

HEARSAY AND THE RIGHT OF CONFRONTATION IN AMERICAN TRIALS BY JURY

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INTRODUCTION

An American jury trial is a unique and peculiar system of judicial dispute resolution. It is an adversarial presentation of evidence in the form of live testimony from witnesses and the introduction of physical evidence to a jury of twelve lay persons, untrained in the law, who have no prior knowledge of the case presented to them. In order to promote fair and accurate fact finding by the untrained lay jury, the law of evidence has been developed.¹ Generally speaking, the law of evidence determines what type of information the adversaries may present to the jury, the form in which this information may be communicated to the jury, and, to some extent, how the jury may use this information in its fact finding and decision making. Evidence doctrine is equally applicable in civil and criminal cases, as well as trials before a jury or judge.

Most notable among the limitations on what evidence the jury may receive is the prohibition of evidence in the form of hearsay.² The jury may not receive statements made out

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¹ In the United States federal court system, the law of evidence is codified in the Federal Rules of Evidence, 28 USC Federal Rules of Evidence. The rules were enacted in 1975. Prior to that time, the body of evidence law existed as a creation of common law. The fifty states are free to enact and maintain their own rules of evidence. Nevertheless, since the enactment of the Federal Rules of Evidence, the vast majority of the states have enacted evidence codes based in whole or in part on the Federal Rules of Evidence.

² Fed. R. Evid. 802 provides, “hearsay is not admissible except as provided by these rules...”

of court when offered to prove the truth of what is asserted by the statement.³ Simply stated, hearsay doctrine requires testimony in open court before the jury and the opportunity for cross examination by the adversary. John Henry Wigmore⁴ is often quoted for referring to the rule against hearsay as “that most characteristic rule of the Anglo-American Law of Evidence – a rule which may be esteemed, next to the jury trial, the greatest contribution of that eminently practical legal system to the world’s methods of procedure.”⁵ Nevertheless, hearsay is a complex and difficult doctrine unique to common law. Much of the complexity lies in the eight exemptions⁶ and twenty-eight exceptions⁷ to the prohibition of hearsay. In general, the rationale for these exemptions and exceptions is a belief that the circumstances under which certain out of court statements are made are such that the hearsay statement is considered reliable, removing the need for the hearsay to be tested by cross examination.

In criminal cases, the Confrontation Clause of the Sixth Amendment guarantees the accused the right “to be confronted with the witnesses against him.”⁸ An obvious conflict exists

³ Fed. R. Evid. 801.

⁴ John Henry Wigmore (1863-1943) was a U.S. jurist and expert in the law of evidence. After teaching law at Keio University in Tokyo (1889–1892), he was the dean of Northwestern Law School (1901 to 1929). He is most known for his Treatise on the Anglo-American System of Evidence in Trials at Common Law (1904) and is considered one of the great thinkers on modern evidence law.

⁵ Wigmore, Evidence §1364, at 28 (Chadbourn rev. 1974).

⁶ Fed. R. Evid. 801(d)(1)(A)-(C) and 801(d)(2)(A)-(E).

⁷ Fed. R. Evid. 803(1)-(23), 804(b)(1)-(4), 807.

⁸ The Sixth Amendment provides:

between hearsay doctrine, which provides for numerous exceptions in which out of court statements will be allowed, and Confrontation Clause doctrine, which guarantees the right to cross examination. While the prohibition against hearsay and the right of confrontation protect similar values, the two doctrines do not entirely overlap. As will be discussed, the Supreme Court did not define the relationship between hearsay exceptions and the right of confrontation until 1980 in *Ohio v. Roberts*, holding that hearsay which is “reliable” does not violate the right of confrontation.⁹ In the following years, confrontation doctrine has taken many twists and turns, most notably in the relatively recent 2004 decision *Crawford v. Washington*,¹⁰ which reversed *Roberts* and held that hearsay statements which were “testimonial” when made violate the right to confrontation, an entirely new approach to reconciling hearsay and confrontation. How these two doctrines are to be reconciled continues to develop. Just three months ago in *Michigan v. Bryant*,¹¹ the Court further refined the new approach. Some would say these recent refinements have left the relationship between hearsay and confrontation in a confusing, if not unsatisfactory, state.

In this article I will discuss the origin and history of the hearsay doctrine, including the

In all criminal prosecutions, *the accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Emphasis added) *Sixth Amendment, 1791*

⁹ *Ohio v. Roberts*, 448 U.S. 56 (1980).

¹⁰ *Crawford v. Washington*, 541 U.S. 36 (2004).

¹¹ *Michigan v. Bryant*, 131 S.Ct. 1143 (2011).

goals it seeks to achieve and the many exceptions to the rule against hearsay. I will then discuss that when exceptions to hearsay are offered into evidence against the accused in a criminal prosecution, a conflict exists with the Sixth Amendment right of confrontation. I will discuss the two very different approaches the Supreme Court decisions has taken in defining the relationship between hearsay doctrine and the right of confrontation, and how hearsay exceptions are presently reconciled with the Confrontation Clause.

I. A BRIEF DESCRIPTION OF THE (FIFTY-ONE) AMERICAN LEGAL SYSTEM(S)

For readers who may not be familiar with the American legal system based upon federalism, a brief description is in order. The phrase “American legal system” actually refers to one federal court system and the fifty judicial systems of the fifty separate states. The federal court system is established in Article III of the Constitution. Section Two of Article III outlines the full extent to which the judicial power of the United States may extend, but Article I delegates to Congress the authority to establish the federal courts and determine the extent to which the judicial power authorized by Section Two shall be established.¹² Pursuant to its power to establish the federal courts, Congress has delegated to the Supreme Court the power to establish the rules of the courts, including evidence and procedure.¹³ Pursuant to this authority, the Federal Rules of Evidence were adopted in 1975. Prior to that time, evidence law in the federal courts existed mostly as common law with some statutory provisions.

¹² Article III, Section 1 provides, “The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

¹³ 28 U.S.C. 2072(a) provides: “The Supreme Court shall have the power to prescribe the general rules of practice and procedure and rules of evidence for cases in the United States district courts ... and courts of appeals.”

The court systems of the fifty states are established pursuant to the constitution and statutory authorizations of each of those states. The vast majority of criminal prosecutions in the United States occur in the state courts. Each of the fifty states has their own bodies of evidence law. More than forty of the states have evidence codes that are based upon the Federal Rules of Evidence, but most of the states have made changes to the Federal Rules and many of those changes are substantial. Additional exceptions to the rule against hearsay are common changes made by the states.

To a large extent, the states are free to shape their own court systems and rules of procedure and evidence, although the Due Process Clause of the Fourteenth Amendment to the United States Constitution operates as a check on state power. It provides “... nor shall any State deprive any person of life, liberty, or property, without due process of law...”¹⁴ Therefore, a state court system must operate within the constrictions of due process. The first ten amendments to the Constitution, commonly referred to as the Bill of Rights, were enacted in 1791 as restrictions on the power of the federal government and as guarantees of certain rights of its citizens. Originally, the Bill of Rights had no application to the fifty states. Through a doctrine known as incorporation, the Supreme Court has made many of the provisions of the Bill of Rights binding upon the states by way of the Due Process Clause of the Fourteenth Amendment. The right of confrontation guaranteed by the Sixth Amendment became an incorporated right in 1965.¹⁵ Therefore, although the federal courts and the states have their own rules of evidence and

¹⁴ Amendment XIV (1868).

¹⁵ *Pointer v. Texas*, 380 U.S. 400 (1965) (holding the right of confrontation to be “fundamental” and binding upon the states by way of the Fourteenth Amendment).

hearsay rules, those rules must not violate the right of confrontation or due process.

II. HEARSAY DOCTRINE

In an American common law jury trial, the jurors hear evidence presented to them in open court by adversarial parties. The jury has no role in investigating the case or gathering facts. Nor are the jurors trained in law. They are chosen at random from the community and screened by the presiding judge and opposing parties for bias, prejudice, or prior knowledge of the case that may cause them to be predisposed to a decision in the case.¹⁶ Evidence law and the rule against hearsay operate to restrict what the jury may consider, a sharp contrast to other legal systems where the judges deciding the case are also involved in gathering facts. The Chief Justice of the English Court of Common Pleas, the great Lord Mansfield, in a case from 1816 summed up the contrast in legal systems and the need for the rule against hearsay in common law jury trials:

[In] most of the Continental States, the Judges determine the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgement on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it as little weight which it may seem to deserve. But in England, where the jury are the sole judges of the facts, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds.¹⁷

As stated by Lord Mansfield, the common law jury is a blank paper upon which the case is written:

A juror should be as white as paper ... and know neither plaintiff nor defendant, but judge

¹⁶ See Fed. R. Crim. P. 24, and Fed. R. Civ. P. 47. Voter registration lists are a common source from which to select jury pools.

¹⁷ Berkeley Peerage Case, 4 Camp. 401, 415, 171 Eng. Rep. 128, 135 (H.L. 1811 (Mansfield, C.J.C.P.) (Advisory opinion).

of the issue as an abstract proposition upon the evidence produced before him.¹⁸

The law of evidence limits what may be written on that piece of paper.

A. Historical Origins

The rule against hearsay, as well as the whole body of evidence law, has been referred to as “the child of the jury,”¹⁹ as well as a product of the adversary system.²⁰ It is a relatively recent development of the common law, although, as will be discussed, scholars disagree on when the body of modern evidence law came into existence, ranging from the end of the 1600's to the middle of the 1880's. There also is no conclusive view as to the one precipitating reason for the development of the rule. As stated by Tapper:

No aspect of the hearsay rule seems free from doubt and controversy, least of all its history. Legal historians are divided between those who ascribe the development of the rule predominantly to distrust of the capacity of the jury to evaluate it, and those who ascribe it predominantly to the unfairness of depriving a party of the opportunity for cross examination.²¹

In the medieval common law system in England, jurors came from the neighborhood where the dispute arose. These were small, isolated agricultural communities. Often the jurors

¹⁸ Mylock v. Saladine, 1 Black. W. 480, 481, 96 Eng. Rep. 278, 278 (K.B. 1764), quoted in William W. Blume, Origin and Development of the Directed Verdict, 48 Mich L. Rev. 555, 558 (1950).

¹⁹ Thayer, Preliminary Treatise on Evidence, 47, 180 (1898).

²⁰ Morgan, The Jury and the Exclusionary Rules of Evidence, 4 U. L. Chi. Rev. 247, 258 (1937); Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948); Langbein, Historical Foundations of the Law of Evidence: A View From the Ryder Sources, 96 Colum. L. Rev. 1168, 1194-1195, 1199-1201 (1996).

²¹ Tapper, Cross and Tapper on Evidence at 565 (8th ed. 1995).

were persons who had knowledge of the dispute and the persons involved.²² The jury conducted its own investigations. If witnesses were needed, they would be summoned to meet with the jury and often participated in their deliberations,²³ but the witnesses from whom the jury obtained information were “not called into court.”²⁴ The jury was self-informing about the case. The public function of these juries was limited to the announcement of a verdict, and not the public receipt of evidence in open court. As Maitland observed, these informed and investigating juries, “hardly had any place for a law of evidence.”²⁵

Toward the end of the Middle Ages, the function of the jury transformed from persons who were active investigators and had knowledge of the case to our present day juries who are passive triers of fact with no prior knowledge of the case presented.²⁶ By the 1500's, testimony of witnesses in open court was becoming the main, though not exclusive source of proof.²⁷ During this time, hearsay statements were received into evidence, but the reliability of hearsay

²² Langbein, Historical Foundations of the Law of Evidence: A View From the Ryder Sources, 96 Colum. L. Rev. 1168 at 1169-1170 (1996).

²³ J. Strong, McCormick on Evidence §244 at 372 (5th ed. 1999).

²⁴ Langbein, supra note 15, citing 5 John Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law §1364 at 11 (3d. Ed. 1940).

²⁵ 2 Frederick Pollock & Frederick W. Maitland, The History of English Law Before the Time of Edward I, at 660 (2d ed. Cambridge 1898).

²⁶ Langbein, Historical Foundations of the Law of Evidence: A View From the Ryder Sources, 96 Colum. L. Rev. 1168 at 1171-1172 (1996).

²⁷ J. Strong, McCormick on Evidence, §244 at 372 (5th ed. 1999).

statements was beginning to be questioned as “a tale of a tale”²⁸ and “a story out of another man’s mouth.”²⁹ This signaled a growing mistrust of the ability of the jury to properly evaluate out of court hearsay statements.³⁰ At the same time, concern grew over the need to test witness statements by cross examination in open court.³¹

In the widely known trial of Sir Walter Raleigh for treason in 1603, the primary evidence against him was a sworn “confession” of Lord Cobham, Raleigh’s alleged co-conspirator. Raleigh alleged that Cobham had recanted. Raleigh protested the admission of this hearsay statement and demanded that Cobham, who was being held in the Tower of London where the trial was being held, be brought to court to testify:

But it is strange to see how you press me still with my Lord Cobham, and yet will not produce him; ... [H]e is in the house hard by, and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of proof.³²

Raleigh was convicted and later executed, fueling outcry against the reliance on hearsay in criminal prosecutions.³³ In civil law systems of continental Europe, the use of out of court

²⁸ Colledge’s Trial, 8 How. St. Tr. 549, 662 (1681).

²⁹ Gascoigne’s Trial, 7 How. St. Tr. 959, 1019 (1680).

³⁰ Wigmore, Evidence in Trials at Common Law at 29 (3rd ed. 1974).

³¹ Morgan, Some Problems of Proof under the Anglo-American System of Litigation, at 117 (1956).

³² Raleigh’s Trial, 2 How. St. Tr. 16 (1603); 1 Jardine’s Crim. Trials 418 (1832).

³³ See 1 J. Stephen, A History of the Criminal Law of England 333-336 (1833); 9 Holdsworth, A History of English Law, 216-217, 226-228 (1926); J. G. Phillimore, History and Principles of the Law of Evidence 157 (1850).

statements taken by judicial officers as part of the investigation of the case was customary.³⁴

But, as Raleigh said as he demanded his accuser, Lord Cobham, be brought to court to testify against him:

...the Proof of the Common Law is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face...³⁵

During this period of transformation, use of witness hearsay statements, both oral and written, including sworn statements, as was the custom in civil law systems, was becoming increasingly criticized, and the reliability of such statements was increasingly questioned.³⁶ The English legal historian Holdsworth proposed that there were two factors directly responsible for the development of the rule against hearsay. The first was Coke's strong condemnation of "the strange conceit... that one may be an accuser by hearsay."³⁷ The second was a need to compensate for the failure of the English system to develop a system of proof comparable to the two witness rule found in civil law and canon law systems.³⁸ Which is the precise reason for the

³⁴ Crawford v. Washington, 541 U.S. 36 at 43 (2004) (Scalia, J., citing 3 W. Blackstone, Commentaries on the Law of England 373-374 (1768).

³⁵ 2 How. St. Tr. At 15-16.

³⁶ J. Strong, McCormick on Evidence, §244 at 373 (5th ed. 1999).

³⁷ Cokes Institutes of the Laws of England (1797 edition; originally written in 1628-1644) Vol 3, at 25. This followed the views of Gilbert, The Law of Evidence 152 (2nd ed 1760; written before 1726) who wrote: "The attestation of the witness must be to what he knows, and not to that only which he hath heard, for mere hearsay is no evidence; for it is his knowledge that must direct the Court and Jury in the judgment of the fact, and not his mere credulity... Besides, though a person testify what he hath heard upon oath, yet the person who spake it was not upon oath; and if a man had been in Court and said the same thing and had not sworn it, he had not been believed in a court of justice."

³⁸ J. Strong, McCormick on Evidence, §244 at 373 (5th ed. 1999).

development of the rule against hearsay is unclear. Nevertheless, it is against this backdrop that the rule against hearsay began to take hold, perhaps as early as the late 1600's and early 1700's. Wigmore believed that the period between 1675 and 1690 is when the rule against hearsay became fully formed.³⁹ Other scholars are of the belief that the rule against hearsay was not fully formed until the middle of the 1800's as a product of the increased use of the adversarial process in criminal trials.⁴⁰ During this time period, the rule developed slowly. Hearsay was not at first fully excluded. Hearsay could be received to confirm other evidence, such as admitting a prior consistent statement of a witness to corroborate their testimony, though it was not independently admissible.⁴¹ Whatever the precise timing and reason or reasons for the development of the rule against hearsay, it became fully ensconced in the Anglo-American legal system by the mid to late 1800's, and the next stage of the development of the rule focused on the development of exceptions.

B. The Present Day Rule Against Hearsay

The rule against hearsay is fundamentally the same in all American jurisdictions.

Hearsay is not admissible.⁴² It is defined as:

³⁹ 5 Wigmore, *Evidence* §1364 at 18 (Chadbourn rev. 1974).

⁴⁰ Langbein, Historical Foundations of the Law of Evidence: A View From the Ryder Sources, 96 Colum. L. Rev. 1168 at 1172, 1194-1203 (1996). *See also*, Morgan, The Jury and the Exclusionary Rules of Evidence, 4 U. L. Chi. Rev. 247, 258 (1937); Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948); Langbein, Historical Foundations of the Law of Evidence: A View From the Ryder Sources, 96 Colum. L. Rev. 1168, 1194-1195, 1199-1201 (1996).

⁴¹ J. Strong, McCormick on Evidence, §244 at 373 (5th ed. 1999).

⁴² Fed. R. Evid. 802.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.⁴³

Simply stated, the rule against hearsay requires witnesses to testify in court and be subject to cross examination. A statement of a witness made out of court is not allowed. Out of court written statements, both sworn and unsworn, and oral statements are equally prohibited.⁴⁴

Therefore, a witness may not testify in court to what someone else said, nor may a written statement be received in evidence. But not all out of court statements are prohibited. The rule only prohibits hearsay statements that are offered for the truth of the statement. If the statement is offered into evidence to prove the truth of its substance, it is hearsay. But an out of court statement is not made inadmissible by the rule against hearsay if it is offered for a purpose other than proving the truth of the assertion.⁴⁵ The rule is equally applicable in criminal prosecution and civil suits, and although the rule against hearsay is referred to as “the child of the jury,” the rule applies to bench trials as well as jury trials.

C. The Reasons for the Rule Against Hearsay

⁴³ Fed. R. Evid. 801(c).

⁴⁴ Fed. R. Evid. 801(a)(1).

⁴⁵ For example, plaintiff sues defendant for slander, alleging that defendant made false statements about the plaintiff. Plaintiff may offer a witness testify to the false statements made out of court by defendant. The out of court statements are not offered for their truth. If they were true, plaintiff would have no case. The statements are offered because they were made and they are false.

Similarly, defendant is charged with battery and claims self-defense. Defendant seeks to testify that he was told out of court that the alleged victim was a mean, violent bully. If offered to prove that the victim is a mean, violent bully, the out of court statement is prohibited hearsay. The statement is not hearsay if offered to show the defendant was afraid of the alleged victim. The statement does not have to be true for his fear and need to act in self defense to be real.

The rule against hearsay views out of court statements as inherently unreliable and an inferior form of proof. Requiring a witness to testify at trial is intended as a safeguard against the risks inherent in this inferior form of proof. The trial process offers several safeguards:

1. *Oath.* Every testifying witness must swear an oath, under penalty of perjury, that the witness will testify truthfully.⁴⁶ The solemnity of the oath is viewed as inducing an obligation to testify truthfully, and to impress upon the witness the threat of criminal prosecution for false testimony.⁴⁷ One of the early historical criticisms of hearsay was that out of court statements were not made under oath.⁴⁸

2. *Presence in Court.* A lack of opportunity by the trier of fact to observe the demeanor of the witness is another long held criticism of hearsay.⁴⁹ It is considered very important that the jury observe the witness while offering testimony in order for the jury to assess the credibility of the witness and the sincerity of the testimony.

3. *Cross Examination.* Common law tradition regards cross examination as “beyond doubt the greatest engine ever invented for the discovery of truth.”⁵⁰ The lack of opportunity for

⁴⁶ Fed. R. Evid. 603.

⁴⁷ At common law, atheists were prohibited from testifying. Witnesses had to believe in a divine being who would punish them if they did not tell the truth. The oath a witness would swear to included the phrases “so help me God”. The requirement that a witness believe in God has long been abandoned. Therefore, a witness may swear to an “oath or affirmation.” Fed. R. Evid. 603.

⁴⁸ 5 Wigmore Evidence §1362 at 8 (Charbourn rev. 1974).

⁴⁹ *Mattox v. United States*, 156 U.S. 237, 242 (1895).

⁵⁰ 5 Wigmore Evidence, §1367 at 32 (Chadbourn rev. 1974).

cross examination is accepted as the main reason for the exclusion of hearsay.⁵¹ Through cross examination, the witness can be tested for bias, perception, memory, and clarity of expression. The witness may be asked about any interest in the case or relationship with one of the adversarial parties.⁵² Cross examination can inquire as to whether the witness has personal knowledge of the matter being testified to and had sufficient opportunity to perceive the subject of the testimony. The accuracy of the description given in court can also be tested on cross examination.

4. Challenges to Witness Credibility. In addition to testing the testimony of a witness by cross examination, the rules of evidence also allow for challenging the character of the witness for truthfulness. Evidence that the witness has been convicted of a felony⁵³ or any crime of dishonesty⁵⁴ is allowed to challenge whether the witness is capable of truthful testimony. As a challenge to character for untruthfulness, the witness may be asked on cross examination about specific instances of the witness's past untruthful conduct, unconnected to the case at hand.⁵⁵ The credibility of the witness may also be attacked by evidence of the untruthful character of the witness.⁵⁶ This evidence is limited to the reputation of the witness for untruthfulness or a person's opinion that the witness is untruthful.

⁵¹ Strong, McCormick on Evidence, § 245 at 374-375 (5th ed. 1999).

⁵² Fed. R. Evid. 611(b).

⁵³ Fed. R. Evid. 609(a)(1).

⁵⁴ Fed. R. Evid. 609(a)(2).

⁵⁵ Fed. R. Evid. 608(b)(1).

⁵⁶ Fed. R. Evid. 608(a).

Taken together, the opportunity for cross examination and the mechanisms for attacking witness credibility are viewed to operate as “a security for the correctness and completeness of testimony.”⁵⁷ If out of court statements were allowed in evidence, these opportunities would not be present to test witness testimony in front of the jury. The Federal Rules of Evidence do allow for challenges to the credibility of the speaker of a hearsay statement by the same manner that would have occurred had the speaker testified in court.⁵⁸ Nevertheless, when the speaker is not present, the jury does not have the opportunity to observe the demeanor of the speaker when the challenges to credibility are made.

III. THE MANY EXCEPTIONS TO THE RULE AGAINST HEARSAY

Despite mistrust of out of court statements that have not been subject to cross examination, hearsay doctrine contains numerous exemptions⁵⁹ and exceptions.⁶⁰ It is often said that hearsay doctrine is most known for its exceptions. The common theme of the exceptions is that cross examination is not needed to test the hearsay exceptions because the circumstances under which the statement was made provide a guarantee of trustworthiness that the statement is reliable. The exceptions are equally applicable in civil and criminal cases. Most of these exemptions and exceptions are recognized in the evidence law of the various states and, as will be discussed, many states have adopted additional or “new” hearsay exceptions. The numerous exemptions and exceptions, as contained in the Federal Rules of Evidence, fall into four broad

⁵⁷ Bentham, Rationale of Judicial Evidence, b. II, ch. IX, and b. III ch. XX (1827).

⁵⁸ Fed. R. Evid. 806.

⁵⁹ Fed. R. Evid. 801(d)(1) and (2).

⁶⁰ Fed. R. Evid. 803 and 804.

categories.

First, out of court statements made by an opposing party and offered into evidence against the party who made the statement are exempted from consideration as hearsay.⁶¹ Commonly referred to as *party opponent statements*, this category could include an accused's self incrimination or confession. The rationale is that the party who would have the right to test the statement by cross examination is the person who made the statement. Obviously, that party does not need to cross examine himself. The party may testify to explain or challenge the out of court statement attributed to him. These exempted statements include not only the party opponent's own statements, but also those the party has adopted or authorized, and statements by its agents or co-conspirators.⁶² To fall within the exemption, the statements must concern matters within the scope of the agency or must further the criminal conspiracy.

Second, out of court statements made by a testifying witness who is present in court and available for cross examination are exempted from hearsay in three limited categories. Generally, a witness's own out of court statements are excluded as hearsay. But the three *prior statement by witness* exemptions are based on the underlying rationale that the witness is in court and can be presently cross examined about the prior statement. The fact that the exemptions for out of court statements of a presently testifying witness are limited to only three narrow areas speaks to the importance attached to the need to have the jury observe the witness while making the statement in order to assess demeanor and credibility.⁶³ The first category includes prior

⁶¹ Fed. R. Evid. 801(d)(2).

⁶² Fed. R. Evid. 801(d)(2)(A)-(E).

⁶³ See discussion at II.C.2.

statements that are inconsistent with the present testimony of the witness are allowed to combat a witness whose testimony has changed.⁶⁴ Second, prior consistent statements of a testifying witness who has been charged on the witness stand with fabrication are allowed because the party against whom the statement is offered has opened the door by making the charge of fabrication, and it is only fair to allow the statement to rebut that charge.⁶⁵ Finally, prior out of court statements of identification are allowed because they are viewed as more reliable than an in court identification of a person who is obviously the accused.⁶⁶

Third, the Federal Rules of Evidence contain twenty-three exceptions from hearsay for a variety of out of court statements that are considered reliable due to the circumstances in which the statements were made. Cross examination is not required because of the *circumstantial guarantee of trustworthiness* surrounding the statement when made. The circumstance of trustworthiness exists in what the speaker was experiencing when the statement was made, such as: describing an event while seeing it, known as *present sense impressions*;⁶⁷ describing a startling event while under the stress of the event, known as *excited utterances*,⁶⁸ or a speaker's description of present *mental, emotional or physical condition*.⁶⁹ The motivation of the speaker to tell the truth, such as *statements made for purposes of medical treatment* also provides the

⁶⁴ Fed. R. Evid. 801(d)(1)(A).

⁶⁵ Fed. R. Evid. 801(d)(1)(B).

⁶⁶ Fed. R. Evid. 801(d)(1)(C).

⁶⁷ Fed. R. Evid. 803(1).

⁶⁸ Fed. R. Evid. 803(2).

⁶⁹ Fed. R. Evid. 803(3).

circumstantial guarantee of trustworthiness.⁷⁰ The records of a business organization, government agency or church are allowed because of the need of the maker to keep accurate records and reports.⁷¹ Similarly, property records and family records are exceptions from hearsay because they are deemed to be reliable.⁷²

All of the *circumstantial guarantee of trustworthiness* hearsay exceptions are allowed whether or not the speaker is available to testify.⁷³ The judge determines whether the required circumstance for admissibility existed at the time the statement was made or recorded.⁷⁴ In a few situations, hearsay law imposes some limitations on these exceptions. A judge may exclude business records and records and reports of public agencies if the “circumstances indicate a lack of trustworthiness.”⁷⁵ The records and reports of public agencies are also excluded from criminal cases if offered against the accused⁷⁶ or if made by police officers.⁷⁷ Otherwise, the judge’s determination of admissibility does not include an assessment of whether the hearsay statement is reliable or trustworthy. It is for the jury to decide my much weight to give the

⁷⁰ Fed. R. Evid. 803(4).

⁷¹ Fed. R. Evid. 803(6)-(12).

⁷² Fed. R. Evid. 803(13)-(15).

⁷³ Fed. R. Evid. 803 – Hearsay Exceptions; Availability of the Declarant Immaterial.

⁷⁴ Fed. R. Evid. 104(a) (providing that preliminary determinations about the admissibility of evidence shall be determined by the court).

⁷⁵ Fed. R. Evid. 803(6) and Fed. R. Evid. 803(8).

⁷⁶ Fed. R. Evid. 803(8)(C).

⁷⁷ Fed. R. Evid. 803(8)(B).

admitted hearsay.

Fourth, if a witness is unavailable to testify at trial due to a claim of privilege, refusal, lack of memory, death, or inability to be procured,⁷⁸ the Federal Rules recognize four limited circumstances in which hearsay statements are not excluded.⁷⁹ The requirement that the witness be unavailable is an expression of the strong preference for live testimony in open court. At the same time, the rule provides that if the unavailability of the witness is due to wrongdoing by the party against whom an out of court statement is offered, that party *forfeits by wrongdoing* the right to object to the admission of the hearsay.⁸⁰ In a sense, the statements allowed under the *declarant unavailable* exception are allowed out of necessity, and are considered less trustworthy than the exceptions discussed in the preceding section, the admissibility of which is not premised upon unavailability. Nevertheless, these hearsay statements are allowed because there is trustworthiness about the circumstances in which the statements were made.

Statements made under oath at a different proceeding where the party against whom they are offered had an opportunity and similar motive for cross examination are allowed as hearsay exceptions.⁸¹ The guarantee of trustworthiness of the *former testimony exception* lies in the prior cross examination. Allowing these statements only when the speaker is unavailable reflects the high degree of importance given to the presence of the witness in court so the jury may assess demeanor and credibility. Hearsay statements that were made while the declarant was under the

⁷⁸ Fed. R. Evid. 804(a)(1)-(3).

⁷⁹ Fed. R. Evid. 804(b)(1)-(4).

⁸⁰ Fed. R. Evid. 804(b)(6).

⁸¹ Fed. R. Evid. 804(b)(1).

belief that the declarant was about to die and the statement concerns the cause of death.⁸² While subject to question, it is believed a person will speak the truth if the person is aware of impending death. Therefore, cross examination is not required to test *dying declaration* statements. The rule also is one of necessity, as well as a forfeiture of the right to object to the hearsay statement offered against the person who caused the death of the unavailable speaker.

Statements which at the time of its making were contrary to the financial or penal interest of the declarant are also exceptions from hearsay.⁸³ *Against interest statements* are allowed because of the belief that the speaker would not say something that subjected the speaker to criminal or civil liability unless it was true.⁸⁴ Finally, statements concerning the speaker's *family history or personal history*, such as birth or marriage, are also not excluded as hearsay.⁸⁵ The guarantee of trustworthiness lies in a belief that persons make truthful statements about the history of their family. For any of these exceptions to apply, it is for the judge to determine whether the circumstances that guarantee the trustworthiness of these statements are met and allow their admission into evidence.⁸⁶ The jury then determines what weight, if any, to give to the admitted hearsay.

⁸² Fed. R. Evid. 804(b)(2).

⁸³ Fed. R. Evid. 804(b)(3).

⁸⁴ The rule reflects a mistrust of against interest statements when offered by the accused to show a lack of guilt by requiring "corroborating circumstances that indicate the trustworthiness of the statement." Fed. R. Evid. 804(b)(3).

⁸⁵ Fed. R. Evid. 804(b)(4).

⁸⁶ Fed. R. Evid. 104(a) (providing that preliminary determinations about the admissibility of evidence shall be determined by the court).

In criminal prosecutions, several of these hearsay exceptions have frequent application. For example, victims and witnesses make *excited utterance* statements at the scene of a crime to police officers and bystanders, or to other persons not connected with the crime scene. If not available or willing to testify, these statements may be offered as hearsay exceptions. *Former testimony* hearsay statements are offered when a witness previously testified at a preliminary hearing, but now refuses to testify or cannot be found. *Dying declarations* are offered in homicides and *forfeiture by wrongdoing statements* are offered in homicides and domestic violence cases. *Against interest statements* are offered when an accomplice makes incriminating statements to investigating officers or casually to others. Laboratory test results may be offered against the accused as *business records*. When exceptions to hearsay are offered into evidence against an accused in a criminal prosecution, it also must be considered whether the Sixth Amendment right of confrontation is violated.

IV. THE RIGHT OF CONFRONTATION

The Confrontation Clause contained in the Sixth Amendment provides that in criminal cases “the accused shall enjoy the right ... to be confronted with the witnesses against him.” In the late 1700's, when the Constitution and Bill of Rights were adopted, the general rule against hearsay had been established in England. The same mistrust of out of court statements that gave rise to the hearsay doctrine was present in the minds of the framers of the Constitution. For example, while defending a merchant in a high-profile admiralty case, John Adams, the second president of the United States and a principle architect of the Constitution, argued:

Examinations of witnesses upon interrogatories are only by the Civil Law.
Interrogatories are unknown at Common Law, and Englishmen and Common Law

Lawyers have an aversion to them if not an abhorrence of them.⁸⁷

Many of the states had adopted declarations of rights that prohibited the use of hearsay declarations and depositions.⁸⁸ Nevertheless, the right of confrontation was not included in the original Constitution, but was added with the Bill of Rights which became effective in 1791 as a limitation on the power of the federal government and a guarantee of rights of individuals. The right of confrontation in criminal prosecutions to protect against the use of hearsay was among those fundamental rights.⁸⁹ By incorporating the hearsay principle from evidence law into the Constitution, it became guaranteed that the right of confrontation in the federal courts could not be altered or abolished.⁹⁰ What remained to be seen was whether the right of confrontation and hearsay doctrine were the same. The principles of hearsay doctrine and the Confrontation Clause

⁸⁷ Draft of Argument in *Sewall v. Hancock* (Oct. 1768 - Mar. 1769), in 2 Legal Papers of John Adams 194, 207.

⁸⁸ *Crawford v. Washington* 541 U.S. 36 at 46 - 50 (2004) (Scalia, J., discussing the origins of the right of confrontation).

⁸⁹ “The primary object of the constitutional provision in question was to prevent depositions of *ex parte* affidavits ... being used against the prisoner ...” *Mattox v. United States*, 156 U.S. 237, 242-243 (1895).

“... the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's [*Sir Walter Raleigh was tried for treason, convicted, and later executed, largely based upon an out of court statement*]; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.” *Crawford v. Washington*, 51 US 36 at 50 (2004, Scalia, J.)

⁹⁰ “... the accused has an opportunity, not only of testing the recollection of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he

protect similar values, but hearsay law also recognizes many exceptions that admit out of court statements that have not been tested by cross examination. As the right of confrontation demands an accuser testify before the accused in open court so that the jury may assess his demeanor and credibility, the Supreme Court has had to determine whether exceptions to the rule against hearsay violate the Sixth Amendment right of confrontation.

It was not until 1965, in *Pointer v. Texas*, that the right of confrontation became applicable to the states by way of the incorporation doctrine.⁹¹ Prior to that time, the admission of hearsay in state court criminal prosecutions was limited only by state hearsay law and state constitutions, and the Supreme Court had few occasions to address the relationship between the right of confrontation and exceptions to the hearsay rule. In a line of cases that followed, the Court began to develop the present view of confrontation. *Pointer* held that the right of confrontation was violated by admission of former testimony that had not been subject to cross examination. Similarly, in *Douglas v. Alabama*,⁹² and *Bruton v. United States*,⁹³ the right of confrontation was violated by the admission of confessions of accomplices who were not available for cross examination. The relationship between hearsay exceptions and confrontation was further refined in two landmark cases. *Barber v. Paige* held that the Confrontation Clause is violated if a hearsay statement is offered in lieu of a witness who could have been made

is worthy of belief.” *Mattox v. United States*, 156 U.S. 237, 242-243 (1895).

⁹¹ *Pointer v. Texas*, 380 U.S. 400 (1965) (holding the admission of the former testimony of an absent witness at a preliminary hearing at which he was not cross examined violated the right of confrontation where the prosecution had not sought to find the witness for trial).

⁹² *Douglas v. Alabama*, 380 U.S. 415 (1965).

⁹³ *Bruton v. United States*, 391 U.S. 123 (1968).

available to testify at trial.⁹⁴ *California v. Green* held that hearsay statements are allowed if the witness is in court and subject to present cross examination concerning the prior out of court statement.⁹⁵

A. The Roberts Rule: “Reliable” Hearsay Does Not Violate the Right of Confrontation

Nevertheless, it was not until 1980 in *Ohio v. Roberts*, that the Court adopted a broad approach of general applicability for addressing the right of confrontation when hearsay is offered against the accused.⁹⁶ In *Roberts*, the prosecution sought to introduce testimony previously given at a preliminary hearing by a witness the prosecution was unable to subpoena to testify at trial. The hearsay was offered pursuant to the hearsay exception for *former testimony* of a currently unavailable witness.⁹⁷ The court adopted a two prong test to determine whether such hearsay violates the right of confrontation. First, the prosecution must produce the witness or demonstrate that the witness is unavailable to testify.⁹⁸ Second, the hearsay must demonstrate adequate “indicia of reliability.” Reliability is inferred if the hearsay is recognized as a “firmly rooted hearsay exception.” Firmly rooted exceptions are those that traditionally have been long recognized at common law. In all other situations, the hearsay is excluded unless it is shown that there are “particularized guarantees of trustworthiness.”⁹⁹ Under *Roberts*, if necessity for the

⁹⁴ *Barber v. Paige*, 390 U.S. 719 (1968).

⁹⁵ *California v. Green*, 399 U.S. 149 (1970).

⁹⁶ *Ohio v. Roberts*, 448 U.S. 56 (1980).

⁹⁷ *See* Fed. R. Evid. 804(b)(1).

⁹⁸ 448 U.S. at 65.

⁹⁹ 448 U.S. at 66.

statement is shown, traditional hearsay exceptions do not violate the right of confrontation, and newly adopted exceptions to hearsay are allowed if the court determines the statement possesses the same kind of reliability that is the rationale for the traditional exceptions. The constitutional right to confrontation, therefore, is only violated by unreliable hearsay, but cross examination is not needed and confrontation is not violated by hearsay exceptions that are traditional or determined by the court to be trustworthy. The Court later retreated from the unavailability requirement, holding that excited utterance and medical statement hearsay exceptions do not require a showing of unavailability because of “substantial guarantees” of trustworthiness.¹⁰⁰ This approach brings hearsay doctrine and the right of confrontation very much together. If an out of court statement meets a hearsay exception, the right of confrontation is most often not violated even though it has not been subject to cross examination.¹⁰¹

B. The Crawford Rule: Only “Testimonial” Hearsay Violates the Right of Confrontation

Just twenty-four years after the decision in *Roberts*, the Court reversed itself in *Crawford v. Washington* in 2004.¹⁰² The prosecution sought to admit into evidence hearsay statements made by the defendant’s wife during a police interrogation. She was unavailable as a witness due to a claim of spousal privilege.¹⁰³ The statements were offered as a state law hearsay exception for *against interest statements*. This exception is not a firmly rooted exception and

¹⁰⁰ *White v. Illinois*, 502 U.S. 346 (1992).

¹⁰¹ *Ohio v. Roberts*, 448 U.S. at 71-73 (holding that the admission of the preliminary hearing testimony did not violate the right of confrontation).

¹⁰² *Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁰³ 541 U.S. at 40.

would be analyzed under *Roberts* for “particularized guarantees of trustworthiness.”¹⁰⁴ Instead, Justice Scalia, writing for the majority, rejected the *Roberts* test for two main reasons. First, the opinion reviews at length the historical background of the rule against hearsay¹⁰⁵ and concludes that the original meaning of the Confrontation Clause was to prevent the “civil law abuses” of allowing out of court witness testimony to be offered against an accused where there has not been a previous right of cross examination.¹⁰⁶ Second, the opinion criticizes *Roberts* for allowing hearsay that has not been subject to cross examination upon the subjective determination that the hearsay is “reliable.”¹⁰⁷ The Court reversed *Roberts* and held that admitted hearsay violates the right of confrontation in circumstances where the out of court statements were “testimonial.” The Court left a comprehensive definition of “testimonial” for “another day,” though it did state that at a minimum the term covers “prior testimony at a

¹⁰⁴ The comparable exception is found at Fed. R.

Evid. 804(b)(3).

¹⁰⁵ 541 U.S. at 42 - 50.

¹⁰⁶ 541 U.S. at 50 - 59.

In dissent, Chief Justice Rehnquist took issue with Justice Scalia’s view of the history of hearsay, arguing that the Framers were concerned with the use of hearsay affidavits and depositions, but that they were not concerned with other forms of hearsay now deemed testimonial. 541 U.S. 69-77.

¹⁰⁷ As the opinion points out, the approach to how courts determined reliability varied widely and resulted in conflicting decisions. 541 U.S. at 63. In the Crawford case itself, the trial court found the hearsay statements to be reliable, the appellate court found the same statements not reliable, and the Washington Supreme Court reinstated the conviction, finding the statements reliable. 541 U.S. at 40-41.

preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”¹⁰⁸ As the hearsay in question consisted of statements made in a police interrogation, it was held to be “testimonial” and a violation of the Confrontation Clause.

The aftermath of *Crawford* is that not all hearsay implicates the Sixth Amendment right of confrontation. The admission of non-testimonial hearsay now becomes a matter of hearsay law alone. The Confrontation Clause does not apply. It is only “testimonial” hearsay that violates the right of confrontation, and if hearsay is “testimonial,” it matters not whether it is reliable. The admission of any hearsay statement that was testimonial when made violates the right of confrontation. In the following few years, several opinions have sought to further refine the meaning of testimonial. Some would argue that these attempts to further define “testimonial” have not been entirely successful.

C. Refining the Meaning of “Testimonial”

In two companion cases in 2006, *Davis v. Washington*, and *Hammon v. Indiana*, the Court considered whether a crime victim’s emergency 911 telephone call to the police and the oral and written statements of a victim at the crime scene were “testimonial.”¹⁰⁹ Both cases involved crimes of domestic violence. The victims did not testify at trial, and their hearsay statements were admitted into evidence under the exceptions for *present sense impressions* and *excited utterances*. Justice Scalia, again writing for the majority, held that hearsay statements to police officers are not testimonial “under circumstances objectively indicating that the primary

¹⁰⁸ 541 U.S. at 68.

¹⁰⁹ *Davis v. Washington*, 547 U.S. 813 (2006).

purpose of the interrogation is to enable police to meet an ongoing emergency.”¹¹⁰ They are testimonial when, objectively speaking, there is no “ongoing emergency” and “the primary purpose ... is to establish or prove past events potentially relevant to later criminal prosecution.”¹¹¹ The court concluded that the purpose of the 911 call was to meet an ongoing emergency. Therefore, it was not testimonial. But the victim statements at the crime scene were testimonial because there was no longer a present threat and the emergency had ended.¹¹² The distinction between statements to aid prosecution versus those made to meet an ongoing emergency is not always clear. The Court recognized that an interrogation that began as a non-testimonial response to an emergency could “evolve into testimonial statements.”¹¹³ Again, the precise definition of what is testimonial was left somewhat unclear, but it became even more so with the decision in *Michigan v. Bryant*¹¹⁴ in 2011.

At issue in *Bryant* was whether hearsay statements given to police by a dying gunshot victim identifying the shooter were testimonial, and therefore prohibited by the right of confrontation. The victim, Anthony Covington, had been shot outside the defendant’s house and then drove himself to a gas station and called the police. As he was dying in the parking lot, he identified the shooter in response to police questions.¹¹⁵ The Michigan Supreme Court held the

¹¹⁰ *Davis v. Washington*, 547 U.S. at 822.

¹¹¹ 547 U.S. at 822.

¹¹² 547 U.S. at 828-829.

¹¹³ 547 U.S. at 828.

¹¹⁴ 131 S.Ct. 1143 (2011).

¹¹⁵ 131 S.Ct. at 1150 (discussing that at the scene the police asked Covington, “what had

identification was testimonial within the meaning of *Crawford*.¹¹⁶ The Supreme Court reversed the decision, holding the hearsay statement to be non-testimonial, and in so doing sought to announce a broad approach for analyzing when hearsay statements are testimonial. The Court held that it must make an objective determination whether the “primary purpose” of the interrogation was to meet an ongoing emergency or was to prove events for a later prosecution. That objective determination should include a review of the circumstances in which the statements were made,¹¹⁷ and view the situation from the perspectives of both the interrogators and the interrogated.¹¹⁸ The Court placed much weight on the facts that the questioning took place in an informal setting and not in a police station, that the perpetrator was at large, and that Mr. Covington asked when emergency medical services would arrive.¹¹⁹ Taking the combined perspectives of the gunshot victim and police together, as well as the circumstances of the statements, the Court held the primary purpose of the questioning was to meet an ongoing emergency, not to preserve the statements for future prosecutorial use.¹²⁰ Therefore, the hearsay was not testimonial, and its admission did not violate the right of confrontation.

The Court reiterated that the purpose of the right of confrontation was to protect against

happened, who had shot him, and where the shooting had occurred”).

¹¹⁶ 483 Mich 132 at 157, 768 N.W. 2d 65 at 79 (2009).

¹¹⁷ 131 S.Ct. at 1158-1160.

¹¹⁸ 131 S.Ct. at 1160-1162.

¹¹⁹ 131 S.Ct. at 1163-1167.

¹²⁰ 131 S.Ct. at 1167-1168.

the civil law “use of *ex parte* examinations as evidence against the accused.”¹²¹ Because it could not determine that the “primary purpose” of the hearsay in question was “to establish or prove past events potentially relevant to later criminal prosecution,” the Court held that the statements were made to meet an ongoing emergency and not testimonial.¹²² In a curious section of the opinion, the Court then equates the circumstances of ongoing emergency statements with the reliability justifications for hearsay exceptions.¹²³ This echoes the rejected *Roberts* view that reliable hearsay does not violate the right of confrontation.

Justice Scalia, the author and architect of the *Crawford* testimonial approach, as well as its refinement in *Davis* and *Hammon*, filed a bitter dissent, writing that the decision left confrontation clause jurisprudence “in a shambles.”¹²⁴ He contended that the case was “absurdly easy,” because Mr. Covington’s motive in identifying his shooter could only have been to secure his arrest and prosecution.¹²⁵ He criticized the approach of looking at the perspectives of both interrogator and interrogated as impractically complex, and argued the only perspective should be that of the speaker of the hearsay statement.¹²⁶ He viewed the opinion as an “expansive exception to the Confrontation Clause for violent crimes,” as police may now take statements from witnesses at the scene under a claim of ongoing emergency and use them at trial if the

¹²¹ 131 S.Ct. at 1152 (citing *Crawford v. Davis*, 541 U.S. at 50).

¹²² 131 S.Ct. at 1165 (citing *Davis*, 547 U.S. at 822).

¹²³ 131 S.Ct. at 1157.

¹²⁴ 131 S.Ct. at 1169.

¹²⁵ 131 S.Ct. at 1170.

¹²⁶ 131 S.Ct. at 1170.

witnesses later become unavailable.¹²⁷

Hearsay doctrine is viewed as a relatively recent development of the common law, dating to the mid 1700's. The relationship between the confrontation clause and hearsay is still developing. The present view dates back to only 2004 with *Crawford*. Just three months ago in *Bryant* the Court announced an opinion that may substantially alter the *Crawford* decision. If nothing else, *Bryant* assured much future litigation concerning the relationship between hearsay and the right of confrontation. The amorphous standard from *Bryant* in some respects signals a return to the criticized approach of *Roberts* that allowed hearsay without confrontation if it was determined to be reliable. *Bryant* indicates hearsay does not violate the right of confrontation if it can be said that the primary reason for obtaining the statements was for a reason other than aiding later prosecution. But this determination of “primary purpose” seems no more clear than the *Roberts* requirement of reliability.

Nevertheless, subsequent to *Crawford*, the Court has resolved a few areas. In *Melendez-Diaz v. Massachusetts*, the Court held that laboratory drug test results contained in sworn certificates were within the “core class of testimonial statements” because the sole purpose of the affidavits was to provide “prima facie evidence” for trial.¹²⁸ Therefore, the admission into evidence of laboratory test results violates the right of confrontation. The analyst who performed the tests must appear in court and testify.¹²⁹ Also, two exceptions to the right of confrontation

¹²⁷ 131 S.Ct. at 1173.

¹²⁸ *Melendez-Diaz v. Massachusetts*, 129 S.Ct 2527 at 2532 (2009).

¹²⁹ On March 2, 2011, the Court heard oral argument in *Bullcoming v. New Mexico*, U.S., No. 09-10876, argued 3/2/11). The question presented is whether the right of confrontation requires the testimony of the particular analyst who conducted the laboratory test being offered,

have been reaffirmed. Both were recognized by common law at the time of the adoption of the Sixth Amendment. Dying declarations¹³⁰ made by a speaker who knew he was dying, and statements made by a speaker who was prevented from testifying by the conduct of the defendant¹³¹ “designed to prevent the witness from testifying,”¹³² do not require the right of confrontation. Both exceptions recognize the principle that an accused should not be allowed to object to hearsay when the speaker is absent because of the acts of the accused. An overview of other exceptions to the rule against hearsay reveals where confrontation clause issues will arise and will not arise.

V. THE RIGHT OF CONFRONTATION IN LIGHT OF THE MANY EXCEPTIONS TO THE RULE AGAINST HEARSAY

When considering the admission of hearsay statements offered against the accused in a criminal prosecution, two questions must be asked. First, do the hearsay statements meet a recognized exception? Second, were the hearsay statements “testimonial” when made, thereby violating the right of confrontation under *Crawford* and the subsequent line of cases? What is revealed is that much hearsay, if not testimonial, may be offered against an accused without violating the right of confrontation. Under the *Roberts* approach, a determination for reliability

or whether the right of confrontation is satisfied by someone else who is familiar with the laboratory process. Many view the case as a straight forward application of *Melendez-Diaz*, though others feel it presents the opportunity for the Court to limit the reach of its previous holding. H. Kaplan, Justices Consider Whether Lab Supervisor May Testify in Lieu of Forensic Lab Report Author, U.S. Law Week, vol. 79, No. 35 at 3529-3531 (3/22/2011).

¹³⁰ See Fed. R. Evid. 804(b)(2).

¹³¹ See Fed. R. Evid. 804(b)(6).

¹³² *Giles v. California*, 128 S.Ct. 2678, 2682, 2683 (2008).

would have been required. But after *Crawford*, hearsay that is not testimonial is not subject to any Confrontation Clause scrutiny. In those situations, hearsay law is the sole safeguard for accurate fact finding.

Party opponent statements raise no Confrontation Clause question because they are the accused's own statements.¹³³ Obviously, the accused does not need to cross examine himself. The accused may testify to explain or challenge the out of court statement attributed to him. Therefore, there is no issue of a right of confrontation. These exempted statements include not only the party opponent's own statements, but also those the party has adopted or authorized, and statements by its agents or co-conspirators.¹³⁴ These statements would not be testimonial. To fall within the exemption, they must concern matters within the scope of the agency or to further the criminal conspiracy. A testimonial statement made for preserving evidence for trial would not be a statement that was within the scope of the agency or for the purpose of the conspiracy.¹³⁵ No Confrontation Clause issues are raised by the limited exemptions for out of court statements made by a testifying witness who is present in court and available for cross examination. The right of confrontation is satisfied because the speaker of the prior out of court statement is a witness presently testifying in court and subject to cross examination.¹³⁶

The twenty-three exceptions from hearsay for out of court statements that are considered

¹³³ Fed. R. Evid. 801(d)(2)(A).

¹³⁴ Fed. R. Evid. 801(d)(2)(A)-(E).

¹³⁵ *Crawford v. Washington*, 541 U.S. at 56.

¹³⁶ *Crawford v. Washington*, 541 U.S. at 59, n.9 (citing *California v. Green*, 399 U.S. 149 at 162 (1970)).

reliable due to the *circumstantial guarantee of trustworthiness* would violate the right of confrontation if the statement was “testimonial” when made, and the speaker is either not available for cross examination or was not previously cross examined.¹³⁷ For example, an *excited utterance* statement to a police officer, if intended to aid criminal prosecution, is testimonial and violates the right of confrontation. But the exact same statement is not testimonial within the meaning of *Crawford* if made to a casual friend or bystander.¹³⁸ After *Bryant*, these statements also do not violate the right of confrontation even if made to a police officer, if the purpose was to aid an ongoing emergency, as opposed to aid a later prosecution. Under a *Roberts* analysis, the right of confrontation would have called for a judicial determination that the circumstances of the statement indicated it was reliable. Under *Crawford* and *Bryant*, constitutional scrutiny for reliability has no place if the hearsay was not testimonial. The same analysis is required for business records,¹³⁹ records of public agencies,¹⁴⁰ and church and family records.¹⁴¹ Unless the primary purpose in making the record was to further a criminal prosecution, there is no violation of the right of confrontation.¹⁴²

¹³⁷ *Crawford v. Washington*, 541 U.S. at 54 and 57.

¹³⁸ This mode of analysis does beg the question of whether a statement made to a friend who is not a police officer in the nature of “if anything happens to me, X is responsible” would be “testimonial.”

¹³⁹ Fed. R. Evid. 803(6) and (7).

¹⁴⁰ Fed. R. Evid. 803(8)-(10).

¹⁴¹ Fed. R. Evid. 803(11)-(15).

¹⁴² *Crawford v. Washington*, 541 U.S. at 56, and *Melendez-Diaz v. Massachusetts*, 129 S.Ct. at 2538.

Two of the unavailable witness hearsay exceptions, *dying declarations*¹⁴³ and the doctrine of *forfeiture for wrongdoing*¹⁴⁴ are the only recognized exceptions to the right of confrontation for testimonial hearsay.¹⁴⁵ These exceptions from confrontation have been passed down from common law. *Former testimony* that was subject to previous cross examination would satisfy the right of confrontation.¹⁴⁶ But, *statements against interest* made to public officials as part of an ongoing investigation would be testimonial and violate the right of confrontation. Although the same *against interest statement* made as a casual remark to an acquaintance or to a police officer to aid an ongoing emergency would not be testimonial, and therefore would not violate the right to confrontation.¹⁴⁷

VI. THE TROUBLESOME NATURE OF “NEW” HEARSAY EXCEPTIONS

The underlying basis of the hearsay exceptions contained in the Federal Rules of Evidence is a belief that the circumstances of the statement cause them to be reliable, so that cross examination to test the statement is not needed. More than forty of the states have evidence codes modeled after the Federal Rules of Evidence that recognize most of the same hearsay exceptions. Many states have adopted additional hearsay exceptions to those contained in the Federal Rules of Evidence. Because the vast majority of criminal prosecutions occur in

¹⁴³ Fed. R. Evid. 804(b)(2).

¹⁴⁴ Fed. R. Evid. 804(b)(4).

¹⁴⁵ *Giles v. California*, 128 S.Ct. 2678, 2682, 2683 (2008), *Crawford v. Washington*, 541 U.S. at 56, n. 6 (2004).

¹⁴⁶ *Crawford v. Washington*, 541 U.S. at 57 (citing *Mattox v. United States*, 156 U.S. 237 (1895)).

¹⁴⁷ *Crawford v. Washington*, 541 U.S. at 51-53, *Michigan v. Bryant*, 131 S.Ct. at 1165.

the state courts, state hearsay law presents most of the Confrontation Clause issues.

Hearsay exceptions have been created to allow the jury to hear statements from certain categories of witnesses who would have difficulty testifying. These include for statements from minor children who have been abused,¹⁴⁸ senior citizens and developmentally disabled adults who have been abused,¹⁴⁹ and victims of domestic violence.¹⁵⁰ Other examples of state created exceptions operate more as an aid to criminal prosecutions than a protection of vulnerable persons. Examples include allowing hearsay when the witness refuses to testify despite a court order¹⁵¹ or simply when the witness is deceased.¹⁵²

Other newly adopted state hearsay exceptions have been a direct reaction to specific cases, and represent an attempt to rectify a failure to obtain a conviction or even as an aid to a

¹⁴⁸ See, Cal. Evid. Code §1360 (allowing hearsay statements by children under the age of 12 made to any person that describe an act of abuse or neglect if the child is unavailable as a witness); 725 ILCS 5/155-10 (Illinois statute allowing hearsay statements by children under the age of 13 made to any person that are a complaint of an act of physical or sexual abuse and the child is unavailable as a witness).

¹⁴⁹ See, Cal. Evid. Code §1380 (allowing hearsay statements by abused elders and dependent adults made to a law enforcement official who videotape recorded the statement, provided that the declarant is unavailable as a witness); 725 ILCS 5/155-10.3 (Illinois statute allowing hearsay statements by elder adults who have been physically or financially abused made to any person and the elder adult is unavailable as a witness).

¹⁵⁰ See, Cal. Evid. Code §1370 (allowing hearsay statements that are in writing or recorded and that describe an infliction or threat of physical injury made to medical personnel or law enforcement official by a person unavailable as a witness); 725 ILCS 5/155-10.2(a) (Illinois statute allowing hearsay statements to any person by victims of domestic violence who are unavailable as a witness).

¹⁵¹ 725 ILCS 5/155-10.2 (allowing hearsay statements by a witness who refuses to testify despite a court order).

¹⁵² 725 ILCS 5/155-10.2 (allowing hearsay statements by a deceased).

pending case. For example, in 1995 the American sports star and actor O.J. Simpson was found not guilty of the murder of his ex-wife Nicole Brown.¹⁵³ At the trial, the prosecution tried to introduce hearsay statements by Nicole Brown in her diary and to friends and relatives about past physical abuse by O.J. Simpson. The prosecution unsuccessfully argued that the offered hearsay met California's version¹⁵⁴ of the state of mind exception.¹⁵⁵ After Mr. Simpson's acquittal, in 1997 the California legislature adopted a new hearsay exception for a declarant's hearsay statements narrating, describing or explaining the infliction or threat of physical injury upon the declarant by the party against whom the statement is offered.¹⁵⁶ In Illinois, a former police officer named Drew Peterson is being charged with the murder of the third of his four wives. The Illinois legislature adopted a hearsay exception to address the circumstances of that specific case. It allows for hearsay statements from a witness who has been murdered.¹⁵⁷ As the high

¹⁵³ K. Murphy, A Hearsay Exception for Physical Abuse, 27 Golden Gate U.L.Rev. 497 (1997).

¹⁵⁴ Cal. Evid. Code §1250.

¹⁵⁵ Fed. R. Evid. 803(3).

¹⁵⁶ Cal Evid. Code §1370.

The statement must be in writing or recorded and made to a medical professional or law enforcement official by a declarant who is unavailable to testify as a witness at trial. Cal Evid. Code §1370(a) (2). The statement must be in writing or recorded and made to a medical professional or law enforcement official by a declarant who is unavailable to testify as a witness at trial. Cal Evid. Code §1370(a)(5). In order to be admitted, the judge must determine that "the statement was made under circumstances that would indicate its trustworthiness." Cal Evid. Code §1370(a)(4). Factors a court may consider in making this determination include: the statement was made in contemplation of litigation, whether there was apparent bias or motive for fabrication, whether other evidence corroborates the hearsay statement. Cal Evid. Code §1370(b)(1)-(3).

¹⁵⁷ 725 ILCS 5/155-10.6 (a hearsay statement is not inadmissible if it was made by a declarant who was intentionally killed by the party against whom it is offered).

profile case has progressed, witnesses have come forward with statements made by the victim concerning past abuse and threats made by Mr. Peterson.¹⁵⁸ As this hearsay would not have met the requirements of existing hearsay exceptions, the Illinois legislature created an exception in 2008 known as the Drew Peterson Law.

The rationale for these state-created exceptions could be viewed as more of an aid to criminal prosecution or an effort to protect vulnerable populations than faith in their reliability.¹⁵⁹ The usual formulation of these rules or statutes creating “new” hearsay exceptions is a requirement that the judge must determine that the statement is reliable or possesses safeguards or guarantees of trustworthiness. This is an obvious attempt to have new hearsay exceptions comply with the *Roberts* test of reliability, as it collapses the hearsay question and the question of confrontation into the same issue of reliability. But the *Roberts* approach has been overruled by *Crawford*, leaving the troublesome question of whether any newly created hearsay exception would be admissible against an accused if it were not testimonial. States no longer need to include a reliability test in new hearsay exceptions. Any out of court statement casually made to a friend, or even to a police officer to aid an ongoing emergency, could be admitted against an accused without violating the right of confrontation. Additionally, states would be free to adopt any hearsay exception they choose, or even eliminate the rule against hearsay. As long as the

¹⁵⁸ <http://archive.chicagobreakingnews.com/2010/02/controversy-surrounds-drew-peterson-hearsay-hearings.html>

¹⁵⁹ The Federal Rules took a different approach. Rather than enumerating specific situations where hearsay would be allowed, the rule contains a “residual” hearsay exception. It allows hearsay statements that do not meet the expressed exceptions provided the hearsay is more probative than other available evidence and the “interests of justice will be served.” Fed. R. Evid. 807.

primary purpose of these statements was not future prosecutorial use, the right of confrontation is not violated. The *Crawford* approach makes the admissibility of these statements a question of hearsay law only, with no constitutional safeguard.¹⁶⁰

CONCLUSION

It is often said that the hearsay rule is known most for its numerous exceptions. If the origins of the rule were the goal of accurate fact finding, many of the exceptions could be criticized for a misplaced reliance on the circumstance of trustworthiness upon which they are based. Do people actually tell only the truth when death is at hand? Who among us does not evade the truth when our doctor asks if we are getting enough exercise or remaining moderate in our diets? The state created exceptions to hearsay often are more suspect. Rather than being based on an underlying rationale of reliability found in recurring situations, they are focused on who was the speaker or how the statement will aid a prosecution.

Some question whether the rule against hearsay is needed at all anymore. After all, in these modern times, juries are more sophisticated and know to discount the value of hearsay. Alternatively, rather than continuing the numerous and confusing exceptions, the question asked of the judge could simply be to determine whether the statement appeared reliable, rather than whether it met the defined circumstances of trustworthiness contained in the exceptions. The states that have newly created hearsay exceptions have done essentially that, allowing hearsay where a judge has determined it is reliable. In bench trials, judges are surely able to give

¹⁶⁰ It is interesting to note that only twelve years prior to *Crawford* the Court criticized this potential outcome. “Such a narrow reading of the Confrontation Clause ... would virtually eliminate its role in restricting the admission of hearsay testimony ...” *White v. Illinois* 502 U.S. 346 at 352 (1992). See also, *Idaho v. Wright*, 497 U.S. 805 (1990).

hearsay the weight it deserves. In civil cases, should the rule be dispensed with all together?

The criticisms of the hearsay rule are numerous, yet the historic approach of numerous exceptions lives on with the belief it produces accurate fact finding.

The relationship between hearsay doctrine and the right of confrontation has proven a difficult issue. The first attempt at reconciling the doctrines treated “reliable” hearsay as not violating the right of confrontation. Under this approach, the two doctrines largely overlapped, though reliability for hearsay purposes and reliability for confrontation purposes was not entirely the same. Most recently, the Court reversed itself, and now views the right of confrontation to apply only to “testimonial” hearsay, holding that the right of confrontation is aimed at preventing the civil law practice of receiving out of court witness statements made for the purpose of aiding prosecution. Therefore, any hearsay statement which is not testimonial and allowed under an exception may be received without violating the Sixth Amendment. With constitutional scrutiny for reliability no longer required for hearsay which is not testimonial, the common law faith in the rule against hearsay as a safeguard for accurate fact finding now looms larger in importance. For many circumstances, only hearsay doctrine remains as that which protects against a criminal conviction based upon on “a story out of another man’s mouth.”¹⁶¹

¹⁶¹ Gascoigne’s Trial, 7 How. St. Tr. 959, 1019 (1680).