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I. INTRODUCTION

Consider the following hypothetical.[1]

An Ohio resident, John, was charged with sexually abusing a five-year-old child, Jane. The prosecutor in the case alleged that John had sexually assaulted Jane while John was babysitting her. John was not Jane's regular babysitter, and his watching of her was a one-time occurrence.

At issue were two statements that Jane made about this encounter. Jane told a neighbor about the alleged events between John and Jane. This conversation took place at the neighbor's house, and the interaction was unrecorded.

Two weeks later, Jane was interrogated by a police officer about the incident. The officer was formally trained to interview children, and she had years of experience doing so. The interrogation took place in a room that looked similar to a doctor's waiting room and was video recorded. Jane's mother was with her for parts of the interview, and a social worker was present for the entire meeting but spoke sparingly.

At a pretrial hearing, Jane was declared incompetent to testify on her own behalf. This ruling was issued because of Jane's struggles to understand the judge's questions and her inability to communicate in a clear manner. In addition, Jane was unable to demonstrate that she understood the difference between telling the truth and telling a lie. Because she was determined to be incompetent, she would not be able to provide any in-court statements that could be used by the prosecution.

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1. The following hypothetical is based on a similar experience that the author encountered while working at a law school externship.

Without her in-court testimony, the prosecution would need to rely on the previous statements Jane had made to her neighbor and to the police officer. John's counsel objected to the use of either of these statements at trial. The defense attorney claimed that admitting Jane's out-of-court accusations would violate the Ohio Rules of Evidence, specifically, those rules regarding hearsay. In addition, the attorney objected that the use of the statement made to the police would be a violation of the Confrontation Clause of the Sixth Amendment. A hearing was held to determine the admissibility of the statements. Should the court allow both statements, only one, or neither?

Cases like the hypothetical situation described above are incredibly complex since the 2004 creation of the *Crawford* Doctrine, a relatively recent interpretation of the Sixth Amendment's Confrontation Clause, which has major implications for admitting hearsay testimony.[2] A person researching the admissibility of out-of-court statements made by unavailable minors would discover a perplexing and problematic mess of issues surrounding this area of law. The Confrontation Clause and the state and federal rules of evidence that govern hearsay work incongruously at times.[3] While some people might expect the existence of a clear-cut answer for when out-of-court statements can or cannot be admitted, this clarity is unfortunately far from reality. Under the *Crawford* Doctrine, definitions are vague, standards are inconsistent, and interpretations vary.[4]

There are plenty of reasons for second-guessing children's statements; for example, children have active imaginations, and they can fictionalize situations or blur true events with untrue ones.[5] However, the courts and legislatures have created incredibly high standards that child statements must pass before being admitted into court.[6] A child's statement may or may not be admitted into evidence, depending on how and when it was made and regardless of its truthfulness.[7]

This article will examine the criteria that must be satisfied to admit an out-of-court statement at trial, particularly in the case of child abuse victims. Section II analyzes the Supreme Court's changing interpretation of the Sixth Amendment, specifically in relation to the Confrontation Clause.[8] Section III will detail exactly what a prosecutor must consider when trying to have a child's out-of-court statement admitted.[9] Finally, Section IV will give

2. *See generally* Crawford v. Washington, 541 U.S. 36, 68 (2004).
3. *See* discussion *infra* Part II(B).
4. *Id.*
5. *See generally* Victoria Talwar & Angela M. Crossman, *Children's Lies and Their Detection: Implications for Child Witness Testimony*, 32 DEVELOPMENTAL REV. 337, 339 (2012).
6. *See* discussion *infra* Part III.
7. *Id.*
8. *See* discussion *infra* Part II.
9. *See* discussion *infra* Part III.

possible improvements that could be made to simplify the processes detailed in Section III, and it will call for overturning *Crawford*—the cause of most of the confusion surrounding the admissibility of out-of-court statements made by minors.[10]

II. BACKGROUND

Before discussing a prosecutor's plight in admitting the out-of-court statements of a child abuse victim who is unavailable to testify, it is important to examine the history of the Supreme Court's understanding of the Sixth Amendment, particularly, the Confrontation Clause. The Court's interpretation of the Clause radically changed in 2004 when it decided *Crawford v. Washington*.[11]

A. The Confrontation Clause Pre-Crawford

The Sixth Amendment, among other protections for a defendant, provides for a person accused of committing a crime "to be confronted with the witnesses against him."[12] This small phrase has been dubbed the Confrontation Clause, and for the first half of the United States' history, it was mostly overlooked.[13] However, over the last 120 years, the Confrontation Clause has been interpreted and expanded to provide criminal defendants with several rights.[14] Among those rights are the right for a defendant to usually, but not always, be present in the courtroom while a witness is testifying against him or her and the right to cross-examine the witness.[15]

These two rights become an issue when hearsay testimony is introduced as evidence.[16] As defined by the Federal Rules of Evidence, hearsay testimony is any statement made outside of court that is an "oral assertion, written assertion, or nonverbal conduct . . . intended as an assertion."[17] To be classified as hearsay, a statement must be offered in order "to prove the truth of the matter asserted in the statement."[18] Prosecutors may find it necessary to introduce a statement that was made before the trial's

10. *See* discussion *infra* Part IV.
11. *See generally Crawford*, 541 U.S. at 60-70.
12. U.S. CONST. amend. VI.
13. Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1004-05 (2003) ("[T]he U.S. Supreme Court did not issue an opinion interpreting the Confrontation Clause until 1895").
14. *Id.* at 1005.
15. *Id.*
16. *Id.* at 1036.
17. FED. R. EVID. 801.
18. *Id.*

commencement by a witness who is unable to be present.[19] In these specific instances, the defendant would not have the ability to see his or her accuser as the statement was made, nor would the defendant be able to cross-examine the witness.[20] Thus, it would seem that the Confrontation Clause would be violated by the introduction of hearsay against a defendant.[21]

On first thought, one might suppose that excluding all hearsay evidence in a criminal trial is desirable. When a witness is required to testify in court, he or she is sworn to tell the truth, providing the defendant with some assurance that the witness will not simply lie or fabricate evidence from the witness stand.[22] In addition, forcing the witness to testify on the stand allows the defendant and the defendant's attorneys to observe the testimony and judge it for inconsistencies or weaknesses.[23] Using these observations, a defense attorney can then cross-examine the witness; through such a cross-examination, a witness statement can be tested for truthfulness.[24] This entire process protects the finder of fact (either the jury or the judge if the trial is a bench trial) from being influenced by untrue or untested testimony, assuring that only the most factual evidence is introduced at trial.[25]

The Supreme Court, however, has generally provided certain exceptions for various types of hearsay statements to be admitted into evidence, provided that there is some type of guarantee of the statements' "trustworthiness."[26] Examples of such excepted statements are excited utterances (statements made while under stress that pertain to some shocking event), statements made for medical diagnosis or treatment, and statements contained in public records.[27] There are also hearsay statements that are allowed specifically in cases when a witness is unavailable, such as statements that were made in former proceedings, statements made under a belief that death was imminent, and statements that were made against the speaker's interest.[28] Because hearsay statements are made outside of court and without any penalty of perjury, these statements are generally subjected to a higher level of scrutiny in order to prevent misinformation from tainting a jury at trial.[29] Despite the fact that a statement was made outside of a hearing, if the statement is deemed

19. Chase, *supra* note 13, at 1036.
20. *Id.*
21. *Id.*
22. Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 905 (1992).
23. *Id.*
24. *Id.*
25. *Id.*
26. Judy Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1748 (1983).
27. *See* FED. R. EVID. 803.
28. *See* FED. R. EVID. 804.
29. Seigel, *supra* note 22, at 909.

to be reliable and necessary, the court may choose to allow its admission into evidence provided it falls under a hearsay exception.[30]

In *Ohio v. Roberts*, the Supreme Court addressed the conflicts between the Confrontation Clause and the admission of hearsay.[31] In this case, Herschel Roberts was accused of forging checks and possessing stolen credit cards.[32] At a preliminary hearing, a witness, Anita Isaacs, testified for the defense but to the defendant's detriment.[33] After Roberts was indicted, Isaacs, despite being subpoenaed, traveled and could not be located.[34] During the trial, Roberts introduced evidence that contradicted the testimony given by Isaacs at the preliminary hearing.[35] The prosecution, wishing to refute the defendant's new testimony, entered Isaacs's prior statements made in the preliminary hearing against Roberts.[36] Roberts's defense attorneys argued that introducing Isaacs's prior statements was a violation of the Confrontation Clause since Isaacs was not present in court and could not be cross-examined.[37] Nevertheless, the statements were admitted, and Roberts was convicted.[38] On appeal, the verdict was reversed, and the Ohio Supreme Court affirmed the reversal, saying that "[s]ince [Isaacs] had not been cross-examined at the preliminary hearing and was absent at trial, the introduction of the transcript of her testimony . . . violated [Roberts's] confrontation right."[39]

The United States Supreme Court heard the case, and, while it acknowledged that the Confrontation Clause usually requires that a defendant be able to cross-examine a witness, if a hearsay statement is a necessity to the hearing at hand and bears "indicia of reliability," the Court declared that the statement could be used at trial.[40] It stated that the prosecution was required to put forth a "good-faith effort" to locate an unavailable witness.[41] In Roberts's case, the Court acknowledged that the prosecution had demonstrated such an effort and that Anita Isaacs was unavailable as a witness, making the use of her previous statement necessary.[42]

The Court established that there were two ways that a hearsay statement could be shown to be reliable: 1) the statement could "fall[] within a firmly

30. *Id.*
31. Ohio v. Roberts, 448 U.S. 56, 62 (1980).
32. *Id.* at 58.
33. *Id.*
34. *Id.* at 59-60.
35. *Id.* at 59.
36. *Roberts*, 448 U.S. at 59.
37. *Id.*
38. *Id.* at 60.
39. *Id.* at 60-62.
40. *Id.* at 66.
41. *Roberts*, 448 U.S. at 75.
42. *Id.* at 77.

rooted hearsay exception," or 2) the statement could contain "particularized guarantees of trustworthiness."[43] Recognizing that Isaacs's statement did not fall under one of the "firmly rooted" hearsay exception categories, the Court looked for some reason to believe that the statement was trustworthy.[44] The Court found that although Isaacs was not cross-examined at the preliminary hearing, the defense had the opportunity to call her as a hostile witness once it was clear that she was testifying in a way that was not helpful to Roberts.[45] By declaring her a hostile witness, the defense attorneys could have asked Isaacs leading questions similar in style to a cross-examination.[46] Thus, the Court said that the defense had the opportunity to cross-examine Isaacs, despite forgoing this strategy, and that this opportunity provided the transcript with "sufficient 'indicia of reliability.'"[47]

For twenty-four years, *Roberts* provided the test for determining whether out-of-court statements from unavailable witnesses could be admitted into evidence.[48] After *Roberts*, the Court further expanded what types of evidence could show that a hearsay statement was inherently trustworthy.[49] However, both the *Roberts* test and the factors used for determining reliability were abandoned following the Court's decision in *Crawford v. Washington*.[50]

B. The Confrontation Clause Post-Crawford

In 2004, the Supreme Court issued a decision that changed the way the Confrontation Clause would be interpreted for the foreseeable future.[51] Michael D. Crawford was accused of stabbing a man whom he suspected of attempting to rape his wife.[52] Crawford admitted to stabbing the man but claimed that it was an act of self-defense.[53] Shortly after the incident, Sylvia

43. *Id.* at 66. *See* Chase, *supra* note 13, at 1046.
44. *See Roberts*, 448 U.S. at 66-68. *See also* Chase, *supra* note 13, at 1046-47.
45. *Roberts*, 448 U.S. at 71.
46. *Id.*
47. *Id.* at 73.
48. Daniel Huff, *Confronting Crawford*, 85 NEB. L. REV. 417, 418 (2006).
49. *See* Idaho v. Wright, 497 U.S. 805, 821-22 (1990) (explaining how the Court, in deciding whether an out-of-court statement made by a child in a sexual abuse case was reliable, listed the following factors as being determinative: "spontaneity and consistent repetition," "mental state of the declarant," "use of terminology unexpected of a child of similar age," and "lack of motive to fabricate"); *see generally* Lilly v. Virginia, 527 U.S. 116, 137-39 (1999). *See also* Chase, *supra* note 13, at 1051 (arguing "[T]he plurality opinion [of *Lilly*] relied upon a number of factors to support a finding that the statement was not reliable: a presumption of unreliability of confessions that shift or spread blame to others; the government's involvement in producing the statement; the fact that the statement described past events and had not been subjected to adversarial testing; and the fact that the codefendant had been *Mirandized* and therefore knew that his words would be used against him, thereby giving him a motive to overstate the blameworthiness of others in comparison to himself").
50. *See generally Crawford*, 541 U.S. at 60-70.
51. *Id.*
52. *Id.* at 38.
53. *Id.* at 40.

Crawford, Michael's wife, was interviewed about the incident, and the conversation was recorded.[54] In Sylvia's interview, she indicated that the stabbing may not have been the result of self-defense, contradicting her husband's claim.[55]

At the trial, Sylvia was unavailable to testify due to a state marital privilege law.[56] Since she was unable to be called as a witness, the prosecution sought to introduce the tape-recording of the prior interview to cast doubt on Crawford's self-defense claims.[57] Crawford objected to the use of the pre-recorded statement, arguing that it was a violation of his Sixth Amendment rights under the Confrontation Clause.[58] The trial court, using the test defined in *Roberts*, admitted the tape recording, affirming that the statement bore "adequate 'indicia of reliability.'"[59] The trial court cited that Sylvia was an eyewitness, that she was discussing events that had occurred recently, and that her questioning was conducted by a neutral officer.[60] Crawford was subsequently convicted of assault.[61] On appeal, the Washington Court of Appeals reversed Crawford's conviction, using a nine-factor test to demonstrate that Sylvia's statement could not be deemed reliable.[62] The Washington Supreme Court disagreed and reinstated Crawford's conviction.[63]

The United States Supreme Court reviewed the case with Justice Antonin Scalia writing the majority opinion, which he started by closely examining the Confrontation Clause and its history.[64] He said that not all out-of-court statements trigger the Confrontation Clause, only those that are "testimonial" in nature.[65] While Justice Scalia did not precisely define what was meant by "testimonial," he did quote an amicus brief definition, saying that testimonial statements were ones that "were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[66] He specifically wrote that "statements taken by police officers in the course of interrogations are . . . testimonial . .

54. *Id. at* 39.
55. *Crawford*, 541 U.S. at 39.
56. *Id.* at 40.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Crawford*, 541 U.S. at 40.
61. *Id.* at 41.
62. *Id.*
63. *Id.*
64. *Id.* at 42.
65. *Crawford*, 541 U.S. at 51.
66. *Id.* at 52. (quoting Brief of National Association of Criminal Defense Lawyers et al. as Amici Curiae at 3, *Crawford*, 541. U.S. 36 (No. 02-9410)).

. ."[67] According to Justice Scalia, the Confrontation Clause mandates that testimonial statements made by unavailable witnesses may only be admitted if the "defendant has had a prior opportunity to cross-examine" the witness.[68]

With this new interpretation of the Confrontation Clause, Justice Scalia confirmed that the *Roberts* test can no longer be a valid way to allow hearsay statements made by unavailable witnesses to enter court.[69] Rather than looking at the necessity and reliability of a statement, as the *Roberts* Court did, Justice Scalia's majority opinion declared that hearsay statements by an absent witness may only be entered if the witness is truly unavailable and if there was some prior opportunity for cross-examination.[70] Using this new test, the Court reversed the Washington Supreme Court's findings, saying that Sylvia Crawford's statement was testimonial, that she was unavailable to testify, and that there was no prior opportunity for her to be cross-examined.[71] This lack of any opportunity of prior cross-examination was a violation of Crawford's Sixth Amendment rights, and her statement was precluded from admission.[72]

Crawford began a new era for admitting statements made by unavailable witnesses in court.[73] Courts are no longer to look for indicia of reliability but, instead, at whether the statement was testimonial, whether the witness is truly unavailable, and whether there was a prior opportunity for cross-examination.[74] While these new *Crawford* questions may be simple enough inquiries in many criminal cases, in situations involving crimes against children, answering these questions can become very complicated.[75] Because of children's inherent lack of maturity, difficulties arise due to the higher likelihood for a child to be deemed incompetent by the court and, thus, unavailable.[76] In addition, while some states have legislated to keep interviews of children who have been abused to a minimum, many have not yet enacted such restrictions, meaning that a child could be subjected to questioning from several different individuals during the course of an

67. *Id.*
68. *Id.* at 59.
69. *Id.* at 68.
70. *Crawford*, 541 U.S. at 68.
71. *Id.*
72. *Id.*
73. Huff, *supra* note 48, at 418.
74. *Id.* at 418; *Crawford*, 541 U.S. at 62 (discussing how Justice Scalia, on why courts should no longer look for indicia of reliability, said, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes").
75. *See generally* Jeffrey L. Fisher, *What Happened – and What Is Happening – to the Confrontation Clause?*, 15 J. L. & POL'Y 587, 623-26 (2008).
76. *Id.* at 623.

investigation and trial.[77] Before being admitted in court, each of these interviews would require answering the question: Were the statements made during the conversation testimonial according to *Crawford*?

III. ANALYSIS

For minors who have been abused, seeking justice through the court system requires a careful navigation of both the *Crawford* test and hearsay rules. Because the minor typically has the best and most damning evidence of any abuse that may have occurred, a prosecutor would likely want to get the minor's statement introduced at trial. Unless the child is deemed competent and available to testify, admitting the child's prior accusations can be an uphill battle for the prosecution. In dealing with an out-of-court statement made by a minor, a court must determine the following: 1) Is the statement testimonial? 2) Is the child-witness unavailable? 3) Was there a prior opportunity for cross-examination?[78]

Crawford mandates that if an out-of-court statement is deemed testimonial, then the child must be unavailable and there must have been some prior opportunity for cross-examination.[79] Without satisfying both of these requirements, an out-of-court testimonial statement would be barred from entry.[80] However, if the statement is not testimonial, then the court must look to see if a hearsay exception applies to the out-of-court statement, allowing it to be entered as evidence.[81] Without said hearsay exception, the statement is simply excluded due to a presumption of unreliability.[82]

What makes this entire process even more complicated is that each of these questions can be difficult to answer. Clear definitions and rules have yet to be established by the Court or Congress, and states vary in their procedures and classifications used in each phase of a criminal prosecution.[83] It is difficult to tell whether a statement is testimonial, whether a child is truly unavailable, and, to a lesser extent, whether there was some prior opportunity for cross-examination. Because of these complexities, the very serious crime of child abuse can be unnecessarily challenging to prosecute.

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77. Ashley Fansher & Rolando V. del Carmen, *"The Child as a Witness": Evaluating State Statutes on the Court's Most Vulnerable Population*, 36 CHILD. LEGAL RTS. J. 1, 5 (2016).

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

79. *Id.*

80. *Id.*

81. *Id.*

82. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 15-16 (2009).

83. *See generally* Tex. Fam. Code § 104.006. *See also* Conn. Practice Book § 35a-23; C.R.S. 13-25-129.

A. Is the Out-of-Court Statement Testimonial?

In order to determine if the Confrontation Clause might work to prevent the admission of an out-of-court statement made by a child victim of abuse, the evidence would first have to be established as either testimonial or nontestimonial.[84] In *Crawford*, Justice Scalia abstains from formally defining this term, but he does give an example of testimonial statements.[85] He says that statements made in police interrogations are testimonial.[86] However, the *Crawford* Court goes no further in describing what other types of statements might be considered testimonial.[87]

Subsequent cases have provided some other examples of and comments about the differences between testimonial and nontestimonial statements.[88] Testimony or formal depositions in prior hearings are considered testimonial for the purposes of *Crawford*.[89] In *Davis v. Washington*, the Court outlines the "primary purpose test" in which the Court analyzes why a statement was initially made to an officer.[90] When the purpose of police questioning is to address an ongoing emergency, the statements made are nontestimonial.[91] For example, an interrogation that occurs while a crime is actually occurring, such as a 9-1-1 emergency call, would be a nontestimonial statement.[92] On the other hand, an interrogation conducted by an officer after a crime has already occurred and when there is no longer a need to provide immediate assistance would be testimonial since the primary purpose of the interview is not to address an emergency situation.[93] *Michigan v. Bryant* instructs courts to consider the formality of the interrogation as a factor in determining

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

85. *Id*. ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

86. *Id.*

87. *See generally id.* at 68. *See also id.* at 56 n.6 (discussing in an aside how Justice Scalia indicates that a statement made to an officer about a past crime while the speaker is dying was historically excepted from a confrontation requirement despite being testimonial. However, he would not, at that moment, decide if it was excepted under the Sixth Amendment, saying it was an unnecessary determination for the case at hand).

88. *See* Davis v. Washington, 547 U.S. 813, 827 (2006). *See also* Giles v. California, 554 U.S. 353, 376 (2008); Michigan v. Bryant, 562 U.S. 344, 358 (2011).

89. *Davis*, 547 U.S. at 826.

90. *Id.* at 822. ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

91. *Id.*

92. *Id.* at 827.

93. *Id.* at 828. *See also Bryant*, 562 U.S. at 358, 369 (expanding the Primary Purpose Test to require consideration of "all of the relevant circumstances" and emphasizing that when the primary purpose of an interrogation is "not to create a record for trial," the statements made are nontestimonial).

whether a statement is testimonial.[94] An interview that has the formality of a "station house interrogation" may be more likely to result in testimonial statements, whereas informality may lessen the likelihood of such an outcome.[95] Finally, *Giles v. California* provides an additional example of nontestimonial statements, saying that those statements concerning abuse made by the victim to his or her friends, neighbors, or treating physicians would be nontestimonial.[96]

Perhaps the most useful case to examine for the purposes of determining whether a minor's statements are testimonial is *Ohio v. Clark*.[97] In *Clark*, L.P., a three-year-old abuse victim, made statements to his preschool teachers identifying his abuser.[98] At trial, due to Ohio law, L.P. was deemed incompetent to testify and, thus, unavailable.[99] The prosecution introduced L.P.'s statements made to his teachers, arguing that a state hearsay exception allowed their introduction.[100] The defendant, Clark, objected to the inclusion of the statements, asserting that their admission violated his Sixth Amendment rights.[101] An Ohio appellate court reversed the conviction saying the admission of L.P.'s statements violated the Confrontation Clause, and the Ohio Supreme Court affirmed the reversal.[102] The Ohio Supreme Court stated that since the teachers were bound by Ohio's law requiring educators to report instances of abuse, they were essentially acting "as agents of the State" when they questioned L.P. about his injuries.[103]

The United States Supreme Court, in a majority opinion written by Justice Alito, reversed the decision of the Ohio Supreme Court.[104] The Court acknowledged that statements made to individuals other than law enforcement might be subject to the Confrontation Clause, and, therefore, it refused "to adopt a categorical rule excluding them from the Sixth

94. *Bryant*, 562 U.S. at 366, 377.

95. *Id.*

96. *Giles*, 554 U.S. at 377 (arguing that when the issue of domestic abuse is brought up by the dissent in *Giles*, Justice Scalia, writing for the majority, says that a separate standard should not exist for crimes of domestic abuse and other forms of criminal activity. "Domestic violence is an intolerable offense that legislatures may choose to combat through many means. . . . But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal").

97. *See generally* Ohio v. Clark, 576 U.S. 237, 246 (2015).

98. *Id.* at 241.

99. *Id.* at 241-42 ("Under Ohio law, children younger than 10 years old are incompetent to testify if they 'appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly"). *See* OHIO REV. CODE ANN. § 2317.01. *See also* OHIO EVID. R. 601(A) & (B).

100. *Clark*, 576 U.S. at 242. *See* OHIO EVID. R. 807 (stating reliable hearsay is to be admitted in cases involving minors in child abuse cases).

101. *Clark*, 576 U.S. at 242.

102. *Id.*

103. *Id.*

104. *Id.* at 243.

Amendment's reach."[105] However, the Court did indicate that statements made to non-law enforcement personnel would be less likely to be testimonial overall.[106]

In this case, Justice Alito said that the statements L.P. made to his teachers were amidst an "ongoing emergency involving child abuse."[107] The Court stated that the injuries to L.P. were serious and that the teachers were forced to immediately question L.P. to aid them in deciding whether it was safe to send him home, potentially to an abuser.[108] The Court interpreted the teachers' questions as "primarily aimed at identifying and ending the threat."[109] Justice Alito noted that the setting of the questioning was informal, and L.P. was never warned that his answers might be used to prosecute his assailant.[110]

Finally, the Court acknowledged that L.P.'s age was a factor that made it less likely that the Confrontation Clause would apply.[111] Justice Alito wrote that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause," citing young children's lack of understanding of the legal system and prosecutorial methods in general.[112] He declared that it would be "extremely unlikely that a 3-year-old child in L.P.'s position would intend his statements to be a substitute for trial testimony."[113] The Court also examined historical evidence to see whether cases like L.P's would have triggered the Confrontation Clause, and Justice Alito wrote that it would be "highly doubtful that statements like L.P.'s would have ever been understood to raise" such concerns.[114]

In the end, the Court rejected the theory put forth by Clark that the teachers were acting as agents of the state, akin to officers in a criminal investigation.[115] It said that the requirement to report instances of child abuse was not enough to make the statements testimonial.[116] For all of these reasons, the Court reversed the Ohio Supreme Court's ruling, affirming that L.P.'s statements were not barred by the Confrontation Clause.[117]

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105. *Id.* at 246.
106. *Clark*, 576 U.S. at 246.
107. *Id.*
108. *Id.* at 247.
109. *Id.*
110. *Id.*
111. *Clark*, 576 U.S. at 247-48.
112. *Id.*
113. *Id.* at 248. ("[A] young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all").
114. *Id.*
115. *Id.* at 249-50.
116. *Clark*, 576 U.S. at 249.
117. *Id.* at 251.

However, it is important to note what the Court *did not* do in *Clark*. It did not conclude that all statements made to non-officers would qualify as nontestimonial.[118] It did not declare that all statements made by a three-year-old in an abuse case would be nontestimonial, only that it was "extremely unlikely" that they would be testimonial.[119] It did not indicate whether such statements would remain nontestimonial for an older minor, who was five, ten, or fifteen years old.[120] It also did not address whether statements about abuse that occurred days, months, or years ago would receive the same treatment as L.P.'s, instead stressing the immediacy of the "ongoing" abusive situation.[121]

In *Clark*, the Supreme Court emphasized that it is unlikely for a child's statement made to a teacher to be considered testimonial.[122] However, it may be worth considering whether the same would have been true had L.P. made his statements to a police officer. Would the Court have still considered this an ongoing emergency like *Davis*? It would seem likely, but if not, the presence of any emergency may not have mattered since the *Clark* Court stressed that the age of the child also led to his statements being nontestimonial.[123] However, without clear categorical rules delineating what is and is not testimonial regarding the Confrontation Clause, it is difficult to say whether a statement by a child made to an officer would always or even would likely be considered nontestimonial.

What the Court has given prosecutors is a puzzling assortment of examples and dicta about what may be considered testimonial under very specific circumstances. Whether an out-of-court statement made by a child in an abuse case is testimonial or not likely comes down to a case-by-case analysis of the specific facts and intentions of the parties involved in the interrogation, which can make the entire process seem unpredictable.

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118. *Id.* at 246.
119. *Id.* at 248.
120. *Id.*
121. *Clark*, 576 U.S. at 246.
122. *Id.* at 248.
123. *Id.* at 246-48. *Crawford* defined police interrogations as testimonial. However, Justice Alito, in *Clark*, stressed that the teachers were faced with an ongoing emergency, and, thus, the teachers had an imperative to act. Under *Davis*, a police officer in a similar situation would be questioning the child with the primary purpose of quelling an emergency and not obtaining statements that could be used in a criminal prosecution. Therefore, it would seem possible that a court could see a statement like L.P.'s made to an officer as nontestimonial. Where this could get complicated is in a situation where a child describes abuse that occurred some time ago by a person who was not residing with the child. In this case, it would seem less likely that the interview would be taking place amidst an ongoing emergency (there would be less of a likelihood of a second incident of imminent abuse). A statement made to a police officer in this scenario would likely be testimonial. It is unclear if a statement in this scenario, made to a teacher, would be testimonial or nontestimonial. *See also Crawford*, 541 U.S. at 52; *Davis*, 547 U.S. at 822.

B. When Is a Minor "Unavailable"?

Once an out-of-court statement has been decided to be either testimonial or nontestimonial, the statement has two paths for admission.[124] If it is testimonial, then the prosecution must satisfy the other requirements of *Crawford*: "unavailability and a prior opportunity for cross-examination."[125] If the statement is nontestimonial, then the statement must satisfy a hearsay exception from either the state or federal rules of evidence.[126]

Assuming that the minor's statement was found to be testimonial, the minor now must be found to be unavailable for the purposes of testifying at trial.[127] A witness can be declared unavailable for multiple reasons.[128] Some possible reasons for unavailability of a witness might be that the witness is unable to be located, the witness is dead, the witness is refusing to testify, or the witness has a medical condition preventing him or her from testifying.[129] It is generally the responsibility of the prosecutor to show a good-faith effort was made in trying to procure the witness for testimony at trial.[130]

A child's competency to testify can be a major issue for dealing with an underage witness.[131] At the federal level, the presumption is that all children are competent.[132] A hearing is required to show that a child witness is incompetent for the purposes of testifying.[133] State rules vary concerning what it means for a witness to be competent, but in general, a witness is competent if he or she has "the capacity to observe, remember, communicate[,] and . . . tell the truth."[134] It is this question of truthfulness that is often the focus of a competency hearing when assessing a minor's ability to testify.[135] In their early years, many children struggle with what it means to tell the truth, and this awareness of veracity develops as a child ages.[136] Children at young ages may have difficulties understanding the

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

125. *Id.*

126. *See* discussion *infra* Part III(D).

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

128. Brian J. Hurley, *Confrontation and the Unavailable Witness: Searching for a Standard*, 18 VAL. U. L. REV. 193, 194-95 (1983).

129. *Id.* at 195.

130. *Id.* at 195, 220-21 ("The prosecution must actively seek, and in most cases, attempt to make personal contact with the witness").

131. Fansher & del Carmen, *supra* note 77, at 20.

132. 18 U.S.C. § 3509 (2022).

133. *Id.*

134. Thomas D. Lyon, *Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law*, *in* CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGY RESEARCH AND FORENSIC PRACTICE 69, 70 (Michael E. Lamb et al., eds., 2nd ed. 2011). *See generally* Robin W. Morey, Comment, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245, 277-78 (1985).

135. Lyon, *supra* note 134, at 73-74.

136. Talwar & Crossman, *supra* note 5, at 338-39.

difference between a truth and a lie, and, thus, they might be declared incompetent and barred from testifying.[137]

Most likely, a declaration from the court designating a child as incompetent to testify would make the child "unavailable" as a witness for the purposes of *Crawford*.[138] In *Clark*, both Justice Alito, writing for the majority, and Justice Scalia, concurring, pointed to historical evidence that children who were ruled incompetent to testify were unavailable for confrontation purposes.[139] While nothing in this case definitively says that incompetent minors are to be deemed categorically unavailable for testimony, it would seem likely that the *Clark* Court would have found them to be so.[140] Whether the current Supreme Court would find incompetent minors to be unavailable remains to be seen.

C. Prior Opportunity for Cross-Examination

Once an out-of-court statement has been determined to be testimonial and the speaker designated as unavailable, the last requirement for its admission into evidence is whether there was a prior opportunity for cross-examination.[141] Unless the statement was made at a prior hearing or trial, it is unlikely that the speaker's statement would have been subjected to any type of cross-examination to test the statement's reliability.[142]

With child witnesses, it is worth examining the usefulness of any such cross-examination by the defense counsel. If a child is deemed to be competent to testify, then cross-examination may indeed prove to be a tool to determine reliability, as required by *Crawford*.[143] However, what if a child is already deemed unavailable to the court due to his or her incompetence? If a child cannot discern between a truth and a lie, cross-examination would not likely be a meaningful test of reliability. Thus, even if there was a prior opportunity to cross-examine a child witness, it is possible that due to his or her age and maturity level, such an effort would prove to be fruitless for a defendant.

On the other hand, it is doubtful that the age of the speaker would affect the *probability* that an out-of-court statement would have been subjected to cross-examination. Any person, regardless of age, who makes testimonial

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137. *Id.*
138. *See Clark*, 576 U.S. at 248.
139. *Id. See also id.* at 251 (Scalia, J., concurring) ("At common law, young children were generally considered incompetent to take oaths, and were therefore unavailable as witnesses unless the court determined the individual child to be competent").
140. *Id.* at 248.
141. *Crawford*, 541 U.S. at 68.
142. *See* Huff, *supra* note 48, at 437-38.
143. *Crawford*, 541 U.S. at 61.

statements to police officers is unlikely to be cross-examined at the time he or she is interviewed because defense attorneys are not typically present for such interviews. Based on this requirement being a necessity for admittance under *Crawford*, such statements would likely be excluded as evidence.[144]

However, one possible workaround to issues of missing cross-examination would be for states to allow attorneys from both the prosecution and the defense to conduct an interview with the child abuse victim that would include an opportunity for cross-examination.[145] Such an interview could occur before trial and could be video recorded for use at trial.[146] The interview should be conducted under oath in order to assure that the interview is reliable.[147] A pre-recorded interview would allow the child abuse victim to make testimonial statements, to remain unavailable for court (whether due to incompetence or some other necessity), and to be subjected to cross-examination.[148] Thus, such a pre-recorded interview would satisfy *Crawford*.[149]

Federal law and most state law allow some form of video-recorded testimony for child witnesses.[150] While this method forces the child victim to endure another interrogation, it does provide a system for admitting a testimonial, out-of-court statement for a minor who is otherwise unavailable for trial.[151] Again, the main reason video recording is acceptable under *Crawford* is that it allows for an opportunity for cross-examination.[152] Without this possibility for cross-examination, testimonial hearsay is doomed to be excluded from any criminal prosecution, leaving the child victim with no way to have his or her statement heard in court.[153]

D. Hearsay Exceptions

Of course, a victim of child abuse does not have to make his or her statement to a police officer or some other state agent.[154] In such cases, it is

144. *Id.* at 68.

145. *See generally* Prudence Beidler Carr, *Playing by All the Rules: How to Define and Provide a "Prior Opportunity for Cross-Examination" in Child Sexual Abuse Cases after* Crawford v. Washington, 97 J. CRIM L. & CRIMINOLOGY 631, 655-58 (2007).

146. *Id.* at 655.

147. *Id.*

148. *Id.*

149. *Id.*; *Crawford*, 541 U.S. at 68.

150. *See* 18 U.S.C. § 3509 (2022); Nancy Walker Perry & Bradley D. McAuliff, *The Use of Videotaped Child Testimony: Public Policy Implications*, 7 NOTRE DAME J. L., ETHICS & PUB. POL'Y 387, 392 (1993). *See generally Closed-Circuit Television Statutes*, NAT'L DISTRICT ATTORNEYS ASS'N (2012), https://ndaa.org/wp-content/uploads/CCTV-2012.pdf (last updated August 2012).

151. *See generally* Carr, *supra* note 145, at 655, 658.

152. *Id.* at 655.

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

154. Fansher & del Carmen, *supra* note 77, at 4.

likely (though not guaranteed) that an out-of-court statement given to someone other than a member of law enforcement would be found to be nontestimonial.[155] In *Whorton v. Bockting*, the Supreme Court drew a clear line on the Confrontation Clause's inapplicability to nontestimonial statements.[156] Justice Alito, writing for the majority, said that "the Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability."[157] Thus, there is no Sixth Amendment constitutional restraint on the use of nontestimonial statements.[158] Because of the lack of Sixth Amendment power over the exclusion of nontestimonial statements, a child abuse victim's statements to his or her parents, friends, teachers, medical personnel, or various other non-law enforcement parties could all potentially be admitted into evidence.[159]

Since the Sixth Amendment does not apply to nontestimonial statements, the only rules governing their admission are state and federal evidence rules, specifically those regarding hearsay.[160] Using state or federal hearsay rules could help or hinder a child abuse victim in asserting claims against defendants because state rules vary widely.[161] A majority of states have enacted some type of rule or statute that is specifically meant to protect child victims of abuse, allowing their out-of-court statements to have an avenue to being admitted into evidence.[162] Many of these state rules and statutes use some or all of the factors first described in *Roberts* and later detailed in *Idaho v. Wright* to test out-of-court statements made by child victims for reliability before allowing them as evidence.[163]

In looking at these state statutes and rules, one of the most glaring differences in how states govern the admission of child hearsay is in the way age is used to apply the exceptions.[164] Many of the states allow for hearsay to be admitted if a child is under the age of ten.[165] Others set the age limit as

155. *See Clark*, 576 U.S. at 246.

156. Whorton v. Bockting, 549 U.S. 406, 420 (2007).

157. *Id.*

158. *Id. See* Laird C. Kirkpatrick, *Nontestimonial Hearsay after* Crawford, Davis *and* Bockting, 19 REGENT U. L. REV. 367, 368-70 (2006).

159. Kirkpatrick, *supra* note 158, at 368-72; *Clark*, 576 U.S. at 246.

160. George Fisher, *The Crawford Debacle*, 113 MICH. L. REV. FIRST IMPRESSIONS 17, 20 (2014).

161. Fansher & del Carmen, *supra* note 77, at 26.

162. *See generally Rules of Evidence or Statutes Governing Out of Court Statements of Children*, NAT'L DISTRICT ATTORNEYS ASS'N, https://ndaa.org/wp-content/uploads/Statutes-Governing-out-of-Court-Statements-of-Children.pdf (last updated May 2014) [hereinafter *State Rules and Statutes*].

163. *See Roberts*, 448 U.S at 66. *See also Wright*, 497 U.S. at 821-22; Kirkpatrick, *supra* note 158, at 375.

164. *See generally, State Rules and Statutes, supra* note 162.

165. *E.g.*, MASS. ANN. LAWS ch. 233, § 81; MINN. STAT. § 595.02, Subd. 3; WASH. REV. CODE ANN. § 9A.44.120; MICH. R. EVID. 803A.

high as sixteen.[166] A few states do not set any age restriction for the child.[167] These variations in age requirements can be the difference between a child's out-of-court statement being used at trial and a child's voice not being heard.[168] A statement that might be used to prosecute a child abuser in one state might be denied admission in another state simply due to the child's age.[169] Should children in one state be held to a higher standard and forced to testify in court when those in another state are allowed to make their statements out of court? Without a national standard, the admissibility of a statement may come down to the arbitrary age limit of the state in which the trial is taking place.[170]

In addition to age being a differing factor in state laws, some states require supplemental proof or evidence validating the alleged sexual activity.[171] For instance, Ohio mandates that an out-of-court statement made by a minor must not be admitted without some "independent proof of the sexual activity or attempted sexual activity, or of the act or attempted act of physical harm directed against the child's person."[172] This necessity means that the child's statement must be accompanied with other evidence; the statement itself cannot be the sole basis of the case against the defendant.[173] Similarly, Hawaii requires extra evidence to show that the offered statement is reliable.[174] Alabama requires that the trial court must be satisfied with the statement's overall trustworthiness prior to its admission.[175] These types of requirements seem similar to the old "indicia of reliability" from *Roberts* and *Wright*.[176] Despite *Crawford* overruling these standards that were previously used for the admission of testimonial statements, it would appear that states are still applying criteria similar to *Roberts* and *Wright* for nontestimonial statements.[177]

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166. *E.g.*, FLA. STAT. ANN. § 90.803(23); GA. CODE ANN. § 24-8-820; HAW. REV. STAT. ANN. § 626-804(6).

167. *E.g.*, KAN. STAT. ANN. § 60-460(dd); MISS. CODE ANN. § 13-1-403 (applying to children in their "tender years"); 40 R.I. GEN LAWS § 40-11-7.2(a) (allowing videotaped statements for children without setting any age limit).

168. Fansher & del Carmen, *supra* note 77, at 10.

169. *Id.*

170. *Id.*

171. *Id. at* 9.

172. OHIO EVID. R. 807(A)(3).

173. *Id.*

174. HAW. REV. STAT. ANN. §626-804 (listing factors of "(A) age and mental condition of the declarant; (B) spontaneity and absence of suggestion; (C) appropriateness of the language and terminology of the statement, given the child's age; (D) lack of motive to fabricate; (E) time interval between the event and the statement, and the reasons therefor; and (F) whether or not the statement was recorded, and the time, circumstances, and method of recording").

175. ALA. CODE § 15-25-32(2).

176. *See Roberts*, 448 U.S at 66. *See also Wright*, 497 U.S. at 821-22; Kirkpatrick, *supra* note 158, at 375.

177. *See* Kirkpatrick, *supra* note 158, at 375; *Crawford*, 541 U.S. at 68.

Finally, it is worth noting that some states simply do not contain any such hearsay exceptions to allow out-of-court statements from child victims of abuse to be admitted.[178] In these states, any out-of-court statement from a child victim that was nontestimonial would have to come into court based on some other hearsay exception that was not specifically designed for child abuse situations.[179] If no such hearsay exception applies, the statement would likely be barred.[180] Unfortunately, a lack of a child abuse hearsay exception could force a victim to either testify in court or see his or her abuser go free.

Overall, it would seem that nontestimonial statements have a much higher likelihood of being admitted in court than testimonial statements due to the stringent requirements of *Crawford*.[181] However, that does not mean that nontestimonial statements are guaranteed to be admitted.[182] The probability that an out-of-court statement will be admitted may drastically shift based on the state in which the trial is taking place.[183] Therefore, although a nontestimonial statement is more likely to be admitted than a testimonial one, the statement may still be barred depending on the location of the court, potentially denying the victim justice.[184]

IV. SUGGESTIONS MOVING FORWARD

Despite *Crawford*'s attempt to return the judicial system's interpretation of the Confrontation Clause to its original, common law meaning, the Court only complicated the process by which children can have their statements admitted by abandoning *Roberts*.[185] How are courts supposed to grapple with the difficult issue of child accusations made outside of court? There are a number of options that states, courts, attorneys, and officers can use to adjust their methods in order to address the difficulties in admitting statements of child victims of abuse.

A. The Court Should Create an Exception for Child Abuse Victims

The current understanding of the Confrontation Clause seems to be somewhat broader than Justice Scalia's original interpretation of it in *Crawford*.[186] Since *Crawford*, the Court has found some statements, such as

178. *E.g.*, IOWA R. EVID. 801-07; ME. R. EVID. 801-06; N.H. EVID. RULE 801-807.
179. *See id.*
180. Kirkpatrick, *supra* note 158, at 375.
181. *See generally Crawford*, 541 U.S. at 68.
182. *See generally State Rules and Statutes*, *supra* note 162.
183. *Id.*
184. *Id. See* Fansher & del Carmen, *supra* note 77, at 8-11.
185. *See* discussion *supra* Part III.
186. *See generally Bryant*, 562 U.S. at 390 (Scalia, J., dissenting) ("[T]oday's decision is not only a gross distortion of the facts. It is a gross distortion of the law . . . ."); *Clark*, 576 U.S. at 253 (Scalia, J., concurring) ("A suspicious mind (or even one that is merely not naïve) might regard this distortion as the

those made to officers during the course of an ongoing emergency, to be outside the reach of the Confrontation Clause.[187] Because of the Court's evolving view of what is and is not testimonial, it is possible that the Court could just create a blanket exception for child abuse victims. Such an exception would prevent the Confrontation Clause from impacting whether child statements from unavailable accusers were admitted into evidence. Instead of addressing whether or not such statements were testimonial, courts could use state hearsay laws and weigh the reliability of the out-of-court statements. Statements deemed to be unreliable would be properly excluded, but statements that qualify as being truthfully made would be admitted.

An exception that precluded the use of the Confrontation Clause against unavailable child abuse victims would spare children from having to face possible trauma from cross-examination. Victims would not have to sit in the same room as the defendant, and they would not be forced to relive the details of their abuse in a courtroom full of people with whom they may not feel comfortable. This exception would also allow law enforcement to conduct thorough interviews of minors without being concerned about whether the statements would be in violation of the Sixth Amendment. Courts would be free to use their discretion to determine the reliability of the statements if and when they were used in an attempt to prosecute.

However, the Court has had several opportunities to create large exceptions to the Confrontation Clause, and, yet, it has chosen not to do so.[188] In *Giles*, Justice Scalia specifically declined to create an exception to the Confrontation Clause for victims of domestic abuse.[189] In *Clark*, the Court had the opportunity to create two exceptions: one for statements made to individuals not employed in law enforcement and another for child witnesses.[190] The *Clark* Court chose not to establish either of these exceptions.[191] Instead, the Court used the same type of analysis detailed in *Bryant*, a case-by-case evaluation of the circumstances of the interrogation to determine whether any statements made were testimonial.[192] Therefore, even though a broad exception for minors might help to alleviate some of the

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first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause – in other words, an attempt to return to *Ohio v. Roberts*").

187. *Davis*, 547 U.S. at 828 (concluding that statements made for the primary purpose of confronting an ongoing emergency are not testimonial and, thus, not subject to the Confrontation Clause); *Clark*, 576 U.S. at 251 (holding that statements made to a teacher about child abuse were not testimonial).

188. *See Giles*, 554 U.S. at 377. *See also Clark*, 576 U.S. at 248-49.

189. *Giles*, 554 U.S. at 377.

190. *Clark*, 576 U.S. at 248-49.

191. *Id.*

192. *Bryant*, 562 U.S. at 370.

difficulties facing courts, the Supreme Court has shown no willingness to go down this road.[193]

B. States Can Provide Paths for Child Abuse Victims' Statements to be Admissible

Without any exception for minors, *Crawford* is the current standard by which all testimonial evidence can be admitted into court. However, there are other conceivable solutions for admitting child statements. One possibility is for states to provide a method for children to give their statements in a way that would satisfy the requirements of unavailability and prior opportunity for cross-examination.[194] A previously mentioned strategy would be to allow minors' statements to be taken via a video or audio recording process.[195] This method can permit a child to make a statement that could be used on the record, and it can also provide an opportunity for cross-examination.[196] If states change the standard for dealing with child abuse to require recording minors' statements while allowing for the possibility of cross-examination, defendants' Sixth Amendment rights as defined by *Crawford* would not be violated, and the children's testimonies would be heard.[197]

States could also work to avoid the implications of *Crawford* by instructing police and state agencies to abstain from leading interviews with child victims.[198] Law enforcement could try to have a neutral third party take statements from children, such as teachers, counselors, or social workers. These parties could collect information from the minors for purposes other than those relating to a criminal prosecution.[199] For instance, a social worker could interview the child to determine the safest way to remove the child from harm. While a criminal trial may ensue, criminal prosecution would not be the primary purpose of the interview, and, thus, *Crawford* would *technically* not be violated.[200] These statements would be admissible so long as they satisfy the home state's hearsay requirements.[201]

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193. *See generally Giles*, 554 U.S. at 377; *Clark*, 576 U.S. at 248-49.

194. *See generally Crawford*, 541 U.S. at 68.

195. *See* discussion *supra* Part III(C).

196. Carr, *supra* note 145, at 655.

197. *See generally id.*

198. *Crawford*, 541 U.S. at 53; *Davis*, 547 U.S. at 827-28 (explaining that the *Crawford* Court specifically said that interrogations conducted by law enforcement would count as testimonial unless they were made for the purposes of addressing an ongoing emergency as detailed in *Davis*).

199. *See Davis*, 547 U.S. at 822 (stating that testimonial statements are those that are for "the primary purpose [of] . . . establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.").

200. *See id.* at 828 (stating that the primary purpose of the interview would be for reasons other than the preservation of information for a future criminal prosecution).

201. *See* discussion *supra* Part III(D).

The hearsay requirements are another area in which states could work together to simplify the process by which victims of child abuse seek justice.[202] States could collaborate to form more unified hearsay exceptions for child victims.[203] Several states have already been working together to streamline their hearsay laws.[204] Idaho, Nevada, New Mexico, and Oklahoma have each enacted the Model Child Witness Testimony by Alternative Methods Act.[205] This Act tries to create uniform standards by which a child may testify without being in the same room as the defendant.[206] It creates a hearing process and outlines some factors for judges to weigh while determining whether a child's statement should be given via an alternative method, such as through video recording or closed-circuit television.[207] Unfortunately, the Act mentions nothing about the age for which these hearing processes would apply.[208] Thus, the states would still be able to set the age for application as they see fit, continuing the inconsistency as to whom states apply their hearsay standards.[209]

States could use the Model Child Witness Testimony by Alternative Methods Act as a starting point and try to build a more unified national method for children to give out-of-court statements. They could set a clear age limit for the applicability of child hearsay rules, or, if they did not want to set an age limit, they could set a firm process by which a child could be examined on a case-by-case basis to determine whether a child hearsay rule should apply. Simply coming up with a more common understanding and application of child hearsay laws across the nation would only aid the consistent administration of justice in child abuse cases, not hinder it.[210]

C. The Supreme Court Could Provide Further Guidance Regarding Crawford

In addition, the Supreme Court could reexamine the Confrontation Clause. It could determine to further define the requirements of *Crawford* and to give firm tests for when evidence is testimonial, when a witness is

202. Fansher & del Carmen, *supra* note 77, at 26.
203. *See id.*
204. *Child Witness Testimony by Alternative Methods Act*, UNIFORM L. COMMISSION (2002), https://www.uniformlaws.org/committees/community-home?CommunityKey=fa810ffb-3194-417c-a79b-bf4100f02f2d (last visited July 24, 2022) [hereinafter *Model Act*].
205. *Id.*
206. *Id.*
207. *Id.* at 4, 5.
208. *Id. at* 2.
209. *Model Act*, *supra* note 204.
210. *See* Fansher & del Carmen, *supra* note 77, at 26.

unavailable, and when a prior opportunity for cross-examination exists.[211] Such tests could be much more useful than the seemingly random list of "testimonial" examples buried in cases like *Crawford*, *Davis*, *Giles*, *Bryant*, and *Clark*. With clearer tests and definitions, courts would be able to better assess when the Confrontation Clause should be applied.

However, such a reexamination of the Confrontation Clause might cause the Court to go back to the original mandate of the majority's language in *Crawford*.[212] The rule in *Crawford* was that the Confrontation Clause provided one method to allow out-of-court testimonial statements to be admitted into evidence when the declarant was unavailable: cross-examination.[213] According to the majority in *Crawford*, the courts have no place in determining the reliability of an out-of-court statement made by an unavailable witness.[214] Reliability can only be truly established through the "crucible of cross-examination."[215]

If the Court reverted to the meaning of the Confrontation Clause as interpreted in *Crawford*, where would this leave child victims? It seems evident that their statements, so long as they are testimonial, would be denied admission into evidence unless there was some opportunity for cross-examination.[216] Under a strict reading of *Crawford*, to prosecute a child abuser, children would have to be cross-examined by the defendant's counsel.[217] While such an application of *Crawford* would be easier for courts to apply than the current understanding of the Confrontation Clause, the results of such a strict interpretation would likely prevent accusations from child victims to be admissible.

D. Better Yet – The Supreme Court Should Overturn Crawford

Why not overturn *Crawford* altogether? Maybe determining what is and is not testimonial is unnecessary. Perhaps, the *Roberts* Court got it right the first time. Since the Supreme Court has seemingly crept away from the strict adherence to unavailability and cross-examination as detailed by Justice Scalia, maybe it is time to rethink whether *Crawford* should remain the standard.[218]

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211. *See generally Crawford*, 541 U.S. at 68 (arguing again that Justice Scalia specifically chose to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" It would seem that the day for "spell[ing] out a comprehensive definition" is now).
212. *Id.*
213. *Id.*
214. *See id.*
215. *Crawford*, 541 U.S. at 61.
216. *See id.* at 68.
217. *Id.*
218. *See generally supra* Part III(B-C).

Justice Scalia maintained that the purpose of the Confrontation Clause was to protect defendants against out-of-court testimonial statements made by unavailable accusers.[219] He based this understanding on a historical review of English law and early issues revolving around the idea of a defendant's right to face his accuser.[220] In the majority opinion of *Crawford*, Justice Scalia referenced a case from 1696, *King v. Paine*, in which the Court of King's Bench held that unavailable witness testimony may only be admissible if a prior opportunity to cross-examine was allowed.[221] To Justice Scalia, it was clear that the Sixth Amendment to the Constitution was written with this type of confrontation in mind.[222] He stated that "the Framers would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[223] Justice Scalia believed a prior opportunity for cross-examination was the *only* way to establish reliability when a witness was unavailable.[224]

However, twenty-four years before *Crawford* was decided, Justice Blackmun stated that reliability could be established through other means.[225] In *Roberts*, Justice Blackmun stressed that what is most important is the reliability of the out-of-court statement.[226] Cross-examination provided one of the ways in which a statement could be shown to be reliable, but it was not the *only* method to show that out-of-court evidence was trustworthy.[227] Pre-*Crawford* courts could rely on "indicia of reliability" to determine whether hearsay against a defendant was admissible.[228] Justice Blackmun wrote that statements that fell into a "firmly rooted hearsay exception" or that contained "particularized guarantees of trustworthiness" would satisfy the requirements of the Confrontation Clause.[229] When compared to the holding in *Crawford*, the *Roberts* Court's interpretation of the Confrontation Clause is a broader and more inclusive rule that would allow more out-of-court statements to be admissible.[230]

If reliability of out-of-court statements is the general goal, then why does cross-examination have to be the only way to show that a statement is trustworthy? When evaluating the admission of hearsay that is not

219. *Crawford*, 541 U.S. at 53-54.
220. *See generally id.* at 44-47.
221. *Id.* at 45.
222. *Id.* at 53-54.
223. *Id.*
224. *Crawford*, 541 U.S. at 55.
225. *Roberts*, 448 U.S. at 66.
226. *Id.* at 65.
227. *Id.*
228. *Id.*
229. *Id.* at 66.
230. *Roberts*, 448 U.S. at 65-66.

testimonial, courts are likely well-practiced in looking at whether there is some evidence to prove that statements are reliable. The Sixth Amendment does not mention cross-examination, nor does it state anything about testimonial evidence versus non-testimonial evidence.[231] Justice Scalia felt that those terms and ideas were inherent in the Confrontation Clause, but Justice Blackmun clearly did not.[232] Based on the post-*Crawford* confusion that has ensued since its decision, perhaps the current Court should reconsider whether Justice Scalia's interpretation of the Confrontation Clause is accurate.

In cases with unavailable witnesses whose out-of-court statements are being offered, the *Roberts* standard, not the unworkable *Crawford* standard, should apply. Returning to the *Roberts* standard would provide courts with a much more malleable set of factors that could be weighed to establish an out-of-court statement's admissibility. No longer would courts have to determine whether the statement was testimonial or not.[233] Instead, rather than only focusing on a statement's possible testimonial nature, courts could use multiple tools to determine its reliability.[234] These tools would include cross-examination but also hearsay exceptions and other "guarantees of trustworthiness."[235]

Overruling *Crawford* would make state hearsay laws easier to apply in the case of unavailable minors and other unavailable declarants. In addition, it would allow states more freedom to craft ways to confirm that a statement is reliable. Ideally, for the sake of consistency, states would work together to provide these tests for reliability. However, even without a nationwide standard, states could continue to create their own methods to assess the reliability of hearsay statements, allowing more out-of-court evidence to be admissible at trial.[236] For instance, Ohio currently requires that unavailable minor statements accusing a defendant of sexual abuse only be admitted if there is also "independent proof of the sexual activity or attempted sexual activity."[237] Thus, in child abuse situations, Ohio has a system for testing reliability without cross-examination.[238] Ohio's standard can be applied

231. U.S. CONST. amend. VI.

232. *Crawford*, 541 U.S. at 53-54. *See generally Roberts*, 448 U.S. at 66.

233. This can be a difficult problem for courts when the statements can be found to have multiple purposes other than just being used to prosecute a defendant in the future. *See* David Crump, *Overruling* Crawford v. Washington*: Why and How*, 88 NOTRE DAME L. REV. 115, 132 (2012) ("The victim of domestic violence may wish to be rescued from her predicament, while at the same time she would like to ensure future safety, and she may consider that this future result may be attained by the confinement of a perpetrator for a long time").

234. *Roberts*, 448 U.S. at 66.

235. *Id.*

236. *See generally* OHIO EVID. R. 807

237. *Id.*

238. *Id.*

whether statements are testimonial or not.[239] Without *Crawford* standing in the way, other states, together or individually, could implement their own guidelines for establishing reliability based on the circumstances in which the statement was made.

Of course, *Roberts* is less friendly toward criminal defendants due to its broader inclusion of out-of-court statements. However, that is not to say that *Roberts* would allow any and all out-of-court statements to be admitted at trial. Courts would still be required to exclude statements that lack any "indicia of reliability."[240] While their protections may be altered under *Roberts*, criminal defendants are hardly stripped of their defenses. [241] In fact, it could be argued that *Roberts* provides protections that *Crawford* does not.[242] *Crawford* says that the Sixth Amendment is only applicable to testimonial statements and not nontestimonial ones.[243] On the other hand, *Roberts* applies the "indicia of reliability" standard regardless of any testimonial nature of the statement.[244] Therefore, nontestimonial evidence is also required to demonstrate "particularized guarantees of trustworthiness."[245] Requiring nontestimonial evidence to satisfy the *Roberts* standard provides an extra check on its admissibility that the *Crawford* standard does not.[246]

Overturning *Crawford* would free courts from being compelled to decipher the vague tests and incomplete definitions provided by the Supreme Court in *Crawford*, *Davis*, *Giles*, *Bryant*, *Clark*, and other cases.[247] More importantly for minors, returning to the *Roberts* standard would provide a clearer path toward having children's statements admitted against child abusers. No longer would courts have to grapple with whether a child was unavailable (whether by incompetency or some other means) and, thus, subject to cross-examination. Instead, courts could simply focus all their attention on whether or not the out-of-court statements were reliable. Overturning *Crawford* is a much-needed step toward alleviating the confusion derailing trials involving child victims.

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239. *Id.*
240. *Roberts*, 448 U.S. at 66.
241. *Id.*
242. *See generally* Crump, *supra* note 233, at 146.
243. *Crawford*, 541 U.S. at 68; Crump, *supra* note 233, at 146.
244. *See Roberts*, 448 U.S. at 66.
245. *Id.*
246. *Crawford*, 541 U.S. at 68; *Roberts*, 448 U.S. at 66.
247. *Crawford*, 541 U.S. at 68; *Davis*, 547 U.S. at 822*; Giles*, 554 U.S. at 376*; Bryant*, 562 U.S. at 366*; Clark*, 576 U.S. at 246.

V. CONCLUSION

Returning to the hypothetical in the introduction, a court using the current interpretation of the Confrontation Clause should only admit one of Jane's two statements about the alleged sexual activity of John. The statement to the neighbor, which was not recorded, should be admitted under Ohio Rule of Evidence 807. The rule permits hearsay for child victims of abuse after meeting certain standards for trustworthiness.[248] Provided that the statement showed itself to be reliable, the court would likely allow its admission.

However, the statement made in the recorded, controlled environment to the police officer and the social worker should not be admitted under the hearsay exception contained in Ohio Rule of Evidence 807. This statement would not be subject to a hearsay rule but instead would be a violation of the Confrontation Clause under *Crawford*. The statement would be testimonial since it was made to law enforcement,[249] was given in a formal environment,[250] and took place two weeks after the alleged abuse when there was no risk of the child being abused again.[251] The interrogation also contained no opportunity for cross-examination.[252] Therefore, the statement Jane gave to the officer must be excluded under the *Crawford* Doctrine because the statement was testimonial; Jane was incompetent and, thus, unavailable to testify; and there was no opportunity for prior cross-examination.[253]

But why should this be so? How does it make sense that a one-on-one, non-recorded conversation with a neighbor could be deemed more reliable than a statement that was recorded, that took place in a controlled environment, and that was conducted by an officer who was trained in interviewing children? The consequential outcome seems logically inconsistent, but under *Crawford*, these irrational results would not just be possible; they would be required.

Jane's nontestimonial statement to the neighbor would likely have been admitted regardless of any objections made by the defense. On the other hand, because of *Crawford*, Jane's testimonial statement made using formal procedures and processes must be excluded. This current interpretation of the Confrontation Clause can and does prevent minors' accusations from being heard in courts.[254] Unlike the *Roberts* standard under which the court

248. OHIO EVID. R. 807(A).
249. *See Crawford*, 541 U.S. at 53.
250. *See Bryant*, 562 U.S. at 366, 377.
251. *See Davis*, 547 U.S. at 828. The child was abused by a one-time babysitter. There was no reason to believe that she would ever be placed in a situation with her alleged abuser again.
252. *Crawford*, 541 U.S. at 68.
253. *See id.*
254. *Id.*

would be free to examine "indicia of reliability," current courts are barred from examining the trustworthiness of testimonial statements by any means other than cross-examination.[255] Results like Jane's demonstrate the reality of the post-*Crawford* world. Courts and legislatures have yet to provide a more navigable path for children's statements to be used in court. Until they do, asking whether a child's out-of-court statements should be admitted against a defendant will result in only one definitive answer: Maybe.

255. *Id.* at 68-69.