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The Death of Dying Declarations in a Post-*Crawford* World

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“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”

Oliver Wendell Holmes Jr., *“The Path of the Law”*¹

“Upon this point a page of history is worth a volume of logic.”

Oliver Wendell Holmes, Jr., *New York Trust Co. v. Eisner*²

I. *CRAWFORD V. WASHINGTON*

As the ambivalence of Justice Holmes reveals, the struggle between logic and historical precedent in the law requires a judicial balance that knows when to yield to the logic of change and when to remain tied to tradition. The landmark case of *Crawford v. Washington*³ reflects that struggle as a work in progress. In *Crawford*, the Supreme Court fundamentally altered its interpretation of the Confrontation Clause of the Sixth Amendment to such an extent that the full reach of the doctrinal logic will take decades to unravel.

Prior to *Crawford*, the Supreme Court had held in *Ohio v. Roberts*, almost a quarter century earlier, that the Confrontation Clause permitted a hear-

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1. 10 HARV. L. REV. 457 (1897).

2. 256 U.S. 345, 349 (1921).

3. 541 U.S. 36 (2004). *Crawford* effected “a fundamental re-conception of the Confrontation Clause.” *United States v. Cromer*, 389 F.3d 662, 671 (6th Cir. 2004). The consensus of federal appellate courts is that the *Crawford* holding is a trial right and does not extend to sentencing procedures. *See United States v. Cantellano*, 430 F.3d 1142, 1146 (11th Cir. 2005).

say statement to be used as evidence against a defendant in a criminal case only if the statement either fell under a “firmly rooted hearsay exception” or, failing that, at least bore “particularized guarantees of trustworthiness.”⁴ Aside from the hearsay exception of declarations against penal interest, the net effect of the *Roberts* doctrine was to constitutionalize the traditional hearsay exceptions of evidence law and to offer the possibility of expanding those exceptions with modern ones based on guarantees of trustworthiness.⁵

Crawford severed this linkage of common law hearsay exceptions and the Confrontation Clause by subjecting those exceptions to a new test. The key test of *Crawford* for a Confrontation Clause violation is whether the hearsay statement offered against a criminal defendant is testimonial.⁶ If the statement is testimonial, the Sixth Amendment requires that the hearsay statement be excluded from the evidence against a criminal defendant, even if the statement falls within a traditional hearsay exception, unless the person who made the out-of-court statement is unavailable at the trial and the defendant in the criminal case had an opportunity before trial to cross-examine that person.⁷ The Supreme Court, however, refused to decide whether non-testimonial hearsay is completely free of any Confrontation Clause restraint or still subject either to the *Roberts* restrictions of firmly-rooted hearsay exceptions or particularized guarantees of trustworthiness.⁸

Although the meaning of “testimonial” becomes crucial if this distinction is to be made, Justice Scalia’s majority opinion declined to provide a definitive definition because the answers to police interrogation in *Crawford* satisfied any definition.⁹ Instead, Justice Scalia concluded that testimonial hearsay includes at a minimum: prior testimony at a preliminary hearing, prior testimony before a grand jury, prior testimony at a former trial, or statements made in answer to police interrogations.¹⁰ Nonetheless, the *Craw-*

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

5. *See Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (“[A]ccomplices’ confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule”).

6. *See Crawford*, 541 U.S. at 53.

7. *See id.* at 42-50.

8. *Id.* at 68.

9. *Id.* at 53 (“Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.”). Justice Scalia also listed as possible testimonial statements a specific list of items suggested in petitioner’s brief and items suggested by him and Justice Thomas in their concurring opinions in *White v. Illinois*, 502 U.S. 346, 365 (1992): ex-parte in-court statements, affidavits, custodial examinations, depositions, confessions, prior testimony that the defendant was unable to cross-examine or similar statements before trial that a declarant would reasonably expect to be used by the prosecution. *Crawford*, 541 U.S. at 51-52 .

10. *See Crawford*, 541 U.S. at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).

ford opinion suggests even more broadly that unconstitutional “testimony” might include any hearsay statements made by one who subjectively expects the statement to be used in a criminal prosecution or perhaps even statements that an objective witness would reasonably expect to be so used.¹¹ Most lower courts that have considered the matter appear to have adopted this broader definition of “testimonial” hearsay to trigger Sixth Amendment protection.¹² As a harbinger of the broad sweep of what may be testimonial, several lower courts have diverged from Justice Scalia’s absolute statement in *Crawford* that business records are an example of a hearsay exception that by nature can never be testimonial.¹³

11. *Id.* at 51-52.

12. The Sixth Circuit rejected the limitation of “testimonial” to formalized statements made directly to state authorities. *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004). Instead, it adopted the view of Professor Friedman that “[a] statement made knowingly to the authorities that describes criminal activity is almost always testimonial.” *Id.* at 675 (citing Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1042 (1998)). See also *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (“testimonial” refers to statements made under circumstances in which an objective person would rationally believe the statement would be available at a later trial); *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) (“testimonial” refers to declarant’s awareness or expectation that their statement may subsequently be used at trial). In fact, the Tenth Circuit has recently concluded that the “common nucleus” of all the definitions tendered by the Supreme Court in *Crawford* centers on an objective test: the reasonable expectation of a declarant that his statement may be used at a later trial. *United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir. 2005) (rejecting narrow definition). It is clear that dying declarations, whether made directly to a state official, such as a police officer, or to a nongovernmental citizen are testimonial under this broad definition. A description by the victim of the “cause or circumstances” of what appears to be the victim’s impending death due to a criminal homicide is principally motivated by the desire to have the authorities apprehend and convict the culprit in a later trial. See FED. R. EVID. 804(b)(2). Although in some cases the homicide victim may utter the information for the purpose of getting more effective medical treatment, the desire to convict the culprit is at least an accompanying motive.

13. *Crawford*, 541 U.S. at 56 (“Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records . . .”). Even though the prosecution argued that the affidavit was admissible as a business record or public record, the New York Court of Appeals recently held that an affidavit of the Department of Motor Vehicles describing the agency’s revocation and mailing procedures was a violation of *Crawford*. The affidavit was an attempt to prove defendant knew his driving privileges had been revoked and thus knew or should have known he was driving with a revoked license as an element in the felony charge. *People v. Pacer*, No. 45, 2006 N.Y. LEXIS 571, *8 (N.Y. Mar. 28, 2006) (affidavit inadmissible even though *Crawford* considered business records nontestimonial at the time the Confrontation Clause was adopted). A Texas appellate court upheld a murder conviction even though the trial court permitted testimony by an assistant medical examiner about the cause of death based on review of an autopsy report prepared by another doctor who did not appear in court. *Mitchell v. State*, No. 04-04-00885-CR,

Despite its holding that a criminal defendant is constitutionally entitled to a prior opportunity to cross-examine a hearsay declarant, the *Crawford* majority conceded that some historical exceptions to the general rule against hearsay admissibility existed and that several had become well established before the Sixth Amendment was adopted in 1791.¹⁴ Yet Justice Scalia deflected the significance of this fact by observing that “scant evidence” existed to prove that hearsay exceptions were used to allow testimonial statements against criminal defendants.¹⁵ He contended further that most of the historical hearsay exceptions concerned statements that were non-testimonial, such as those allowing business records or statements in furtherance of a conspiracy.¹⁶ The one glaring exception is the exception for dying declarations, which Justice Scalia admitted was undoubtedly used against criminal defendants in both testimonial and non-testimonial senses.¹⁷ Tantalizingly, the Supreme Court leaves open for another day whether the Confrontation Clause as interpreted by *Crawford* incorporates a unique historical exception for dying declarations.¹⁸

The alleged uniqueness of this exception would defy the clear logic of *Crawford*. A statement given to a police officer by a living hearsay declarant unavailable at trial, such as the wife in *Crawford* who incriminates her hus-

2005 WL 3477857 (Tex. Ct. App. Dec. 21, 2005). Defendant unsuccessfully argued that the *Crawford* holding entitled him to cross-examination of that absent doctor. *Id.* at *1. *But see* *City of Las Vegas v. Walsh*, 91 P.3d 591, 596 (Nev. 2004) (stating chain-of-custody affidavit by nurse authenticating blood alcohol test was “testimonial”). *Accord* *People v. Rogers*, 780 N.Y.S.3d 393 (N.Y. Ct. App. 2004) (blood test report was “testimonial”); *People v. Capellan*, 791 N.Y.S.2d 315 (N.Y. Crim. 2004) (Dept. of Motor Vehicles affidavit about defendant’s driving record was “testimonial”); *Shiver v. State*, 900 So. 2d 615 (Fla. Dist. Ct. App. 2005) (breath test affidavit certifying maintenance and identity of testing device called “testimonial”). Even some of the decisions that agree business records or official records are not testimonial do so more because of practical difficulties than because of strict constitutional doctrine. *See, e.g.,* *People v. Durio*, 794 N.Y.S.2d 863 (N.Y. Sup. Ct. 2005) (autopsy reports not considered “testimonial”).

14. *Crawford*, 541 U.S. at 46.

15. *Id.* at 56.

16. *Id.*

17. *Id.* at 56 n.6.

18. *Id.* (“We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds it is *sui generis*.”). The California Supreme Court, however, has decided that the Sixth Amendment does incorporate an exception for dying declarations. *People v. Monterroso*, 101 P.3d 956, 971 (Cal. 2004). *See also* *Wallace v. State*, 836 N.E.2d 985 (Ind. Ct. App. 2005); *State v. Martin*, 695 N.W.2d 578 (Minn. 2005) (en banc); *People v. Gilmore*, 828 N.E.2d 293 (Ill. App. 2005). *But see* *United States v. Jordan*, No. 04-CR-229-B, 2005 U.S. Dist. LEXIS 3289, at *7 (D. Colo. Mar. 3, 2005) (stating that dying declarations are a violation of the Sixth Amendment: “[T]here is no rationale in *Crawford* or otherwise under which dying declarations should be treated differently than any other testimonial statement”).

band by giving a statement to the police and then becomes unavailable at trial because of the marital privilege, is barred by the Sixth Amendment Confrontation Clause.¹⁹ But, as Justice Scalia suggests, if that same wife were to give the statement on her deathbed to police interrogators in order to implicate her husband in her death, the Confrontation Clause might not be a bar for purely historical reasons.²⁰ The thesis of this article is that neither historical precedent nor the internal logic of *Crawford* justifies retention of the dying-declaration hearsay exception in its present form.²¹

II. THE CLAIM OF HISTORICAL EXCEPTIONALISM FOR DYING DECLARATIONS

The majority opinion in *Crawford* relies upon the proposition that the Confrontation Clause's original meaning controls its interpretation. For Justice Scalia, the text of the Sixth Amendment itself does not reveal that original meaning because the words "witnesses against" in the Confrontation Clause could signify either persons who actually testify in court or also those whose out-of-court statements are offered in court, or maybe even some intermediate definition.²² The textual ambiguity impelled him to write a detailed exegesis of historical precedent going back to pre-1791 English cases and statutes. To determine what kind of statements violate the Confrontation Clause, Justice Scalia centered on 1791, the year in which the Sixth Amendment was adopted, as the focal point of his historical analysis.²³ The key question then becomes: what does this historical precedent indicate about the meaning of the text when adopted in 1791.

The *Crawford* Court's historical exposition is superficially consistent with the interpretive philosophy of *Mattox v. United States*, in which the Court had earlier justified the dissonance between the text of the Confrontation Clause and the implied exception for dying declarations on the ground that from "time immemorial" dying declarations were considered admissible even though they may offend the letter of the constitutional provision.²⁴ But

19. See *Crawford*, 541 U.S. 36.

20. See *id.* at 56 n.6.

21. Although acknowledging dying declarations as a constitutional exception to the Confrontation Clause by its dictum in a pre-*Crawford* case, the Supreme Court acknowledged the exception could not be squared with the plain meaning of the constitutional text. *Mattox v. United States*, 156 U.S. 237, 243 (1895) ("[T]here could be nothing more directly contrary to the letter of the provision in question [the Confrontation Clause] than the admission of dying declarations.").

22. *Crawford*, 541 U.S. at 42-43.

23. The year 1791 is the heart of Justice Scalia's extended historical analysis in pursuit of this original meaning or understanding. *Id.* at 46, 54-55.

24. *Mattox*, 156 U.S. at 243 ("A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant.").

whereas the Court in *Mattox* had invoked a generalized homage to tradition without even one citation to justify what it accepted as a “technical” violation of the plain text of the Confrontation Clause, the Court in *Crawford* used a specific recitation of historical precedents to clarify what it considered an ambiguity in the text of the Confrontation Clause. Under either approach, however, the validity and strength of the historical argument advanced is crucial.

Typical of the early hearsay cases, the birth of the dying-declaration exception to the hearsay rule is murky and fragmentary. Before the adoption of the Sixth Amendment in 1791, English precedent clearly existed for the admission of hearsay evidence in the form of dying declarations.²⁵ The earliest reported case appears to be *The King v. Reason*.²⁶ In that murder case, a clergyman’s oral testimony of what the then deceased victim had said on his deathbed about the identity of the assailant was admitted into evidence, even though a more detailed written statement taken under oath by two justices of the peace was not admitted for lack of both the victim’s signature and the original statement itself.

Two years before the adoption of the Sixth Amendment, an English court in *The King v. Woodcock* again used the emergent dying declaration to bypass defective statements taken by justices of the peace.²⁷ In *Woodcock*, a

25. Oddly, in the light of the early English precedent and extensive subsequent authority, one district court concluded, without any citation of authority, that dying declarations violate the *Crawford* holding because, among other reasons, this common law exception did not exist in 1791. *Jordan*, 2005 U.S. Dist. LEXIS 3289, at *10. (“However the dying declaration exception was not in existence at the time the Framers designed the Bill of Rights.”)

26. (1722) 16 How. St. Tr. (K.B.). *Accord* *The Trial of William Lord Byron*, (1765) 19 How. St. Tr. 1178, 1220 (Parl.) (“As to dying Declarations, see the Case of Reason and Tranter.”). Even at this early date, the dying declaration in *Reason* served the evasive purpose of allowing into evidence hearsay that would not have been admitted if only the written statement taken by the justices of the peace existed. *Crawford* takes pains to show how eventually English courts even disallowed pretrial statements taken by justices of the peace in felony cases. *See Crawford*, 541 U.S. at 46. *Reason* shows how such a statement can be backdoored into evidence by means of the dying declaration exception.

27. *The King v. Woodcock*, (1789) 168 Eng. Rep. 352, 353 (declarations at the point of death have a guarantee of truth equal to the obligation of an oath in court even though the declarant did not expressly acknowledge she was dying). *But cf.* *The King v. Drummond*, (1784) 168 Eng. Rep. 271, 272 (dying declaration of convict to chaplain before convict’s execution inadmissible on behalf of defendant in a robbery trial because, had the convict lived, he could not have testified in court under oath). The expedient of using a dying declaration to remedy a written statement improperly taken by a magistrate under statutory law failed to work where the attorney for the Crown conceded the murder victim was not “under apprehension of immediate death” so as to justify use of a dying declaration. *The King v. Dingler*, (1791) 168 Eng. Rep. 383, 384.

murder victim near death gave a signed, written statement under oath to a magistrate as provided by an Act of Parliament.²⁸ However, the statement could not be admitted into evidence under this Act because, contrary to the Act, the statement was not taken in the presence of the accused with the possibility of cross-examining the victim.²⁹ However, as in *Reason*, the court allowed the statement into evidence under the alternate theory of dying declaration.³⁰ Early on, therefore, dying declarations functioned as a jurisprudential escape hatch allowing hearsay statements into evidence that had failed to satisfy the procedural requirements of statutory law regarding written statements taken by magistrates and justices of the peace. As a matter of logic and policy, however, it is not evident why dying declarations are more reliable than written statements given under oath, when neither had been subjected to contemporaneous examination by a suspect or defendant.

The suggestion that dying declarations should be differentiated historically from other hearsay exceptions rests in part on an inaccurate claim that dying declarations were the only recognized criminal hearsay exception at common law. The *Crawford* majority cites a treatise for this proposition.³¹ Yet Heller, the treatise writer, relied solely for this assertion upon another treatise written by Rottschaefer.³² Rottschaefer, however, never claimed that dying declarations were the only exception; he merely stated that they were an exception.³³ Even before *Crawford*, Justice Harlan had exposed Heller's error as resting on a sweeping assertion of a general constitutional right of cross-examination unsupportable either on the basis of history or on the basis of contrary Supreme Court decisions which had upheld various hearsay exceptions against the claim they violated the Sixth Amendment.³⁴

28. *Woodcock*, 168 Eng. Rep. 352.

29. *Id.*

30. *Id.*

31. *Crawford*, 541 U.S. at 56 n.6. (citing F. Heller, *The Sixth Amendment* 105 (1951) and parenthetically noting that the treatise "assert[ed] that this was the *only* recognized criminal hearsay exception at common law.").

32. FRANCIS H. HELLER, *THE SIXTH AMENDMENT* 105, 168 n.65 (1951) ("The common law knew only one exception to the rule, that of dying declarations.") The sole citation for this assertion is to Henry Rottschaefer's *Handbook of American Constitutional Law* 796 (1939).

33. ROTTSCHAEFER, *supra* note 32, at 796 ("The admission of dying declarations is a recognized exception to the general rule based on necessity and historical considerations."). Unlike Heller, Rottschaefer cited the primary authority of *Kirby v. United States*, 174 U.S. 47 (1899), for support. *Kirby* had noted that dying declarations were an exception to the hearsay rule. Nowhere does Rottschaefer or *Kirby* claim dying declarations were the only exception.

34. *California v. Green*, 399 U.S. 149, 178 n.12 (1970) (Harlan, J., concurring) ("This view is open to question. Wigmore, for one, takes the position that several exceptions to the hearsay rule existed as of the time the Sixth Amendment was adopted.").

No legal historian has been found who would define dying declarations as the only criminal hearsay exception at common law. Indeed, a British author has identified some thirteen hearsay exceptions which existed at early common law, plus other exceptions which probably existed, though not as well defined.³⁵ William Blackstone, shortly before the American Revolution, wrote his classic *Commentaries on the Laws of England* in which he noted that hearsay exceptions existed for “general customs, or matters of common tradition or repute” and for “books of account” or “shop-books” where the servant was dead.³⁶ No legal scholar has asserted that, except for dying declarations, all the other hearsay exceptions were only available in civil trials. It is implausible that dying declarations were the only hearsay exception used in criminal trials at the time of the adoption of the Sixth Amendment in 1791.

The stronger argument made in *Crawford* for the uniqueness of dying declarations is based on the premise that, although dying declarations may not have been the only hearsay exception used at common law, “scant evidence” exists that these other exceptions were used testimonially against defendants in criminal cases.³⁷ However, the evidence at the end of the eighteenth century was scarcely more scant in criminal cases for the exceptions of *res gestae* than it was for dying declarations.³⁸ The exception for *res gestae* hearsay statements dates back to at least *Thompson v. Trevanion* in 1694.³⁹ In that domestic violence case, the incriminating hearsay statements made by a victim wife against her husband before she could “devise or contrive any thing for her own advantage” were admissible against the husband as evidence of the injury.⁴⁰ About five years later, the concept was again applied to admit

35. JOHN HUXLEY BUZZARD ET AL., PIPSON ON EVIDENCE §§ 16-16, 16-17, at 345-46 (1982) (“In addition to the exceptions set out above, there are probably others which are less well-defined and established.”). See also THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 8-12 (London, E. Rider 1801) (listing hearsay exceptions for reputation, pedigree, prescription, custom, business records, and admissions by a barrister at law).

36. WILLIAM BLACKSTONE, 3 COMMENTARIES *368.

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

38. *White v. Illinois*, 502 U.S. 346, 356 (1992) (“The exception for spontaneous declarations [a species of *res gestae*] is at least two centuries old.”). The rule limiting dying declarations to homicide cases of murder or manslaughter does not definitively occur before the late eighteenth century. See 1 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 447 (London, MacMillan & Co. 1883) (“I believe this rule as now limited to be about 100 years old.”).

39. (1694) 90 Eng. Rep. 179 (K.B.) Although the case was an action for trespass, this form of action still had criminal law overtones. See PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 8 (5th ed. 1984) (“[A]s late as 1694 the defendant to a writ of trespass was still theoretically liable to a criminal fine and imprisonment”). See also 11(2) HALSBURY’S LAWS OF ENGLAND ¶ 1105, at 922-23 (4th ed. 1973) (citing *Thompson v. Trevanion* together with later nineteenth century British cases as using *res gestae* hearsay exception in criminal matters).

40. *Thompson*, 90 Eng. Rep. at 179.

testimony of what the deceased had said out of court about her state of melancholy and threatened suicide.⁴¹ Furthermore, ten years before the adoption of the Sixth Amendment, the Crown brought criminal charges against Lord George Gordon for high treason in *The King v. Gordon*.⁴² In *Gordon*, the question was whether the cries of a mob and the words on banners and placards were admissible against the defendant to show how Lord Gordon misused the Protestant religion as a pretext to attack the government. The court permitted the words to be entered as evidence. Three years after the adoption of the Sixth Amendment, another English court explicitly used the phrase “res gestae” to justify the admission of a letter into evidence.⁴³ The historical evidence, therefore, supports the conclusion that not only dying declarations but also res gestae statements were used as hearsay exceptions against criminal defendants before and at the time of the adoption of the Sixth Amendment.

The phrase “res gestae,” though often criticized because of its Latinized nebulosity, governed in its early years what are considered in modern law to comprise no less than four separate hearsay exceptions: statements of present sense impressions, excited utterances, statements of present bodily condition, and statements of emotions and present mental condition.⁴⁴ Similar to early res gestae cases was the early common law of “hue and cry” in rape cases.⁴⁵ The prosecutor of a rape case had to prove that the victim cried out to someone about the rape immediately after it happened.⁴⁶ Early courts required the full details of the victim’s outcry in open court.⁴⁷ With the emergence of the hearsay rule, the doctrine evolved into the fresh-complaint doctrine, which omitted the details of the hearsay statement.⁴⁸ Even within the last few years, New Jersey has refused to subsume the fresh-complaint doctrine under the res gestae hearsay exception because this would limit the broader exception of fresh-complaint to spontaneous or excited utterances

41. *The Trial of Spencer Cowpers*, (1699) 13 How. St. Tr. 1106, 1166-69 (Hertford Assizes) (murder case).

42. (1781) 21 How. St. Tr. 485, 535-36 (K.B.).

43. *The Trial of John Horne Tooke*, (1794) 25 How. St. Tr. 439, 440-43 (Special Comm’n of Oyer & Terminer) (high treason).

44. MCCORMICK ON EVIDENCE (5th ed. 1999) § 268, at 414 (Latin phrase also employed to justify admission into evidence of statements that were not even hearsay). For a critical comment on the confusion caused by the term “res gestae” see 6 JOHN HENRY WIGMORE, EVIDENCE § 1767, at 180-84 (Chadbourn rev. ed. 1976) (“The phrase ‘res gestae’ has long been not only entirely useless, but even positively harmful.”).

45. *See People v. Hill*, 578 A.2d 370, 374 (N.J. 1990).

46. *See id.*

47. *See id.*

48. *Id.* at 377-79 (fresh complaint made to police detective among others). Application of the *Crawford* testimonial-nontestimonial constitutional distinction will presumably involve many testimonial declarations, because, like dying declarations, a fresh complaint will often be made directly to the police.

uttered shortly after the rape.⁴⁹ As one legal scholar has observed, the concept of *res gestae* in earlier Anglo-American law was so broad that it effectively masked judicial discretion in the admission of hearsay in the guise of a rigid hierarchy of exceptions.⁵⁰

The House of Lords in *Regina v. Andrews* approved this traditional common law use of the *res gestae* hearsay exception against a criminal defendant.⁵¹ In that case, two men entered the victim's apartment and attacked him with knives.⁵² Police officers arrived within minutes.⁵³ In response to a police inquiry, the victim informed them of the identity of the two attackers, one of whom was the defendant.⁵⁴ At that time, the victim did not appear in danger of imminent death so as to justify the use of a dying declaration.⁵⁵ Two months later, however, the victim died as a result of his injuries.⁵⁶ In dismissing defendant's appeal, the House of Lords used the *res gestae* variant of spontaneous declaration to hold that the trial judge could properly have found the circumstances of the stabbing to be so startling and the victim's statement so contemporaneous with the stabbing as to exclude the possibility of dissimulation or distortion by the victim.⁵⁷ As the rule against hearsay crystallized from about 1670 onward the "exception or modification" of the rule as exemplified by the *res gestae* variant of spontaneous declarations was "virtually as old as the rule itself."⁵⁸ The significance of *Andrews* is that it considers the use of an apparently testimonial statement against a defendant in a criminal case to be simply a continuation of English law dating back to the seventeenth century. The victim in *Andrews* identified his assailants in response to a question by one of the police officers regarding the cause of the

49. *Id.* at 378. At least one New York court has concluded its "prompt outcry" rule is not "testimonial" under *Crawford*. *People v. Romero*, 791 N.Y.S.2d 872 (Crim. Ct. 2004).

50. JENNY MCEWAN, *EVIDENCE AND THE ADVERSARIAL PROCESS* 86 (2d ed. 1998) ("An obvious example is the operation of the doctrine of *res gestae*; the concept affords a convenient cloak for discretion and frequently provides a useful escape route from the rigours of exclusionary rules such as the hearsay rule.").

51. *Regina v. Andrews*, (1987) A.C. 281 (H.L.) (appeal taken from Ct. App. Crim. Div. Eng.). *Accord* *The Queen v. Callender*, (1998) Crim L.R. 337 (recognition of the *res gestae* principle in criminal cases).

52. *Andrews*, (1987) A.C. 281.

53. *Id.*

54. *Id.*

55. *Id.* at 295. (Lord Ackner) ("He could not submit that the statement was a 'dying declaration' since there was no evidence to suggest that at the time when the deceased made the statement (two months before his ultimate death), he was aware that he had been mortally injured.").

56. *Id.*

57. *Id.* at 300-02.

58. *Id.* at 289 (Argument of Michael Worsely Q.C. and Godfrey Carey for the Crown).

victim's injuries.⁵⁹ The statements to the police officers rather clearly come within the narrow definition of "testimonial" statements now barred by the Sixth Amendment under the *Crawford* rationale.⁶⁰

The historical similarity between the *res gestae* exception and the dying declaration exception is illustrated by the frequent overlap of the two. In *The King v. Lawson*, a woman retrieved from a burning home was taken to a hospital where she exclaimed "murder, murder."⁶¹ Shortly afterward she died.⁶² The words played a central part in the conviction of her husband.⁶³ The appellate court agreed with the trial judge that the words could be justified as an exception to the hearsay rule both on the basis of a dying declaration and on the basis of *res gestae*.⁶⁴ The *res gestae* variant was what we would call in the United States an excited utterance because the appellate court observed the emotionally overpowering event left no opportunity for distortion or fabrication.⁶⁵

In fact, *res gestae* is the more flexible of the two exceptions and has been used by English judges when one or more of the preconditions of a dying declaration have not been met. In *R. v. Mills & Others*, although the Privy Council refused to dispense with the requirement of a hopeless expectation of death before a dying declaration could be used, it affirmed the conviction by circumventing the dying declaration exception by means of the *res gestae* exception.⁶⁶ The attack on the victim who uttered the words was so startling that his words were *res gestae* even though a hopeless expectation of death did not exist on the part of the victim who in fact did later die because of wounds inflicted by the attack.⁶⁷

An overview of this more recent English legal development leads to several conclusions. The hearsay exceptions of dying declarations and *res gestae* not only arose together early in English law but continued their legal development side by side up to the present in the country of their origin. That dying declarations were ultimately confined to murder and manslaughter cases where the victim uttered the statement with a hopeless expectation of

59. *Id.* at 294-95.

60. *Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("Whatever else the term [testimonial] covers, it applies at a minimum . . . to police interrogations."); *id.* at 52 ("Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."); *id.* at 53 n.4 ("Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.").

61. *The King v. Lawson*, (1998) Crim. App. 883.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *R. v. Mills & Others*, (1995) All Eng. Rep. 865 (P.C) (appeal taken from the Court of Appeal of Jamaica).

67. *Id.*

death did not mean that, as of 1791, dying declarations were the sole hearsay exception in criminal cases.⁶⁸ Not only their common pre-1791 origin, but also the contemporary use of both exceptions to justify admission of the same hearsay, or even the use of the *res gestae* exception when the more limited dying declaration exception cannot be used, shows that both exceptions have grown together like intertwined legal vines from the earliest days of the English common law.

Furthermore, American law also recognizes and regularly employs the interconnectivity between the two hearsay exceptions of dying declarations and the modern excited-utterance variation of the older doctrine of *res gestae*.⁶⁹ The use of excited utterances evolved as a hearsay exception from earlier English precedents, which had permitted the use of spontaneous declarations only if the declarations were made more or less contemporaneously with the event at issue.⁷⁰ A survey of case decisions shows that American courts regularly use both exceptions to justify statements by a homicide victim at the point of death when the requirements of each exception are satisfied.⁷¹ The violence of a homicide obviously provides the “startling event or condition” to which the dying victim’s statement relates while the dying victim, who is conscious of impending death, is “under the stress of excitement caused by the event or condition.”⁷² American judges, like their British brethren, are adroit in using the excited-utterance or *res gestae* exception to admit the hearsay of a criminal homicide victim when the elements of a dying declaration are not met or when they prefer not to decide whether a dying declaration exception exists.

Yet, the Court in *Crawford* has teasingly suggested that dying declarations might satisfy the requirement of the Confrontation Clause because of

68. MCCORMICK, *supra* note 44, § 311, at 464 (“Although the English courts in the 1700s had not done so, subsequent decisions refused to admit dying declarations in civil cases, . . . or in criminal cases other than those charging homicide as an essential part of the offense.”)

69. Compare FED. R. EVID. 803(2) (“Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”) with FED. R. EVID. 804(b)(2) (“Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.”).

70. *People v. Brown*, 517 N.E.2d 515, 517-18 (N.Y. 1987).

71. See, e.g., *Lyons v. United States*, 683 A.2d 1080 (D.C. App. 1996); *Young v. United States*, 391 A.2d 248 (D.C. App. 1978); *State v. Adamson*, 665 P.2d 972 (Ariz. 1983); *State v. Henderson*, 672 So. 2d 1085 (La. App. 1996); *State v. Clay*, 477 N.W.2d 363 (Wis. App. 1991); *People v. Treat*, 561 N.Y.S.2d 198 (N.Y. App. Div. 1990); *Barker v. State*, 728 S.W.2d 204 (Ark. App. 1987); *People v. Lagunas*, 710 P.2d 1145 (Colo. App. 1985); *People v. Schinzel*, 272 N.W.2d 648 (Mich. App. 1978).

72. FED. R. EVID. 803(2).

the historical imperative but that spontaneous declarations, excited utterances, or other variants of *res gestae* are constitutionally problematic.⁷³ By casting doubt upon the constitutionality of testimonial spontaneous declarations, including 911 emergency telephone calls, but suggesting that dying declarations might be constitutional, the *Crawford* majority has perhaps unintentionally foreshadowed the possibility of a Confrontation Clause legerdemain in which the same hearsay statement might be considered constitutional if viewed as a dying declaration but not if viewed as a spontaneous declaration or its modern variant of excited utterance.⁷⁴ This would amount to a type of semantic sophistry that cannot tenably be based on solid historical grounds. Perhaps sensing this, Justice Scalia suggests that to the extent spontaneous declarations existed in 1791, they were confined to statements made by the victim immediately after injury without the time to fabricate or distort.⁷⁵ This appears to concede that at least those limited spontaneous declarations could have been used against criminal defendants in 1791. At most, Justice Scalia's dictum would lead to the conclusion that the excited-utterance exception of Federal Rule of Evidence 803(2) may not be constitutionally employed against a criminal defendant in a testimonial sense where the utterances are not contemporaneous or nearly so with the startling event or condition which caused them.⁷⁶ This is a possible originalist interpretation that rather rigidly freeze-frames as of 1791 not only core evidentiary principles but also every legal

73. *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (“questionable” whether testimonial statements admissible as spontaneous declarations in 1791).

74. Several lower courts have already accepted the *Crawford* invitation to view spontaneous declarations, excited utterance, and 911 emergency telephone calls with constitutional suspicion. A New York decision appears to brand 911 telephone calls as necessarily testimonial under *Crawford* and subject to the Sixth Amendment. *People v. Cortes*, 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004) (“The 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or JPs under the Marian committal statute.”). *Accord* *United States v. Arnold*, 410 F.3d 895, 903 (6th Cir. 2005) (911 call expected to be used in a future trial even if one purpose is also to obtain assistance). *See also* *People v. Victors*, 819 N.E.2d 311, 320-21 (Ill. App. 2004) (dictum). *But see* *Gamble v. State*, 831 N.E.2d 178, 183 (Ind. App. 2005) (third-party 911 calls deemed non-testimonial because principal purpose is to alert emergency personnel and not to initiate criminal prosecution). For a good summary of the disarray of federal and state opinions regarding the application of *Crawford* to excited utterances or 911 emergency telephone calls, see *United States v. Hadley*, 431 F.3d 484, 503-06 (6th Cir. 2005).

75. *Crawford*, 541 U.S. at 58 n.8.

76. Noting Justice Scalia's distinction, a New York court concluded that its excited utterance exception was unconstitutional insofar as it applied to a testimonial statement taken by police from a robbery victim after the defendant had already been taken into custody for the robbery. *People v. Watson*, 798 N.Y.S.2d 712 (N.Y. Sup. Ct. 2004) (unpublished disposition). The statement was not sufficiently contemporaneous with the robbery. *Id.*

detail of those principles. A more flexible originalist alternative to this procrustean approach would be to acknowledge that the Framers most likely did not expect the evidentiary principles of 1791 to become frozen relics of time and devoid of normal common law development.

Therefore, the Supreme Court in the inevitable future case requiring an answer whether dying declarations should be declared the only exception permitted by *Crawford* has two basic options. The first is to acknowledge that both dying declarations and at least limited versions of *res gestae* were used against pre-1791 criminal defendants and were all part of the original meaning the Sixth Amendment at the time of its adoption.⁷⁷ However, *Crawford*'s explicit and recent rejection of *Ohio v. Roberts*⁷⁸ in regard to testimonial hearsay statements realistically precludes any return to "firmly rooted hearsay exceptions."⁷⁹ Although an originalist might take as a starting point that the Framers clearly intended to provide no less protection against hearsay than existed at the time of the adoption of the Sixth Amendment, it does not follow that, because the Framers elevated the right of confrontation to a constitutional level, they intended to freeze-frame the right in the eighteenth century with the often hair-splitting flotsam and jetsam of the emerging hearsay exceptions or that a fair reading of the text requires such a solution.⁸⁰ By rejecting the firmly-rooted-hearsay mantra of *Roberts*, the Court in *Crawford* has in fact turned its back on that lockstep approach to the Confrontation Clause.

The only other option for the Court is to recognize that, even though dying declarations, limited versions of *res gestae*, and possibly other hearsay common law exceptions existed in 1791, and could be used against criminal defendants, that historical fact alone does not trump the text of the Sixth

77. To the extent spontaneous declarations existed in 1791, Justice Scalia suggested they were confined to statements made immediately upon injury to the victim without any time to fabricate or distort. *Crawford*, 541 U.S. at 58 n.8. This implicitly concedes, as this paper more definitively concludes, that at least those spontaneous declarations so restricted did exist by 1791. At most, Justice Scalia's dictum would lead to the conclusion that Federal Rule of Evidence 803(2) is only unconstitutional to the extent it permits into evidence testimonial excited utterances that are not contemporaneous with the startling event or condition which caused them.

78. 448 U.S. 56 (1980).

79. *Crawford*, 541 U.S. at 60. The Court's opinion in *Crawford* effectively overruled *Roberts*' permissive use of testimonial statements. *Id.* at 65 ("*Roberts*' failings were on full display in the proceedings below."); *id.* at 69 ("I dissent from the Court's decision to overrule *Ohio v. Roberts*."). (Rehnquist, J., dissenting).

80. A procrustean literalism of constitutionally limiting the dying declaration exception to 1791 would mean that the exception could only be used in cases where the declarant died. But the modern practice under Rule 804(b)(2) is to use the exception by the dying declarant recovers but becomes unavailable a trial for reasons other than death. In addition, the trend for courts is to require only a less demanding standard of belief in imminent death rather than the earlier requirement of a consciousness of death that excluded all hope of recovery. MCCORMICK, *supra* note 44, § 311, at 463-64.

Amendment.⁸¹ Common law English hearsay exceptions that emerged before the rise of the full right to cross-examination have to be weighed against a later constitutional right of confrontation, which clearly includes not only a literal right of face-to-face confrontation but also the right to conduct a cross-examination.⁸² Although questionable but settled hearsay exception precedent can be a troubling roadblock for those who seek the original and true meaning of constitutional text, the doctrine of textually-derived originalism should start from the premise that the interpretation of a constitutional text is not subservient to whatever common law existed on the point at the time the constitutional text was adopted.⁸³ That the Framers were aware or could have become aware of these common law hearsay exceptions does not necessarily lead to the conclusion that they meant to implicitly engraft these exceptions onto the explicit text of the Sixth Amendment.

After all, English judges created the common law exceptions before there was a Sixth Amendment. And, if judges can modify or overrule the common law that they created, all the more do the Justices of the Supreme Court have that choice when the common law conflicts with the textual interpretation of the higher constitutional law in the Sixth Amendment.⁸⁴ Had the Framers meant to transform the hearsay exceptions into constitutional postulates as a primary goal they could, of course, easily have done so by explicitly saying so in the Sixth Amendment.

III. RATIONALE FOR THE DYING-DECLARATION EXCEPTION

If the historical argument for the unique survival of dying declarations under the Sixth Amendment is at least questionable, if not nonexistent, the

81. Justice Scalia has criticized the theory of an evolving Constitution on the ground that it does not necessarily enlarge individual rights as claimed. He points, for example, to *Maryland v. Craig*, 497 U.S. 836 (1990), as a case that truncated the textual protection of the Sixth Amendment right to confrontation by allowing a child to testify out of the presence of her alleged sexual abuser. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 43 (1997). To the contrary, an interpretation of the Confrontation Clause that eliminated all the hearsay exceptions when used for testimonial purposes, including dying declarations, would increase individual rights.

82. *Coy v. Iowa*, 487 U.S. 1012 (1988) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)) (“[T]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination”).

83. CHRISTOPHER WOLFE, *HOW TO READ THE CONSTITUTION 175-90* (1996). “In the final analysis, then, originalist judges will have to make prudent determinations about which precedents to consider beyond debate and which to regard as open to challenge.” *Id.* at 191.

84. “A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.” SCALIA, *supra* note 81, at 23. At another place he rejects Lord Chief Justice Coke’s view that the common law is superior to and controls an Act of Parliament. *Id.* at 129-30.

traditional reasons for the exception should at least be re-examined to determine whether they are still sufficiently persuasive in all cases to justify rote allusions to the unique historicity of the exception. The traditional reasons for the dying-declaration exception are that dying declarations are reliable and, in any case, necessary, regardless of whether or not they are reliable as a hearsay category.

A. Reliability

The classic justification for the exception at common law goes back to *The King v. Woodcock* in 1789.⁸⁵ In *Woodcock*, Justice Eyre reasoned that hearsay declarations made at the point of imminent death are so motivated by a powerful incentive to tell the truth that the declarations are equivalent to testimony under oath in court.⁸⁶ The original premise of this assumption was that the fear of divine judgment for lying provided religious assurance that the dying person would speak the truth.⁸⁷ In fact, one British commentator has noted that dying declarations were not used in Papua New Guinea where this kind of religious underpinning could not be assured.⁸⁸ Ironically, a British legal historian noted that the dying declaration exception had a perverse effect in India where a mortally wounded person would use the occasion to implicate all hereditary enemies.⁸⁹ It appeared incomprehensible to the natives that a person at the point of death would have any particular motive to speak the truth.⁹⁰ Rejecting the example of early English precedent, American courts have typically discounted a lack of belief in God or a lack of belief in an afterlife of rewards and punishments as a basis for excluding dying declarations, specifically because freedom of religion or freedom from religion is constitutionally guaranteed in the United States.⁹¹ Besides the protection of

85. 168 Eng. Rep. 352.

86. *Id.* at 353.

87. *The Queen v. Osman*, (1881) 15 Cox Crim. Cases 1, 3 (Eng. N. Wales Cir.) (Lush L.J.) (“[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips”), *cited in* *Idaho v. Wright*, 497 U.S. 805, 820 (1990) (pre-*Crawford* reasoning that cross-examination offers only marginal utility because the “dying declaration” and “medical treatment” hearsay exceptions are based on belief persons making such statements are highly unlikely to lie). *See also* *Kelly v. State*, 694 P.2d 126, 131 (Wyo. 1985).

88. RICHARD EGGLESTON, *EVIDENCE, PROOF AND PROBABILITY* 48-49 (1978) (“The exception has been held not to apply in the case of the natives of Papua-New Guinea where the next life is believed to be spent on a neighbouring island.”).

89. STEPHEN, *supra* note 38, at 448.

90. *Id.*

91. *State v. Weir*, 569 So. 2d 897, 901 (Fla. Dist. Ct. App. 1990) (“[R]eligious justification for the exception has long lost judicial recognition.”) (citing *Carver v. United States*, 164 U.S. 694 (1897)). *Accord* *Wilson v. State*, 468 P.2d 346, 350 (Nev. 1970); *Wright v. State*, 135 So. 636, 639 (Ala. 1931); *State v. Yee Gueng*, 112 P. 424,

First Amendment guarantees, scarcely any defender of the exception now attempts to rest the exception on a religious basis, because the decline of organized religions from their medieval antecedents and the diversity of contemporary religious belief have destroyed the bedrock premise of shared Christian doctrine. In any event, the use of a dying declaration, even where the declarant is an avowed non-believer, guts the original religious rationale for the rule.

Apart from specific religious doctrines involving the next world, however, the defense of the exception currently rests more broadly on the assumption that the imminent approach of death will produce candor on the part of a homicide victim as to the circumstances of the homicide.⁹² Courts have even suggested that nonreligious, psychological pressure from the event itself is sufficient to guarantee reliability.⁹³ Although the imminence of death no doubt creates psychological pressure, it is a leap of logic to assume that the pressure is only the pressure to tell the truth. The assumption that a declarant, at the point of death, has no self-serving motives other than the truth is an unwarranted generalization. The desire for revenge is a powerful motivation that may well overcome the truth of the declaration in certain cases.⁹⁴ In at least one case, the hatred and vengefulness of the dying declarant toward the defendant was so profound that the appellate court required the dying declara-

425 (Or. 1910); *State v. Hood*, 59 S.E. 971, 973 (W. Va. 1907). *But cf.* *Tracy v. People*, 97 Ill. 101, 105-06 (1880) (profane language undercuts the presumed belief in an afterlife of rewards and eliminates the compensation for lack of an oath). The allowance of nonreligious affirmations in place of the traditional oath to a witness in court lends support to the view that disregards the religion or irreligion of the dying declarant whose circumstances were supposedly a substitute for the rigidity of the early court oath. *See* FED. R. EVID. 603 advisory committee's note ("The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children."). However, these factors may be used to impeach the credibility of the dying declarant. *See, e.g., Gambrell v. State*, 46 So. 138, 138 (Miss. 1908) ("to show that the deceased was an infidel, and offered to prove that the deceased boasted of the fact that he did not believe in God, the devil, or anything of a like nature").

92. FED. R. EVID. 804(b)(2) advisory committee's note ("While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present.").

93. *People v. Calahan*, 356 N.E.2d 942, 945 (Ill. App. Ct. 1976) ("At the moment wherein the deceased realizes his own death is imminent there can no longer be any temporal self-serving purpose to be furthered regardless of the speaker's personal religious beliefs.").

94. *Blair v. Rogers*, 89 P.2d 928, 931 (Okla. 1939) ("[The exception] leaves entirely out of account the influence of the passions of hatred and revenge, which almost all human beings naturally feel against their murderers, and it ignores the well-known fact that persons guilty of murder beyond all questions very frequently deny their guilt up to the last moment upon the scaffold.").

tion to be expunged entirely from the jury's consideration, with the observation that dying declarations probably have a greater than deserved influence on juries.⁹⁵ The frequency of homicide arising out of domestic disputes increases the opportunity for vengeance as the dying spouse or ex-spouse takes the opportunity to accuse the defendant spouse either out of malice or bias.⁹⁶ Apart from outright vengeance against a real or imagined enemy, a dying person could be motivated by a desire to falsely claim responsibility for her own death or to falsely shift blame to a third party rather than inculcate a loved one. The desire to tell the truth is simply one motivation among several affecting those at the point of death.

Beyond the motivation of the dying person, however, are the traumatic circumstances of most dying declarations. Many persons facing death and hurried to the emergency room of a hospital suffer severe physical trauma, such as a gunshot wound, stabbing, or a poisoning. Even if such a person desired to tell the truth, his perception, memory, and power of recollection would often be so debilitated that he would likely be declared incompetent if he were to testify in court.⁹⁷ One medically-trained scholar has concluded that penetrating traumas, such as those inflicted by gunshots and stabbings, are a leading cause of death in circumstances where a dying declaration is likely to be made.⁹⁸ Courts have overwhelmingly confined the dying declaration exception to homicide cases where one would naturally expect to find a penetrating trauma and the police sought out the dying declaration to preserve the

95. *Reeves v. State*, 64 So. 2d 836, 837-38 (Miss. 1914).

96. Between 1976 and 2002 most murder victims were familiar with their attackers and about 11% were found to have been killed by an intimate, such as a spouse, an ex-spouse, a boyfriend, or a girlfriend. Bureau of Justice Statistics, *Homicide Trends in the U.S.-Intimate Homicide*, <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm> (last modified Sept. 28, 2004). About one-third of female murder victims were killed by an intimate. *Id.*

97. A notorious example of such a dying declaration is that of David Hennessey, police superintendent of New Orleans, who was gunned down alone on the rainy night of October 15, 1890, by five armed men. RICHARD GAMBINO, *VENDETTA* 1-5 (1977). While Hennessey lay on the ground with at least six bullets in his body a friend who had come onto the scene from almost a block away asked Hennessey who had shot him. *Id.* at 3. The friend's statement was that, as he bent down to listen, Hennessey whispered into the friend's ears the word: "Dagoes." *Id.* at 4. No one else heard the dying declaration. *Id.* at 4-5. On the basis of this questionable declaration set against a municipal backdrop of racial and ethnic tensions numerous Italian-Americans were rounded up, and after the acquittal of five, a mob stormed the prison and killed eleven of the remaining prisoners, the largest single lynching in United States history. *Id.* at ix.

98. Bryan A. Liang, *Shortcuts to "Truth": The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 239 (1998) ("Epidemiologically, in the United States, penetrating trauma, such as those induced by gunshots and knives, is involved in greater than 80% of all homicides, with two-thirds involving firearms and 18% involving a cutting or stabbing instrument.").

victim's account of events.⁹⁹ When a person is wounded by a penetrating trauma, the primary cause of death is uncontrolled hemorrhage.¹⁰⁰ The interruption of the blood supply to the brain of a hemorrhaging victim results in a loss of oxygen to the brain and other organs.¹⁰¹ If blood flow to the brain is stopped for just thirty seconds, the metabolic functions of the brain are affected.¹⁰² Neuronal functioning of the brain may stop after one minute.¹⁰³ And if blood flow to the brain ceases for five minutes, permanent brain damage may result.¹⁰⁴ Although the rigorously scientific method of double-blind studies is not suitable for dying declarations, studies indicating the effect of high altitude on human cognition shed relevant light on the mental state of a person whose brain has been deprived of oxygen.¹⁰⁵ The evidence of these studies is that deprivation of oxygen has a profound effect on mental state.¹⁰⁶ The blocked flow of blood or the trauma can induce delirium, which can occur in all age groups, but especially with the elderly.¹⁰⁷ Delirium inflicts on the victim significant global disorders involving all the major cognitive functions, such as perception, thinking, and memory.¹⁰⁸

The questionable reliability of such statements taken in traumatic conditions is further eviscerated by the leading questions of those eager to obtain a favorable version of events, such as the police, insurance agents, or investigators.¹⁰⁹ The dying declaration hearsay exception tempts prosecutorial authorities to emphasize and, perhaps exaggerate, the danger of impending death to the declarant, so that the foundation for the exception will be clearly estab-

99. ROGER C. PARK ET AL., EVIDENCE LAW § 7.51, at 338 (2d ed. 1998) (“At common law, the dying declaration exception was limited to homicide prosecutions. The federal rule makers extended its scope to civil actions.”).

100. Liang, *supra* note 98, at 239-40 (“In a large multi-center study involving eight major medical centers, it was found that 91% of patients with penetrating trauma died of hemorrhage in the operating room.”).

101. *Id.* at 240.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 240-41.

106. *Id.* (“Therefore, in generally young, healthy volunteers, under controlled conditions of hypoxia without other physical stressors, a broad array of cognitive deficits occurred, including those involving memory and informational processing abilities.”).

107. *Id.* at 241.

108. *Id.* (illusions, hallucinations, and sometimes even delusions, usually of a persecutory nature, may occur).

109. JACK B. WEINSTEIN, EVIDENCE MANUAL § 17.03, at 17-15 (2005). *See also* Brendan I. Koerner, *Last Words*, LEGAL AFFAIRS 33, 34 (Nov./Dec. 2002) (“Traumatized victims, often robbed of the ability to speak, are sometimes asked to make ‘declarations’ through a series of nods, winks, or hand signals – physical gestures that require a lot of interpretation from intermediaries, who typically have known the victim for no more than a few minutes.”).

lished at trial. There is a kind of ghoulish grotesqueness in the thought that a wounded person should be told, accurately or not, that he or she is about to die so that the dying declaration of that person will stand up in court when and if the person does die. What is legally indicated is not necessarily in the best medical interest of the dying declarant. Furthermore, when a witness reports these statements from the dying person in court, the statements reported could simply be the unsworn, oral statements of the deceased. The danger is that the witness, relating in court what the deceased said, may not feel restrained by fear of perjury because the person making the statement is dead or otherwise unavailable. Generally, the defendant was not present at the scene to act as a check. It may even be the case that no other person was present to hear what the dying person allegedly said except the lone witness.

The weakness of the reliability argument is shown by the fact that, until about 1800, the exception applied in both civil and criminal cases.¹¹⁰ How can it be that a dying declaration became less reliable in a civil case than in a criminal homicide case where more is at stake both for the defendant and society?¹¹¹ Even the Federal Rules of Evidence, which now apply the rule to civil wrongful death cases as well as criminal homicide cases, do not extend the exception to nonhomicide cases.¹¹² Therefore, a statement taken from a rape victim who dies in childbirth regarding the circumstances of the rape or a statement from a dying robbery victim regarding the robbery cannot be used as a dying declaration where the prosecution is only for the rape or the robbery.¹¹³ In order to use the dying-declaration exception, the defendant must be prosecuted for an offense legally involving death of the victim as a necessary element. Why is it that the reliability is greater under the Federal Rules of Evidence in a civil wrongful death case but not in the rape case or other nonhomicide criminal cases where the victim dies? If reliability were truly a sufficient reason for the exception, this crazy quilt of exceptions to the excep-

110. *United Servs. Auto. Ass'n v. Wharton*, 237 F. Supp. 255, 258 (1965) (“[F]ew jurisdictions have restored the dying declaration exception to its original common law scope”).

111. *But see* MASS. GEN. LAWS ch. 233, § 65 (2005) (“In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.”). However, this statute only applies to civil cases; it does not apply to criminal cases, where the dying declaration exception still exists. *Commonwealth v. Dunker*, 298 N.E.2d 813 (Mass. 1973).

112. FED. R. EVID. 804(b)(2). The rules apply generally to civil and criminal cases. FED. R. EVID. 1101(b).

113. FED. R. EVID. 804(b) advisory committee’s note (stating that only occasionally has a state statute removed this restriction). The dying declaration exception of Rule 804(b)(2) did not apply because the case was neither a criminal homicide case nor a civil case. *United States v. Hendricks*, No. 2004-05 F/R, 2004 U.S. Dist. LEXIS 8854 (D.V.I. Apr. 27, 2004) (indictment for drug, conspiracy & money laundering charges).

tion would not exist. All hearsay from a person at the point of death who subsequently dies would forthrightly be used in any type of trial.¹¹⁴

Without the restraint of a Sixth Amendment, Great Britain now has a more flexible policy toward the admission of hearsay in a criminal case under its Criminal Justice Act of 2003.¹¹⁵ Although the *res gestae* exception to the hearsay rule is one of the few common law hearsay exceptions preserved under the Act, the dying declaration exception is not one of them.¹¹⁶ Instead, any out-of-court statement of an identified dead person may or may not be admitted by the court under a set of balancing factors set out explicitly in the Act.¹¹⁷ The abolition of the dying-declaration exception and the preservation of the *res gestae* exception in criminal proceedings not only implicitly attests to the greater value of the *res gestae* exception but also to a recognition that whatever reliability adheres to statements of the dying is not automatically guaranteed by the traditional contours of the dying declaration as developed at common law.

In any case, the logic of *Crawford* itself ultimately delivers the *coup de grace* to the reliability argument for dying declarations. Even aside from the questionable reliability of dying declarations as a generic hearsay exception, Justice Scalia in *Crawford* made it quite clear that general reliability, however great it may be, is no longer a sufficient justification for the use of testimonial hearsay exceptions against criminal defendants. Justice Scalia pointed out that the Sixth Amendment provided only one method of guaranteeing reliability, and that is through the exclusive process of cross-examining the testimonial statement, whether made in court or out of court.¹¹⁸ Therefore, even if dying declarations were systemically reliable, under the logic of *Crawford*, if the opportunity does not exist for extrajudicial cross-examination of the unavailable declarant, the reliability is immaterial. Any constitutional exceptionalism for dying declarations must therefore rest on some basis other than reliability, because under current law the opportunity to cross-examine a dying declarant unavailable for trial is not a prerequisite for the admissibility of this hearsay exception.

B. Necessity

Beyond the categorical assumption of reliability for dying declarations in a pre-*Crawford* world, the defenders of the exception also point to neces-

114. Wigmore questioned every traditional limitation of the dying declaration except the death of the declarant. See WIGMORE, *supra* note 44.

115. Criminal Justice Act, 2003 Ch. 2, § 114.

116. *Id.* § 118.

117. *Id.* § 114(2) (nine specific factors listed plus “any others” the court considers relevant).

118. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

sity as an alternate reason for this hearsay exception. The Supreme Court in *Mattox v. United States* relied heavily on the necessity argument for its defense of the exception.¹¹⁹ The Court admitted that nothing could be more logically opposed to the Confrontation Clause than dying declarations, which are seldom made in the presence of the accused or with the opportunity for cross-examination.¹²⁰ The Court could have also added that the doctrine does not even require that the declarations be in writing or under oath. Nonetheless, the Court defended the doctrine, not because of any general rule, but basically because the statements have historically been considered necessary to prevent a miscarriage of justice.¹²¹ Some courts have considered this necessity argument the real or primary reason for the exception, regardless of its degree of reliability.¹²² The Supreme Court of California even repeated uncritically the dire assertion that it would be “abhorrent” to a sense of justice, individual security, and public safety if the rule were abolished.¹²³ To the contrary, some might consider it abhorrent if the cry for necessity became an unanalyzed shibboleth considered automatically sufficient in itself to override the trustworthiness of dying declaration or the *Crawford*-mandated constitutional right of cross-examination. If mere need of the state to use whatever information it has to ensure a conviction suffices, then the entire array of hearsay exceptions and even confrontation guarantees risk collapse.

Those courts that have articulated a more precise definition of necessity point out that the dying declaration exception is normally limited to cases of felonious homicide, precisely because those crimes are usually committed in secret. Therefore, the wrongdoer should not be permitted to kill the only person who has knowledge of their guilt.¹²⁴ But this argument by necessity is threadbare. The dying declaration exception applies regardless of whether no

119. *Mattox v. United States*, 156 U.S. 237, 243-44 (1895). *Accord* *State v. Weir*, 569 So. 2d 897, 902 (Fla. Dist. Ct. App. 1990) and *People v. Durio*, 794 N.Y.S.2d 863, 866-67 (N.Y. Sup. Ct. 2005).

120. *Mattox*, 156 U.S. at 243-44.

121. *Id.* at 244 (“They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.”).

122. *See, e.g.*, *United Servs. Auto. Ass’n v. Wharton*, 237 F. Supp. 255, 258 (D.C.N.C. 1965) (“[T]he main reason for the exception was simple necessity”) and *United States v. Jordan*, No. 04-CR-224-B, 2005 U.S. Dist. LEXIS 3289, *8 (D. Colo. Mar. 3, 2005) (“[S]ince enactment of the Sixth Amendment, ‘necessity,’ rather than reliability of the statement became paramount.”). One case seems to treat dying declarations and necessity as separate exceptions. *Walton v. State*, 603 S.E.2d 263 (Ga. 2004) (*Crawford* application to the dying declarations and the necessity exception avoided by waiver and harmless-error doctrines).

123. *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004).

124. *Blair v. Rogers*, 89 P.2d 928, 930 (Okla. 1939). *Accord* *State v. Nix*, No. C-030696, 2004 Ohio App. LEXIS 5039, at *72 (Ohio Ct. App. Oct. 15, 2004) (“[A] homicide victim is often the only witness to his murder or the only person to understand its circumstance.”).

eyewitness or a hundred eyewitnesses saw the commission of the criminal homicide. Nothing in the exception prevents its application to cases where, although no eyewitnesses to the homicide can be found, substantial forensic evidence exists, such as that obtained from fingerprints, DNA, or hair analysis, to link the accused to the homicide. Modern forensic science has provided law enforcement with a panoply of detection devices that did not exist in the late Middle Ages when the exception was created.

In short, the argument of necessity, if taken literally, is logically inconsistent with the general ban against hearsay in criminal cases, whether on common law or constitutional grounds. Hearsay is often needed by one side or the other to pursue its adversarial goals but need alone has never been the test of hearsay admission. *Crawford* demands both necessity, in the sense of unavailability, and an opportunity for cross examination before hearsay may be allowed against a criminal defendant. The presence of only one of these preconditions is insufficient to satisfy the Sixth Amendment.¹²⁵ *Crawford* itself, therefore, recognizes by its own logic that necessity alone cannot justify an infringement of the very confrontation rights which that opinion claims to have rediscovered.

IV. FORFEITURE

Even if the dying declaration exception does not ultimately survive the textualist logic of *Crawford*, some would still allow the use of dying declarations against criminal defendants on the ground that defendants who are tried for criminal homicide have automatically forfeited their constitutional right to bar dying declarations from the victims of their homicide.¹²⁶ The argument presupposes that a forfeiture of a Sixth Amendment right of confrontation is still effective even though the criminal defendant is tried for the commission of the very act that made the witness unavailable. Under this sweeping view of forfeiture, a criminal defendant on trial for murdering her victim has automatically forfeited the right of confrontation just as much, for example, as does a defendant on trial for rape who intentionally kills or kidnaps a eyewitness to prevent that eyewitness from testifying against the defendant. In either case, the hearsay statements of the deceased urged against the defendant should, according to this theory, be admitted by use of the forfeiture doctrine. This theory of forfeiture has an intrinsic appeal because it allows a court to sidestep the troublesome existence of any confrontation rights guaranteed by

125. *Jordan*, 2005 U.S. Dist. LEXIS at *10 (“Based on my reading of *Crawford*, in the case of a dying declaration, the presence of only one [necessity and opportunity for cross-examination] will not suffice.”).

126. Several law professors, relying the law review article of Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997) urged the forfeiture argument in an amicus brief filed in *Crawford*. *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004).

Crawford.¹²⁷ The appeal of avoiding a thorny constitutional question apparently overshadows for some the bizarreness of a forfeiture doctrine that would always extinguish the constitutional protection whenever a defendant committed the pertinent criminal act. A constitutional right could be claimed hypothetically, but it would never enter the real world, because precisely at the point when it is required it would have been forfeited. It would amount at best to a virtual constitutional right of confrontation with no practical significance whatsoever. In any event, this hyperdoctrine of forfeiture is defective for several additional reasons.

The argument for automatic forfeiture is essentially circular. It assumes that homicide defendants have committed the very crime of which they stand accused before they have been found guilty beyond a reasonable doubt. The inculpatory statements of the dying homicide victim are used against the defendant on the basis that the defendant prevented the in-court testimony of the victim by commission of the homicide and thus forfeited their constitutional right of confrontation. However, at the time the inculpatory hearsay statements are admitted into evidence, the defendant has not yet been found guilty of the homicide. Regardless, the victim's statements are used against the defendant to prove that the defendant committed the homicide on the paradoxical assumption that the defendant has already committed the homicide.¹²⁸ At least one court has refused to accept this logic on the basis that such an expanded concept of forfeiture by wrongdoing would deprive a defendant of a the right to a jury by allowing a judge to determine by a preponderance of the evidence that the defendant unlawfully killed the victim so that the jury could later find the unlawful killing was beyond a reasonable doubt.¹²⁹

Those courts which defend this expansive forfeiture procedure attempt to justify it by analogy to the Supreme Court's decision in *Bourjaily v. United States*.¹³⁰ *Bourjaily* held that the Confrontation Clause allowed as evidence against a defendant charged with drug violations the out-of-court admissions

127. *United States v. Mayhew*, 380 F. Supp. 2d 961 (D. Ohio 2005) (dying declarations violate post-*Crawford* right of confrontation but right forfeited). *Accord Meeks*, 88 P.3d at 793-94 (testimonial nature of dying victim's statement "Meeks shot me" to police officer avoided by appellate court's determination of forfeiture without specific trial court determination). The use of the harmless-error doctrine has also been used to avoid a square substantive decision about *Crawford* doctrine. *See, e.g., People v. Patterson*, 841 N.E.2d 889 (Ill. 2005).

128. The degree of the conflict may vary. The conflict is at its greatest, for example, when the defendant denies the killing and the prosecution's case is entirely circumstantial. At the other end are cases where the defendant has admitted the killing and the dispute is only about the type of murder. *See, e.g., United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) ("[D]efendant admitted that he killed Kathleen, thereby procuring her unavailability to testify.").

129. *United States v. Lentz*, 282 F. Supp. 2d 399, 426 ("No case cited by the Government stands for this proposition.").

130. 483 U.S. 171, 175-76 (1987).

of an unavailable co-conspirator under Federal Rule of Evidence 801(d)(2)(E) so long as the trial court made a determination by a preponderance of the evidence under Rule 104(a) that the conspiracy existed.¹³¹ Significantly, the trial court, in making this determination, is permitted to use the co-conspirator's admissions themselves as partial proof of the alleged conspiracy in determining whether the conspiracy existed by a preponderance of the evidence.¹³² If a trial judge can thus determine the predicate commission of the conspiracy by using an alleged conspirator's admissions, some courts have reasoned by analogy that a trial judge should also be allowed to determine under Rule 104(a) that a defendant committed the forfeiting homicide by a preponderance of the evidence. This finding of forfeiture conveniently sidesteps any Confrontation Clause protection and permits the jury to use the dying declaration to find the defendant guilty of homicide beyond a reasonable doubt based on all the evidence, including the dying declaration.¹³³

However, the analogy to *Bourjaily* is deficient for several reasons. The Supreme Court in *Bourjaily* left open whether a co-conspirator's out-of-court statements could be constitutionally used as the sole evidence of the underlying conspiracy and Federal Rule of Evidence 801(2)(d)(2)(E) was amended after *Bourjaily* to make it clear that a co-conspirator's out-of-court statements are not alone sufficient to find a conspiracy or the participation of the co-conspirator and the defendant in the conspiracy. There is, however, an even more basic distinction between the two situations. The basis for the use of the co-conspirator's statements is the broader notion that those who are principals or partners are bound by the statements of their agents and partners.¹³⁴ *Crawford* cannot be used analogously to this line of reasoning in conspiracy cases, because the right of confrontation does not logically translate into a right to

131. *Id.*

132. *Id.* at 178-79.

133. *See, e.g.*, United States v. Mayhew, 380 F. Supp. 2d 961, 967 (D. Ohio 2005) (citing United States v. Emery, 186 F.3d 921 (8th Cir. 1999); United States v. White, 116 F.3d 903 (D.C. Cir. 1997)). Although *Bourjaily* allows the testimonial use of a co-conspirator's out-of-court statements to a confidential informant, one court questioned whether *Bourjaily's* reasoning would extend in a post-*Crawford* world to the admission of the testimonial statements of a confidential informant who was not part of the conspiracy. United States v. Hendricks, 395 F.3d 173, 183 (3d Cir. 2005). Yet the statements of the undercover police officer were admitted on the basis that where the confidential informant's statements were used simply to put the entire conversation between a defendant and his or her co-conspirators into an integrated context, the Confrontation Clause does not bar use of the confidential informant's statements for this limited purpose. *Id.*

134. Courts have not usually distinguished between vicarious admissions and statements of a co-conspirator. MCCORMICK, *supra* note 44, § 259, at 401 ("Conspiracies to commit a crime or an unlawful tortious act are analogous to partnerships."). *See also* United States v. Layton, 855 F.2d 1388, 1398 (9th Cir. 1988) ("The theoretical justification for the rule that a coconspirator's statements are admissible comes from the law of agency.").

cross one's self about one's own admissions or those of one's agents and confederates who are not "witnesses against" the defendant under the plain language of the Sixth Amendment. Indeed, Justice Scalia in *Crawford* acknowledged that a co-conspirator's statement in furtherance of a conspiracy is necessarily nontestimonial, and therefore free of any cross-examination requirement of the Confrontation Clause, even if the co-conspirator who uttered the hearsay statement is unavailable at the trial.¹³⁵ The aim of a co-conspirator in uttering the hearsay is obviously not to defeat a common illegal aim shared with the defendant but to promote that common aim. It would be unrealistic to assume that a co-conspirator expects the hearsay statement to be used against the co-conspirator and the defendant in a subsequent trial. Co-conspirators expect to escape prosecution and scarcely expect their statements to be the instruments of their apprehension.

However, under the reasoning of *Crawford*, the use of a victim's dying declaration is the testimony of an unavailable "witness against" the defendant. The statements of a dying declarant given to law enforcement personnel are intended to be used against a defendant by implicating him as the cause of the victim's death. Under the broader definition of "testimony," even hearsay statements made to those not engaged in law enforcement will likely also be testimonial because a reasonable observer would foresee their use in a subsequent criminal trial. The circumstances surrounding a dying declaration are hardly the stuff of casual chitchat whose recitation could not be anticipated in a future criminal trial.¹³⁶ In addition, because the alleged victim of a criminal homicide could by definition never be an available in-court "witness" against the defendant, it is illogical to claim that by killing the victim the defendant has automatically forfeited his confrontation right by making the victim unavailable. The definition of criminal homicide presupposes the unavailability of the witness; therefore, one cannot intentionally procure the unavailability of a victim whose unavailability because of death is a necessary part of the crime.

Beyond the circular reasoning of this forfeiture theory, a more fundamental objection is that the Federal Rules of Evidence and constitutional in-

135. *Crawford v. Washington*, 541 U.S. 36, 55 (2004) ("Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy."). *Accord* as to statements in furtherance of a conspiracy, *United States v. Lee*, 374 F.3d 637, 644 (8th Cir. 2004); *United States v. Reyes*, 362 F.3d 536, 540-41 (8th Cir. 2004); *Diaz v. Herbert*, 317 F. Supp. 2d 462, 483 (S.D.N.Y. 2004). The fact that one party to the conversation with a co-conspirator is an undercover government agent does not prevent admission of the co-conspirator's statements as long as the declarant is a member of the conspiracy. *People v. Redeaux*, 823 N.E.2d 268, 270-71 (Ill. Ct. App. 2005) (FED. R. EVID. 801(d)(2)(E) applies even if only the party making the statement during the conversation is a co-conspirator).

136. *Crawford*, 541 U.S. at 51 (discounting casual remarks to an acquaintance as testimonial hearsay).

terpretation require that a defendant intentionally forfeit the Sixth Amendment right of confrontation. Federal Rule of Evidence 804(b)(6) allows hearsay statements to be offered against a defendant who has perpetrated or acquiesced in wrongdoing “that was intended to, and did, procure the unavailability of the declarant as a witness.”¹³⁷ The history of this rule shows that it was adopted to correct the problem of witness intimidation whereby a criminal defendant intentionally procures the unavailability of a witness. The rule requires the deliberate wrongdoing or acquiescence of the defendant by actions taken after the event to prevent a witness from testifying.¹³⁸ It is, therefore, one thing to properly use this provision against a defendant who purposely murders a witness scheduled to testify in an upcoming criminal case, say a robbery or theft case, unrelated to the murder case of the witness. The rule applies in such a case.¹³⁹ But it is not permitted against a defendant tried for the criminal homicide of a victim whose necessary by-product is the unavailability of the victim as a witness.¹⁴⁰ To allege that a defendant who kills his spouse in a jealous rage for an extramarital affair specifically intended to intimidate the victim spouse so that she would not testify in the murder case against the defendant has an Alice-in-Wonderland quality that defies reality. To adopt the expanded view of forfeiture would run counter to the rule and render it useless.

Perhaps aware of the unsupportive nature of Rule 804(b)(6) for the expanded view of forfeiture, justices in several Sixth Circuit cases have argued

137. FED. R. EVID. 804(b)(6).

138. MICHAEL H. GRAHAM, FEDERAL RULES OF EVIDENCE § 804.6, at 519 (6th Nutshell ed. 2003).

139. *See, e.g.*, United States v. Rivera, 412 F.3d 562 (4th Cir. 2005) (allowing evidence based on defendant’s “acquiescence” in the homicide of defendant’s girlfriend to prevent her testimony in the murder trial of another victim).

All federal and state courts that have addressed this issue, that we could find, have concluded that when a defendant procures a witness’s unavailability for trial *with the purpose of preventing the witness from testifying*, the defendant waives his rights under the Confrontation Clause to object to the admission of the absent witness’s hearsay statements.

Devonshire v. United States, 691 A.2d 165, 168 (D.C. App. 1997) (emphasis added).

140. United States v. Jordan, No. 04-CR-229-B, 2005 U.S. Dist. LEXIS 3289, at *15 (D. Colo. Mar. 3, 2005) (“[T]he government provides no cases – and I found none in my research – holding that a murder whose by-product is the unavailability of a witness to that killing is covered by the rule.”) *Accord* People v. Melchor, No. 1-03-3036, 2005 Ill. App. LEXIS 626 (Ill. App. June 28, 2005) and United States v. Montague, 421 F.3d 1099, 1102 (10th Cir. 2005). One court has held that Federal Rule of Evidence 804(b)(6) requires that “at least in part” the defendant intended to prevent a witness from testifying. United States v. Gray, 405 F.2d 227, 242 n.9 (4th Cir. 2005). A “conclusive link” must be established between the murder of a potential witness and the underlying criminal case before the forfeiture rule of Rule 804(b)(6) can be employed. United States v. Hendricks, No. 2004-05 F/R, 2004 U.S. Dist. LEXIS 8854, at *4-5 (D.V.I. 2004).

that the Sixth Amendment is not subject to the vagaries of evidence law.¹⁴¹ But an appeal to the constitutional law principle of waiver beyond the reach of Rule 804(b)(6) affords no better justification for this expanded view of forfeiture theory. For over seventy years, the Supreme Court decision of *Johnson v. Herbst*¹⁴² has provided that a presumption exists against a defendant's waiver of fundamental constitutional rights.¹⁴³ When a constitutional right is involved, it is not the concept of forfeiture but that of waiver which is key.¹⁴⁴ The decisional law is clear: a waiver of a Sixth Amendment right to confrontation and cross-examination is not presumed and must be an "an intentional relinquishment or abandonment of a known right or privilege."¹⁴⁵

To say that any defendant accused of criminal homicide, such as a physician or other professional prosecuted for criminal negligence resulting in death, or an automobile driver prosecuted for automobile homicide because of negligent driving, should be subjected to the hearsay of a dying declaration because of a forfeiture of Sixth Amendment rights by wrongdoing is to use the doctrine where the crime is not even intentional.¹⁴⁶ Federal Rule of Evi-

141. *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (quoting *Crawford*, 541 U.S. at 61). See also *United States v. Arnold*, 410 F.3d 895, 916 (6th Cir. 2005) (Sutton, J., dissenting).

142. 304 U.S. 458 (1938). Federal courts, for purposes of the plain-error doctrine define "forfeiture" as "the failure to make a timely assertion of a right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Accord *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005) (describing forfeiture as "basically an oversight" and waiver as "deliberate decision"). A forfeited issue may sometimes be considered a plain error on appeal but a waived issue may not. *Olano*, 507 U.S. at 733-34.

143. *Johnson*, 304 U.S. at 464. See also *United States v. Buonocore*, 416 F.3d 1124, 1137-38 (10th Cir. 2005) (Seymour, J., concurring) ("A factual admission by a defendant that the government can prove drug quantity by a preponderance of the evidence, without more, simply does not fulfill the requirements of a voluntary and knowing waiver of the defendant's Sixth Amendment *Apprendi* rights.").

144. *United States v. Osborne*, 402 F.3d 626, 630 (6th Cir. 2005). Outside of Rule 804(b)(6), "forfeiture" is simply the failure to make a timely assertion of a right, and differs from "waiver," which is the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). "Forfeiture," as defined in Rule 804(b)(6), is more akin to this definition of "waiver," which is used to denote a purposeful abandonment of a constitutional right.

145. *Brookhart v. Janis*, 384 U.S. 1, 4 (1996). Accord *Milne v. Local 15, AFL-CIO*, 156 F. Supp. 2d 171 (D. Conn. 2001) (procedural due process of right of confrontation and cross-examination under Labor-Management Reporting & Disclosure Act of 1959 not waived). The stringent requirement of a knowing and intentional relinquishment of the fundamental rights contained in the Sixth Amendment originated in *Johnson v. Zerbst*. *Zerbst*, 304 U.S. at 464 (waiver of right to counsel must be intelligent).

146. The Model Penal Code § 210.4 includes a provision for negligent homicide, a lesser offense to manslaughter. MODEL PENAL CODE § 210.4 (1962). Some of the new criminal codes contain the offenses of "reckless homicide, criminally negligent

dence 406(b)(2) extends dying declarations to any kind of criminal “homicide” and not only those that are intentional.¹⁴⁷ The reach of the broad term “homicide” would logically extend even to the controversial topic of felony-murders. A robber who flees the scene of the crime in his getaway automobile and accidentally runs over a pedestrian during the escape could be guilty of a felony-murder. Therefore, the homicide of the pedestrian would logically allow into evidence the dying declaration of the pedestrian, all because of a mongrelized concept of “forfeiture” derived from the constitutional principle of waiver, even though the death itself may have been accidental but for the technical application of the felony-murder rule.¹⁴⁸

V. CONCLUSION

Had *Crawford* not been decided, there might have been some reason to leave dying declarations as an exception to the Sixth Amendment, along with most of the other common law hearsay exceptions that could be justified either as “firmly rooted” and in any case as having narrowly-framed “particularized guarantees of trustworthiness” based on the circumstances of each case.¹⁴⁹ But *Crawford* clearly rejected any supposition that reliability obtained by any method other than cross-examination is constitutionally sufficient. The *Crawford* Court reasoned that the Framers provided for only one mode of assuring reliability of testimony and that was by the mode of confrontation and cross-examination guaranteed in the text of the Sixth Amendment.¹⁵⁰ The historical justification, therefore, is the sole escape for the preservation of testimonial dying declarations and the only one that Justice Scalia entertains as a possible escape in *Crawford*.

However, the historical record does not justify a “sui generis” treatment of dying declarations because the historical record indicates that the res gestae exception was also recognized by the common law in 1791 as a mechanism for the use of hearsay even as against a defendant in criminal

homicide, negligent homicide and vehicular homicide.” ROLLIN M PERKINS & RONALD N. BOYCE, CRIMINAL LAW 139 (1982). See also *State v. Durrant*, 561 P.2d 1056 (Utah 1977) (automobile homicide).

147. For an excellent discussion of the complicated array of possible major criminal homicides, see *Oates v. State*, 627 A.2d 555 (Md. App. 1993) (“Even assuming we have criminal homicide . . . we still have no idea whether it is a garden variety criminal homicide (second-degree murder) in any of its four manifestations, aggravated criminal homicide (first-degree murder) in any of its two clear manifestations, or mitigated criminal homicide (manslaughter) in any of its four manifestations.”).

148. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 635 (2d ed. 1986).

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

150. *Crawford v. Washington*, 541 U.S. 36, 68-9 (2004) (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

cases. Thus, the historical record does not justify a unique historicity for the use of dying declarations against criminal defendants as of 1791. But even if the historical records were otherwise, the bedrock principle of *Crawford* is that confrontation and cross-examination are the sole methods of reliability for testimonial evidence offered against a criminal defendant. The pre-1791 historical records would be irrelevant in suggesting that tradition confers constitutional reliability apart from cross-examination.

With neither history nor circumstantial guarantees of accuracy sufficient to justify the exceptionalism of dying declarations in a post-*Crawford* world, the temptation is to avoid the difficulty by using forfeiture theory to effectively eviscerate the Sixth Amendment right of every defendant tried for criminal homicide and convicted in whole or part by the admission into evidence of a dying declaration. This avenue of escape, however, is blocked both by the Federal Rules of Evidence and the requirement of voluntary and intentional waivers of known Sixth Amendment rights.

The solution to the dilemma of dying declarations may be either a radical elimination of the dying declaration as inherently inconsistent with the Confrontation Clause or a more modest modification. In any event, some modification must occur if *Crawford* is to maintain the coherence of its constitutional logic. The radical solution is to hold that dying declarations, which are testimonial under whatever definition adopted ultimately by the Supreme Court, violate the Sixth Amendment because *Crawford* has simply decoupled the entire baroque structure of common law hearsay exceptions from the constitutional requirement of cross-examination contained in the Sixth Amendment. The peculiar limitations of the dying-declaration exception are either too broad or too narrow to further any principled basis for guaranteeing consistent reliability even if the logic of *Crawford* permitted a determination of reliability outside of the crucible of cross-examination.

The more modest alternative is to reshape the dying declaration exception so that it fits into the rationale of *Crawford*. At a minimum, this would require that the burden of proof be on the prosecution to show in good faith that the victim was unavailable to the defense for cross-examination before trial. The burden of informing the defendant of the opportunity for cross-examination of the victim's incriminating statements should probably fall on the government at the point when the government targets the defendant as a suspect in the case. At the very least the government should bear this good faith burden when the death of the victim occurs after indictment.¹⁵¹ At this point the defendant is clearly targeted as the culprit and should be afforded the opportunity of cross-examining the victim who makes a death bed state-

151. The time between the dying declaration and death may vary. In one case, intervals of nine days and eleven days were discussed and approved. *People v. Schinze*, 272 N.W.2d 648, 652 (Mich. Ct. App. 1978). Nor does Rule 804(b)(2) specify a time line between the two events as long as the declarant believes the death was "imminent" at the time the hearsay statement was made. FED. R. EVID. 804(b)(2).

ment implicating the defendant and then dies before testifying at the trial or otherwise becoming unavailable.

Even before *Crawford*, the Supreme Court recognized that mere unavailability of a witness was insufficient to deprive a defendant of the right of confrontation and cross-examination where the prosecution had not attempted to make the witness available to the defendant.¹⁵² The Court has similarly recognized that a violation of the Confrontation Clause occurs if the absence of the witness is due to the government's negligence even though the defendant had a pretrial opportunity to cross-examine the witness.¹⁵³ The Fourth Circuit has also concluded that a defendant under forfeiture Rule 804(b)(6) has some minimal constitutional right to discover from the prosecutor information about defendant's alleged "wrongdoing" under the rule.¹⁵⁴ This may require a defense examination of the individuals whom the government relies upon to establish the wrongdoing under Rule 804(b)(6).¹⁵⁵

By parallel reasoning, the Sixth Amendment should require some minimal good-faith effort by government to provide the accused with the opportunity of questioning a dying declarant, where circumstances permit, even beyond the less intrusive right of simply being present when the government does its own questioning of the dying declarant. It is already generally recognized that criminal defendants and, to a lesser extent, prosecutors are entitled to the discovery of witnesses' statements under certain circumstances.¹⁵⁶ It is not even strictly necessary under *Crawford* that the cross-examination of the dying declarant must take place contemporaneously with the statement taken by governmental agents, so long as some opportunity is provided before trial

152. *Barber v. Page*, 390 U.S. 719 (1968) (discussing improper prosecutorial use at trial of a preliminary hearing transcript of a witness who was incarcerated in another state). *Accord* *Britton v. State*, 298 F. Supp. 641 (D. Md. 1969) (prosecutorial use at subsequent trial of witness' testimony at prior trial not allowed where relatively slight burden on prosecution to make a good faith effort to obtain presence of witness at subsequent trial); *State v. Carroll*, 513 A.2d 1159 (Vt. 1986) (witness's deposition not allowed where prosecutorial bad faith was shown in failing to procure informant's presence at actual trial date, even though witness had been procured in good faith for earlier trial dates).

153. *Motes v. United States*, 178 U.S. 458, 470-71 (1900).

154. *United States v. Rivera*, 412 F.3d 562 (4th Cir. 2005).

155. *Id.* at 568. ("To deny discovery on the ground that the defendant engaged or acquiesced in wrongdoing is to assume the existence of the facts to be established."). Although basing his claim on the Sixth Amendment, the defendant in *Rivera* focused on the right to compel the production of witnesses rather than on the right of confrontation. *Id.* at 568 n.5

156. *See generally* Vitauts M. Gulbis, Annotation, *Right of Prosecution to Discovery of Case-Related Notes, Statements, and Reports-State Cases*, 23 A.L.R. 4th 799, 803 (1983). Florida provides a developed system of reciprocal criminal discovery for the prosecution and the defense based on a defendant's election to participate in the discovery process. FLA. R. CRIM. P. § 3.220.

for the defendant to cross-examine the dying declarant about the declarant's statement.¹⁵⁷

Should competent medical authorities properly certify that the dying declarant is not in a physical or mental condition to answer questions, that determination should bar the government's questioning as well as any questioning by the defendant. If, on the other hand, the dying declarant is medically able to answer some questions at a joint meeting of both the prosecution and the defense, a requirement that the answers be in the form of a written deposition under oath would provide additional guarantees of accuracy. Even if the Sixth Amendment does not compel this additional step, an amendment to the Federal Rules of Evidence to specifically provide for depositions under oath assures even greater accuracy at the time of trial. Once the Rules allow a defendant to require the dying declarant to answer written questions under oath, the defendant has received what is due under the Sixth Amendment as reinterpreted by *Crawford*.

157. See, e.g., *State v. Causey*, 898 So. 2d 1096 (Fla. Dist. Ct. App. 2005) (testimonial statement of child victim in sexual battery case may be taken by state and offered as evidence without violating *Crawford* as long as defendant is given an opportunity to cross-examine the child at some time prior to trial).