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The Story of Crawford

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The Story of *Crawford*

Richard D. Friedman

I never open most of the unsolicited e-mail messages I get. But the subject line of one I received on the afternoon of March 10, 2003—“Confrontation Clause cert petition”—caught my eye. For some years I had been contending that the Supreme Court should dramatically change its conception of what the Sixth Amendment means when it guarantees an accused “the right to be confronted with the witnesses against him.” And so I opened the message immediately, and read:

Professor Friedman—

I graduated from Michigan Law School in 1997. Although I never had you as a professor, I became familiar with your Confrontation Clause scholarship in 1999, when I was clerking for Justice Stevens during the *Lilly v. Virginia*¹ case.

I now practice law in Seattle and teach as an adjunct professor at the Univ of Washington School of Law. As part of my practice, I occasionally handle cases presenting constitutional criminal procedure issues for the NACDL (National Association of Criminal Defense Lawyers). After I learned of the Washington Supreme Court’s interpretation of the Confrontation Clause in this case, I contacted the defendant’s attorney, and he gave the case to me.

I thought you might be interested in the cert petition that I filed in the case last Friday, so I’ve attached a copy. As you can see, I am urging the Court to adopt the testimonial approach you presented in *Lilly* in order to put an end to lower court opinions like this one. If you have any thoughts on this case or the issue in general, I would, of course, love to hear them. Otherwise, I will be sure to let you know if the Court takes the case. We hope to get an answer before the end of this Term.

Sincerely,
Jeff Fisher

¹ 527 U.S. 116 (1999).

Now, of course, I was intrigued, and so I opened the attachment and read the petition. Michael Crawford had been charged with assault. At his trial, the prosecution offered a statement made in the police station on the night of the incident by Crawford's wife Sylvia, who did not testify at trial. He objected, in part on the ground that this violated his right under the Confrontation Clause. The trial court nevertheless admitted the statement, and Crawford was convicted. The Washington Supreme Court ultimately affirmed the judgment. In rejecting the Confrontation Clause challenge, that court purported to apply the then-governing doctrine of *Ohio v. Roberts*,² under which the Clause posed no obstacle to admissibility if the statement was deemed sufficiently reliable. And the court concluded that the statement met this standard, in part because it "interlocked" with a statement Michael himself had made to the police the same night. In his petition, Jeff—as I will refer to Fisher, because we have become friends and close working colleagues—argued first that the "interlock" theory was in conflict with decisions of other jurisdictions and was an inappropriate application of *Roberts*. This part of the petition struck me as very, very good—well argued, precise, and professional. But it was the second part of the petition to which Jeff had referred in his message. There, he urged that the Court take the case so that it could throw out the whole *Roberts* doctrine. The Court should replace that doctrine, he said, by an approach under which an out-of-court statement that is testimonial in nature cannot be introduced against an accused if he has not had a chance to cross-examine the maker of the statement. As Jeff had indicated in his e-mail, this was the approach I had advocated in my scholarship, and the petition featured generous quotations from my work. Now, as you can imagine, I thought this was a *great* petition.

Indeed, I began salivating, at least figuratively. In response to *amicus* briefs in two prior cases, one of which was the *Lilly* case mentioned by Jeff, three justices had indicated their willingness to rethink the foundations of Confrontation Clause jurisprudence. But *amici*, friends of the Court, stand on the sidelines. Until a party to a case before the Court urged the Court to discard *Roberts*, we were probably going to be stuck with it for the foreseeable future. And here was a defendant, represented by an able lawyer, who was asking for just the change I had hoped, adoption of the testimonial approach. But three questions were immediately apparent:

- Would the Court take the case? Most petitions for *certiorari* are rejected.
- If the Court took the case, would it reach the broad issue, or would it simply continue to apply the *Roberts* framework? The Court

² 448 U.S. 56 (1980).

usually tries to avoid broad questions if it can decide a case on narrow grounds, and there was no doubt the Court could reverse Michael Crawford's conviction without needing to consider whether it should abandon *Roberts*.

- If the Court did reach the broad issue, would it actually adopt the testimonial approach, or would it stick with *Roberts*? The Court is generally hesitant to make dramatic changes in doctrine, and there was no doubt that rejecting *Roberts* would be dramatic. And, as in Crawford's case, the Court always *could* reach a sensible result while staying within the *Roberts* framework (The Court could reach just about *any* result within that framework, and that was part of the problem.)

All three questions would be answered in the affirmative over the next year. And so the story of *Crawford* is much more than the story of Mike and Sylvia Crawford and the knife fight with another man that landed Mike in prison. It is also the story of how the accused's right to be confronted with witnesses developed over the centuries and then atrophied, and of how a young lawyer with talent, gumption, and guts was able to persuade the Supreme Court to restore the right to its proper place at the center of our system of criminal justice. From my point of view as a scholar, it is a story that is enjoyable to tell in part because it is so gratifying.

* * *

Let's do a little thought experiment. It is 1220, and the young King Henry III has given you a hard assignment. Until recently, the criminal justice system in England, like that of most Christian countries, has relied to a considerable extent on various means to determine the judgment of God. Principal among these were the *ordeals*. For example, an accused person might be asked to carry a red-hot iron rod a fixed distance in his hand. If in three days his wound was healing nicely, then this was taken as judgment that he was innocent; if it was festering, he was deemed guilty. Alternatively, the accused might be bound up and lowered into cold water. If he sank, he was deemed innocent and pulled out, wet but happy; if he floated, that was taken as a sign of guilt.

This wasn't a bad system, if your principal concern was reaching a judgment that was swift and easy to determine. The problem, of course, was that to accept these ordeals one would have to have a lot of faith that God was in fact revealing judgment in these strange ways. In 1215, at the great Fourth Lateran Council, the Catholic Church forbade its clergy to participate in administering the ordeals. This limitation has impaired the practice, which had already lost much support in England. So your job is to devise a new system that does not rely on the ordeals. What will you do?

You probably will realize pretty quickly that a rational system of adjudication must depend to a large extent on witnesses, who have information relevant to the case to transmit to the adjudicator. But how will they pass that information on—that is, how will they *testify*? Probably requiring them to take an oath is a good idea, so that they know the seriousness of the matter and they understand they are at risk of damnation³ if they testify falsely. Beyond that, various means are possible. You could follow the method used by the later Athenians, and have all the witnesses submit written testimony in a pot, which would be sealed up until the day of trial and then presented to the adjudicator. Or you could go along with a model being developed by most of the courts in Continental Europe, in which testimony is received and recorded in writing by an official out of the presence of the parties—for fear that otherwise the witnesses will be intimidated—but with the parties afforded an opportunity to pose questions in writing.

But you may be drawn to another model, the system used by the ancient Hebrews, by the earlier Athenians, and by the Romans: Witnesses give their testimony orally, in the presence of the parties, at an open trial. This system avoids any possibility that the witness's testimony has been transmitted incorrectly to the court. It gives the accused some assurance that the witnesses against him are not testifying as a result of coercion. It also may give the accused a chance to question the witness. And it puts a significant moral onus on the witness, telling her in effect: "If you're going to say that, look him in the eye."

Now of course this thought experiment does not reflect reality, in that nobody sat down and designed the common law system of criminal adjudication; rather, it evolved over centuries. But it is clear that by the middle of the sixteenth century the English courts were following the last of these models, the one requiring open, confrontational testimony, in which a witness gave testimony face to face with the accused. Indeed, repeatedly over the next few centuries, English commentators on the law proclaimed this method of giving testimony as the central glory of their criminal justice system. Repeatedly, too, Parliament passed statutes providing that in treason cases witnesses had to testify "face to face" with the accused.

This procedure was not uniformly followed. In some politically charged cases in the sixteenth and early seventeenth century, particularly treason cases, the Crown presented evidence that had been taken out of the presence of the petitioner. The case of Sir Walter Raleigh was the most notorious of these, but not the only one. Statutes passed under Queen Mary in the middle of the sixteenth century required justices of

³ Under the softer conception of later times, the risk would only be of a perjury prosecution.

the peace to take statements from witnesses to felonies, and soon it became established that a statement so taken could be admitted at trial if it had been taken under oath and the witness was unavailable to testify then. Finally, a set of courts, such as the Court of the Star Chamber, followed the Continental style of taking testimony rather than the English style.

By the middle to end of the seventeenth century, however, the right to be confronted with adverse witnesses was firmly established. Courts in treason cases not only ensured that the prosecution witnesses testified live at trial but solicitously gave the accused the opportunity to cross-examine. The practice permitted under the Marian statutes was not expanded beyond the scope of those statutes, felony cases; in misdemeanor cases, the notable case of *R v. Payne* ruled in 1696 that, even if a witness were unavailable at trial, his prior testimony could not be introduced against the accused if the defendant had not had an opportunity for cross-examination. And most of the courts following the Continental model, including the Star Chamber, did not survive the political upheavals of the era. Equity courts continued to take evidence in the Continental style, but they did not have criminal jurisdiction. If a witness was unavailable at trial in a common law court, depositions taken in equity could be admitted, but only if the adverse party had had an adequate opportunity to pose questions in writing.

The confrontation right crossed the Atlantic, and it took strong root in America. In England, until the nineteenth century, most criminal cases were privately prosecuted, and the accused usually was not represented by counsel. But in America, the right to counsel became established sooner, and this intensified the benefit of the confrontation right, because it made the ability to cross-examine witnesses more valuable. Moreover, cases prosecuted by the Crown under the Stamp Acts were assigned to the admiralty courts, which followed the Continental model, operating without a jury and taking testimony in writing out of the presence of the parties.⁴ This practice became one of the colonists' grievances leading to the Revolution.⁵ Most of the early state constitu-

⁴ This history is summarized in *Crawford*, 541 U.S. at 47-56.

⁵ The Stamp Act Congress complained that "by extending the jurisdiction of the courts of Admiralty beyond its ancient limits," the Act had "a manifest tendency to subvert the rights and liberties of the colonists," one of which was trial by jury. Resolutions of the Stamp Act Congress § 8th (Oct. 19, 1765), reprinted in *SOURCES OF OUR LIBERTIES* 270, 271 (R. Perry & J. Cooper eds. 1959). The Declaration of Independence made a similar complaint, asserting in its enumeration of grievances against King George III:

He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation: * * *

For depriving us, in many cases, of the benefits of trial by jury. . . .

tions included a guarantee that prosecution witnesses would testify live in the presence of the accused. Some used the time-honored “face to face” formula. Others used language very similar to that which was incorporated into the federal Constitution after its ratification, when the absence of an enumeration of rights was corrected by the first ten amendments, the Bill of Rights. The sixth amendment, ratified in 1791, provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

Note that in this account, the term hearsay has not played a role—just as it is not mentioned in the Confrontation Clause itself. Indeed, the rule against hearsay as we know it today was still inchoate at the time the Clause was adopted. The Clause was not a constitutional statement of the rule against hearsay, but rather a procedural rule about how prosecution testimony should be given.

Soon, though, the distinction became less apparent. Around the time of the adoption of the sixth amendment, and for several decades thereafter, the hearsay rule developed rapidly. The increasing role of criminal defense counsel seems to have been largely responsible for the change. Defense lawyers recognized the potential value of cross-examination whenever the probative value of adverse evidence depended in part on the capacities of an observer to perceive, remember, and describe an event or condition and on her inclination to communicate accurately. By the early years of the nineteenth century, then, something like the modern definition of hearsay—an out-of-court statement offered to prove the truth of a matter that it asserted—had emerged. And indeed, in 1838, the rule against hearsay reached its high-water mark, when the House of Lords held in effect, in the famous case of *Wright v. Doe d. Tatham*,⁶ that the rule applied not only to statements but to any out-of-court conduct offered to prove the truth of a proposition apparently

And what were “the benefits of trial by jury”? In its Address to the Inhabitants of the Province of Quebec, of October 26, 1774 (drafted, like the Stamp Act resolutions, by John Dickinson), the First Continental Congress explained that this right

provides that neither life, liberty, nor property can be taken from the possessor until twelve of his unexceptionable countrymen and peers of his vicinage, who, from that neighborhood, may reasonably be supposed to be acquainted with his character and the characters of the witnesses, upon a fair trial and full inquiry, face to face, in open court, before as many of the people as choose to attend, shall pass their sentence upon oath against him. . . .

<http://www.ushistory.org/declaration/related/decrees.htm>

Thus, though neither the Resolutions of the Stamp Act Congress nor the Declaration of Independence explicitly mentions the confrontation right, it appears that the right is included in their references to trial by jury—the English style of adjudication, in contrast with the Continental style used by the admiralty courts. The Sixth Amendment articulates the two rights separately, side by side.

⁶ 5 Cl. & F. 670, 7 E.R. 559, 47 Rev. Rep. 136 (H.L. 1838).

believed by the actor. Even without this extension, the rule described a vast category of evidence, including but reaching far beyond the relatively narrow category of testimonial statements that was the focus of the confrontation right. But the rule against hearsay was never absolute, and for nearly two centuries courts and rule-makers have developed an ever-expanding list of exceptions to it. These are designed to exempt from the rule hearsay that will be particularly helpful to the truth-determination process, because it appears highly probable that the statement in question is accurate and because there is no good substitute evidence for the statement.

With so much intellectual energy focused on the rule against hearsay, the independent role of the confrontation right—as a categorical prohibition of testimonial evidence offered against the accused without offering him an opportunity to be face-to-face with the witness and cross-examine her—became obscured. I believe many decision-makers still had a rough intuitive sense of where the right applied, and this sense almost unconsciously helped shape the rule against hearsay and helped prevent results from being altogether intolerable.⁷ And so we muddled through. Any result a court should have reached by speaking of the accused's right to confront witnesses it could still reach by speaking of the rule against hearsay—until 1965. In that year, the Supreme Court held that the confrontation right is a fundamental one that is applicable against the states via the fourteenth amendment to the Constitution.⁸ Now a federal court, whether on direct or collateral review, could hold that a state court conviction was invalid because it had violated the accused's confrontation right—but not because it violated the state's rule against hearsay. Therefore, it became crucial to understand the scope of the confrontation right.

The problem was that, with the confrontation right having been mixed together with the rule against hearsay for so long, the Supreme Court did not have a well developed and articulated understanding of what the right meant and where it applied. And so before long the Court started referring for guidance to the rule against hearsay—which meant that the confrontation right had very little force of its own. In *Ohio v. Roberts*, the Court tried to articulate a general framework, under which

⁷ For example, many (but not all) American jurisdictions in the late twentieth century would not allow a confession made to the authorities by one confederate to be introduced against another confederate. The reason usually given was that such a statement was unreliable, because it may have been made to curry favor with the authorities. Sometimes these statements are indeed highly unreliable—but sometimes not. The real reason to exclude such statements is that they amount to testimony against the second confederate; this, I believe, accounts for the simple, categorical rule against such statements that was adopted by the twelve judges in *Tong's Case*, Kel. J. 17, 84 Eng. Rep. 1061 (1662).

⁸ *Pointer v. Texas*, 380 U.S. 400 (1965).

any hearsay statement—not just testimonial statements—made by an out-of-court declarant posed a potential Confrontation Clause problem. On the one hand, the Court seemed to set up a general requirement that such hearsay could not be admitted if the declarant was available to be a witness at trial. On the other hand, the confrontation problem could be overcome by showing that the statement was reliable, and reliability could be demonstrated by showing that the statement fell “within a firmly rooted hearsay exception.” Alternatively, the Court suggested, the reliability test could be satisfied by “a showing of particularized guarantees of trustworthiness.”⁹

This framework was shaky from the start. The Court quickly drew back from the supposed unavailability requirement—which if taken seriously would have meant, for example, that a routine business record could not be introduced without showing that its makers were unavailable to testify at trial.¹⁰ The Court continued to profess adherence to the reliability requirement, but it was highly problematic. Why should the fact that an exception from the ordinary (that is, non-constitutional) rule against hearsay had become “firmly rooted” (whatever that meant) relieve a statement fitting within the exception (as construed by the Supreme Court¹¹) from the constitutional guarantee of confrontation? And what if a state interpreted a given exception in a way that was particularly generous to the prosecution? Moreover, the “individualized guarantees of trustworthiness” prong of the doctrine was highly manipulable. Regardless of whether a statement was made calmly or in excitement, soon after the events it described or after a period for reflection, to private persons or to police officers, lower courts tended to conclude that the statement was made in circumstances giving it sufficient reliability to warrant admission.

I became particularly interested in the confrontation right around 1990. I was working on a large project on the law of hearsay, and I became convinced that the confrontation right was the key to unlocking

⁹ 448 U.S. 56, 66 (1980).

¹⁰ See *United States v. Inadi*, 475 U.S. 387 (1986) (holding that a conspirator’s statement may be admitted against an accused even if the declarant is available to testify at trial but does not do so); *White v. Illinois*, 502 U.S. 346 (1992) (holding that spontaneous declarations are admissible against an accused notwithstanding availability of declarant).

¹¹ Monitoring by the Court was necessary, because otherwise a state court could interpret a particular exception with undue generosity towards the state. In both *Lee v. Illinois*, 476 U.S. 530 (1986), and *Lilly v. Virginia*, 527 U.S. 116 (1999), the state courts had admitted confessions made by co-defendants to police officers, and in each case the Court refused to accept for Confrontation Clause purposes the state’s characterization of the statement as a declaration against penal interest. In *Lilly*, a plurality explicitly stated that “accomplice’s statements that shift or spread the blame to a criminal defendant” fall outside a “firmly rooted” hearsay exception.

the hearsay puzzle. Because the confrontation right had become dependent on the law of hearsay, the rule against hearsay was more restrictive than it should be in general, and the confrontation right was less strong than it should be. It became apparent to me that, *Roberts* notwithstanding, it was not true that any hearsay statement posed a potential confrontation problem; rather, it was only those statements made with the anticipation that they would aid in the investigation or prosecution of crime. And *Roberts* erred by holding that even this type of statement did not violate the confrontation right if it was deemed sufficiently reliable; there should be a categorical rule of exclusion. But I lacked a theory under which this one type of statement should be considered the focus of the Confrontation Clause. During two extended periods in Oxford in the 1990s, though, I found myself drawn, against my original inclination, back into the remote history I have just summarized. I had the great fortune of being able to work with Mike Macnair, an extraordinarily knowledgeable English historian who understood the materials far better than I did. And the picture clicked into place: The Confrontation Clause does not simply describe a species of statement that is subject to a stringent rule of evidentiary exclusion. Rather, it is a fundamental procedural rule designed to ensure that *testimony* is given under proper conditions, in the presence of the accused. Statements that perform the function of testimony, by providing information for use in investigation or prosecution of crime, are necessarily within the ambit of the Clause, and as to these the Clause provides a categorical rule of exclusion—for otherwise, our system would countenance a method of giving testimony against an accused that did not require confrontation.

I was not the only scholar, nor the first (though I may have been the most persistent and obsessive), to argue that *Roberts* erred by diluting the confrontation right—on the one hand by giving it the breadth of hearsay law rather than grappling with the meaning of the phrase “witnesses against”, and on the other by allowing the right to be defeated upon a finding that the statement was reliable. Michael Graham, Akhil Amar, and Margaret Burger all articulated theories that resembled mine to some extent, though in each case there were significant differences as well. Moreover, the United States Government played a significant role. In *United States v. Inadi*, in a brief co-authored by a young Assistant Solicitor General, Samuel A. Alito, Jr., the Government argued that the Confrontation Clause, having been intended to prohibit trial by affidavit and comparable practices, “closely regulated the admission of hearsay, such as former testimony, that is broadly analogous to an affidavit or deposition,”¹² but did not seriously limit the admission of other hearsay. The Court ruled in favor of the Government—holding that a statement fitting within the hearsay exemption for declarations of

¹² Brief for the United States 25, *United States v. Inadi*, No. 84–1580.

a conspirator could be admitted against an accused even absent a showing that the declarant was unavailable—without reaching the essence of the Government’s argument. In 1992, in *White v. Illinois*, the Solicitor General’s office tried again, submitting an *amicus* brief that argued that the Confrontation Clause should apply only to “those individuals who actually provide in-court testimony or the functional equivalent—i.e., affidavits, depositions, prior testimony, or other statements (such as confessions) that are made with a view to legal proceedings.”¹³ The Court, in an opinion by Chief Justice William Rehnquist, said this argument came “too late in the day”; “[s]uch a narrow reading of the Confrontation Clause,” the Court said, “would virtually eliminate its role in restricting the admission of hearsay testimony,” and it was barred by the Court’s precedents.¹⁴ But Justice Clarence Thomas, joined by Justice Antonin Scalia, wrote a concurring opinion, saying the Court had rejected the Solicitor General’s approach too hastily. While not endorsing that approach in its entirety, Thomas suggested that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”¹⁵ (But why, one might ask, is a confession necessarily “formalized”?)

In May 1998, in part by virtue of another stroke of luck, I was seated next to Justice Stephen Breyer at a dinner in Oxford. He spoke favorably about the value of *amicus* briefs from academics. I thought of that conversation several months later when the Supreme Court granted *certiorari* in *Lilly v. Virginia*, a case in which the state courts had held the Confrontation Clause did not preclude admitting a statement made to the police accusing the declarant’s brother of being the trigger man in a murder. Margaret Burger and I co-authored an *amicus* brief for the American Civil Liberties Union, urging the Court to discard *Roberts* and adopt a doctrine under which the Confrontation Clause applied categorically to out-of-court statements by those deemed to be witnesses against the accused (however that term might be understood). By a 5–4 vote, the Court held that the challenged statement should not have been admitted against Lilly. (The minority agreed that the conviction should be reversed, but would have left it to the Virginia courts to decide whether there were particularized guarantees of trustworthiness.) What I found most exciting was that Justice Breyer, a member of the majority, wrote a concurrence saying quite explicitly that he found the arguments in our

¹³ Brief for the United States as Amicus Curiae Supporting Respondent, *White v. Illinois*, 502 U.S. 346 (1992) (No. 90–6113), microformed on U.S. Supreme Court Records and Briefs 1991/92 FO, Card 4 of 7 (CIS).

¹⁴ 502 U.S. at 352–53.

¹⁵ 502 U.S. at 365.

brief appealing. There was no need to re-examine the link between hearsay law and the Confrontation Clause in that case, he concluded, but the question was “open for another day.”

And so that made three justices who had expressed willingness to consider a revamp of Confrontation Clause doctrine. But, especially given that *Roberts* was so manipulable that it almost always would allow the Court to reach whatever result it wanted, a change was unlikely to occur at the urging of *amici*. Transformation would not occur unless a defendant made a point of asking for it.

* * *

Michael and Sylvia Crawford, both 21, were married and had a small child. But life was hardly idyllic. They had recently re-united after a period of separation, and neither of them was employed. They spent the afternoon of Thursday, August 5, 1999 as they spent much of their time, drinking with friends in downtown Olympia, Washington. At some point, they decided that they needed to settle an old score with an acquaintance whom they knew as Kenny Lee. And so the two set off to find him. They may have searched first at several taverns that Kenny frequented, but in any event they soon wound up at Kenny’s apartment; Sylvia, who had been there before, showed Mike the way.

When they saw Kenny, Mike immediately mentioned several hundred dollars—drug money, perhaps?¹⁶—that he said Kenny owed him. Whether this was just a rather clumsy conversation-opener, or whether, contrary to the accounts that Mike and Sylvia later gave police, this was the only grudge that Mike had against Kenny, is unclear. In any event, the encounter almost immediately became violent. Mike pulled a knife from a sheath on his belt and stabbed Kenny in the midsection, injuring him seriously. Mike and Sylvia quickly left the scene, but Kenny managed to make a 911 call and gave the operator enough identifying information about them that they were promptly picked up by police.

Sylvia first told a police officer informally that she, Mike, and Kenny had come to Kenny’s apartment together, that Mike had gone to the store to buy liquor, and that while he was gone, Kenny had sexually assaulted her, pinning her to the ground and trying to remove her clothes; the knife fight began when Mike came back to see Kenny on top of Sylvia. She repeated this account at around 7 p.m. in a more formal interview at the police station. This interview was audiotaped, and Sylvia was given the *Miranda* warnings and asked a series of identifying questions before the interview began. Soon after, Mike—whom the police

¹⁶ One of the interviews with Mike contains this passage:

Q . . . [H]e apparently owed you some money for perhaps some marijuana or drugs
A I (won’t?) (inaudible) specify.

had separated from Sylvia—was subjected to a similar interview, and he gave an account that was similar in many respects but not in all: According to Mike, Sylvia had mentioned a prior sexual assault committed by Kenny while Sylvia was living apart from Mike, and so the incident on the evening of August 5 was the second of its type.

Suspicious because of the inconsistencies, and also perhaps dubious that Mike would leave his wife alone with a man who had allegedly assaulted her, the police pressed Sylvia and Mike further. They each agreed to give another statement, again audiotaped and under considerable formality. Now their stories were more congruent with each other, and put them in a far more aggressive light: The sexual assault had occurred several weeks earlier, during the period of estrangement, and Mike had been nowhere near the scene. But mention of it during the afternoon's bout of drinking had prompted Mike to say that Kenny "deserve[d] a ass-whoopin'." And so they set off to find Kenny. He came to the door of his apartment, and there the fight occurred. On one crucial issue, however, Mike and Sylvia's accounts were subtly different. Mike indicated that before the stabbing he thought Kenny had reached inside his pocket for something, though he admitted he could not be sure. Sylvia seemed not to believe that Kenny had reached for anything before Mike stabbed him. But Sylvia acknowledged some difficulty in giving a detailed rendition of the incident: "I shut my eyes and I didn't really watch. I was like in shock . . ."

* * *

In preparing for Mike's trial, before Judge Richard Strophy of Thurston County Superior Court, the prosecution subpoenaed Sylvia. But Sylvia did not want to testify at trial. She could have invoked her Fifth Amendment right not to do so, because the state was considering filing charges against her (and eventually did). She never did formally invoke that right. But after the jury was selected, on October 18, 1999, Mike's trial lawyer, Hugh McGavick, reported to the court that she was invoking the spousal privilege. Washington law provides that one spouse may not testify against another in a criminal case unless the defendant spouse consents, so a more accurate statement—putting aside the unexercised Fifth Amendment—would have been that Mike was declining to waive his right to prevent Sylvia from testifying. Nobody made an issue of the difference at the trial level, and the parties agreed that Sylvia was unavailable to be a witness at trial. McGavick contended that introducing Sylvia's statements against Mike would violate the spousal privilege and—relying heavily on *Lilly*, which had been decided four months earlier—the Confrontation Clause. After reading *Lilly* and the statements overnight, the judge ruled the statements admissible. He spent little time explaining his view that the privilege did not apply to out-of-court statements made to third parties. But then at greater length, he

ruled that Sylvia's statements were sufficiently reliable to be admitted. In part, he relied on the similarities of her statements to Mike's own. Were he to make the assessment without taking Mike's statements into account, he indicated, the case would be a much closer call, and he suggested that to avoid creating an issue for appeal the prosecution should consider not using Sylvia's statements in its case-in-chief.

The prosecution did not heed this advice. It introduced Sylvia's statement at trial. The jury found Michael guilty, and he was sentenced to fourteen years in prison.

Through a new attorney, Thomas E. Doyle, Crawford took the case to the Washington Court of Appeals. Steve Sherman of the Thurston County Prosecutor's Office—who eventually would argue the case in the United States Supreme Court—argued for the state. He contended that Mike had waived his confrontation right by not allowing Sylvia to testify. The court rejected the contention—Mike had a statutory right to prevent Sylvia from testifying against him at trial, and he should not have to choose between that right and the right not to be convicted in violation of the Confrontation Clause. On the merits, the court held that the admissibility of Sylvia's first statement rested on whether the second statement was admissible, because the first was admitted not for its truth but to show evasive conduct by the couple. As for the second statement, two members of the three-judge panel held that parts were too unreliable to satisfy either the Confrontation Clause or Washington's hearsay exception for statements against penal interest. In reaching this conclusion, the court attempted to apply a nine-factor test for reliability that the Washington Supreme Court had developed. Concluding also that the error was not harmless, the court reversed Mike's conviction on July 30, 2001. One judge dissented, concluding that the majority had erred, according to another decision of the state supreme court, by assessing credibility without taking into account the fact that Sylvia's statement "interlocked" with Mike's own.

Not surprisingly, the State sought review of the decision in the state supreme court, and on March 5, 2002, that court decided to take the case. On September 26, the nine-justice court issued its decision, unanimously reversing the court of appeals and reinstating Crawford's conviction. The state supreme court agreed with Crawford, and with the court of appeals, that he had not waived the confrontation right. On the merits, though, the supreme court concluded that Sylvia's second statement was sufficiently reliable to overcome the confrontation right. In this case, the court did not believe it needed to work through all nine factors of its elaborate reliability test. Rather, it grounded its decision on the facts that Sylvia's statement was self-inculpatory and that it overlapped, or interlocked, substantially with Mike's own statement.

Enter Jeff Fisher. A young associate with a large Seattle firm, Jeff did *pro bono* work for the National Association of Criminal Defense Lawyers. He sat on a committee that looked for potentially important cases in which to write *amicus* briefs. Jeff spotted the *Crawford* case and called Doyle, Crawford's lawyer, to offer the committee's help if Doyle prepared a petition for *certiorari*. But he found that Doyle was uninterested in preparing a *cert* petition; it would be an enormous amount of work offering a flimsy chance of success, and (given that Doyle had already worked through the state's \$2000 cap on fees for appointed appellate counsel) no chance of financial gain. With the support and resource of his firm behind him, Jeff offered to take the case over. Doyle readily agreed. Jeff then wrote the petition that he sent me by e-mail in March 2003.

When you write a *cert* petition, you always want to find a conflict among the lower courts, for if there is none the Supreme Court is likely to conclude that there is no need for it to intervene. And Jeff had a pretty good conflict. The Supreme Court had held that in applying the "particularized guarantees of trustworthiness" test under *Roberts* a court could not rely on evidence corroborating the challenged statement but instead had to limit itself to circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief."¹⁷ In holding that Sylvia's statement was reliable, the state supreme court, like the trial court, relied heavily on the interlock with Mike's own statement. That seemed to fly in the face of the no-corroboration rule, and several other courts had so held. It was reasonable to suppose, therefore, that the Supreme Court might want to take the case to clean up application of *Roberts*.

But Jeff did not rest there. As I mentioned at the beginning of this story, his petition included a second part that asked the Court to discard the entire *Roberts* doctrine and replace it with a "testimonial" approach. So we were not only rooting for the Court to grant *certiorari* but for it to do so without limiting the grant to the first question presented, the narrow and highly technical matter of how *Roberts* should be applied. The state did not bother to file a response to the *cert* petition, but the Court called for one. That was a good sign; it meant that at least someone was paying attention, and as Jeff explained to me the Court would not grant the petition without calling for a response. On June 9, we got our answer. The Court granted the petition—a simple grant, without limitation to one question or the other. We were in business: The testimonial approach would now be presented to the Supreme Court by a party.

¹⁷ *Idaho v. Wright*, 497 U.S. 805, 819 (1990).

As Jeff prepared his brief on the merits, he told me he was thinking of flipping the issues, of arguing first the broad question of whether the testimonial approach should replace *Roberts* and just addressing the narrow, technical issue towards the end of the brief. I encouraged him to do so. I thought it made sense, and that it would not diminish Jeff's chance of achieving a reversal for his client. Of course, I was self-interested: I was eager for the testimonial approach to be considered by the Court, and I regarded the "interlock" issue as just one of many odd questions that were bound to arise under the utterly unsatisfactory *Roberts* framework. Jeff later told me that I was the *only* person who advised him to switch the issues. Some of the wiser heads whom he consulted thought that doing so—putting greatest weight on a request that the Court should completely discard a long-established doctrine, replacing it with a broad categorical rule, when there was a narrow and straightforward way of ensuring reversal under the prevailing framework—was foolhardy. And this seemed especially so given that on so many issues the swing vote was Justice Sandra Day O'Connor, who had an aversion to broad rules. In a brave move—especially for a young rookie preparing his first Supreme Court case—Jeff made the switch. The first and longest part of his brief, which contained a powerful showing of how lower courts had manipulated the *Roberts* standard, asked for adoption of the testimonial approach, and only towards the end of the brief did Jeff address the interlock issue.

Meanwhile, I prepared an *amicus* brief, arguing from the academic perspective why the testimonial approach should be adopted. After completing a draft, I asked law professors around the country if they were interested in signing on, and eight of them did; David Moran of the Wayne State faculty, a brilliant former student of mine, made particularly valuable contributions, and I designated him as "of counsel" on the brief. As the argument date approached, Jeff asked me to be "second chair"—that is, to sit next to him at counsel table during the argument. I accepted with delight; on November 10, 2003, I would get to sit up front and almost at the center as the merits of the testimonial approach were discussed in the highest court of the land.

* * *

The Supreme Court justices do not file into the courtroom in a single line. They emerge almost all at once from curtains behind their chairs, and they take their seats immediately. Jeff's nerves were eased a little by a reassuring smile from his old boss, Justice Stevens, but when he rose to argue *Crawford*, he was hit promptly with pointed questions. Notably, although Jeff mentioned the interlock question in passing at the outset, the justices seemed uninterested in it; instead, they, as well as Jeff, focused entirely on the testimonial approach. Justice Anthony Kennedy posed a clever hypothetical that we had not anticipated. There

is a serious auto accident, and insurance investigators take statements from witnesses; if a criminal prosecution later emerges from the accident, are those statements testimonial? Jeff hesitated, saying that such a statement was “likely not to be testimonial,” but that if the statement was made to a police officer that would “tip the balance.” I wasn’t happy with the response. It seemed to me that even though the insurance investigator is a private individual the statement should probably be deemed testimonial because it was made in clear anticipation of use in litigation.¹⁸ Chief Justice Rehnquist jumped on Jeff’s answer; if he was balancing, how much certainty would be gained by adopting a testimonial approach? Justice O’Connor joined in. Wasn’t the *Roberts* framework working well enough? Why change? (“[W]hy buy a pig in a poke?” she asked later in the argument.) Jeff argued effectively that actually *Roberts* was leading to very bad results in the lower courts.

Justice Breyer soon broke in to ask Jeff to clarify his standard of “testimonial”. Echoing the Government’s brief in *White*, Jeff had spoken of the “functional equivalent” of in-court testimony. But that, as Justice Breyer pointed out, was a little vague. Did Jeff agree with the standard articulated in the law professors’ brief, whether “a reasonable person in the position of declarant [would] anticipate that the statement would likely be used for evidentiary purposes”? I held my breath. The “functional equivalent” was his starting point, said Jeff, but he thought the “reasonable expectation” standard was “a good test.” Trying to make the testimonial approach appear unthreatening, though, he worked hard, perhaps too hard, to emphasize its narrowness. In “99 cases out of 100” a testimonial statement would be made to the authorities; there might be “a rare, rare case” in which a statement made to a private audience could be considered testimonial. Not so rare, I was thinking—but that was a matter that could be cleared up in later cases.

Why should the decisive consideration be the anticipation of the declarant, Justice Scalia wanted to know; what if the statement were made to an undercover police officer? Jeff—not wanting to go further than necessary in any direction for fear of impairing the formation of a majority—suggested that this posed a difficult case. Uh-oh, I thought. The Court is never going to accept the testimonial approach if doing so is going to put in doubt the admissibility of conspirators’ statements to undercover officers or informants. Justice John Paul Stevens asked whether it was the intent of the speaker or the intent of the person taking the statement that mattered. Jeff noted correctly that this was a question that the Court did not have to reach, but Justice Scalia interjected: “I really object to saying, . . . ‘We’ll worry about it later.’ I

¹⁸ I further elaborate on this point in *Grappling with the Meaning of “Testimonial”*, 71 *BROOK. L. REV.* 241, 249 n.26 (2005).

mean, if there are real problems that come up later, I'm not going to buy your . . . retreat from *Roberts*."

Well, that sounded ominous—though I thought Scalia was just playing law professor with Jeff. Jeff tried to suggest that a statement should be testimonial if the speaker anticipated use in a criminal case and that in some circumstances it would be testimonial if the recipient did. But that did not relieve the problem. Justice Breyer pointed out that under prevailing law an informant's testimony of a statement made by a conspirator would be admissible, and that he would be "a little nervous" about a test that seemed to throw that result into doubt. But there was no need to do that. The law professors, he said, seemed to be thinking that "this isn't difficult." Referring to the standard we suggested in our brief, which referred to the anticipation of a reasonable person in the position of the declarant, he said, "I think they wrote these words in this brief thinking about [the case of a conspirator's statements to an undercover police officer or informant]." As second chair, I was not permitted to say a word audible to the bench. But while Justice Breyer was speaking to Jeff I was well within his line of vision, and he may have noticed that I was nodding my head, subtly perhaps but as vigorously as I could within the bounds of decorum.

And to my relief Jeff soon agreed with Breyer that "the law professors have it right." I am not sure that Justice Scalia's question, as to why the proper perspective was that of the witness, had been satisfactorily answered, but at least it was clear that Jeff was contending that the witness's perspective was the proper one, and that conspirator statements to undercover officers or informants were not testimonial. And when Justice Breyer referred to "the new rule," it seemed to me that he was treating it almost as a foregone conclusion that the Court would adopt the testimonial approach.

The Court continued to pepper Jeff with questions as to the consequences of that approach. Jeff did a deft job of reassuring the Court that adopting the approach would leave untouched most of the results of the Court's own decisions. At one point, he seemed to say flatly that excited utterances are not testimonial—a statement having no relation to the case at hand that he would later regard as overly broad, a practicing lawyer's counterpart to judicial dictum.

There was just one other set of questions that worried us: Justice Ruth Bader Ginsburg pointed out that the reason that Sylvia was unavailable for cross-examination at trial was that Mike refused to waive his spousal privilege to prevent her from being a live witness. We had been concerned that the Court might decline to reach the merits, rejecting the view of the Washington courts that Mike could not be forced to elect between his confrontation right and his spousal privilege.

But this, it turned out, was not Justice Ruth Bader Ginsburg's point at all. If Mike had a privilege to prevent Sylvia from testifying at trial, she wondered, what sense did it make not to apply the privilege to the out-of-court statement that was a substitute for her in-court testimony? It was a good question, but it would have been better addressed to the Washington Supreme Court, for it concerned only a matter of state law and had nothing to do with the issue before the United States Supreme Court.

Michael R. Dreeben, a Deputy Solicitor General and an extremely skilled and experienced Supreme Court advocate, then spoke for fifteen minutes. *Amici* generally do not make oral arguments in the Supreme Court, but there is one big exception—the United States. When Michael had asked for seven and one half minutes from each side, the parties had little choice but to agree, because if they had resisted the Court surely would have granted the time anyway. Michael argued that the reach of the Confrontation Clause should be limited to testimonial statements, but that within that ambit the Clause should not be absolute; if the declarant was unavailable, the statement should be admitted if it was sufficiently reliable. I had characterized this position as taking the bitter without the sweet. To my relief, the Court seemed not to be buying it. When Michael pointed to other areas in which the Sixth Amendment had not been interpreted absolutely, Justice Scalia gave the right response—those decisions, he said, were matters of the scope of the particular right, not decisions in which the Court allowed other considerations to overcome exercise of the right within its proper scope. Michael mentioned in passing that adopting the testimonial approach would require development of a jurisprudence of what “testimonial” means. Justice Scalia asked: “Do you think that developing a jurisprudence to decide what constitutes testimonial statements is any more difficult than developing a jurisprudence to determine what are sufficient indicia of reliability to overcome the text of the Confrontation Clause?” I liked that. Justice Scalia seemed to be signaling that he would reject any theory that allowed a confrontation claim to be overcome by a determination of reliability. As Michael sat down, it seemed to me that he had made very little headway.

Steve Sherman, arguing for the state, had an even more difficult time. Justice Breyer joined Justice Scalia in expressing skepticism about the constitutional validity of a reliability test. And even if *Roberts* applied, the justices suggested, it did not appear Sylvia's statement should have been admitted. Justice Ginsburg expressed puzzlement as to how Sylvia's statement could be deemed reliable given that Sylvia said she had her eyes closed part of the time—and suggested that the fact that the Washington Supreme Court nevertheless deemed the statement reliable reflected the arbitrariness of the reliability test. And the justices

also doubted that her statement and Mike's should qualify as interlocking, given that they differed on the crucial point for which Sylvia's was offered, or that *Lee v. Illinois*, a case involving confessions by two suspects, left any space for the admission of Sylvia's statement on an interlock theory. Steve conceded the difficulty, and said weakly that the Washington Supreme Court had interpreted *Lee* to permit admission. "Well, maybe they better re-read it," said Justice O'Connor, to laughter in the courtroom. And at that moment I suspect that Steve Sherman realized there was not much chance that Michael Crawford's conviction would be upheld. Jeff treated his rebuttal time the way a quarterback with a ten-point lead treats the last thirty seconds of play; he took no chances, offering an historical overview of why a reliability test was inappropriate.

As we reflected on the argument over lunch, we had reason for confidence. Not a single justice seemed inclined to uphold the conviction, but of course our interest went far beyond that. More significantly, none of the justices seemed drawn to the Solicitor General's approach. The questioning of Jeff, which had focused entirely on the testimonial approach, gave us reason to think that as many as seven justices might join an opinion adopting that approach: Only two justices, Rehnquist and O'Connor, had expressed doubts about the need for making a wholesale change in doctrine; the others seemed primarily interested in exploring the contours of the doctrine. And if some of Jeff's answers exploring those contours were not the ones I would have given (easy to say from the second chair!), that was a relatively small matter; it was clear enough, Justice Scalia's jab notwithstanding, that if the Court were going to adopt the testimonial approach in this case it could not resolve all the difficult issues at once. Maybe, I said to Dave Moran over lunch, even Rehnquist and O'Connor would go along with an opinion adopting the testimonial approach. Dave's optimism didn't carry that far.

* * *

Now we just had to wait. On December 15, Jeff sent me a message saying that the justices had heard nine cases in the November sitting, so he expected each justice to write for the Court in one case—and the first decision had just been handed down, with the Court's opinion by Rehnquist! As the cases came down, eliminating the justices one by one as potential authors of the *Crawford* opinion, we played a little game, adjusting up or down our assessment of the odds that the Court would adopt the testimonial approach. With a flurry of decisions issued on February 24, there was only one case left from the sitting, *Crawford*, and only one justice who had not written a majority opinion, Scalia. Maybe, Jeff speculated, the decision was taking so long because O'Connor was writing a long historical dissent.

* * *

At last, on March 8, 2004, the decision came down. Sure enough, the Court unanimously reversed Crawford's conviction, Justice Scalia wrote the Court's opinion, six other justices joined in, and the Chief Justice, joined only by Justice O'Connor (not the other way around), concurred separately. Most importantly, the majority opinion, over the objection of those two justices, explicitly adopted the testimonial approach.

After reviewing the historical background of the Confrontation Clause, Justice Scalia concluded that "testimonial hearsay" was the principal, if not the only, object of concern of the Clause. And, he wrote, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." And in these two propositions was the essence of the testimonial approach to the Clause. Although the actual results of Supreme Court decisions were largely in accordance with these principles, Justice Scalia wrote, the rationale stated by the Court under *Roberts*, based on an assessment of reliability, was unsound. A judicial determination of reliability could not replace the constitutionally prescribed procedure, cross-examination—and as this case and many others in the lower courts demonstrated, judicial assessments of reliability were unpredictable and sometimes resulted in admitting statements that should have been deemed to be at the center of the Confrontation Clause's concerns. Without deciding what the fate of the *Roberts* standard should be with respect to statements not deemed to be testimonial, the Court was utterly clear with respect to statements that are testimonial: They could not be admitted against an accused unless he has had a chance to cross-examine the witness and the witness is unavailable to testify at trial.

But what are testimonial statements? Here was an irony, and one that Jeff particularly relished, given Justice Scalia's jab at him during the oral argument: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." And the statement here, "knowingly given in response to structured police questioning, qualifies under any conceivable definition" of interrogation. I thought the Court acted sensibly in taking this general approach—avoiding the articulation of a general standard in the first case transforming the law of the confrontation right, but reciting some clear instances of statements that are testimonial, and holding that the statement at issue clearly fell into one of those categories. To what extent the approach was a necessary compromise to achieve a majority opinion and to what extent it was a product of simple caution I do not know.

There were other relatively narrow points that I was glad to see in the opinion (even apart from the citation of one of my articles!). The Court said that it was “questionable whether testimonial statements would ever have been admissible on [the] ground [that they were spontaneous] in 1791 [when the Sixth Amendment was adopted]; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made “‘immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.’ *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B.1694).” That struck me as exactly right—and language that should be heeded by courts that have allowed prosecutors to prove their cases on the basis of accusations assertedly made under excitement by complainants who for one reason or another do not testify at trial.¹⁹ The Court noted that, though there have always been exceptions to the rule against hearsay, the only exception that was established in 1791 that would admit testimonial hearsay against a criminal defendant was the one for dying declarations. Exactly right again. “If this exception must be accepted on historical grounds,” the Court said, “it is *sui generis*.” I was glad to see the contingent nature of this statement; the Court reserved the question whether the Confrontation Clause “incorporates an exception for testimonial dying declarations,” and I think the answer should be negative. Rather, I believe many dying declarations should be admissible on the grounds that if the reason the witness cannot testify at trial is that the accused murdered her, then the accused has forfeited the right to demand that the statement be excluded for want of confrontation. And the Court expressly preserved the concept of forfeiture, not on a reliability rationale but “on essentially equitable grounds.”

There were also aspects of the opinion that I wish I could change. Some stray language might be taken to suggest that a statement could not be testimonial unless it was made to a governmental agent—a bad result, and one that would open the door to the evasion of the confrontation right by the intercession of private organizations that would take statements from witnesses and relieve them of the burden of testifying subject to confrontation. And the Court’s apparent emphasis on prosecutorial abuse raised the danger that statements would not be deemed testimonial absent such abuse, which would be a most unfortunate construction (and therefore ultimately one that I do not believe the Court will adopt).

¹⁹ In fact, it now appears clear that the hearsay exception for spontaneous declarations did *not* exist in 1791; this is a point that Jeff and I are making in the pending cases of *Davis v. Washington* and *Hammon v. Indiana*, respectively. Also, though not of great importance, with the help of my superb research assistant, Josh Diehl, I have determined that *Thompson* was decided in 1693 not 1694.

Important as these matters were, they were relatively trivial in context, especially because they could be straightened out later. Overwhelming all other considerations was the fact that the Court had transformed the Confrontation Clause by adopting the testimonial approach.²⁰

* * *

In October, Justice Scalia spent two days at our law school. He attended a lunchtime presentation I made to our faculty of a paper I had written before *Crawford* but that was published after. My main argument was that evidentiary discourse relies too much on the notion that the jury is unable to deal satisfactorily with some types of evidence. One of my illustrations was the Confrontation Clause as it was applied before *Crawford*. I noted that the change I advocated in the paper had “just happened.” Justice Scalia appeared amused, and I noted further that with the author of the opinion that had achieved this great change in attendance, the gracious thing to do would be to acknowledge his contribution and move on. But being an academic, I could not resist the opportunity to carp about one aspect of the opinion that I did not like, the apparent emphasis on prosecutorial abuse. During the question period, Justice Scalia pressed me on the point. Why should the question of whether a statement is testimonial be determined from the perspective of the speaker rather than that of, say, a police officer who took the statement? I was able to say that this was the second time I had heard him ask that question, and the first time—when I was sitting in front of his Court at the *Crawford* argument—I was not allowed to say a word. Now I had my chance. I told Justice Scalia that making the role of government agents decisive is wrong on several grounds. It is wrong historically, for the confrontation right predated the existence of police officers and prosecutors. It is wrong analytically, for a police officer or prosecutor does nothing wrong in taking statements from witnesses in the defendant’s absence. Indeed, this is how much police work is accomplished. It is the *court* that violates an accused’s right by admitting an incriminating testimonial statement if the accused does not have an opportunity to cross-examine the person who made it. And it leads to very bad results: If a witness shoves an affidavit under the courthouse door, with no involvement by the police or prosecutor, and says, “Here is

²⁰ I will indulge here in a purely personal note. Shortly before the decision came down, I spoke about the case with my father, who had just turned 95. His powers of understanding were limited but he was eager to know about it; he couldn’t much focus on the potential implications of the case for the administration of criminal justice, but his concern for his son’s career remained as strong as ever. When I talked to him about the decision shortly after it was issued, the pride and delight in his voice were just what they would have been in his prime. Seven weeks later, he died swiftly and peacefully. The time was not too soon—but I was glad that it had not come two months sooner.

my accusation, but I don't want to come to court to talk about it," the affidavit is plainly testimonial, and it is just as plain that the statement should be inadmissible.

* * *

As a result of the Supreme Court's reversal of his conviction, Michael Crawford was able to negotiate a plea yielding a reduced sentence of ten years. But of course that did not end the story of *Crawford*; that story is just beginning. By transforming the jurisprudence of the Confrontation Clause, the case opened up an array of issues. Although some of the most egregious violations of the confrontation right that recurred before the decision—such as the use against defendants of statements made, without cross-examination, in grand jury testimony or in plea hearings—have pretty much ended, many courts have given the decision a grudging interpretation. Some courts have treated *Crawford*'s enumeration of core examples of testimonial statements as if it stated the outer bounds of that category. Some have insisted that only formal statements could be considered testimonial—thus admitting without cross-examination statements that were clearly made with the anticipation that they would be used in prosecution, so long as they were made informally. Some have said that only statements made in response to official interrogation can be considered testimonial, and have declined to characterize as interrogation any questioning that was not “structured.”²¹

One recurrent issue involves accusatory statements made in 911 calls. Another, related, issue involves accusatory statements made at the scene of the alleged crime to responding police officers. On October 31, 2005, the Supreme Court granted certiorari in a 911 case, *Davis v. Washington*, and a responding officer case, *Hammon v. Indiana*, with Jeff Fisher and me, respectively, as counsel for the petitioners. We argued the cases in tandem on March 20, 2006, contending that any accusation of criminal conduct knowingly made to a police officer or other government agent with significant law enforcement responsibilities is necessarily testimonial within the meaning of *Crawford*. That proposition has strong intuitive appeal, and I am hopeful that the Court will accept it. Whether or not the Court does so will, to a very considerable extent, shape the future of the story of *Crawford*.

²¹ I have begun the Confrontation Blog, www.confrontationright.blogspot.com, to allow me to comment rapidly on significant developments, good and bad.