few decisions on this issue. Generally, dying declarations are admissible only in cases of homicide where the declarant’s death is the subject of the homicide charge. There are, however, state cases where the admissibility is not confined to situations in which the declarant’s death is at issue, but extends to any situation in which the circumstances of the declarant’s death is relevant to any issue. *See, e.g.*, *State v. Lester*, 240 S.E.2d 391 (N.C. 1978). Typically, these cases present the odd situation where the accused is on trial for the murder of two or more persons, and the admissibility of a dying declaration of one of the deceased persons is at issue for both charges or in the trial for the homicide of the non-declarant. *See, e.g.*, *Commonwealth v. Key*, 407 N.E.2d 327 (Mass. 1980); *State v. Harding*, 230 S.E.2d 397 (N.C. 1976).

28. The rule is different in civil cases; although these require the unavailability of the declarant, that unavailability need not be the death of the declarant (at least, not by the time of trial). FED. R. EVID. 804(b)(2).

29. This situation, of course, gives rise to the possibility that how the Founders understood dying declarations may be somewhat different from how the

B. *Crawford Summary*

In 1980, the Court confronted, yet again, the question of whether the admission of hearsay against an accused always violates the Sixth Amendment or whether exceptions to the rule excluding hearsay are also exceptions to the Sixth Amendment.³⁰ In response, the Court announced the “super-reliability” test in *Roberts*.³¹ The holding is, essentially, a tautology: if hearsay is sufficiently reliable that its admission would not violate the Sixth Amendment, then the Sixth Amendment is not violated by its admission because it is sufficiently reliable.³² Put in the language of the case, we can say that where a declarant is unavailable, hearsay may be admitted without violating the Sixth Amendment if the relevant hearsay exception is “firmly-rooted” or, if not, that the relevant hearsay exception provides circumstantial guarantees of trustworthiness equivalent to those provided by the firmly-rooted

Federal Rules of Evidence define dying declarations. *See infra* Part III. Embedded in this proposition is another issue: whether the Confrontation Clause is concerned only with testimonial hearsay or also with non-hearsay but testimonial statements. In the heart of the *Crawford* analysis, the Court discusses the “specific type of out-of-court *statement*” about which the Sixth Amendment is concerned. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (“Various formulations of this core class of ‘testimonial’ *statements* exist . . .”) (emphasis added). At the conclusion of his decision for the Court, Justice Scalia refers neither to testimonial hearsay nor testimonial statements, but to testimonial evidence. *Id.* at 68 (“Where testimonial *evidence* is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”) (emphasis added). By way of example, consider the following scenario: a co-conspirator approaches someone he knows to be an undercover police officer and says: “We have some great narcotics moving through the city tonight. We need some help from ‘inside.’ You interested? You could make a lot of money helping us out.” Arguably, that is a statement made during and in furtherance of the conspiracy, under Federal Rule of Evidence 801(d)(2)(E) and, thus, defined as non-hearsay. *See* FED. R. EVID. 801(d)(2)(E). But it is also a testimonial statement in that it was “made under circumstances which would lead an objective witness reasonably to believe . . . would be available for use at a later trial,” should the declarant have guessed wrongly as to the corruptibility of the officer. *Crawford*, 541 U.S. at 52. If *Crawford* is limited to testimonial “hearsay,” then the only issue preventing this statement from being introduced against an accused (assuming the declarant is unavailable) would be whether the Founders considered co-conspirator statements non-hearsay. If the holding of *Crawford* is not limited to testimonial *hearsay*, but includes testimonial *statements* or testimonial *evidence*, then admission of the statement at issue here might well violate the Sixth Amendment. Conjecturing potential resolutions to this issue is beyond the scope of this article.

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

31. *Id.*

32. *Id.* at 57.

exceptions.³³

Almost immediately, confusion arose about the meaning of the Court's decision in *Roberts*. For example, the unavailability requirement of *Roberts* was discarded in *United States v. Inadi*.³⁴ *Inadi* suggested that *Roberts* applied only to the facts of that case: prior testimony situations, where the Federal Rules of Evidence required unavailability as an evidentiary prerequisite to admission.³⁵ *Inadi* itself addressed the co-conspirator situation, where a showing of unavailability had never been required.³⁶ In 1987, *Bourjaily* seemed to accept that *Roberts* applied to all hearsay offered against an accused but provided the requirements of a firmly-rooted Federal Rules of Evidence hearsay exception were satisfied.³⁷ If they were, admission would be insulated against constitutional challenge.³⁸ *White v. Illinois*³⁹ stated that *Roberts* unavailability analysis is only required when the declarant's statements were made in a prior judicial proceeding.⁴⁰

Perhaps the quintessential example of the conceptual mess created by *Roberts* is *Lilly v. Virginia*.⁴¹ The case involved statements against penal interest and produced no single opinion joined by a majority of the Justices.⁴² Although the Court unanimously voted to reverse, a four-three split developed over the extent to which defendant-inculpatory accomplice statements may fall within a

33. The "firmly-rooted" hearsay exceptions have been held to include co-conspirator statements. *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) ("We think that these cases demonstrate that co-conspirators' statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion."). *Roberts* itself dealt with prior testimony under Federal Rule of Evidence 804(b)(1)—a defense witness testified unfavorably at a preliminary hearing; when the witness proved to be unavailable at trial, the prosecution offered the preliminary hearing testimony which, of course, the defendant had had an opportunity to confront. *See Roberts*, 448 U.S. at 56. It is interesting to note that though the Court overruled *Roberts* in *Crawford*, the result of *Roberts* would be the same under *Crawford*. *Idaho v. Wright* provides an example of what is not a firmly rooted exception: Federal Rule of Evidence 807. *See Idaho v. Wright*, 497 U.S. 805, 805 (1990) (rejecting Idaho's residual hearsay exception as firmly-rooted for purposes of the Confrontation Clause).

34. 475 U.S. 387 (1986).

35. *See id.* at 400.

36. *See id.*

37. *Bourjaily*, 483 U.S. 171, 182.

38. *Id.*

39. 502 U.S. 346 (1992).

40. *Id.* at 353–54.

41. 527 U.S. 116 (1999).

42. *Id.*

firmly-rooted hearsay exception, and over the extent to which the declarant's statements might be separated out into admissible inculpatory and inadmissible self-serving statements.⁴³ Justices Scalia and Thomas concurred in the result, noting that the Confrontation Clause was only concerned with testimonial statements.⁴⁴

Suffice it to say that the focus on testimonial statements in Justices Scalia and Thomas's opinions in *White* and *Lilly* evolved into the majority holding in *Crawford*. Those opinions are rooted in an understanding of "1791 Theory," and have held firm in the two major⁴⁵ post-*Crawford* decisions issued prior to the publication of this article: *Davis v. Washington*⁴⁶ and *Giles v. California*.⁴⁷ Justice Scalia wrote both opinions, and both reflect a strong originalist approach to constitutional decision-making. *Davis* did not contain a dissenting opinion, though Justice Thomas concurred on even narrower historical grounds.⁴⁸ In *Giles*, the majority held together over the 1791 understanding of forfeiture of Sixth Amendment confrontation rights, but not without disagreement.⁴⁹

III. THE FOUR ALTERNATIVE EXPLANATIONS

For ease in discussing the four alternative explanations for a Sixth Amendment exception for testimonial dying declarations (what we might call the *praeter jus* status of testimonial dying declarations), let us posit the following scenario: an undercover police officer infiltrates a gang. His identity is discovered and he is murdered by the gang leader. Suspecting something is amiss, other officers locate the dying undercover officer who says to them, recognizing them to be his colleagues in law enforcement: "Lieutenant, I know I'm dying. I don't have long. They figured

43. See *id.* at 120.

44. See *id.* at 143 (Scalia, J., and Thomas, J., concurring).

45. There are two *Crawford* retroactivity cases, both of which fall outside the issues discussed in this article. See *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008); *Whorton v. Bockting*, 549 U.S. 406 (2007).

46. 547 U.S. 813 (2006).

47. 128 S. Ct. 2678 (2008). On November 10, 2008, the Court heard arguments in another confrontation case. The decision in that case is still pending. See *Melendez-Diaz v. Massachusetts*, 128 S. Ct. 1647 (2008).

48. *Davis*, 547 U.S. at 834 (Thomas, J., concurring).

49. *Giles*, 128 S. Ct. at 2688, 2691–93. See also *id.* at 2695 (Souter, J., concurring, joined by Ginsberg, J.); *id.* at 2695 (Breyer, J., dissenting, joined by Stevens and Kennedy, JJ.)

out who I was and the gang leader shot me. I hope you catch the son-of-a-bitch. He's probably headed to his girlfriend's house at 101 West Main Street. The gun he used is a thirty-eight caliber Beretta with a pearl handle." Whereupon the officer expires. The gang leader is apprehended at his girlfriend's house and prosecuted for the murder of the undercover officer. At the time of the suspect's arrest, he is in possession of a thirty-eight caliber Beretta with a pearl handle.

A. Dying Declarations Are So Reliable That the Sixth Amendment's Concern for the Reliability of Evidence Is Not Raised

A review of common law sources would seem to support the proposition that dying declarations are so reliable that the Sixth Amendment is not offended by their admission against an accused. For example, in *Rex v. Woodcock*,⁵⁰ the court stated that

Now the general principle on which [dying declarations are] admitted is, that they are declarations made in extremity, when the party is at the point of death,⁵¹ and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.⁵²

The problem with the Supreme Court accepting this approach, which has obvious and intuitive appeal,⁵³ is that it would

50. *Rex v. Woodcock*, (1789) 168 Eng. Rep. 352 (L.R.C.C.R.).

51. Canon law made a distinction between "in the moment of death" (*in articulo mortis*) and "in danger of death" (*in periculo mortis*). See JAMES T. BRETZKE, CONSECrated PHRASES: A LATIN THEOLOGICAL DICTIONARY 61–64 (2003). *In articulo mortis* "[r]efers to the imminent danger of death (usually due to illness or serious injury)." *Id.* at 61. *In periculo mortis* had "an important legal distinction in that it applies not only to those who are physically near death but also includes those who, due to circumstances like war or natural disasters, might also be in some danger of death." *Id.* at 64.

52. *Woodcock*, 168 Eng. Rep. at 353.

53. In the oral argument for *Giles v. California*, Justice Scalia suggested that dying declarations are simply outside Sixth Amendment boundaries because of their reliability. See Transcript of Oral Argument at *12–13, *Giles v. Washington*, 128 S. Ct. 2678 (2008) (No. 07-6053), 2008 WL 1803647 ("And the evidence of truthfulness [of a dying declaration] was apparently that the person was about to enter the next world . . . [a]nd most of us don't lie at that particular moment. Whereas, in the Confrontation Clause situation you have a totally different situation.").

signal a return to *Ohio v. Roberts*, something the Court has been clear it does not intend to do.⁵⁴

Considering our scenario, if a court can find as a matter of fact (by, for example, a preponderance of the evidence, a standard often applied by the Court to preliminary finding of fact on evidentiary rulings when it concludes it should articulate a standard at all)⁵⁵ that all of the dying officer's statements are "statement[s] made . . . while believing that . . . death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death,"⁵⁶ then it should be "super-reliable" and admissible. The Court could have made this ruling under *Roberts*, especially if this represented the common law's approach to dying declarations. But if *Roberts* is no longer available for consideration, then the *Crawford* Court would likely deny certiorari, if the "super-reliability" theory was the reason the Founders would have considered dying declarations exempt from Sixth Amendment analysis.

In short, Justice Scalia has risked painting himself into the proverbial corner by mentioning that dying declarations are *sui generis* exceptions to the Sixth Amendment.⁵⁷ If the exception rests on an understanding that dying declarations are "super-reliable," then—testimonial or not—this exception would seem to be more in line with the reasoning of *Roberts* than with *Crawford*. Or is there another reason why this exception exists, if it does?

54. See *Giles*, 128 S. Ct. 2678, 2693 ("We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter."). Justice Scalia has also put a fine point on this during oral arguments. See Transcript of Oral Argument at *11, *Giles*, 128 S. Ct. 2678 (No. 07-6053), 2008 WL 1803647 (Scalia, J.) ("But we did say that the meaning of the Confrontation Clause is the meaning it bore when the people adopted it."); Transcript of Oral Argument at *23, *Melendez-Diaz v. Massachusetts*, (No. 07-591), 2008 WL 4892843 (Scalia, J.) ("I am interested in the history since that's what the Court held in *Crawford*, that the content of the Confrontation Clause is not what we would like it to be, but what it historically was when it was enshrined in the Constitution.").

55. See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("We are . . . guided by our prior decisions regarding admissibility determinations that hinge on preliminary factual questions. We have traditionally required that these matters be established by a preponderance of proof.").

56. FED. R. EVID. 804(b)(2).

57. *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

B. Dying Declarations Are Self-Confronted

Is it possible that dying declarations may have been considered self-confronted? That is to say, because the dying person was about to meet his (or her) maker, that him-(or her-) self (or The Maker Him-, Her-, or Itself) would in effect be the confrontational presence testing the truth of the dying person's declarations. The cultural normative concerns about such a less secular super-reliability thesis aside,⁵⁸ if this were the case the Court would hardly refer to dying declarations as "exceptions" to the Sixth Amendment. They would, in effect, be subject to the Sixth Amendment. And as it is not the defendant who is doing the confronting,⁵⁹ this argument (if it rises to the level of an argument) is but an alternate way of ensuring reliability, not by testing in the "crucible of cross-examination,"⁶⁰ but by testing in the crucible of death and the afterlife.

The entire statement in our scenario would likely pass such a bare "statement made at the moment of death" test. Even if this were the Founders' understanding, it would seem to gut Federal Rule of Evidence 804(b)(2) of any particular meaning and, for that reason alone, would not be a likely resolution to the question of why dying declarations might be exceptions to the Sixth Amendment.

C. No Dying Declaration Can Be Testimonial

Footnote six in *Crawford* begs this question because it refers explicitly to testimonial dying declarations.⁶¹ Nevertheless, could that reference be inaccurate? Might dying declarations as

58. If the Constitution entrenches relevant common law provisions, see *Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("Our Constitution and the common-law traditions it entrenches"), what does that mean? If dying declarations, as understood by the Founders, were recognized as an exception to the Sixth Amendment because of the accepted religious beliefs of the time, are those beliefs "entrenched," i.e., normative, today, or does an empty formalism merely provide an arbitrary rule of evidence?

59. In his oral argument in *Melendez-Diaz*, Jeffrey Fisher suggested that the relevant issue was whether the defendant, not someone else, is confronting the witness. Transcript of Oral Argument at *17, *Melendez-Diaz*, (No. 07-591), 2008 WL 4892843. "It's, again, for the defendant to decide and not for the court to decide whether cross-examination would be useful." *Id.*

60. *Crawford*, 541 U.S. at 61.

61. *Id.* at 56 n.6 ("The one deviation we have found involves dying declarations.").

understood by the Founders exclude testimonial statements?

Under Federal Rule of Evidence 804(b)(2), the undercover officer's statement in our hypothetical scenario arguably qualifies as a dying declaration. Assuming the veracity of the officer (that he sincerely apprehends his imminent death), the officer's statement that he knows his death is imminent and that on being discovered to be a police officer, the gang leader shot him with a pearl handled thirty-eight caliber Beretta, would qualify as a statement "made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death."⁶²

But would that have been considered a dying declaration by the Founders, for whom dying declarations focused not on revenge or apprehension of wrongdoers, but on the overwhelming fact of the awareness that one was dying? These were statements made not just in danger of death (*in periculo mortis*), but at the point of death (*in articulo mortis*), and it was death, not some other altruistic concern, that caused the mind to be "induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice."⁶³

If a distinction between non-testimonial and testimonial dying declarations can be made, between evidentiary dying declarations and Sixth Amendment dying declarations respectively, then we would be able to say that footnote six in *Crawford*⁶⁴ is inaccurate. To the extent a dying declaration is non-testimonial, it would pose no Sixth Amendment concern, but to the extent it was testimonial, then it would not be acceptable under *Crawford*.⁶⁵

But this is not to identify a partial exception to the Sixth Amendment. It is, rather, to note the obvious: that non-testimonial dying declarations present no constitutional issues. "Where nontestimonial hearsay is at issue, it is wholly consistent with the

62. FED. R. EVID. 804(b)(2). Out of an abundance of caution and consistent with the purpose of Federal Rule of Evidence 403, the trial court should redact the declarant's wish and inference that the gang leader be apprehended at the girlfriend's house.

63. R v. Woodcock, (1789) 168 Eng. Rep. 352, 353 (L.R.C.C.R.).

64. *Crawford*, 541 U.S. at 56 n.6.

65. Because, following *Giles*, the Court would have to "decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter." *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

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.”⁶⁶ Under this approach, testimonial dying declarations would no more be exempt from Sixth Amendment testing than any other testimonial hearsay.

Addressing our scenario, a critical fact issue would arise for the trial court: whether the dying officer's statement was made in contemplation of death or in contemplation of prosecution. If the former, it would be a non-testimonial and admissible hearsay statement; if the latter, it would be a testimonial and therefore inadmissible hearsay statement. If it is possible that the statement might be made both in contemplation of death and in the hope of a successful prosecution, then further questions arise: to what extent is it one or the other? To what extent would the Founders have understood a dying declaration to be made in the hope of a criminal prosecution and still be a statement made “when every hope of this world is gone[?]”⁶⁷

D. Dying Declarations Do Not Present Sixth Amendment Problems Because the Founders Said (or Understood) So

The fourth approach to the question of whether dying declarations are *sui generis* exceptions to the Sixth Amendment is simply this: dying declarations, like death, are different. For whatever reason they did so, the Founders accepted the fact that dying declarations were not subject to “testing in the crucible of cross-examination,” and therefore, we likewise do not subject them to cross-examination.

That is to say, it is possible that the Court today could rule that dying declarations are *sui generis* exceptions to the Sixth Amendment simply because the Founders would have understood dying declarations to be exceptions to the Sixth Amendment, and not to inquire into why that might be so. This would avoid a problem hinted at earlier, whether the cultural reasons for the Founders' acceptance of dying declarations might be rooted in the religious understanding of the time (which is undoubtedly reflected in the common law tradition).⁶⁸ Because the common law

66. See *Crawford*, 541 U.S. at 68.

67. *Woodcock*, 168 Eng. Rep. at 353.

68. See, e.g., *supra* Part III.B.

tradition known in 1791 is “entrenched by our constitution,”⁶⁹ an argument suggests itself that the cultural norms existing in 1791 remain, as a constitutional matter, cultural norms today.

In short, a ruling on the evidentiary and constitutional questions raised by our scenario might be as follows: should a trial court find that the evidentiary predicate for 804(b)(2) admission exists as a matter of fact, then the Sixth Amendment would pose no barrier to the admission of the dying declaration because the Founders would have likewise barred their admission, and no further explanation is necessary.

IV. CONCLUSION

We have raised the question as to why dying declarations might be understood to be, as the Court suggests, *sui generis* exceptions to the Sixth Amendment Confrontation Clause. We have summarized the shift in jurisprudence from super-reliability to cross-examination as the test for the constitutionally acceptable admission of testimonial hearsay against homicide defendants. We have looked at four possible approaches to the *praeter jus* status of dying declarations, and we see that the problem of dying declarations and the Sixth Amendment highlights a fundamental weakness of Justice Scalia’s “1791 jurisprudence.” The weakness is also at its strength: it is over-simple in a complex and pluralistic, multi-cultural society. However simple it makes the task of constitutional interpretation, it cannot make the world simple merely by demanding it be so.⁷⁰

69. *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (“Our Constitution and the common-law traditions it entrenches . . .”).

69. Justice Scalia’s *Crawford*-based jurisprudence may, however, signal a return to the jurisprudence of dissent primarily authored by Justices Stephens, Marshall, Brennan, and sometimes, Blackmun. See *Moran v. Burbine*, 475 U.S. 412 (1986) (“This case poses fundamental questions about our system of justice. As this Court has long recognized, and reaffirmed only weeks ago, ‘ours is an accusatorial and not an inquisitorial system.’”). *Id.* at 434 (Stephens, J., dissenting); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (“[I]t is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial.”) *Id.* at 635 (Blackmun, J., dissenting). *Crawford* and its progeny recognize the centrality of the defense lawyer in an accusatorial, adversarial system. “To be sure, the Clause’s ultimate goal is to ensure the reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner, by testing in the crucible of cross-examination.”) 541 U.S. at 61–62. See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (“Vigorous cross-examination, presentation of contrary evidence, and

So we end where we began: with an observation and a question: dying declarations may, like grey-eyed Athena springing fully armed from the head of Zeus,⁷¹ be self-generating, and also like Athena may be outside the Sixth Amendment.⁷² In Athena's case, we likely know the answer why. In the case of dying declarations, the question remains. Why?⁷³

careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.") *Id.* at 596.

71. HESIOD, THEOGONY 924 (Apostolos Athanassakis trans., Johns Hopkins University Press 1983).

72. However significant the acts of the gods may be in other disciplines, they are irrelevant to questions of constitutional law. *Cf.* *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (holding *Miranda* protects defendants' rights under the Fifth Amendment, and does not go any further).

73. On April 7, 2008, the Kenosha County (Wisconsin) Circuit Court issued an opinion in *State v. Jensen*, discussing whether, under *Crawford*, a letter containing testimonial hearsay, written November 21, 1998, could be admitted as a dying declaration in a prosecution for a homicide committed on December 3, 1998. 727 N.W.2d 518, 529 (Wis. 2007) (holding that the letter was written, given to a neighbor to be delivered to specific police officers in the event of the declarant's death and, according to the Kenosha County Circuit Court, "ratified" by not having been withdrawn by the victim.) Seeming to confuse the evidentiary issue with the constitutional issue, the court determined that this "timed letter . . . must be analyzed not by the flawed imminence-focused rule of the modern era, but in the light of the common law rule which existed at the time that the Framers adopted the Sixth Amendment." *State v. Jensen*, 02-CF-0314 at 16 (Kenosha Cty. Cir. Ct. Apr. 7, 2008) (unpublished, <http://www.personal.umich.edu/~rdfrdman/JensenDyingDec.pdf>) (last visited Mar. 16, 2009). That common law rule was rooted in a medieval English understanding of religion and the medieval maxim *nemo moriturus praesumitur mentiri* (no one who is dying is presumed to lie). That is to say, the present Wisconsin evidentiary rule, which requires temporal and subject matter links between the declaration and the dying ("[a] statement made by the declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.") should nonetheless be understood according to the common law in 1791. WIS. STAT. ANN. 908.045(3) (West 2000). But there is nothing in *Crawford* that requires this. What *Crawford* requires is not that the evidentiary rule but that the Sixth Amendment be understood as it was in 1791. Thus, it is probable that some dying declarations might pass constitutional muster only to be excluded because of the requirements of the relevant rules of evidence. The Sixth Amendment issue arises after a court has found a testimonial hearsay statement admissible as a matter of evidentiary law, not before. But the Kenosha County Circuit Court is adamant that the common law rule in existence in 1791 controls both the constitutional and evidentiary issues, regardless of the current understanding of the premises on which it rests. The court thus ignores another medieval maxim: *cessante ratione legis, cessat et ipsa lex* (the reason for the law having ceased, so also the law ceases). The court states: "*Crawford* teaches that in analyzing the extent of the Confrontation Clause, a court must look to the [evidence] Rule as it existed in 1791, not to how it has eroded to its present form." *Jenson* at 10–11, available at <http://www-personal.umich.edu/~rdfrdman/>

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DYING DECLARATIONS

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Might it be that, over two hundred years since the ratification of the Sixth Amendment, the Anglo-American tradition still finds—and should expect to find—testimonial truth at the moment of death?

JensenDyingDec.pdf. By failing to distinguish the evidentiary rule from the constitutional principle, the Wisconsin court effectively held (1) that dying declarations in Wisconsin in 2008 should be understood in light of the medieval maxim that a dying person is presumed not to lie, and (2) that dying declarations are exceptions to the Confrontation Clause because the Founders said so, regardless of why they said so. Because of the important role dying declarations play in many homicide prosecutions, especially domestic violence homicides, it may take yet another Supreme Court confrontation decision before we gain a meaningful understanding of dying declarations then and now, and their relationship to the Sixth Amendment. Without understanding the relationship of dying declarations at common law to dying declarations today, and of both to the Sixth Amendment, rulings such as the Kenosha County ruling in *Jensen* amount to little more than judicial fiat.