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Coping with Crawford: Confrontation of Children and Other Challenging Witnesses

Eileen A. Scallen

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COPING WITH *CRAWFORD*: CONFRONTATION OF CHILDREN AND OTHER CHALLENGING WITNESSES

Eileen A. Scallen[†]

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I. INTRODUCTION

In March 2009, the United States Supreme Court’s landmark decision in *Crawford v. Washington*¹ turned five years old. A few months later, the consolidated cases *Davis v. Washington* and

[†] Professor of Law, William Mitchell College of Law. The author is a former Chair of the Association of American Law Schools Section on Evidence, Professor of Law at the University of California, Hastings College of the Law from 1989 to 2000, and Associate Academic Dean from 1996 to 1998. I want to thank the editors and staff of the *William Mitchell Law Review* for their hard work throughout the year, with special thanks to my editor, Robert Ambrose.

1. 541 U.S. 36 (2004).

*Hammon v. Indiana*² turned three. One can only hope that no human toddlers have ever inflicted the level of disruption and uncertainty wrought by these cases and their progeny, which upset the application of the Sixth Amendment's Confrontation Clause³ to hearsay evidence in criminal cases. In *Crawford*, *Davis*, and *Hammon*, the United States Supreme Court created a serious hurdle in prosecuting certain kinds of crimes, such as domestic violence, elder abuse, and child abuse.⁴ Investigators and prosecutors spent years drafting policies and procedures to increase the reliability of statements taken from alleged victims of these crimes that were out of court or outside the presence of a criminal defendant. These investigation and interrogation techniques were developed to comply with existing Supreme Court case law and to increase the integrity of the criminal justice system. Today, however, the more structured and careful investigators and prosecutors are in collecting hearsay evidence, the more likely the courts will bar the use of the evidence under the Confrontation Clause, as interpreted in *Crawford* and its progeny.

Part II of this article briefly describes the *Crawford* debacle, arguing that its "cure" was worse than the problem it addressed. However, there is no point belaboring the issue because, as the Court appears to be refining its analysis, it shows no sign of taking another dramatic turn in the near future. Consequently, Part III focuses on the most serious problem created under *Crawford*: the prosecution of crimes involving vulnerable witnesses, particularly crimes of domestic violence, elder abuse, and child abuse. Focusing on the pragmatics of coping with *Crawford*, this article suggests ways to overcome *Crawford*'s limitations on admissibility of evidence and ways to exclude evidence that is no longer protected by the Confrontation Clause after *Crawford*.⁵ This article takes the perspective of a trial judge who must apply the law as it is given, balancing the constitutional rights of the accused against the public

2. 547 U.S. 813 (2006).

3. 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.

4. "[W]ithin days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past." Tom Lininger, *Prosecuting BATTERERS After Crawford*, 91 VA. L. REV. 747, 749 (2005) (citations omitted).

5. See *infra* Part III.B–C.

interest in resolving the dispute with integrity.⁶

II. THE EVOLUTION OF THE CRAWFORD REVOLUTION

A. *The Confrontation Clause, B.C.E. (Before the Crawford Era)*

For almost two hundred years after the creation of the Bill of Rights, there was relatively little commentary by the Supreme Court or scholars on the application of the Confrontation Clause to hearsay. That changed in 1980 when the Court decided *Ohio v. Roberts*.⁷ In *Roberts*, the Court held that prior testimony given by an unavailable declarant does not violate the Confrontation Clause.⁸ The Court established a two-step test: (1) the prosecution must “either produce, or demonstrate the unavailability” of the declarant; and (2) if the declarant is unavailable to testify, the prosecution must show that the hearsay had sufficient “indicia of reliability.”⁹ The “indicia of reliability” can be established in two different ways. First, sufficient reliability “can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception,”¹⁰ which the Court did not define. Second, the prosecution can satisfy the reliability prong of *Roberts* by making “a showing of particularized guarantees of trustworthiness.”¹¹

In tacitly overruling *Roberts*, the Court in *Crawford* aimed its most stinging rebukes at the “reliability” prong of *Roberts*.¹² According to the Court, it produced tremendous variation and uncertainty in application.¹³ The “particularized guarantees of [the] trustworthiness” approach to proving reliability was not an easy, bright-line test. In practice, courts avoided that route to reliability, preferring instead to find that the hearsay had adequate “indicia of reliability” because it was admissible under a “firmly

6. See *infra* Part III.A.

7. 448 U.S. 56 (1980). The Court moved toward the application of the Confrontation Clause to hearsay in *California v. Green*, holding that a prior inconsistent statement made during a preliminary hearing was admissible when the same witness testified at trial but claimed to have a poor memory and was otherwise uncooperative. 399 U.S. 149, 168 (1970); See also *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (applying the Confrontation Clause to the states).

8. *Roberts*, 448 U.S. at 72.

9. *Id.* at 65.

10. *Id.* at 66.

11. *Id.*

12. *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

13. *Id.*

rooted” hearsay exception.¹⁴ Over the years, the *Roberts* reliability prong became rather routine, as courts found that most of the common hearsay exceptions were “firmly rooted,” including: prior testimony,¹⁵ statements made by co-conspirators,¹⁶ spontaneous exclamations (also called excited utterances),¹⁷ and statements made for purposes of medical diagnosis or treatment.¹⁸ This ever-expanding list of “firmly rooted” hearsay exceptions made it quite easy to meet the *Roberts* reliability prong. The Court never directly clarified what makes a hearsay exception “firmly rooted,” except to say that the age¹⁹ and popularity²⁰ of the exception were important factors. Evidence scholar folklore posits that a firmly rooted hearsay exception is any exception the judge recalls from his or her law school days. In fact, during the *Roberts* era, the Supreme Court found only two hearsay exceptions that were *not* firmly rooted: the residual exception²¹ and some statements against interest, insofar as they amounted to an accomplice’s custodial confession that also implicated the defendant.²²

Indeed, the Court’s recognition that only some “statements against interest” fall within a “firmly rooted hearsay exception” probably had more to do with the death of *Ohio v. Roberts* than any

14. *Id.*

15. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

16. *Bourjaily v. United States*, 483 U.S. 171, 172 (1987).

17. *White v. Illinois*, 502 U.S. 346, 357 (1992).

18. *Id.*

19. *Bourjaily*, 483 U.S. at 183.

20. *White*, 502 U.S. at 355.

21. *Idaho v. Wright*, 497 U.S. 805, 817 (1990) (applying Idaho Rule of Evidence 803(24), which is Idaho’s version of Federal Rule of Evidence 807). The Court held that a court must look for “particularized guarantees of trustworthiness” when applying the residual hearsay exception. *Id.* The Court further explained that such particularized guarantees of trustworthiness should be found in the totality of circumstances “that surround the making of the statement and that render the declarant particularly worthy of belief.” *Id.* at 820. Other independent evidence corroborating the hearsay statements did not matter in terms of evaluating the reliability of those statements. *Id.*

22. *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) (applying Federal Rule of Evidence 804(b)(3)). The Court reasoned that such statements “are inherently unreliable . . . because an accomplice often has a considerable interest in ‘confessing and betraying his cocriminal.’” *Id.* at 131. These statements are “given under conditions that implicate the core concerns of the old *ex parte* affidavit practice—that is, when the government is involved in the statements’ production and when the statements describe past events that have not been subjected to adversarial testing.” *Id.* at 135. Here, one sees the nascent development of the “procedural” dimension of the Confrontation Clause. See *Kirst*, *infra* note 40 and accompanying citations.

other factor.²³ The only support Justice Scalia provided for his argument that *Roberts* produced inconsistent or unpredictable results were lower court cases interpreting *Lilly v. Virginia*.²⁴ *Lilly* was a plurality Supreme Court decision, a confusing mélange of approaches to the Confrontation Clause problem. The justices all voted to reverse *Lilly*'s conviction, but only three other justices joined Justice Stevens' opinion, which was based on *Roberts*.²⁵ The four other opinions provided four additional theories.²⁶ It is not surprising then that Justice Scalia was able to point to conflicting lower court cases dealing with similar facts of confessions of accomplices that implicate the accused and are offered under the hearsay exception for statements against interest.²⁷ *Roberts* certainly had its faults, such as conflating the Confrontation Clause and the hearsay rule, but it is unfair to blame *Roberts* for the confusion and unpredictability generated by *Lilly*. In reality, the *Roberts* reliability prong produced very little unpredictability or uncertainty because most hearsay statements could be shoved into a "firmly rooted" hearsay exception.²⁸

At the same time the Court was expanding the list of "firmly rooted" hearsay exceptions, making it easier to satisfy *Roberts*'s reliability requirement, the Court moved steadily toward eliminating *Roberts*'s "unavailability" prong. For example, in *United States v. Inadi*,²⁹ the Court held that no showing of unavailability was required to satisfy the Confrontation Clause when the hearsay was admitted as the statement of a co-conspirator.³⁰ The Court explained that unavailability was required in *Roberts* because the statement was admitted as prior testimony, which requires unavailability as an element under the terms of the hearsay exception.³¹ The Court emphasized that the evidence produced by

23. See *Lilly*, 527 U.S. at 131 (1999).

24. See *Crawford v. Washington*, 541 U.S. 36, 63–64 (2004).

25. *Lilly*, 527 U.S. at 120 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ.).

26. *Id.* at 140 (Breyer, J., concurring); *id.* at 143 (Scalia, J., concurring); *id.* (Thomas, J., concurring); *id.* at 144 (Rehnquist, C.J. & O'Connor & Kennedy, JJ., concurring in the judgment).

27. See *Crawford*, 541 U.S. at 54.

28. In contrast, the confusion and uncertainty over the Court's current "testimonial" approach to the Confrontation Clause makes the *Roberts*'s reliability prong look like a bright-line test.

29. 475 U.S. 387 (1986).

30. *Id.* at 395.

31. *Id.* at 393 (applying Federal Rule of Evidence 804(b)(1)).

statements of co-conspirators could not be obtained through in-court cross-examination.³² Finally, the Court stressed that, in the case of co-conspirators, the benefits of the unavailability prong would be insignificant, while the burden on the prosecution to produce an unnamed, unindicted co-conspirator would be substantial.³³ Thus, the Court eliminated *Roberts's* unavailability prong in the case of co-conspirators, concluding that “the Confrontation Clause does not embody such a rule.”³⁴

A few years later in *White v. Illinois*,³⁵ the Supreme Court simply eliminated “unavailability” as a requirement of the Confrontation Clause for all hearsay exceptions. As a result, unavailability was only required where the terms of the federal or state hearsay exception required it. In *White*, a case involving child sexual abuse, the Court held that the child’s out-of-court statements, which were admitted over hearsay objections as “spontaneous declarations” and “statements made for purposes of medical diagnosis or treatment,” were firmly rooted hearsay exceptions and that this was sufficient to satisfy the Confrontation Clause.³⁶ It was not necessary for the prosecution to produce the child in court or to show that the child was unavailable to testify.³⁷ The Court reasoned that if the defendant wished to confront the child, the defendant was free to subpoena the child.³⁸ Minnesota law differs on this issue. The Minnesota Supreme Court established a practice that, when requested by the defense, requires prosecutors to call available child witnesses in their case-in-chief when child hearsay is being admitted against the defendant.³⁹

The *Roberts* decision fell out of favor with scholars long before *Crawford* was decided.⁴⁰ *Roberts* was widely criticized as

32. *Id.* at 395.

33. *Id.* at 396–400.

34. *Id.* at 400.

35. 502 U.S. 346 (1992).

36. *Id.* at 356 n.8.

37. *Id.* at 356–57.

38. *Id.*

39. *State v. Larson*, 472 N.W.2d 120, 125 (Minn. 1991), *cert. denied*, 502 U.S. 1071 (1992). This approach is praised by Professor Myrna Raeder, who notes that although this procedure “was not constitutionally based, it provides a model that should be more widely enacted.” Myrna S. Raeder, *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay and Confrontation*, 82 IND. L.J. 1009, 1019 (2007).

40. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 125–31 (1997); Margaret A. Berger, *The Deconstitutionalization of the*

unpredictable, unworkable, and unprincipled, primarily because its emphasis on reliability simply parroted the concerns behind the hearsay rule, making the Confrontation Clause superfluous.⁴¹ Given the hostility toward *Roberts*, it is not surprising that courts had no trouble circumventing the *Roberts* requirements under the Confrontation Clause in the vast majority of cases. “Unavailability” was required only if it was an element of a hearsay exception; it was not a constitutional requirement. A particularized search for reliability was required only when statements were offered under the residual hearsay exception and accomplice confessions implicating the accused were offered under the hearsay exception for statements against interest. But in the vast majority of cases, it was not difficult to avoid those two hearsay exceptions by finding a more “firmly rooted” exception. Because appellate courts have always given trial courts wide discretion in deciding whether a statement is admissible under a particular hearsay exception,⁴² the

Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 MINN. L. REV. 557, 558–60 (1992); Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1054 (2003); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1013 (1998); Randy N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 573 (1988); Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 667 (1986); Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485, 490 (1987); Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 870–71 (1988); Myrna S. Raeder, *Hot Topics in Confrontation Clause Cases and Creating a More Workable Confrontation Clause Framework Without Starting Over*, 21 QUINNIPAC L. REV. 1013, 1014 (2002); Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 626 (1992); Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court’s Accuracy Rationale in White V. Illinois Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145, 181 (1993); Andrew Taslitz, *Catharsis, The Confrontation Clause, and Expert Testimony*, 22 CAP. U. L. REV. 103, 118–19 (1993).

41. Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409, 2409–10 (2005); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 575 (1988).

42. The evidentiary rulings of trial courts are notoriously difficult to overturn on appeal for reasons of judicial efficiency and deference to the trial judge, who is generally in a better position to evaluate the evidence when it is offered than is the appellate court, which only reviews the cold record. See, e.g., *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007) (stating that “[w]e afford trial courts considerable discretion in admitting evidence” and “review their evidentiary rulings for an abuse of that discretion.”); *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006) (stating that the “[e]rroneous admission of evidence that does not have constitutional implications is harmless if there is no ‘reasonable possibility that the wrongfully admitted evidence significantly affected the verdict’”) (quoting *State v.*

Confrontation Clause, as interpreted in *Roberts*, presented no serious obstacle to the introduction of hearsay evidence against criminal defendants.

At the same time the Court was discarding unavailability as a constitutional requirement for the admission of hearsay in criminal cases, there was a related development in Confrontation Clause jurisprudence. Throughout the 1980s state and federal courts began to grapple with difficult prosecutions for child sexual and physical abuse.⁴³ These cases are particularly difficult to investigate and prosecute because of the problems of gathering and presenting information from the primary witnesses to the alleged crimes—children.⁴⁴ Getting reliable in-court testimony from children was perceived as difficult because of the perceived limited capacity of children to recall events that may be at least several months, if not years, old as well as perceived inability to communicate clearly about their experiences.⁴⁵ Moreover, children were frequently characterized as being so psychologically traumatized by their abuse that they could not be expected to testify in front of the alleged abuser without experiencing revived or new trauma.⁴⁶

Lower courts attempted to cope with these problems, using “low-tech” and “high-tech” solutions. However, the Supreme Court struck down a “low-tech” solution in *Coy v. Iowa*,⁴⁷ holding that the trial court violated the defendant’s Confrontation Clause right by placing a large screen between the defendant and a child witness.⁴⁸ Writing for the majority, Justice Scalia applied his brand of textualism to the Confrontation Clause, finding that “the

Post, 512 N.W.2d 99, 102 n.2 (Minn. 1994)); *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (observing that “[o]n appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced.”).

43. See Gail S. Goodman, *Children's Eyewitness Memory: A Modern History and Contemporary Commentary*, 62 J. SOC. ISSUES 811, 820–21 (2006) (discussing the development of specialists in questioning alleged victims of child abuse).

44. Karen J. Saywitz, Gail S. Goodman & Thomas D. Lyon, *Interviewing Children in and out of Court*, in *The APSAC Handbook on Child Maltreatment*, 349, 359–77 (John E.B. Myers et al. eds., 2d ed. 2002).

45. Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 CRIM. JUSTICE 12, 19 (Spring 2009) (hereinafter “Legal Profession’s Response”) (citing TASK FORCE ON CHILD WITNESSES, AM. BAR ASS’N CRIM. JUSTICE SECTION, *THE CHILD WITNESS IN CRIMINAL CASES* 40–42 (2002)).

46. *Id.*

47. 487 U.S. 1012 (1988).

48. *Id.* at 1020.

irreducible literal meaning of the Clause” is “[the] right to meet face to face all those who appear and give evidence at trial.”⁴⁹

Yet the Court upheld a “high-tech” solution to the problem of child testimony in *Maryland v. Craig*.⁵⁰ There the Court held that “a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.”⁵¹ The Court ruled that if the prosecution can show that it is “necessary to further an important public policy” and that “the reliability of the testimony is otherwise assured,” the court may permit a child witness to testify out of the physical presence of the defendant through a one-way, closed-circuit television.⁵²

Two years later, the Supreme Court’s decision in *White v. Illinois*⁵³ eliminated “unavailability” as a requirement of the Confrontation Clause.⁵⁴ *White* was a godsend to prosecutors of child sexual abuse cases. After *White*, prosecutors could orchestrate their proof more effectively. If a child was able to testify in person, the prosecutor could present the child as an in-court witness. If the child was not able to testify because the child would be traumatized by the defendant’s presence, the child could testify via closed-circuit television. Further, if the prosecutor could not make the required showing of the necessity for closed-circuit television, the prosecutor could simply introduce the child’s out-of-court statements implicating the defendant by having a parent, doctor, nurse, social worker, or teacher repeat the child’s statements on the stand. Of course, the defendant always retained the ability to call a child to the witness stand if the defendant wished, even though a criminal defendant has no obligation to produce any witnesses on his or her behalf.

Craig and *White* also mark a temporary departure from Justice Scalia’s textualist approach to the Confrontation Clause. The majority in *Craig* reflects the moderate pragmatism of its author, Justice Sandra Day O’Connor, who tried to find a compromise

49. *Id.* at 1021 (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)).

50. 497 U.S. 836 (1990).

51. *Id.* at 853.

52. *Id.* at 850. Justice Scalia’s continuing interest in the Confrontation Clause surfaced when he wrote the majority opinion in another case from the same term. *United States v. Owens*, 484 U.S. 554 (1988).

53. 502 U.S. 346 (1992).

54. *Id.* at 354–55.

between the right of the defendant to confront his or her accuser and the need of the prosecution to obtain testimony from vulnerable witnesses. Justice Scalia filed a vigorous dissent in *Craig*⁵⁵ and joined Justice Thomas's concurring opinion in *White*,⁵⁶ setting forth and applying their strict interpretation of the Confrontation Clause to "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."⁵⁷ Although Justices Scalia and Thomas failed to narrow the scope of the Confrontation Clause in *White*, less than a decade later Justice Scalia became the dominant voice on the Court on the meaning of the Confrontation Clause, even though he had to moderate his textualist approach to do so.

B. The Confrontation Clause, C.E. (The Crawford Era)

As the author of the majority opinion in *Crawford v. Washington*,⁵⁸ Justice Scalia radically altered the application of the Confrontation Clause to hearsay evidence by limiting its scope to "testimonial statements."⁵⁹ Although the text of the Confrontation Clause does not refer to "testimonial statements," Justice Scalia reasoned that it is the "testimonial" quality of the evidence that makes a hearsay declarant a "witness against" the accused, bringing the text of the Confrontation Clause into play.⁶⁰ Drawing on his originalist jurisprudential philosophy, Justice Scalia grounded this interpretation of the text of the Confrontation Clause in the status of the hearsay rule and its exceptions at the time the Bill of Rights was adopted in 1791.⁶¹ The Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."⁶²

55. See *Craig*, 497 U.S. at 863 (Scalia, J. dissenting) (referring to the majority's conclusions as "antitextual").

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

57. *Id.*

58. 541 U.S. 36 (2004).

59. *Id.* at 68.

60. *Id.* at 51.

61. *Id.* at 53–54.

62. *Id.* The only kind of hearsay clearly outside the *Crawford* test are those statements qualifying under the "dying declaration" hearsay exception, where the declarant is unavailable and describes the cause of his or her impending death. Justice Scalia reasoned that because this exception existed at birth of the

Justice Scalia refused to set forth a complete definition of the term “testimonial,” leaving the development and application of the term to countless trial court judges, who would, for the next two years, have to make do with the hints dropped in *Crawford*. Justice Scalia classified only one class of statements as obviously “testimonial:” “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”⁶³ The Court did not fully explain what it meant by “police interrogations” but did indicate that these interrogations involved “structured police questioning.”⁶⁴ The Court held that the evidence in question in *Crawford* was “testimonial” in this sense because it was a tape-recorded statement obtained from the defendant’s wife, who was questioned by the police while in their custody at the police stationhouse.⁶⁵ Because the defendant had never had an opportunity to cross-examine the witness regarding the statements and because she was unavailable at trial under the marital privilege, the use of the witness’s “testimonial” statements thus violated the “new” interpretation of the Confrontation Clause.⁶⁶

Two years later, in the companion cases *Davis v. Washington* and *Hammon v. Indiana*,⁶⁷ Justice Scalia returned to redefining the Confrontation Clause in the context of 911 calls and police investigations in the field, two of the most common types of law enforcement “interrogation.” Justice Scalia set forth a revised understanding of “testimonial” statements in the context of police interrogations:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution.⁶⁸

Confrontation Clause, this evidence was *sui generis* and need not be excluded even if it is testimonial. *Id.* at 56 n.6.

63. *Id.* at 68.

64. *Id.* at 53.

65. *Id.* at 68.

66. *Id.* at 68–69.

67. 547 U.S. 813 (2006).

68. *Id.* at 822.

The facts of the consolidated cases illustrated the two different scenarios. The Court held that in *Davis*, there was an ongoing emergency because the complainant called 911 immediately after the defendant left her home.⁶⁹ Justice Scalia described these statements as not testimonial because the complainant was seeking police assistance for an ongoing emergency and still faced a “bona fide physical threat” because the defendant could return.⁷⁰ In contrast, Justice Scalia concluded that the statement in *Hammon v. Indiana* was testimonial because the complainant made the statements to responding police officers after the officers separated the suspect from the complainant; therefore, the emergency ended when the police arrived on the scene and took control of the suspect.⁷¹ Justice Scalia rejected efforts to broaden the category of nontestimonial statements, noting that even if a 911 call began as part of an ongoing emergency, it could become an effort to collect evidence of a past crime.⁷²

In the three years after *Davis*, the two Justices who opposed the shift in *Crawford*, Chief Justice Rehnquist and Justice O’Connor, left the court. And there were two more notable Supreme Court decisions interpreting the Confrontation Clause—one that drew a bright line and one that did not. In *Whorton v. Bockting*,⁷³ the Court provided one of the few clear statements on the Confrontation Clause, holding that its *Crawford* decision was not retroactive.⁷⁴ In reaching this decision, the Court stated plainly that, under *Crawford*, “the Confrontation Clause has no application to [nontestimonial] statements.”⁷⁵ Nontestimonial hearsay could be excluded under the state or federal evidence rules or other constitutional provisions, but the Sixth Amendment no longer provided a basis for exclusion.

Following this brief moment of (relative) clarity, the Court blocked the path many courts tried to take after *Crawford* to allow the use of hearsay from unavailable witnesses in domestic violence and child abuse cases—the doctrine of forfeiture. The common law doctrine of forfeiture is grounded in a principle of equity: a

69. *Id.* at 817–19.

70. *Id.* at 826–27.

71. *Id.* at 829–30.

72. *Id.* at 832.

73. 549 U.S. 406 (2007).

74. *Id.* at 409.

75. *Id.* at 420.

person should not be able to profit from his wrongdoing.⁷⁶ Some jurisdictions, including federal evidence law, codified the concept of forfeiture in a hearsay exception.⁷⁷ After *Crawford*, however, prosecutors turned to forfeiture not as a hearsay exception but as a constitutional principle, relying on dicta in both *Crawford* and *Davis* to overcome the Confrontation Clause. In both cases, Justice Scalia suggested that “forfeiture by wrongdoing” was a path around the Confrontation Clause barrier because it was part of the original understanding of confrontation doctrine.⁷⁸ Domestic violence victim advocates and prosecutors argued that defendants in domestic abuse cases forfeited their right to confrontation where the defendants’ actions resulted in the unavailability of the witness/victim at trial.⁷⁹ They argued that this was the only reasonable response after *Crawford*, which made these cases difficult to prosecute successfully. In domestic violence cases, the victim and other witnesses frequently recant earlier allegations against an accused and refuse to testify against the defendant at trial, forcing the prosecutors to rely on pre-trial statements made by these witnesses to police and other law enforcement officials.⁸⁰ *Crawford*’s holding clearly banned such “testimonial” statements where the witness was unavailable to testify at trial and there was no prior opportunity to cross-examine the witness.⁸¹ Thus, prosecutors increasingly argued that a defendant whose criminal conduct resulted in a witness being unavailable could not complain about the lack of opportunity for cross-examination.

76. See *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878) (stating that the rule of forfeiture “has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong . . . a maxim based on the principles of common honesty.”).

77. See FED. R. EVID. 804(b)(6).

78. *Crawford v. Washington*, 541 U.S. 36, 62 (2004); *Davis v. Washington*, 547 U.S. 813, 833 (2006).

79. See, e.g., *State v. Wright*, 701 N.W.2d 802, 814–15 (Minn. 2005) (dictum) (“In Minnesota, a defendant will be found to have forfeited by his own wrongdoing his right to confront a witness against him if the state proves that the defendant engaged in wrongful conduct, that he intended to procure the witness’s unavailability, and that the wrongful conduct actually did procure the witness’s unavailability”) (citing *State v. Fields*, 678 N.W.2d 341, 347 (Minn. 2004)).

80. See Lininger, *supra* note 4, at 751 (summarizing some of the reasons why witnesses to and victims of domestic violence recant or refuse to testify, including “fear of retaliation, economic dependence on the batterer, and concern about the possibility that the state would remove children from a household that has experienced domestic violence”).

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

Finally, in *Giles v. California*,⁸² the Court found an opportunity to clarify the “forfeiture by wrongdoing” solution to *Crawford*’s hurdles in domestic-violence cases.⁸³ However, instead of establishing a bright-line rule, the *Giles* Court splintered, producing only a murky plurality decision. All of the justices agreed that common law recognized a forfeiture doctrine that allowed “the introduction of statements of a witness who was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.”⁸⁴ But the Court could not agree on the standard for finding forfeiture. The defendant in *Giles* was charged with murdering his girlfriend but argued that the shooting was in self-defense.⁸⁵ At trial, the prosecution introduced statements incriminating the defendant that the victim had made to a police officer who responded to an earlier assault.⁸⁶ The California Supreme Court held that the defendant had forfeited his Confrontation Clause objection by killing his girlfriend, regardless of whether he specifically intended to do so to keep her from testifying.⁸⁷ Yet after a thorough discussion of the historical treatment of the forfeiture doctrine, the Supreme Court reversed, holding that the forfeiture-by-wrongdoing doctrine applies only where the defendant engaged in wrongdoing with the purpose of preventing the witness’s testimony.⁸⁸

There were essentially three approaches in *Giles*. Justice Scalia castigated those who criticized the consequences of his originalist Confrontation Clause jurisprudence on the prosecution of modern domestic violence cases, rejecting “a special, improvised, Confrontation Clause for those crimes that are frequently directed against women. . . .”⁸⁹ However, what Justice Scalia taketh away with one hand, his other hand giveth. Although Justice Scalia would require a showing of specific intent to make the witness unavailable for the forfeiture doctrine to apply, he opined that this showing could be met in many domestic violence cases when it culminates in murder because of the “intent to isolate the victim.”⁹⁰ Justice Souter argued in a concurring opinion that Justice Scalia’s

82. 128 S.Ct. 2678 (2008).

83. *Id.*

84. *Id.* at 2683 (Scalia, J.); *id.* at 2697 (Breyer, J., dissenting).

85. *Id.* at 2681.

86. *Id.*

87. *People v. Giles*, 152 P.3d 2678, 2682 (Cal. 2007).

88. *Giles*, 128 S.Ct. at 2683–84.

89. *Id.* at 2693.

90. *Id.*

historical analysis of the forfeiture doctrine was inconclusive and unconvincing.⁹¹ Nevertheless, Justice Souter joined most of Justice Scalia's opinion, fearing that without a requirement that the defendant specifically intended to make the witness unavailable, the forfeiture doctrine could bootstrap a finding of witness unavailability into a conclusion of murder.⁹² However, Justice Souter suggested that the required showing of intent could be inferred by proof of a "classic abusive relationship."⁹³ Finally, Justice Breyer dissented, joined by Justices Stevens and Kennedy, arguing that a showing of intentional misconduct should suffice if the defendant should have known that it would prevent the witness from testifying.⁹⁴ Justice Breyer's survey of the common law showed that the requirement was only that "the witness' absence was the *known consequence* of the defendant's intentional wrongful act."⁹⁵ Justice Breyer's most powerful comments come toward the end of the dissent, as he points out that Justice Scalia and, even more so, Justice Souter's concurring opinion, created a type of presumption in the case of domestic violence cases.⁹⁶ The presumption is that where the fact pattern falls into a classic domestic violence pattern, there is likely to be the required purpose or design to make the declarant unavailable and thus forfeit the right of confrontation.⁹⁷ Justice Breyer stresses that he agrees with this approach, but he points out that it is more in line with his approach that requires only a showing that the defendant knew the likely consequences of his actions would make the witness unavailable to testify.⁹⁸ He dissents only because the Justices refuse to apply the same approach they would apply to domestic violence cases to all cases.⁹⁹

III. COPING WITH THE *CRAWFORD* REVOLUTION.

The clear losers in the *Crawford* upheaval are the courts, especially the state trial court judges who are responsible for the lion's share of criminal trials in this country.¹⁰⁰ State trial court

91. *Id.* at 2694–95 (Souter, J., concurring).

92. *Id.* at 2694–95 (Souter, J., concurring).

93. *Id.* at 2695 (Souter, J., concurring).

94. *Id.* at 2698–99 (Breyer, J., dissenting).

95. *Id.* at 2701.

96. *Id.* at 2708–09.

97. *Id.*

98. *Id.* at 2078.

99. *Id.*

100. Wendy N. Davis, *Hearsay, Gone Tomorrow? Domestic Violence Cases at Issue as*

judges struggle to apply the almost perversely cryptic formulations of “testimonial hearsay” emanating from the Supreme Court to the messy real-life factual contexts that trial courts face every day. Thus, this section is for them, those overworked and underpaid public servants who must somehow find a balance, however imperfect, among: (1) the constitutional rights of the accused, who are entitled to a presumption of innocence against even the most heinous of accusations, (2) the interests of vulnerable victims of physical and sexual abuse in having their abusers prosecuted and punished, and (3) the interest of society in resolving disputes in a criminal justice system that has integrity. Thus, taking the current case law as we find it, here are some basic principles for handling confrontation between a criminal defendant and a difficult witness, such as a child, an adult with limited mental capacity, or a victim or witness to domestic violence who refuses to cooperate.

A. *Applying Crawford, Even with Difficult Witnesses*

Five years after *Crawford*, how does one apply Confrontation Clause to hearsay evidence? In a nutshell:

(1) Are the out-of-court statements “testimonial?” For now, we know that testimonial statements include the following: affidavits; prior testimony; stationhouse police interrogations; and nonemergency, investigatory statements about past events taken by law enforcement officials, including police and 911 operators. If the evidence is nontestimonial, there is no Confrontation Clause problem (although there may still be a hearsay or other evidentiary barrier to admissibility).¹⁰¹

(2) If the evidence is testimonial, is the declarant is unavailable to testify at trial? If the evidence is testimonial, but the declarant testifies at trial, there is no Confrontation Clause problem with admitting the prior statements.¹⁰²

Judges Consider Which Evidence to Allow, ABA J., Sept. 2004, at 22, 22–24. *But see*, Roger Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?* 71 BROOK. L. REV. 35, 99 (2005).

101. *See infra* Part III.C.2.

102. *See infra* Part III.B.1. (discussing the “Warm Breathing Body” rule).

(3) If the evidence is testimonial and the declarant is unavailable to testify at trial, was there a prior opportunity to cross-examine the declarant about the statements? If there was a prior opportunity to cross-examine the declarant about the statements, such as at a preliminary hearing, then there is no Confrontation Clause problem with admitting the statements.

(4) Do either of the two current exceptions to the Confrontation Clause analysis apply?

a. *Was the statement admitted as a “dying declaration?”* If so, the evidence is “sui generis” and thus not subject to the Confrontation Clause.¹⁰³

b. *Did the accused engage in conduct purposely designed to prevent the witness from testifying?* If so, the accused has forfeited the Confrontation Clause objection by wrongdoing.

If the statements are testimonial, the declarant is unavailable to testify at trial, there was no prior opportunity to cross-examine the declarant about the statements, and neither the dying declaration nor forfeiture by wrongdoing exceptions apply, then the evidence must be excluded under the Confrontation Clause of the Sixth Amendment.

Unfortunately, this summary of current Confrontation Clause doctrine leaves plenty of unresolved issues, especially in the case of domestic violence, elder abuse and child abuse. Determining when a statement “testimonial” continues to be thorny. For example, if a social worker, a teacher or a doctor, all of whom have a legal duty to report child abuse, questions a child about suspected abuse, are the child’s responses testimonial? Where is the turning point when a police interrogation moves from dealing with an “ongoing emergency” to investigating and collecting evidence of a crime? In a domestic abuse, elder abuse, or child abuse situation, exactly how much evidence does the court need that the defendant’s purpose or design was to exercise control over his or her victim’s actions—including the victim’s ability to testify to admit the statements of a victim who is now “unavailable” (e.g., dead or refusing to testify,

103. *Crawford*, 541 U.S. at 55 n. 6.; see also Stephen J. Cribari, *Is Death Different? Dying Declarations and the Confrontation Clause after Crawford*, 35 WM. MITCHELL L. REV. 1542 (2009).

despite a subpoena)?

As much as I would like to resolve the quandaries about whether such statements are testimonial, I am as frustrated and befuddled as most of the trial courts that must resolve the question. Thus, the remainder of this article sidesteps *Crawford*'s "testimonial" framework and takes a different approach by turning to evidentiary doctrines that have largely been ignored in the excitement and confusion generated by *Crawford*, *Davis/Hammon*, and *Giles*. These doctrines deserve far more attention because they offer an opportunity either for overcoming the Confrontation Clause objection or for excluding evidence even if it surmounts the *Crawford* analysis. Whether one approaches the issue from the perspective of the prosecution, the defense or the trial judge, in the highly emotional and difficult context of domestic violence and child abuse prosecutions, it is important to remember that *Crawford*'s "testimonial" framework is not the only game in town.

B. Prosecution Strategies for Overcoming the Confrontation Clause Objection

1. The "Warm Breathing Body" Rule

Simply put: to avoid Confrontation Clause problems, prosecutors and judges must work to do everything possible to put the declarant (the person who made the out-of-court statement) on the witness stand whenever possible. Putting a witness, who is also a hearsay declarant, on the stand—even for a short time and even if the witness will not or cannot cooperate or provide meaningful information about the underlying facts of the case—eliminates the Confrontation Clause objection to the use of out-of-court statements by that witness. However, as discussed more below, it will not eliminate problems of competency and lack of personal knowledge. I call this the "Warm Breathing Body" rule, but in naming it I do not mean to suggest I approve of it. It is a sad but necessary way to cope with *Crawford*. As discussed more below, the Warm Breathing Body rule applies even to children or other vulnerable witnesses. Before *Crawford*, prosecutors frequently argued that it was essential to keep children off the witness stand in order to protect them from further trauma.¹⁰⁴ Yet child abuse researcher Professor John Myers, states that "despite the difficulty,

104. Raeder, *Legal Profession's Response*, *supra* note 45, at 14 (Spring 2009).

most children are able to testify in the traditional manner, especially when they are prepared and supported through the process.”¹⁰⁵ Empirical research also suggests that the outcome of the prosecution has as much impact on the child’s well being than whether the child testifies or not.¹⁰⁶ Thus, it is especially important to understand the significance of the “Warm Breathing Body” rule, especially when dealing with children, uncooperative victims of domestic violence, and persons with age-related memory problems, brain injuries, or other mental challenges. The origin of the “Warm Breathing Body” rule is Justice Scalia’s opinion in *United States v. Owens*.¹⁰⁷ Justice Scalia summarized the facts:

On April 12, 1982, John Foster, a correctional counselor at the federal prison in Lompoc, California, was attacked and brutally beaten with a metal pipe. His skull was fractured, and he remained hospitalized for almost a month. As a result of his injuries, Foster’s memory was severely impaired. When Thomas Mansfield, an FBI agent investigating the assault, first attempted to interview Foster, on April 19, he found Foster lethargic and unable to remember his attacker’s name. On May 5, Mansfield again spoke to Foster, who was much improved and able to describe the attack. Foster named respondent as his attacker and identified respondent from an array of photographs.

Respondent was tried in Federal District Court for assault with intent to commit murder under 18 U.S.C. § 113(a). At trial, Foster recounted his activities just before the attack, and described feeling the blows to his head and seeing blood on the floor. He testified that he clearly remembered identifying respondent as his assailant during his May 5th interview with Mansfield. On cross-examination, he admitted that he could not remember seeing his assailant. He also admitted that, although there was evidence that he had received numerous visitors in the hospital, he was unable to remember any of them except Mansfield, and could not remember whether any

105. *Id.* (quoting JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC, AND ELDER ABUSE CASES § 3.01 (2007)).

106. *Id.* (citing Jodi A. Quas et al., *Childhood Sexual Assault Victims: Long-Term Outcomes After Testifying in Criminal Court*, 70 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 88 (No. 2, 2005)).

107. 484 U. S. 554 (1988).

of these visitors had suggested that respondent was the assailant. Defense counsel unsuccessfully sought to refresh his recollection with hospital records, including one indicating that Foster had attributed the assault to someone other than respondent. Respondent was convicted and sentenced to 20 years' imprisonment to be served consecutively to a previous sentence.¹⁰⁸

To be respectful to Mr. Foster, who survived a terrible attack, he was more than a warm breathing body. But his condition made him analogous to one, at least when it came to recalling the facts of the attack, including the identity of his attacker. In his dissent, Justice Brennan notes that although Foster had no recollection of the first time the FBI agent visited him in his hospital bed, Foster described his memory of the FBI agent's second visit as "vivid."¹⁰⁹ However, Foster had no recollection of visits from other people around the same time, including his own wife, who visited him daily.¹¹⁰ Moreover, Foster could not recall whether any of his visitors, including prison officials, had ever suggested that the defendant was the attacker.¹¹¹

The incongruous nature of the "Warm Breathing Body" rule can be illustrated with a simple hypothetical. If Foster made his identification in front of both the FBI agent and a nurse, but then died, neither the nurse nor the FBI agent could testify at trial about Foster's identification of the attacker. It would be meaningless that the nurse, who had no knowledge or memory of the attack, could corroborate what Foster said in his hospital room. The defense got no more from its actual cross-examination of Foster than it could from cross-examining the nurse (or the FBI agent) about Foster's identification of the defendant. Only the fact that Foster took the stand at trial (thankfully warm and breathing, but clueless as to the circumstances of the attack) made it possible, in the eyes of the Supreme Court, to use Foster's hospital room identification of the defendant as his attacker.

The Court in *Owens* reached its result by focusing on the form of cross-examination, rather than the substance: "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in

108. *Id.* at 556.

109. *Id.* at 565 (Brennan, J., dissenting).

110. *Id.* at 565-66.

111. *Id.*

whatever way, and to whatever extent, the defense might wish.”¹¹² All that is required is “that the defendant has the opportunity to bring out such matters as the witness’ bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination . . .) the very fact that he has a bad memory.”¹¹³

In *State v. Holliday*,¹¹⁴ the Minnesota Supreme Court applied the “Warm Breathing Body” rule in upholding the defendant’s murder conviction arising from a March 2006 shooting and death of an innocent bystander in a popular entertainment district in downtown Minneapolis.¹¹⁵ At the defendant’s trial, the State called “A.A.” as a witness, who was allegedly the person whom the defendant meant to shoot and kill.¹¹⁶ A police sergeant interviewed A.A. in April 2006 and a Hennepin County prosecutor interviewed A.A. twice, in May and September 2006.¹¹⁷ In those interviews, A.A. claimed to be the defendant’s actual target.¹¹⁸ At trial, however, A.A. testified that he could not remember those conversations with the police and prosecutor, even after reviewing the police sergeant’s report and a report of his May interview with the prosecutor.¹¹⁹ After reviewing another report from the September meeting with the prosecutor, A.A. said he remembered talking to someone in the county attorney’s office but could not remember what the conversation was about.¹²⁰

The trial court allowed the police sergeant to testify about his April interview with A.A.¹²¹ In addition, the court allowed testimony from Jessica Immerman, a legal services specialist from the prosecutor’s office, regarding the September 2006 meeting with the prosecutor.¹²² Immerman, who was present at the September 2006 meeting between A.A. and the prosecutor, testified that the prosecutor read a report of the police sergeant’s April interview to A.A. and that A.A. acknowledged he made the

112. *Id.* at 559 (citation omitted).

113. *Id.* (citation omitted).

114. 745 N.W.2d 556 (Minn. 2008).

115. *Id.*

116. *Id.* at 561.

117. *Id.*

118. *Id.*

119. *Id.* On cross-examination, A.A. admitted that his regular ecstasy use possibly affected his ability to remember. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

statements included in the report.¹²³ The court then allowed Immerman to read into the record the report of the April police interview.¹²⁴ Immerman then testified that the prosecutor read to A.A. a memorandum the prosecutor made of their May meeting, and A.A. affirmed its contents.¹²⁵ The court then allowed Immerman to read into the record the memorandum of the May meeting, which included A.A.'s allegation that appellant was chasing and shooting at him when the victim was shot.¹²⁶ Finally, the court allowed Immerman to read into the record a portion of a memorandum summarizing A.A.'s September meeting with prosecutor, which documented A.A.'s affirmations of the April report and the May memorandum.¹²⁷ The trial judge overruled the defendant's hearsay and Confrontation Clause objections.¹²⁸ The trial court overruled the hearsay objection under the recorded recollection exception and the residual exception.¹²⁹ Although the trial court found A.A.'s statements to be "testimonial" under *Crawford*, the trial court overruled the Confrontation Clause objection because A.A. testified at trial and was subject to cross-examination.¹³⁰ The trial judge later convicted the defendant in the bench trial.¹³¹

The Minnesota Supreme Court upheld the defendant's convictions, resting its ruling squarely on *Owens* and dicta from *Crawford*.¹³² The Minnesota court acknowledged that *Owens* could be distinguished from the case before it in that the witness in *Owens* could recall making the prior identification, while in this case, A.A. could not recall the conversations where he allegedly implicated the defendant.¹³³ The Minnesota court, however, held that *Crawford*'s direction was clear: "the Court in *Crawford* explicitly stated in a footnote that a declarant's appearance for cross-examination at trial removes all Confrontation Clause barriers to

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 561–62.

129. *Id.*

130. *Id.*

131. *Id.* at 559.

132. *Id.* at 565–67.

133. *Id.* at 566. The Court was referring to Foster's hospital room conversation with the F.B.I. agent, identifying Owens as his attacker.

the admission of his or her prior statements. . . .”¹³⁴

Although the “Warm Breathing Body” rule is unpalatable, especially as applied to its outer limits with an uncooperative witness in *Holliday* one can understand the motivation behind it. Justice Brennan, in his dissent in *Owens*, offered an alternative: he would have applied the rule from *Green v. California* that “the Sixth Amendment guarantees criminal defendants the right to engage in cross-examination sufficient to ‘affor[d] the trier of fact a satisfactory basis for evaluating the truth of [a] prior statement. . . .’”¹³⁵ But one wonders how many and what types of questions asked on cross-examination would suffice to satisfy the trier of fact about the truth of a prior statement? Justice Brennan’s call for more than just an opportunity for cross-examination, his demand for an effective and meaningful cross-examination, has strong intuitive appeal, but it seems difficult if not impossible to measure in practice.

In fact, Justice Brennan raised many of the difficulties himself in his dissent in *Green*.¹³⁶ In that case, the trial witness had previously testified at the preliminary hearing (where he was subject to cross-examination) and identified the defendant as the person who sold him marijuana.¹³⁷ At the actual trial, however, the witness was “markedly evasive and uncooperative on the stand.”¹³⁸ The Court held that the use of the witness’s prior testimony at the preliminary hearing, for the substantive purpose of identifying the defendant as the person who sold him drugs, did not violate the Confrontation Clause where the prior testimony was subject to cross-examination.¹³⁹ In dissent, Justice Brennan questioned how cross-examination at the preliminary hearing in the actual case could serve as a substitute for effective cross-examination at trial where “defense counsel . . . did not engage in a searching examination” at the preliminary hearing.¹⁴⁰ Moreover, Justice Brennan questioned how the adequacy of the prior cross-examination could be determined in any case:

134. *Id.* at 565 (citing *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)).

135. *United States v. Owens*, 484 U.S. 554, 565 (1988) (Brennan, J., dissenting) (quoting *California v. Green*, 399 U.S. 149, 161 (1970)).

136. *See Green*, 399 U.S. at 189 (Brennan, J., dissenting).

137. *Id.* at 190.

138. *Id.* at 151–52 (White, J.) (quoting *People v. Green*, 451 P.2d 422, 423 (Cal. 1969)).

139. *Id.* at 168–69.

140. *Id.* at 191 (Brennan, J., dissenting).

[T]oday's holding raises another practical difficulty: how extensive must cross-examination at the preliminary hearing be before constitutional confrontation is deemed to have occurred? Is the mere opportunity for face-to-face encounter sufficient? Perhaps so. The Court states that 'respondent had every opportunity to cross-examine Porter as to his statement' at the hearing. Does that mean that if defense counsel fails to take advantage of the opportunity that the accused can subsequently be convicted at trial on the basis of wholly untested evidence? If more than an unexercised chance to cross-examine is required, how thorough and effective must the questioning be before it satisfies the Confrontation Clause? Is it significant, for example, that in the present case neither the defense nor prosecution explored the most elemental fact about Porter's testimony—the possibility that he was under the influence of drugs at the time of the alleged offense?¹⁴¹

This was, in fact, the second time Justice Brennan faulted both the prosecution and defense counsel for failing to question the witness at the preliminary hearing about whether he was under the influence of drugs at the time of the drug transaction with the defendant.¹⁴² The message was clear: Justice Brennan would have conducted a different cross-examination, but the practical problem is also clear. Once the Court starts to examine what was asked and what was not asked during cross-examination, the Confrontation Clause analysis becomes impractical.

The "Warm Breathing Body" rule allows for an unsatisfactory opportunity for cross-examination, but tying the Confrontation Clause to a standard of "meaningful," "effective," "full" or "searching" cross-examination does not work either. However, as discussed below in the section on taking evidence rules seriously,¹⁴³ this does not mean the trial court is powerless to exclude testimony and prior statements of a witness who testifies that he or she has no recollection of an underlying event. That evidentiary problem is best dealt with as a problem of competency or lack of personal knowledge of the underlying facts.

141. *Id.* at 200 n.8 (citation omitted).

142. *See also id.* at 191 n.4.

143. *See infra* Part III.C.1–2.

2. *Improving Competency Determinations*

The prospect of using the “Warm Breathing Body” rule, as is the case with all aspects of confrontation, is most unpleasant in the case of child or otherwise vulnerable witnesses. Moreover, it is a difficult judgment call because in the case of children or other vulnerable witnesses, the “Warm Breathing Body” rule frequently overlaps with the concept of “competency.” As it has been interpreted by the United States Supreme Court, the “Warm Breathing Body” rule responds to the requirement of both some hearsay exceptions and the Confrontation Clause that the hearsay declarant be available and testifying at trial and thus subject to cross-examination.¹⁴⁴

“Competency,” in contrast, means more than just showing up—more than just getting the declarant on the witness stand. “Competency” is sometimes defined in different ways by state statutes, but at its core, competency means that the witness (1) is capable of distinguishing fact from fiction; (2) is willing to promise, swear an oath or make some other kind of affirmation or assurance that he or she will tell the truth; and (3) is capable of communicating about the facts in issue. It is important to separate the concept of competency from other evidentiary doctrines. For example, when some courts or commentators talk about a witness testifying “reliably” or “correctly,” in all likelihood, they are not talking about competency but rather whether the witness has personal knowledge of the facts about which they will testify. It is possible for a witness to sit on the witness stand and promise clearly and intelligibly to tell the truth but not to have first-hand knowledge of the disputed facts.

In addition to sometimes being confused with the personal knowledge requirement, competency is confusing because it is steeped in political and social prejudice. The common law was obsessed with the fear that a witness might commit perjury. As a result, “parties, spouses of parties, accomplices, persons with an interest in the litigation, convicted felons, children, and atheists were all at one time viewed as incompetent.”¹⁴⁵ “Incompetent” meant that these individuals could not take the witness stand in a court of law to testify about any subject, no matter how reliable or

144. United States v. Owens, 484 U. S. 554 (1988).

145. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:2, at 1 (3d ed. 2008).

knowledgeable the individual might be about the facts of a case.¹⁴⁶ These automatic disqualifications eventually were abolished and became grounds for impeaching the credibility of the witness or raised a ground of evidentiary privilege.¹⁴⁷

Today, both federal law and Minnesota law follow the modern approach of competency provisions.¹⁴⁸ Thus, a convicted felon can give testimony but is subject to impeachment under Federal and Minnesota Rule of Evidence 609. A spouse of a litigant or criminal defendant may testify, subject to the spousal testimonial privilege and the marital confidential communications privilege.¹⁴⁹ Under federal law, witnesses are competent “except as otherwise provided.”¹⁵⁰ This creates, in essence, “a presumption that everyone is competent to testify, and in the case of ordinary witnesses (as opposed to experts), the burden of showing that a particular person is not competent to testify rests with the party challenging the witness.”¹⁵¹

Minnesota Rule of Evidence 601 also follows the modern approach but states simply that at existing state law determines the controlling principles of competency. The leading Minnesota case setting forth the general principle of competency is *State ex rel. Dugal v. Tahash*.¹⁵²

Determination of a person’s competency as a witness is within the sound discretion of the trial court and is ordinarily made by such preliminary examination of the proposed witness as may be deemed necessary by the court. If it appears from the examination that the witness understands the obligation of an oath and is capable of correctly narrating the facts to which his testimony relates, the witness is competent in fact and should be permitted to testify.¹⁵³

146. *Id.*

147. *Id.*

148. FED. R. EVID. 601; MINN. R. EVID. 602; MINN. STAT. § 595.02 (2008). The primary exceptions to these rules are the provisions that make a judge or juror incompetent to testify as a witness in proceedings in which they are sitting. FED. R. EVID. 605, 606. MINN. R. EVID. 605, 606. Minnesota expands that categorical exclusion, with only a few exceptions, to any person “presiding at any alternative dispute resolution proceeding.” MINN. STAT. 595.02, § subd.1a.

149. *Id.*

150. FED. R. EVID. 601.

151. MUELLER & KIRPATRICK, *supra* note 145, at 1.

152. 278 Minn. 175, 153 N.W.2d 232 (1967).

153. *Id.* at 177–78, 153 N.W.2d at 234.

Minnesota has codified principles of competency, especially as they pertain to children and vulnerable adults, in Minnesota Statutes section 595.02, which provides in relevant part:

Subdivision 1. Competency of witnesses.

Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as provided in this subdivision: . . .

(f) Persons of unsound mind and persons intoxicated at the time of their production for examination are not competent witnesses if they lack capacity to remember or to relate truthfully facts respecting which they are examined. . . .

(n) A child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined. A child describing any act or event may use language appropriate for a child of that age.¹⁵⁴

Enacted in 1987, this statute reversed the legislative approach to the competency of children and adults with mental challenges or under the influence of mind-altering substances and created a rebuttable presumption that such witnesses are competent to testify.¹⁵⁵ In *State v. Lanam*,¹⁵⁶ the Minnesota Supreme Court explained the purpose of a competency hearing after this change in the law:

[The statute] does not mean that the court is to question the child on the details of possible testimony, but rather means

154. MINN. STAT. § 595.02. In addition, Minnesota Statutes section 595.06 provides in relevant part that:

When an infant, or a person apparently of weak intellect, is produced as a witness, the court may examine the infant or witness to ascertain capacity, and whether the person understands the nature and obligations of an oath, and the court may inquire of any person what peculiar ceremonies the person deems most obligatory in taking an oath.

155. See MINN. STAT. § 595.02, subd. 1 (f), *repealed by* 1987 Minn. Laws, ch. 120 § 1 (stating that children under ten years old are presumed incompetent to testify).

156. 459 N.W.2d 656 (Minn.1990).

that the court should determine in a general way whether the child remembers or can relate events truthfully. The jury will judge the child's credibility and decide the weight to assign the testimony. A competency hearing is not a credibility hearing. Competency concerns the child's ability to be truthful and to understand the importance of telling the truth in court. It also concerns the child's ability to remember and relate events. Whether a child is easily led goes more to credibility than to competency. Even adults at trial become inconsistent upon cross-examination. It is the jury's province to sort out the inconsistencies and determine credibility, the court's province to determine competency. Where the court is in doubt as to the child's competency, it is best to err on the side of determining the child to be competent.¹⁵⁷

There is another part of Section 595.02 that can easily confuse the competency analysis. Section 595.02, subd. 3 tries to provides a "super" hearsay exception for certain out-of-court statements "alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on" or any physical abuse of the hearsay declarant. The statute makes the out-of-court statements admissible for the truth of what they assert if the court finds that the circumstances surrounding the making of the statement bear "sufficient indicia of reliability" and the declarant either testifies or is unavailable, but there is corroborative evidence of the act. The statute requires advance notice that the evidence will be offered and expressly "includes video, audio, or other recorded statements."¹⁵⁸ Although this statutory provision is placed in the general competency statute, it is actually a hearsay exception that incorporated the *Roberts* confrontation clause test, which was in effect at the time the statute was created in 1987. It was intended to provide an exception to the hearsay rule that would simultaneously ensure the evidence passed the Confrontation Clause analysis. It is not a competency test, for its last line specifically states that "[a]n unavailable witness includes an incompetent witness," which sends us circling back to the competency provisions of 595.02, subd.1(f) and (n), which presume that a child or mentally challenged adult is competent to

157. *Id.* at 659–60.

158. MINN. STAT. § 595.02, subd. 3.

testify unless proved otherwise.

Crawford has now made this statute constitutionally suspect, at least in part. Where the statement about sexual or physical abuse is made in response to structured questioning by law enforcement officials, it is clearly testimonial under *Crawford*. Thus, the only route to admissibility of the out-of-court statements is to have the witness testify, for *Crawford* prohibits such evidence where the declarant is unavailable to testify and there has been no prior opportunity to cross-examine the declarant. One big area of contention and confusion is whether statements made to forensic interviewers (who specialize in child abuse investigation) and statements made to professionals (such as doctors, teachers, social workers who have a mandatory statutory duty to report such abuse) fall under this category of testimonial statements.¹⁵⁹ This issue will ultimately have to be resolved by the United States Supreme Court, but in the meantime, such statements are constitutionally suspect even if they satisfy the reliability provisions of Minnesota Statutes section 595.02, subd. 3, or any other hearsay exception. The upshot is that in Minnesota, a child or mentally challenged witness should take the stand unless proven to be incompetent under Minnesota law.¹⁶⁰ Where there is doubt about the witness's competency, they are to be resolved in favor of having the witness testify.¹⁶¹ Having the witness take the stand cures the *Crawford* problem, through the magic of the "Warm Breathing Body" rule.

Recent empirical research focused on obtaining more reliable evidence from child witnesses suggests that courts are far too reluctant to find that young children are competent to testify.¹⁶²

159. See *Bobadilla v. Carlson*, 570 F.Supp.2d 1098 (D. Minn. 2008) (granting amended petition for writ of habeas corpus in child sexual abuse case resting on statements made to forensic interviewers and medical professionals).

160. In the 2009 Minnesota Legislative Session, legislators in both houses introduced legislation to amend MINN. STAT. 595.02, subd. 3, to allow a child witness to testify either in person or through "an alternative method under [MINN. STAT.] 595.10]. See 2009 Minn. Senate File No. 563, Minn. First Regular Sess. of the Eighty-Sixth Legislative Sess. (Introduced Feb. 9, 2009); 2009 Minn. House File No. 720, Minn. First Regular Sess. of the Eighty-Sixth Legislative Sess. (Introduced Feb 12, 2009).

161. *Lanam*, 459 N.W.2d at 659–60. Minnesota Statute 595.10 essentially incorporates the Supreme Court's decision in *Craig*. Thus, if *Craig* survives *Crawford*, and if this legislation is ultimately passed into law, it would make it easier to introduce all sorts of out-of-court statements by children, including testimonial statements made to police officers and forensic interviewers.

162. Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children's Competence*

First, research suggests that trial judges and advocates may be skewing the competency hearing results by the way they frame the questions, especially those aimed at determining whether the child is able to and will follow a moral obligation to tell the truth, meaning that the child will reject false statements of fact. Professor Tom Lyon, who has focused on developing protocols for questioning children about abuse both during the investigatory phase and during trial, explains:

[f]ar too often, children are kept off the stand not because of their incompetency but because of the limited competency of their interrogator. Children should not be asked whether they know the meaning of *truth* and *lie* or asked to define the terms. They should not be asked whether they have ever told a lie. They should not be asked hypothetical questions about the consequences of lying, particularly hypothetical questions in which they are the speaker (What would happen if you told a lie?). Many children will perform poorly at these questions despite being quite capable of identifying statements as true or false and recognizing that lie-tellers are punished.¹⁶³

Professor Lyon and his co-author Karen Saywitz, from the U.C.L.A. Medical Center, created a simplified competency assessment tool that is available online for download without charge.¹⁶⁴ The focus of the assessment is to determine whether a child can determine and communicate that some statements of fact are false. This assessment was developed because “even children who have not learned labels for true and false statements are capable of rejecting false statements.”¹⁶⁵ The assessment is designed “to both minimize the difficulties children face in defining and discussing the truth and lies, and to ensure that children will not falsely appear competent due to guessing or

to *Take the Oath*, 3 APPLIED DEVELOPMENTAL SCI. 3, 16–27 (1999), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1061&context=thomaslyon>.

163. Thomas J. Lyon, *The Supreme Court, Hearsay, and Crawford: Implications for Child Interviewers*, AM. PROF. SOC’Y ON THE ABUSE OF CHILDREN ADVISOR, Summer/Fall 2008, at 5, available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1058&context=thomaslyon>.

164. Thomas D. Lyon & Karen J. Saywitz, *Qualifying Children to Take the Oath: Materials for Interviewing Professionals* (May 2000), <http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=thomaslyon>.

165. Lyon & Saywitz, *supra* note 44, at 5.

following the questioner's lead."¹⁶⁶ Over the course of the assessment, the interrogator asks whether there are bad consequences for saying something that is false. The interrogator poses four scenarios to a child involving the concepts of truth and falsity and four scenarios involving morality. If a child answers all four of the scenarios of each type correctly, "this demonstrates good understanding of the concept (there is only a 6% likelihood that a child would answer four of four problems correctly by chance)."¹⁶⁷

The first four scenarios present the child with a cartoon.¹⁶⁸ The interrogator asks the child to look at a larger object toward the top of the cartoon (for example, a drawing of a sleeping cat).¹⁶⁹ The child is asked to name the object.¹⁷⁰ For example, if the child says, "that's a kitty," the interrogator then confirms the child's label for the object, "Ok, that's a kitty."¹⁷¹ The interrogator then calls the child's attention to the lower part of the cartoon, where there is a drawing of two boys, each one imagining (in a cartoon callout cloud) a different picture.¹⁷² One boy imagines a cat; the other boy imagines a dog.¹⁷³ The interrogator then tells the child, "LISTEN to what these boys say about the kitty [or whatever label the child has used]."¹⁷⁴ One of them will tell a LIE and one will tell the TRUTH, and YOU'LL tell ME which boy tells the TRUTH."¹⁷⁵ The interrogator then points to the picture of the boy on the left side of the page (who is imagining a cat).¹⁷⁶ "THIS boy looks at the [kitty] and says 'IT'S a [kitty].'"¹⁷⁷ Then the interrogator points to the picture of the boy on the right side of the page and says, "THIS boy looks at the [kitty] and says 'IT'S a PUPPY.' Which boy told the TRUTH?"¹⁷⁸ The next problem follows the same pattern, except the cartoon involves two girls imagining two different kinds of food

166. Lyon & Saywitz, *supra* note 44, at 2.

167. *Id.*

168. *Id.* at 3–6.

169. *Id.* at 3.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

and the final question is “Which girl told a LIE?”¹⁷⁹ These two problems are followed by two additional problems, one of which asks which character tells the truth and one of which asks which character told a lie.¹⁸⁰

The final four problems involve “morality” tasks, which evaluate whether a child understands there are negative consequences for telling a lie. The first task puts two cartoon boys in front of a cartoon woman judge. Here is the script for the interrogator:

Here’s a Judge. She wants to know what happened to these boys.

Well, ONE of these boys is GONNA GET IN TROUBLE for what he says, and YOU’LL tell ME which boy is GONNA GET IN TROUBLE.

LOOK [child’s name],

(*point to left boy*) This boy tells the TRUTH.

(*point to right boy*) This boy tells a LIE.

Which boy is GONNA GET IN TROUBLE? (*correct answer is boy on the right*).¹⁸¹

The other three scenarios are structured almost identically, except that there is a different adult cartoon character in each scenario who “wants to know what happened” to the children.¹⁸² All of the adult characters are adult women, but one is “a Lady who comes to visit these girls at home” (presumably a social worker or guardian ad litem).¹⁸³ Another character is a doctor.¹⁸⁴ The final character is “a Grandma.”¹⁸⁵ The gender of the children alternates between two girls and two boys.¹⁸⁶ Note that these questions do not ask the children to create abstract definitions of terms such as “lie” or “truth.” The child is asked about concrete, visual situations, not conceptual hypotheticals (for example, “What would happen to you if you lied?”).¹⁸⁷

179. *Id.* at 4.

180. *Id.* at 5–6.

181. *Id.* at 7.

182. *Id.*

183. *Id.* at 8.

184. *Id.* at 9.

185. *Id.* at 10.

186. *Id.* at 3–10.

187. *Id.* at 11–14.

Children and mentally challenged witnesses without abstract reasoning skill will have difficulty “swearing to tell the truth” in a conventional manner, but this does not mean they are incompetent to testify. There are empirically tested ways of testing an individual’s understanding of a moral obligation to reject untrue statements of fact and to obtain the individual’s assurance that he or she will do so.¹⁸⁸ Trial judges should try to use these research-based tools to determine whether a child can sufficiently communicate in a truthful manner.

The determination of witness competency is left to the trial judge; a reviewing court will only reverse the decision if: (1) it was an abuse of discretion;¹⁸⁹ and (2) it is not harmless error.¹⁹⁰ Trial judges should try to assess witness competency to testify in a thorough and age-appropriate manner, especially given the “Warm Breathing Body” rule, which may make all the difference between admitting videotaped forensic interviews or other kinds of hearsay over a Confrontation Clause objection.

3. *More Craig, Not Less.*

Another problem with vulnerable witnesses is that they may experience trauma either from the adversarial courtroom setting itself, or, especially in cases of alleged abuse, from the presence of the defendant. The United States Supreme Court held in *Maryland v. Craig*,¹⁹¹ that there are times when the right to confrontation must give way to other powerful societal interests, such as

188. See also *infra*, note 273, which cites to other empirical research by Professor Lyon and others on the best practices for interviewing suspected victims of abuse both outside and inside the courtroom.

189. Minnesota *ex rel.* Dugal v. Tahash, 278 Minn. 175, 177–78, 153 N.W.2d 232, 234 (1967). Contrast this deferential standard of review with the more stringent standard of review for alleged violations of the right to confrontation: “We review *de novo* the district court’s determination of the protections afforded by the confrontation clause, while we review the underlying factual determinations for clear error.” United States v. Bordeaux, 400 F.3d 548, 552 (8th Cir. 2005) (citation omitted). And compare the more searching review of the similar-sounding but distinctly different issue of competency to stand trial in *State v. Ganpat*, 732 N.W.2d 232 (Minn. 2007). If the issue is competency to stand trial, as opposed to competency to testify, the appellate courts will do an “independent[] review [of] the record to determine if the district court gave ‘proper weight’ to the evidence produced and if ‘its finding of competency is adequately supported by the record.’” 732 N.W.2d at 238 (citations omitted).

190. MINN. R. EVID. 103 (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . .”).

191. 497 U.S. 836 (1990).

protecting children from additional trauma by testifying in the physical presence of their alleged abuser.¹⁹² The Supreme Court held that one-way, closed-circuit testimony did not violate the Confrontation Clause when: (1) the court determines that it is necessary “to protect the welfare of the particular child witness;” (2) the court finds “that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant;” and (3) “the trial court [finds] that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*.”¹⁹³

Several courts and commentators have questioned whether *Craig* is still good law after *Crawford*. *Crawford* expressly rejected the balancing of constitutional rights against societal interests that *Craig* adopts.¹⁹⁴ Moreover, *Craig*’s critics argue that *Crawford* rests on a foundation of originalism. The Court purported to recognize only those exceptions to the right of confrontation that were in effect when the Bill of Rights was adopted. By this reasoning, a process of testifying through one- or two-way video was not within the imagination of the Framers, who emphasized “face-to-face” confrontation. By rejecting exceptions to the right of confrontation, even those exceptions based on reliability of the evidence, one might argue that the Court has implicitly overruled *Craig*.

However, lower courts have not yet accepted this argument. In fact, several courts have upheld *Craig* in light of challenges after *Crawford*.¹⁹⁵ The reasoning of these courts is that if *Crawford* had

192. *Id.* at 853.

193. *Id.* at 855–56 (citations omitted). See also FED. R. CRIM. P. 43, which was amended to codify *Craig* and provides in relevant part:

In Open Court. At trial, the witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

The Eighth Circuit found this rule unconstitutional as applied in *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) because the district court found that the child was afraid of both the defendant and testifying in the courtroom setting, an inadequate showing of necessity under *Craig*.

194. Compare *Crawford*, 541 U.S. at 67–68 (“By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers’] design”) with *Craig*, 487 U.S. at 553 (explaining the need to balance the right to confrontation against “other powerful societal interests”).

195. See, e.g., *United States v. Yates*, 438 F.3d 1307, 1313–18 (11th Cir. 2006);

overruled *Craig*, it would have done so explicitly. In addition, *Crawford* is easily distinguishable from *Craig*. *Crawford* only decided when the use of hearsay evidence at trial violates the Confrontation Clause.¹⁹⁶ *Craig*, in contrast, was not about whether confrontation was available to the accused but rather what form of confrontation is required.¹⁹⁷ Moreover, some of these same courts note that *Crawford*'s target was the reliability test of *Roberts*,¹⁹⁸ which is not implicated by *Craig*. Finally, Professor Myrna Raeder argued that “*Craig* has not produced the parade of horrors that *Crawford* so dramatically portrayed as justification for jettisoning *Roberts*. Indeed, *Craig* has provided a sensible solution for an intractable problem: providing cross-examination of abused children who are traumatized.”¹⁹⁹ This article argues that *Roberts* was not responsible for the alleged “parade of horrors” attributed to it in *Crawford* but rather the Court’s own incomprehensible application of *Roberts* in *Lilly v. Virginia*.²⁰⁰ Nevertheless, I agree with Professor Raeder that the *argumentum ad terrorem* used in *Crawford* would not work to overrule *Craig*. *Craig* is grounded in the pragmatic availability of advanced technology and an awareness of the problem of child abuse and has not generated the controversy and criticism produced by *Roberts*. Even if *Craig* is still good law after *Crawford*, the Court in *Craig* made clear that a child’s “trauma” or “emotional distress” from the adversarial or courtroom proceeding is not

United States v. Bordeaux, 400 F.3d 548, 553–54 (8th Cir. 2005); State v. Henriod, 131 P.3d 232, 237 (Utah 2006); State v. Blanchette, 134 P.3d 19, 29 (Kan. Ct. App. 2006); State v. Griffin, 202 S.W.3d 670, 680–81 (Mo. Ct. App. 2006); State v. Vogelsberg, 724 N.W.2d 649, 654 (Wis. Ct. App. 2006); United States v. Pack, 65 M.J. 381, 383–84 (C.A.A.F. 2007).

196. Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

197. Craig, 497 U.S. at 860.

198. 448 U.S. 56 (1980), overruled by Crawford v. Washington, 541 U.S. 36 (2004).

199. Myrna Raeder, *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1016 (2007). Professor Raeder also cites empirical research that suggests that when children are shielded, the jury may find the child lacks credibility, even if the child’s testimony is reliable. *Id.* at 1018. She suggests that when a shield is used, prosecutors should be able to introduce expert testimony to explain the presence of the screen and thus counteract the non-intuitive conclusion that children who have some kind of shield are less reliable. *Id.* Although Professor Raeder acknowledges the *Daubert* problems with such expert testimony, she suggests that the defense should be deemed to waive a *Daubert* (expert) testimony objection if it implies or suggests that the child is less reliable because of the lack of face-to-face confrontation. *Id.*

200. 527 U.S. 116 (1999).

sufficient grounds to dispense with face-to-face confrontation.²⁰¹ Such trauma or emotional distress, however, can be a serious problem if it interferes with a child's ability to communicate or recall events. But researchers, child advocates, and criminal justice specialists are trying to provide better guidance to judges and prosecutors to help make the process of testifying less intimidating and frightening for vulnerable witnesses.²⁰² Again, the key is to making the child sufficiently comfortable and competent to take the stand, thus invoking the "Warm Breathing Body" rule so that the child's out-of-court testimony can be introduced through other witnesses.

C. Defense Strategies for Excluding "Nontestimonial" Evidence

The first three suggestions of this part of the article²⁰³ all allow for greater admissibility of out-of-court statements, even where those statements are "testimonial" because they all work toward putting the witness on the stand to testify in some fashion. However, a trial court needs to balance the right of the defendant to exclude unreliable evidence along with the prosecution's need for evidence.

The reliability of evidence traditionally has been regulated by the rules of evidence. As noted earlier, one of the strongest objections to *Roberts* was that it conflated the Confrontation Clause and the hearsay rule.²⁰⁴ Thus, if a statement, other than one made while testifying in the court proceeding, was offered in evidence to prove the truth of the matter asserted,²⁰⁵ one could object that both the hearsay rule and the Confrontation Clause were violated. If the hearsay objection was overruled, however, one could generally also beat the Confrontation Clause objection, especially if the hearsay

201. *Craig*, 497 U.S. at 838.

202. See Raeder, *supra* note 39 at 1013 ("Obviously, the reason for incompetency is significant, since the inability to discern truth from falsity cannot be immediately fixed, while the failure to communicate with the jury often can."). In a separate article, Professor Raeder called attention to a free but valuable resource available online for download: American Prosecutors' Research Institute: Finding Words: Half a Nation by 2010: Interviewing Children and Preparing for Court, http://ndaa.org/pdf/finding_words_2003.pdf (last visited May 18, 2009) cited at Raeder, *Legal Profession's Response*, *supra* note 45.

203. These recommendations include the "Warm Breathing Body Rule," better witness competency assessments, and increased use of shields where necessary.

204. See *supra* notes 32–34 and accompanying text.

205. See FED. R. EVID. 801(c).

exception was “firmly rooted,” and, usually, it was. Thus, under *Roberts*, the problem was that by finding a “firmly rooted hearsay exception” one usually got a “two-fer”: beating both the hearsay rule and the Confrontation Clause objections. *Crawford*’s value is that it has de-coupled the Confrontation Clause from the hearsay rule. Now, even if an out-of-court statement may be admitted for its truth under every hearsay exception known to humanity, it cannot be admitted if: (1) the hearsay declarant is unavailable to testify at trial; (2) there was no prior opportunity to cross-examine the hearsay declarant; and (3) the hearsay declarant’s statement is “testimonial” (whatever that means).²⁰⁶

But in the effort and confusion to learn and figure out how to apply *Crawford*’s analysis, defense lawyers and trial courts sometimes overlook important evidentiary issues that exist to screen out unreliable evidence. Now that “reliability” is no longer the concern of the Confrontation Clause,²⁰⁷ it is time to apply the evidence rules with greater rigor.

1. *Taking The Personal Knowledge Requirement Seriously*

One evidentiary concept that needs to be applied with greater care is this: all witnesses, including hearsay declarants, must have personal knowledge of the subject of their testimony.²⁰⁸ This rule, codified in Federal and Minnesota Rules of Evidence 602, has great significance in the case of testimony from difficult witnesses, including children. The requirement of “personal knowledge” is closely related to, but not distinct from, the concept of “competency.” Professors Mueller and Kirkpatrick summarize the key distinction as it is applied in court:

The judge decides whether the witness has made an adequate oath or affirmation and can communicate with the jury, for these are issues of “competency” under Fed. R. Evid. 104(a), but the jury decides whether the witness has adequate perception and memory, for these matters are considered to be issues of conditional relevancy under Fed. R. Evid. 104(b) and the judge plays only a screening role, barring a witness from testifying only if there is not enough evidence of perception and memory to enable a

206. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

207. *Id.* at 61–62.

208. *See* FED. R. EVID. 602.

reasonable jury to rely on the witness.²⁰⁹

Putting a warm breathing body on the witness stand—someone who is capable of and understands the importance of rejecting false statements of fact—may defeat both competency and Confrontation Clause objections under today’s law. In addition, an out-of-court statement may beat a hearsay objection through a hearsay exception. Nonetheless, a trial court must still determine whether the out-of-court declarant has a basis for knowing first-hand what he or she is talking about.

Although a hearsay declarant is a person who makes a statement other than while testifying at trial, a declarant is as much as witness to the truth of disputed facts as an in-court witness when the out-of-court statement is offered for its truth.²¹⁰ While a hearsay exception may be justified because necessity or factors of reliability substitute for the chance to cross-examine the declarant, there is no substitute for proof that the hearsay declarant could see, hear, touch, smell or taste whatever it is the declarant is describing, explaining, commenting—and ultimately testifying—about. The burden of showing that the witness or declarant had an adequate opportunity to observe whatever he or she is testifying about is on the party offering the statement, not on the objecting party.²¹¹ Thus, where the court cannot determine whether the declarant had first-hand knowledge, the court should exclude the statement.

Take the case of an anonymous 911 call, in which the caller states that several light-skinned black men matching defendant’s description are shooting guns.²¹² As with many hearsay declarants, there is no chance to consider the competency of the “witness,” because the witness is not available to testify at trial. The statement might be admissible under the excited utterance or another exception to the hearsay rule.²¹³ Moreover, it might not pose a Confrontation Clause problem under the “testimonial” framework of *Crawford* and *Davis* because the caller was describing an on-going emergency. Nevertheless, as the appellate court held in the actual case, the trial court properly excluded the 911 call because the prosecution failed to show that the caller saw who was firing the

209. MUELLER & KIRKPATRICK, *supra* note 145, § 6:2.

210. FED. R. EVID. 801(b)–(c); MINN. R. EVID. 801(b)–(c).

211. State v. Ferguson, 581 N.W.2d 824, 832 (Minn. 1988).

212. Although it predates the *Crawford* decision, these are the facts of Brown v. Keane, 355 F.3d 82 (2d.Cir. 2004).

213. FED. R. EVID. 803(2); MINN. R. EVID. 803(2).

shots:

It is one of the most basic requirements of the law of evidence that a witness's report may be admitted only where grounds exist for "a finding that the witness has personal knowledge of the matter" to which the statement relates. *See* Fed. R. Evid. 602. Ordinarily, such a witness's account may be received only when given in open court, under oath, and subject to cross-examination. When the witness's declaration was made out of court in excited circumstances, the excited utterance exception to the hearsay rule permits the receipt of the out-of-court statement, not under oath, and without opportunity for cross-examination. But the exception does not obviate the requirement that the declarant have personal knowledge of the subject of his report. . . . An assertion of fact based on conjecture and surmise, to which the declarant would not be allowed to testify if called to the witness box, does not become admissible under an exception to the hearsay rule merely because it was uttered out of court in a state of excitement. Where the People failed to show that the caller saw who was firing the shots outside the Phoenix Bar, the caller's excitement cannot justify the receipt of his statement based on surmise that light-skinned black men wearing green coats were doing the shooting²¹⁴

This statement is as clear as one can find distinguishing the requirement of personal knowledge from the requirements of the "excited utterances" hearsay exception.²¹⁵

The Advisory Committee Note to Minnesota Rule of Evidence 602 is in accord with the federal approach:

The rule requires that witnesses have firsthand knowledge. It does not specifically refer to the declarant of a hearsay statement that is admitted subject to an exception to the hearsay rule. With the exception of party admissions, which are admitted as a function of the adversary system (and are not hearsay under rule 801(d)(2) the Courts have generally required that the declarant of a hearsay statement have firsthand

214. *Brown*, 355 F.3d at 90 (citations omitted).

215. *Id.* Unfortunately, the court was not as clear earlier in the opinion, where it muddled the concepts of competency and personal knowledge: "To be competent as evidence, however, the declarant's factual assertion must rest on personal knowledge." *Id.* Courts often mingle archaic and contemporary language but do so at the expense of clarity.

knowledge, before the hearsay statement is admissible.

The rule should be read to continue this practice.²¹⁶

However, litigants and courts do not always pay as close attention to the personal knowledge requirement.

In *State v. Holliday*,²¹⁷ the prosecution's witness A.A. took the stand despite his many failures to recall the facts relating to a shooting in downtown Minneapolis. He testified that his frequent use of the drug ecstasy might have damaged his memory.²¹⁸ A.A. reportedly told the police in two different interviews that he was the real target of the defendant's bullets. The focus of the *Holliday* decision was whether A.A.'s testimony violated the Confrontation Clause. As noted above, A.A.'s testimony did not violate the Confrontation Clause because of the "Warm Breathing Body" rule. Moreover, the trial court overruled the defendant's hearsay objections and admitted A.A.'s out-of-court statements under the exception for "recorded recollections" and the "residual exception," exception presumably because they were contemporaneously and reliably recorded or adopted by a witness at trial.²¹⁹ However, that does not mean A.A.'s testimony should have been admissible.²²⁰

The Minnesota Supreme Court noted that the witness A.A. had no recollection of the conversations he had with the police, or

216. MINN. R. EVID. 602 advisory committee cmt. (citations omitted). The note's reference to party admissions, which "are admitted as a function of the adversary system," contains a questionable conclusion about the lack of a first-hand knowledge requirement. *Id.* This observation may make sense where the statement is a personal or adopted statement of a party-opponent because the party can take the stand and explain the lack of first-hand knowledge; however, it makes no sense in the context of vicarious admissions, where a party may be held responsible for the statements of an agent or a co-conspirator who may be as unreliable as any other hearsay declarant without first-hand knowledge. Because it may not be possible to call the agent or co-conspirator to the stand for cross-examination or explanation of the lack of personal knowledge of the events in the statement, personal knowledge should be required for vicarious admissions.

217. 745 N.W.2d 556 (Minn. 2008).

218. *Id.* at 561.

219. *Id.* See MINN. R. EVID. 803(5) (recorded recollections) and the residual hearsay exception of MINN. R. EVID. 803(24) (2006) (recodified Sept. 1, 2006, with MINN. R. EVID. 804(b)(5) (2006) to form MINN. R. EVID. 807).

220. The Minnesota Supreme Court did not discuss the issue of whether the trial court erred in applying these exceptions to the hearsay rule, holding that any such error was harmless. *Holliday*, 745 N.W.2d at 568.

later, with the prosecutors.²²¹ Although it is unclear just from the appellate report, it appears that there was no foundation as to the basis of A.A.'s prior statements that he was the defendant's real target, but there also was no objection on based on the lack of personal knowledge. Thus, we do not know whether A.A. made statements accusing the defendant of wanting to kill him based on first-hand knowledge (by hearing defendant threaten him at the scene of the shooting?) or on the basis of reports from others (hearsay). Because *Holliday* was a bench trial, the Minnesota Supreme Court might have found this evidentiary error to be harmless, as it did the alleged hearsay errors.²²² The court stressed, however, that, at least as to the alleged hearsay issues, its decision might have been different if this had been a jury trial.²²³ In the bench trial, the district court judge specifically stated that he found A.A. to be not credible and did not rely on his testimony in finding the defendant guilty.²²⁴ If this was a jury trial, then one hopes that the appellate court (and trial counsel) would have paid more attention to the need for a foundation of personal knowledge of the underlying facts.²²⁵

Sometimes an evidentiary objection, such as competency or lack of personal knowledge, can have as much bite as the Confrontation Clause. In *B.B. v. Commonwealth*,²²⁶ the Kentucky Supreme Court held that the trial court abused its discretion in finding a four-year-old child competent to testify in a sexual abuse prosecution, reversing the defendant's conviction, even though, as in *Holliday*, this was a bench trial.²²⁷ The court held that the trial

221. The Minnesota Court recognized that *Owens* was arguably distinguishable on this ground, because in that case, the hearsay declarant/victim recalled the prior conversation in which he identified his attacker to the F.B.I. agent. *Holliday*, 745 N.W.2d at 566.

222. *Id.* at 568.

223. *Id.*

224. *Id.*

225. There was also an issue of competency lurking in *Holliday*. On cross-examination, A.A. admitted "that his regular ecstasy use possibly affected his ability to remember." *Id.* at 561. However, the opinion does not state whether defendant's counsel inquired further into A.A.'s ability to testify at trial or objected on grounds of competency. Cf. MINN. STAT. § 595.02(f) (2008) ("[P]ersons of unsound mind and persons intoxicated at the time of their production for examination are not competent witnesses if they lack capacity to remember or to relate truthfully facts respecting which they are examined.").

226. 226 S.W.3d 47 (Ky. 2007).

227. *Id.* at 49.

court should not have allowed the child to testify and should not have admitted the child's out-of-court statements to a nurse and social worker, accusing the defendant of committing sex acts. Kentucky's rule of competency is far broader than either the Federal or Minnesota Rules of Evidence, including a requirement of personal knowledge:

- (b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:
 - (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
 - (2) Lacks the capacity to recollect facts;
 - (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
 - (4) Lacks the capacity to understand the obligation of a witness to tell the truth.²²⁸

The Kentucky Supreme Court had trouble framing its holding under this statute, debating whether the problem was the child's lack of ability to tell the truth or her inability to recollect facts.²²⁹ Yet all of its examples express frustration at the testimony's lack of evidentiary reliability.²³⁰ What makes this case unique, however, is that the court also held that the child's incompetency extended to her out-of-court statements, holding "that testimonial incompetence of a declarant should be an obstacle to the admission of the declarant's out-of-court statements if the reason for the incompetence is one which would affect the reliability of the hearsay."²³¹ Although the Kentucky court characterized the evidentiary problems here as ones of competency, one could also characterize the reliability problems here as resulting from a lack of first-hand knowledge. There was evidence that the child may have learned about sexual acts from pornography her mother possessed as well as allegations that the mother had accused other relatives of sexual abuse.²³² This does not appear to be a case where the appellate court did not believe the child; rather, the court simply did not see sufficient foundation from any witness (in-court or out-of-court) that the evidence was based on first-hand experience

228. *Id.* (quoting Ky. R. EVID. 601).

229. *Id.* at 50–51.

230. *Id.* at 49–50.

231. *Id.* at 51 (citing and adopting the view of ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK 675 n. 53 (4th ed. 2003)).

232. *Id.* at 48.

rather than on other sources.

How might *United States v. Owens*,²³³ have been decided if the requirement of personal knowledge had been considered more thoroughly? Although the focus of the Supreme Court decision was on the application of the prior identification exemption to the hearsay rule and the Confrontation Clause, the defense also raised the personal knowledge objection in a motion *in limine* before trial.²³⁴ Based on the government's offer of proof, the trial court ruled that Foster, the in-court witness (and hearsay declarant), had personal knowledge of the identity of his attacker.²³⁵ However, the testimony at trial did not match the prosecution's offer of proof. In trial, Foster testified that he never saw his attacker:

Foster testified that he was walking down an aisle "when I felt an impact on my head . . . I looked down and saw blood on the floor and I-Now, I don't remember seeing at this time-I don't remember seeing the individual." Foster then said that "[t]he next thing I remember after receiving the blow to the head is many days later in the hospital." Finally, Foster stated that he could not recall "the person or persons" that struck him on the head. None of this testimony suggests that Foster saw his assailant. Indeed, it tends to suggest that he did not see his attacker and thus had no personal knowledge of the identity of his assailant.²³⁶

The appellate court noted that although the defense had made a continuing objection to Foster's testimony on personal knowledge grounds, the trial court judge never revised his ruling.²³⁷ The appellate court decided, in light of its ultimate rulings on hearsay and constitutional grounds, not to reach the issue of the declarant's lack of personal knowledge regarding the attack and his attacker.²³⁸

The *Owens* facts are helpful in illuminating another source of confusion—the difference between the lack of personal knowledge of a hearsay declarant and the personal knowledge of an in-court witness who relates an out-of-court statement. Foster (the declarant

233. 789 F.2d 750 (9th Cir. 1986), *rev'd*, 484 U.S. 554 (1988).

234. *Id.* at 754.

235. *Id.* at 755 & n.4.

236. *Id.* at 755.

237. *Id.* at 755 n.4.

238. *Id.*

and in-court witness) was attacked on April 12, 1982.²³⁹ At trial, Foster testified that did not recall seeing or talking to the F.B.I. agent on his first visit to Foster's hospital room on April 19, but Foster clearly recalled telling the agent about the attack on his second visit to the hospital, a few weeks later, on May 5.²⁴⁰ The appellate court stressed that Foster had personal knowledge of what he told the agent in the hospital on May 5 (that Owens attacked him).²⁴¹ Moreover, the agent also had personal knowledge of what Foster told him on that date (that Owens was the attacker).²⁴² However, neither Foster nor the F.B.I. agent had personal knowledge that Owens attacked Foster.²⁴³ Because the Ninth Circuit Court of Appeals, and later, the Supreme Court, were so focused on applying the nuances of the hearsay rule and the intricacies of the Confrontation Clause analysis, they glossed over the lynchpin of evidentiary reliability.²⁴⁴

One of the reasons a court may treat the personal knowledge requirement so casually is that the evidentiary rule requires very minimal proof of personal knowledge.²⁴⁵ For example, in *Owens*, the government argued that Foster's wounds were all in the front of his body, thus suggesting that Foster must have seen his attacker. The appellate court agreed that:

[T]he location of the injuries provides support for the theory that Foster saw his attacker. On the other hand, it is possible that Foster was looking down or away and was taken by surprise when he was hit on the head; it is also possible that his assailant wore a mask or other disguise. Thus, the location of the injuries is not necessarily dispositive.²⁴⁶

The appellate court used an unfortunate turn of phrase here, for the sufficiency test does not require the proof of personal knowledge to be "dispositive." Such a showing can be made with circumstantial evidence.²⁴⁷ Under Rule 602, the judge serves only a

239. 484 U.S. at 556.

240. *Id.*

241. 789 F.2d at 754.

242. 484 U.S. at 556.

243. *See id.*

244. The requirement that a witness, even a hearsay declarant, must have personal knowledge of the facts about which he or she testifies.

245. *See* FED. R. EVID. 602; MINN. R. EVID. 602 (requiring that evidence be "sufficient to support a finding.").

246. *Id.*

247. *Miller v. Keating*, 754 F.2d 507, 511 (3d Cir. 1985) ("Direct proof of

screening function of deciding only whether a reasonable juror could decide that the witness/declarant had personal knowledge of the identity of his attacker.²⁴⁸ Nonetheless, the appellate court was right to stress that in a criminal case, where the central issue was the identity of the attacker, the judge, in performing the screening function under Rule 602, must ensure that a jury will base its decision on more than speculation or imagination.²⁴⁹ It certainly would not have been an abuse of discretion for the trial court to exclude Foster's testimony (as well as the F.B.I. agent's corroboration of Foster's hospital room identification) on the grounds that there was an insufficient showing that they knew the identity of the attacker based on first-hand knowledge.

The same requirement of first-hand knowledge applies to child witnesses²⁵⁰ and all other witnesses whether they testify in person or as a hearsay declarant.²⁵¹ When a witness/declarant provides testimony in a criminal case about the identity of a perpetrator, courts should be especially careful about screening the source and circumstances of the witness/declarant's knowledge of the perpetrator. In *State v. Ferguson*,²⁵² the Minnesota Supreme Court held that the trial court erred when it concluded that a hearsay declarant's identification of the shooter was admissible because it was the declarant's "conclusion based on what happened earlier

perception, or proof that forecloses all speculation, is not required. On the other hand, circumstantial evidence of the declarant's personal perception must not be so scanty as to forfeit the 'guarantees of trustworthiness' that form the hallmark of all exceptions to the hearsay rule.").

248. MUELLER & KIRKPATRICK, *supra* note 145. See also FED. R. EVID. 602; MINN. R. EVID. 602 (both requiring "evidence sufficient to support a finding").

249. Moreover, the appellate court was clearly concerned about the impact of Foster's head injuries and potential suggestive comments and questions from Foster's many visitors—none of whom Foster could recall (other than F.B.I. Agent Mansfield):

Foster may have named Owens as a result of statements made to him during his hospital stay by one or more of his frequent visitors. Certainly the subject of the assault was one likely to arise when Foster and his friends or colleagues talked, and reports regarding the progress of the investigation may well have been conveyed to him. Unfortunately, as we have noted above, at the time of trial Foster had no recollection of any visits by persons other than Mansfield or the conversations that occurred during those visits.

United States v. Owens, 789 F.2d 750, 754 (9th Cir. 1986), *rev'd*, 484 U.S. 554 (1988).

250. See *State v. Richardson*, 670 N.W.2d 267, 282–83 (Minn. 2003) (applying personal knowledge requirement to hearsay statements from child declarants).

251. FED. R. EVID. 602.

252. 581 N.W.2d 824 (Minn. 1998).

and it is his opinion which is permissible in this situation.”²⁵³ The court noted that the statement was offered under the dying declaration exception and stated that trial courts should apply especially stringent admissibility rules regarding first-hand knowledge where the statement is offered to identify the perpetrator of a crime.²⁵⁴ Thus, the court concluded that where “the declarant’s identification is simply a result of reasoning from collateral facts, the statement should not be admitted.”²⁵⁵ Although the court held that the trial court’s error was harmless,²⁵⁶ it provides a good example of the need to enforce the evidentiary rule of personal knowledge for all witnesses.

2. *Get Serious About the Hearsay Rule and its Exceptions*

One reason it is crucial to determine the basis of a witness or declarant’s knowledge of the facts is that it may reveal another layer of hearsay. For example, in the *Owens* case, F.B.I. Agent Mansfield, who testified at trial did have personal knowledge, but his personal knowledge consisted only of a hearsay statement (Foster told him that Owens was the attacker).²⁵⁷ While that made Mansfield an acceptable in-court witness as to Foster’s prior identification, it could not satisfy the requirement that Foster have first-hand knowledge of who attacked him. Getting serious about the personal knowledge requirement is the first step to getting serious about the rest of the evidentiary rules, including the hearsay rule and its exceptions in criminal cases. Trial courts and defense attorneys must determine whether the witness has first-hand knowledge or is the witness simply testifying about hearsay, or perhaps even double or triple hearsay.

In narrowing the application of the Confrontation Clause to testimonial statements in *Crawford*, Justice Scalia stated that the States retained flexibility in developing their hearsay rules to exclude nontestimonial statements.²⁵⁸ But this can only happen if we start to honestly and critically examine the rationales for many of the most commonly used hearsay exceptions, such as excited utterances, dying declarations, and statements made for purpose of

253. *Id.* at 832.

254. *Id.*

255. *Id.* at 833.

256. *Id.*

257. *Owens*, 789 F.2d at 752.

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

medical diagnosis or treatment. These exceptions share a common reliability rationale, which allegedly provides an adequate substitute for cross-examination. The hearsay declarant is presumed to be reliable because he or she is not thinking about fabricating evidence. In the case of excited utterances and dying declarations, the declarant is presumed to be either not thinking at all (excited utterances) or to be thinking of the next stop in his or her spiritual journey (dying declarations). In the case of statements made for purpose of medical diagnosis or treatment, the declarant, who by definition has some medical or psychological illness or injury, is allegedly thinking only of getting better. Although it is always good for a cheap laugh, evidence professors grow weary of teaching generations of law students about the absurdity of these rationales.²⁵⁹ Moreover, even if these rationales were grounded in reality, they only address the danger of insincerity and not the dangers of memory, perception or communicative ambiguity that will go untested by cross-examination when a statement is admitted under a hearsay exception.

It is important to think about why certain hearsay exceptions exist and how they relate to each other. For example, in *State v. Holliday*, the trial court admitted the statements of a witness who did not remember making them (or the underlying facts contained in the statement) under the hearsay exception for recorded recollections and the residual exception.²⁶⁰ However, all of these statements were in fact, double-hearsay. Under Minnesota Rule of Evidence 805, multiple hearsay is not admissible unless each layer of hearsay is covered by a hearsay exception. This common evidentiary problem is not discussed in the opinion. The first layer of hearsay is A.A.'s statement to the law enforcement officials (first to the police officer and later, the prosecutors).²⁶¹ The second layer of hearsay is the out-of-court memorials that the law enforcement officers testified from (Sergeant Charlie Adams testified off his own report of his interview with A.A.; a paralegal from the prosecutor's office testified off of Adams' report and a memorandum in the prosecutor's file memorializing the interviews

259. See Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 651 n.10 (1992) (collecting scholarship that is critical of the "excited utterance" or "spontaneous exclamation" exception from 1928 onward).

260. 745 N.W.2d 556, 568–59 (Minn. 2008).

261. *Id.* at 560–61.

with A.A.).²⁶² To the degree that any hearsay exception applied to those documents, it covered only the documents themselves (assuming the proper foundation for the recorded recollection and residual exceptions were laid), but not A.A.'s original statements. No hearsay exception covers A.A.'s original statements to the law enforcement officers.²⁶³ Moreover, by allowing these law enforcement documents to be used against the defendant (even if they were only read into evidence), the trial court violated the spirit of the public records exception to the hearsay rule, Minnesota. Rule of Evidence 803(8)(B), which was more directly on point than the hearsay exceptions offered by the prosecution. The public records exception expressly excludes documents produced by law enforcement agencies to be used against a criminal defendant.²⁶⁴ Thus to allow the officer's police report and the prosecutor's memos to be offered as recorded recollection or under the residual exception was to allow an end-run around a key statutory limitation of the public records exception.²⁶⁵

This argument is not an attempt to embarrass or second-guess a very hard-working trial judge, who may not have been presented with these objections and arguments. Rather, it merely illustrates that at times, the evidence rules do provide sufficient grounds for excluding unreliable evidence, even though one's first instinct may be to gravitate toward the Confrontation Clause objection. Many of the issues of reliability raised by the testimony of a child or other difficult witnesses could be handled not only under the hearsay rule and its exceptions, but also under the basic rules of relevancy (401 and 403). Evidence of questionable reliability has little or no probative value. Evidence with no probative value fails the relevancy test of Rule 401. If evidence has minimal probative value and passes Rule 401's standard, it is still worth spelling out the unreliability of the evidence. Evidence with little probative value is

262. *Id.*

263. *See* MINN. R. EVID. 805.

264. *See* MINN. R. EVID. 803(8) (excepting from the hearsay rule "matters observed pursuant to duty imposed by law as to which matters there was a duty to report, (but) excluding, however, in criminal cases and petty misdemeanors matters observed by police officers and other law enforcement personnel").

265. *Cf.* *United States v. Oates*, 560 F.2d 45, 70 (2d Cir. 1977) (holding that prosecution could not subvert limitation of Rule 803(8)(B) by using the more generic business records exception, 803(6), which did not restrict the use of business records in criminal cases).

far easier to exclude under Rule 403 than would otherwise be the case. If trial courts applied the hearsay rule and its exceptions to see if their promise of reliability is meaningful in a given context and used Rules 401 and 403 to exclude unreliable evidence, a trial court might never have to reach a Confrontation Clause issue.

I am not suggesting that trial judges rewrite the hearsay or other evidence rules. Rewriting the hearsay rule and its exceptions is, of course, beyond the pay grade of state and federal trial judges in their daily work, although they do have a fair amount of input in the rulemaking process, at least at the federal level.²⁶⁶ However, as is stated in nearly every appellate decision touching on evidence, trial court judges have great discretion in making evidentiary rulings. One cannot imagine or understate the difficulty of exercising that discretion when heinous crimes are alleged. But as the Kentucky Supreme Court observed in a child sexual abuse case:

[t]here may be a temptation among judges to let pity for small children who may have been victimized . . . overcome their duty to enforce the rules of evidence. . . . “The rules of evidence have evolved carefully and painstakingly over hundreds of years as the best system for arriving at the truth. They bring to the law its objectivity. Their purpose would be subverted if courts were permitted to disregard them at will . . . [O]beying these rules is the best way to produce evidence of a quality likely to produce a just result.”²⁶⁷

Even in the most difficult criminal cases, evidence law matters—and maybe when it matters most.

IV. CONCLUSION

My last scholarly article about the Confrontation Clause was published seventeen years ago.²⁶⁸ Since that time, I watched the pendulum swing from a Confrontation Clause that was little more than a constitutionalized hearsay rule to a Confrontation Clause stuck somewhere in the eighteenth century. The Court’s emphasis on the evidentiary (reliability) dimension of confrontation in *Roberts* made the Confrontation Clause superfluous when the statement fit a firmly rooted hearsay exception. That was wrong,

266. See generally, Eileen A. Scallen, *Analyzing the Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 843 (2002) (describing the federal rulemaking process and critiquing the political interests involved).

267. *Commonwealth v. B.B.*, 226 S.W.3d at 50 (citations omitted).

268. Scallen, *supra* note 40.

and I was one of many who said so at the time. However, the current Confrontation Clause jurisprudence is intellectually and ethically bankrupt. It is used to exclude a videotape of trained investigators questioning a vulnerable child witness whose memory will only likely deteriorate with time. But it allows the use of evidentiary statements made by hysterical, unavailable declarants whose ability to perceive, recall, and communicate key facts is questionable. Those key facts will not and cannot be meaningfully tested by cross-examination when those statements are made to a parent or other nongovernmental person outside the courtroom simply because those statements are “nontestimonial.”

Until now, I have refused to write about *Crawford* and its progeny, preferring to spend my time in the twenty-first century, doing many continuing legal education sessions with state trial judges, both in Minnesota and California. We work together to understand, apply, and teach *Crawford*. But other scholars have been highly critical of *Crawford*, arguing that its historical/originalist analysis is defective.²⁶⁹ Some wrote insightful articles attempting to create legal frameworks or interpretations that would clarify the *Crawford* Court’s concept of “testimonial” evidence.²⁷⁰ *Crawford* stimulated law student scholars to propose innovative approaches to the problems raised by child witnesses.²⁷¹ Some scholars have

269. Thomas Y. Davies, *Not the Framers’ Design: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 BROOK. J.L. & POL’Y 349 (2007); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005); Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond Brasier’s Irrelevance to (Perhaps) Relevant American Cases*, 15 J. L. & POL’Y 471 (2007); Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219 (2005).

270. Ellen Yang Lee, *Confronting the “Ongoing Emergency”: A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment*, 35 FLA. ST. U. L. REV. 729 (2008) (“providing an analytical approach to aid courts in defining an ‘ongoing emergency’ in the context of problematic relationships”); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them”*, 82 IND. L.J. 917 (2007) (advocating that, among other ideas, focus should be on the questioner’s purpose in determining whether a statement is “testimonial.”); Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006) (applying *Crawford*’s testimonial approach in the prosecution of domestic violence).

271. Anna Richey-Allen, Note, *Presuming Innocence: Expanding the Confrontation Clause Analysis to Protect Children and Defendants in Child Sexual Abuse Prosecutions*, 93 MINN. L. REV. 1090 (2009) (advocating the use of evidentiary presumptions to facilitate the admission or exclusion of evidence produced through child advocacy centers that investigate child abuse); Jonathan Scher, Note, *Out-of-Court Statements*

written excellent articles suggesting, among other things, legislative and other institutional law reform responses to *Crawford*.²⁷² Finally, as noted earlier, other scholars created or joined multidisciplinary teams to analyze, develop, test (empirically) and critique methods and approaches of handling child or other vulnerable witnesses.²⁷³

There are signs that the popularity of Justice Scalia's

by *Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAM. CT. REV. 167 (2009) (arguing that the use of forensic interview techniques produces statements that are nontestimonial in accordance with *Crawford* and its progeny).

272. See *Lininger*, *supra* note 4, at 783–818 (discussing legislative proposals to facilitate pretrial cross-examination in domestic violence cases, such as requiring non-waivable preliminary hearings, special hearings for cross-examination, and depositions, along with many other proposals to adapt the hearsay rules and procedures for prosecuting domestic violence cases more sensitive to the unique problems of proof posed by these cases); Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 CRIM. JUST. 12, 15–19 (Spring 2009) (discussing many recommendations for the treatment of victims of child abuse, including the appointment of guardian ad litem, so the child victim has more of a voice in court); Myrna S. Raeder, *Remember the Ladies and the Children Too* 71 BROOK. L. REV. 311, 315 (2005) (advocating “evidentiary creativity,” with increased attention to creating new hearsay exceptions when the declarant testifies using expert testimony and prior act evidence under Federal Rule of Evidence 404(b) and its state counterparts).

273. Thomas D. Lyon, *Speaking with Children: Advice from Investigative Interviewers*, in HANDBOOK FOR THE TREATMENT OF ABUSED AND NEGLECTED CHILDREN 65 (P. F. Talley, ed., 2005); Thomas D. Lyon et al., *Coaching, Truth Induction, and Young Maltreated Children's False Allegations and False Denials*, 79 CHILD DEV. 914 (2008); Thomas D. Lyon & Joyce S. Dorado, *Truth Induction in Young Maltreated Children: The Effects of Oath-Taking and Reassurance on True and False Disclosures*, 32 CHILD ABUSE & NEGLECT 738 (2008); Thomas D. Lyon et al., *Reducing Maltreated Children's Reluctance to Answer Hypothetical Oath-Taking Competency Questions*, 25 LAW & HUM. BEHAV. 81 (2001); Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1023 (2000); Livia L. Gilstrap, *Child Witnesses: Common Ground and Controversies in the Scientific Community*, 32 WM. MITCHELL L. REV. 59 (2005); Michael R. Keenan, *Child Witnesses: Implications of Contemporary Suggestibility Research in a Changing Legal Landscape*, 26 DEV. MENTAL HEALTH L. 100 (2007); Amy Russell, *Best Practices in Child Forensic Interviews: Interview Instructions and Truth-Lie Discussions*, 28 HAMLINE J. PUB. L. & POL'Y 99 (2006) (literature review); Paul Wagland & Kay Bussey, *Factors That Facilitate and Undermine Children's Beliefs About Truth Telling*, 29 LAW & HUM. BEHAV. 639 (2005); Michael E. Lamb et al., *Structured Forensic Interview Protocol Improves the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE & NEGLECT 1201 (2007), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=2180422#id398384>; Angela D. Evans et al., *Complex Questions Asked by Defense Lawyers But Not Prosecutors Predicts Convictions in Child Abuse Trials*, LAW & HUM. BEHAV. (forthcoming 2009) available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1057&context=thomaslyon>).

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originalism, as applied to the Confrontation Clause, is waning. This article, however, took a different path by demonstrating that there are many ways for prosecutors and defense attorneys to look beyond the constitutional conundrums as they try their cases and for trial judges to do what they do best by using their intelligence, diligence and judgment to reach a fair result in each particular case. Even if we are stuck with *Crawford*, we can cope.