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The Case for the Retroactive Application of *Crawford v. Washington*

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

I. INTRODUCTION

The Confrontation Clause, embedded in the Sixth Amendment to the United States Constitution, guarantees all criminal defendants the right to confront their accusers.[1] Described as the "greatest legal engine ever invented for the discovery of truth,"[2] the right of confrontation is considered *essential* to a fair trial.[3] Indeed, it is one of the "fundamental

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1 The full text of the Amendment reads,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. (emphasis added).

2 California v. Green, 399 U.S. 149, 158 (1970) (citing 5 Wigmore § 1367).

3 In *Kirby v. United States,* the Supreme Court referred to the Confrontation Clause as "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." 174 U.S. 47, 55-56 (1899).

Pointer v. Texas declared, "[t]he fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." The Court continued that, "the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases." 380 U.S. 400, 404 (1965) (footnote omitted).

Moreover, in 1807 Chief Justice Marshall wrote, "I know of no principal in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principal so truly important." United States v. Burr, 25 F. Cas. 193 (C.C. Va. 1807) (No. 14,694).

guarantees of life and liberty,"[4] and "an *essential and fundamental* requirement for the kind of fair trial which is this country's constitutional goal."[5]

In March of 2004, the Supreme Court decided *Crawford v. Washington*,[6] redefining the landscape of Confrontation Clause jurisprudence.[7] *Crawford* announced that no testimonial statement may be admitted at trial against a criminal defendant unless the defendant has the opportunity to cross examine the declarant.[8] In short, *Crawford* significantly reinterpreted the Confrontation Clause's force and effect.

When the Supreme Court promulgates a rule, as in *Crawford*, criminal defendants with pending litigation gain access to the rule's application on direct appeal. In order for a criminal defendant who has exhausted all direct appellate avenues, and whose conviction is final, to benefit from a recent Court decision, however, he must attempt to do so on collateral review.[9] If a rule is important enough, courts may apply it

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[4] *Kirby*, 174 U.S. at 55; *accord Pointer*, 380 U.S. at 410 (Stewart, J., concurring) (referring to the right of cross-examination as "[o]ne of the fundamental guarantees of life and liberty," "one of the safeguards essential to a fair trial," and, "as indispensable an ingredient as the 'right to be tried in a courtroom presided over by a judge.'") (citations omitted).

[5] *Pointer*, 380 U.S. at 405 (emphasis added).

[6] 541 U.S. 36 (2004).

[7] *See, e.g.*, Neil P. Cohen & Donald F. Paine, Crawford v. Washington*: Confrontation Revolution*, 40 TENN. B.J. 22, 22 (May 2004) ("On March 8, 2004, the U.S. Supreme Court decided Michael Crawford's appeal from a Washington State conviction for assault and totally revised the modern approach to the Confrontation Clause.") (citation omitted); Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 511 (2005) ("In *Crawford v. Washington*, the Supreme Court of the United States radically changed [the] Confrontation Clause doctrine . . . ."); Rene L. Valladares, Crawford v. Washington*: The Confrontation Clause Gets Teeth*, 12 NEV. LAW. 12, 12 (Sept. 2004) ("The Court's decision is anticipated to cause rapid and profound changes in how hearsay statements are used against a defendant in a criminal trial. Appellate courts have described *Crawford* as being a 'bombshell,' and a 'paradigm shift in confrontation clause analysis.'"); John F. Yetter, *Wrestling with* Crawford v. Washington *and the New Constitutional Law of Confrontation*, 78 FLA. BAR J. 26, 26 (Oct. 2004) ("The Court erased a body of precedent that was, if not completely favorable to the prosecution, well understood and generally accommodating to the use of hearsay evidence without the necessity of calling the declarant as a witness.").

[8] Prior to *Crawford*, the Supreme Court case that articulated the governing Confrontation Clause doctrine was *Ohio v. Roberts*, 448 U.S. 56 (1980). Under *Roberts*, statements were routinely admitted at trial, without the defendant's ability to cross-examine the declarant, if they were deemed reliable. *Id.* at 57. See Part II, *infra*, for a discussion of *Crawford* and *Roberts*.

[9] A defendant convicted in state court can seek collateral review using either state or federal procedures. Usually, a state defendant will invoke state collateral procedures before federal collateral procedures, though not required to do so. "After state collateral procedures have been used unsuccessfully, the defendant may try federal collateral remedies, especially federal habeas corpus." NEIL P. COHEN &

retroactively on collateral review, thus broadening the rule to reach even those defendants with final convictions.[10] Therefore, if *Crawford* is deemed retroactive, a defendant with a final conviction may seek collateral review alleging *Crawford* violations, even if *Crawford* was decided after the conviction became final.

The Supreme Court generally disfavors retroactivity, and accordingly, has fashioned a standard difficult to satisfy.[11] In fact, under the Supreme Court's current standard no "new" rule has been applied retroactivity.[12] *Crawford*, however, is a rule of paramount importance. The Constitution guarantees the right of confrontation, yet, prior to *Crawford* the law ran afoul of that Constitutional mandate. *Crawford* corrected a serious flaw in the Court's Confronation Clause jurisprudence, and its rule is so crucial to the legitimacy of criminal proceedings that it must be applied retroactively.

Part II of this Note discusses the significance of *Crawford*'s holding by recapitulating the weaknesses of the pre-*Crawford* test and describing the improvements made by *Crawford*. Part III summarizes the high bar set by the Supreme Court's current retroactivity doctrine, specifically *Teague v. Lane*[13] and its progeny. More specifically, Part III elaborates on the contours of the second exception to *Teague*'s

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DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS CASES AND MATERIALS 805 (2d ed. 2000).

The federal habeas statute provides that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a) (1982); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1312 (4th ed. 2004) ("[T]hrough the federal writ of habeas corpus, a state defendant may challenge his state conviction on federal constitutional grounds in the federal courts.").

A defendant convicted in federal court can file a Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 to challenge the constitutionality of his conviction. "A § 2255 Motion involves virtually the same issues and procedures as federal habeas corpus." COHEN & HALL, *supra* note 9, at 848.

[10] *See* LAFAVE, *supra* note 9, at 1359-61.

[11] *See, e.g.*, *id.* at 1359 ("[T]he second *Teague* exception is quite restrictive."); Cohen & Hall, *supra* note 9, at 843 ("Recent Supreme Court decisions have greatly reduced the chances that a habeas corpus petitioner will be able to get relief based on a recent decision or a novel theory.").

[12] "Beginning with the rule at issue in *Teague*, the Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria for the second exception and, in every case, has refused to apply the rule retroactively." United States v. Mandanici, 205 F.3d 519, 529 (2d Cir. 2000). The Second Circuit proceeded to list a number of cases illustrating this pattern. *Id. See also* Part III.A, *infra*, to learn what constitutes a "new" rule.

[13] 489 U.S. 288 (1989) (establishing the current standard for "new" rule retroactivity). For a further discussion of the *Teague* standard, see *infra* Part III.

general bar to retroactivity. Part IV argues that the *Crawford* rule fits within the narrowly construed second *Teague* exception. It does so by drawing from the Court's language in *Crawford*, discussing pre-*Teague* precedent, distinguishing the previous rules that the Supreme Court has declined to make retroactive, and analogizing the *Crawford* rule to a rule that achieved retroactivity under *Teague* in lower state and federal courts.

II. BACKGROUND

A. Crawford*'s Facts and Procedural History*

On August 5, 1999, Michael Crawford and his wife Sylvia visited a friend, Rubin Richard Kenneth Lee.[14] During the visit Michael Crawford stabbed Lee because Crawford thought Lee sexually assaulted Sylvia.[15] After the police apprehended Michael Crawford, he and Sylvia each gave recorded statements to the police in which they recounted the events that precipitated the stabbing.[16] Their statements differed in one very significant way; Michael said that Lee reached for a weapon of his own before Michael stabbed him, intimating that Michael acted in self-defense, while Sylvia said she never saw Lee with a weapon, intimating that Michael was the lone aggressor.[17] Michael Crawford was then prosecuted for assault and attempted murder.[18]

At trial, Michael Crawford claimed self-defense.[19] Sylvia Crawford did not testify because Michael Crawford invoked Washington's marital privilege, which allowed him to prevent his wife from testifying against him.[20] The prosecution did, however, introduce her tape-recorded statement incriminating Michael, despite the fact that she was not available to be cross-

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[14] Crawford v. Washington, 541 U.S. 36, 38 (2004).

[15] *Id*.

[16] *Id.* at 38-40.

[17] *Id*. at 38-39 ("Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account of the fight itself was arguably different – particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him . . . .") Michael Crawford said, "I think that he pulled somethin' out and I grabbed for it and that's how I got cut," while Sylvia, when asked if she saw anything in Lee's hands, said "um um (no)." *Id.* at 39-40.

[18] *Id.* at 40.

[19] *Crawford*, 541 U.S. at 40 (2004).

[20] *Id.*

examined.[21] Her statement that Lee did not have a weapon was fatal to Michael Crawford's self-defense claim,[22] and he was convicted of assault.[23]

Crawford then challenged his conviction on the grounds that the admission of Sylvia's statement violated his Sixth Amendment right to confrontation.[24] The Washington Supreme Court, applying the then-controlling United States Supreme Court precedent, *Ohio v. Roberts*,[25] upheld Crawford's conviction, concluding that Sylvia's statement "bore guarantees of trustworthiness."[26] Crawford then appealed his conviction to the United States Supreme Court.[27]

B. Hearsay

Statements, like Sylvia's, made out-of-court and offered as evidence to prove that which they assert are hearsay.[28] The Federal Rules of Evidence[29] generally bar hearsay because hearsay is thought to be unreliable. Underlying the hearsay rule is the idea that if the declarant—the one who made the statement—is not in court there is no way to judge the veracity of the statement; hence, the statement is presumptively unreliable.[30] The Federal Rules of Evidence do, however,

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[21] *Id.*

[22] In fact, in closing argument the prosecutor referred to Sylvia's statement as "'damning evidence' that 'completely refute[d] [Crawford's] claim of self-defense.'" *Id.* at 40-41.

[23] *Id.* at 41.

[24] *Id.* at 40-41.

[25] *Crawford*, 541 U.S. at 41 ("The Washington Supreme Court . . . conclud[ed] that, although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness . . . ."). The test from *Roberts* allowed for the admission of *ex-parte* testimony if it bore "adequate 'indicia of reliability.'" Ohio v. Roberts, 448 U.S. 56, 66 (1980). To satisfy that test, evidence had to either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Id.*

[26] *Crawford*, 541 U.S. at 41.

[27] *Id.*

[28] FED. R. EVID. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") (adopting the common law definition of hearsay). Michael Crawford was convicted in state court, and hence, the applicable rules of evidence were those of the State of Washington. This Note refers to the Federal Rules to exemplify the law of evidence, and not to imply that they were used at Michael Crawford's trial.

[29] *See, e.g.,* FED. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

[30] "[T]he chief goal of the hearsay rule is to enhance the fact-finding process by excluding certain declarations whenever the declarants cannot be subjected to cross-

provide for exceptions. In other words, there are situations in which statements, though hearsay, may be admitted nonetheless.[31] These exceptions generally proceed on the notion that some statements, though made out-of-court, are still reliable enough to be valuable as evidence. For example, Rule 804(b)(3) provides that hearsay statements made against the declarant's interest are admissible.[32] The Rules of Evidence consider statements against interest more reliable than other hearsay because the Rules assume that declarants do not make untruthful statements that are self-incriminating.

Sylvia Crawford's statement was clearly hearsay. It was made out-of-court, and it was offered by the prosecution to prove what it asserted—that Lee did not have a weapon. The court, however, admitted her statement against her husband under Washington's version of the "statement against interest" exception because, as the argument went, Sylvia implicated herself as an accomplice in the assault, and therefore, she would not have made the statement had it not been true.[33] Accordingly, the court admitted her statement at trial, even though Michael Crawford was unable to cross-examine her.[34]

C. The Confrontation Clause

The Sixth Amendment's Confrontation Clause provides criminal defendants with an extra layer of protection against hearsay statements. By guaranteeing the defendant the right to be confronted with the witnesses against him, the Confrontation Clause aims to insure that certain statements, notwithstanding the rules of hearsay, be excluded unless the declarant is cross-examined. Thus, even if a statement fits

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examination. The rule achieves this goal by permitting the opposing party to object to the use of out-of-court statements that are offered to prove the truth of the matter asserted. Since the use of hearsay can deprive the opponent of an opportunity to challenge the credibility of the hearsay declarant, the rule proceeds on the assumption that cross-examination is vital to assuring the reliability of evidence." Miguel A. Mendez, Crawford v. Washington*: A Critique*, 57 STAN. L. REV. 569, 574 (2004).

[31] FED. R. EVID. 801(d) (listing statements not included in the definition of hearsay, and thus, not barred by Rule 802), 803 (listing hearsay exceptions that apply even if the declarant is available), 804 (listing hearsay exceptions that apply only if the declarant is unavailable), 807 (providing for the residual exception).

[32] FED. R. EVID. 804(b)(3).

[33] *Crawford*, 541 U.S. at 40 ("Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest.") (citing WASH. R. EVID. 804(b)(3) (2003)).

[34] *Id.* at 40-41.

within a hearsay exception it will be inadmissible if it runs afoul of the Confrontation Clause.[35]

Therefore, insofar as hearsay declarants constitute "witnesses against" a criminal defendant for the purposes of the Confrontation Clause, the Constitution bars admission of the statements.[36] Not all hearsay admitted against a criminal defendant implicates the Confrontation Clause, however, and prior to *Crawford* the Supreme Court struggled to define exactly what kind of hearsay would trigger the right of confrontation.[37]

The Supreme Court first attempted to formulate a workable Confrontation Clause doctrine in *Ohio v. Roberts.*[38] *Roberts* articulated a two-part test for the admission of hearsay against the accused, informed by the Court's pragmatic balancing of society's interests in law enforcement and finality against an individual's constitutional right to confrontation.[39] Hearsay was admissible under *Roberts* if, first, the declarant was unavailable, and second, the hearsay statement bore "indicia of reliability."[40] If the statement qualified under a "firmly rooted hearsay exception" it was presumptively reliable.[41] Otherwise, a statement could still be admissible if it bore "particularized guarantees of trustworthiness."[42] In other words, under *Roberts*, if the declarant was unavailable, and the

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[35] *See, e.g.*, GEORGE FISHER, FEDERAL RULES OF EVIDENCE STATUTORY AND CASE SUPPLEMENT 394 (2004-05) ("[T]he Constitution is a *higher* law than the Federal Rules of Evidence, but not necessarily a *stricter* law. Evidence permitted by the rules of evidence but forbidden by the Confrontation Clause must stay out. Evidence permitted by the Confrontation Clause but excluded by the rules of evidence also must stay out.").

[36] U.S. CONST. amend. VI.

[37] *See, e.g.*, FISHER, *supra* note 35, at 393-94.

[38] 448 U.S. 56 (1980). Prior to *Roberts*, "the Court issued a number of ad hoc judgments to resolve particular controversies, but made little attempt to systematize the Confrontation Clause's impact on the admission of hearsay." FISHER, *supra* note 34, at 394.

[39] In *Roberts*, the Court recognized that:

> [C]ompeting interests, if "closely examined" may warrant dispensing with confrontation at trial. '[G]eneral rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.' Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings.

Roberts, 448 U.S. at 64 (citations omitted).

[40] *Id.* at 66.

[41] *Id.*

[42] *Id.*

statement was deemed reliable, the hearsay was admissible notwithstanding the absence of confrontation.[43] Accordingly, the Washington Supreme Court rejected Michael Crawford's Confrontation Clause challenge because the court concluded that, under *Roberts*, Sylvia's statement bore "guarantees of trustworthiness."[44]

D. Crawford*'s Holding*

On March 8, 2004, however, a unanimous Supreme Court reversed Crawford's conviction on the grounds that the use of Sylvia Crawford's statement violated Michael Crawford's Sixth Amendment right to confront his accusers.[45] Justice Scalia's majority opinion, joined by six justices,[46] overruled *Roberts*,[47] and formulated a new standard to govern the admissibility of hearsay statements against a criminal defendant.

Under *Crawford*, the reliability of the statement is irrelevant; the nature of the statement is all that matters.[48] Justice Scalia looked at the text of the Amendment, and determined that the Confrontation Clause concerns only statements made by declarants who *bear witness* against the accused. Thus, not all hearsay implicates the Constitution, only hearsay statements that are *testimonial* in nature do.[49] Furthermore, Justice Scalia noted that the Confrontation

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[43] *Id.*

[44] Crawford v. Washington, 541 U.S. 36, 41 (2004).

[45] *Id.*

[46] Justices Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer joined Scalia's majority opinion. *Id.* at 37. Chief Justice Rehnquist and Justice O'Connor concurred in the reversal, but argued that the result did not require overruling *Roberts*. *Id.* at 69.

[47] Some lower courts have continued to apply *Roberts* to non-testimonial statements. *See, e.g.*, Horton v. Allen, 370 F.3d 75, 83-84 (1st Cir. 2004) (noting that unless statements are testimonial "Crawford is inapplicable and Roberts continues to apply"); State v. Rivera, 844 A.2d 191, 200-01 (Conn. 2004) ("nontestimonial hearsay statements may still be admitted as evidence against an accused in a criminal trial if it satisfies both prongs of the *Roberts* test, irrespective of whether the defendant had a prior opportunity to cross examine the declarant."). The general consensus, however, is that *Roberts* no longer has any precedential value. *See* FISHER, *supra* note 35, at 431.

[48] *Crawford*, 541 U.S. at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.").

[49] *Id.* at 51 ("[N]ot all hearsay implicates the Sixth Amendment's core concerns. . . . It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'") (citing 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

Clause does not guarantee reliable evidence; it guarantees a process by which the reliability of evidence is to be judged.[50]

Accordingly, the *Crawford* Court criticized the *Roberts* test for being both too broad and too narrow. Too broad, argued the Court, because it subjected *non-testimonial* statements to Constitutional scrutiny, and too narrow because it routinely admitted *testimonial* statements upon a mere showing of reliability, absent confrontation.[51] *Roberts*'s "malleable standard," according to the Court, "often fail[ed] to protect against paradigmatic confrontation violations."[52] *Crawford* concluded, therefore, that "[w]here *testimonial* statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[53]

Although Justice Scalia and the *Crawford* Court opted not to define *testimonial*,[54] clearly, according to the Court, Sylvia Crawford's statement constituted testimony, and therefore, was barred by the Confrontation Clause.[55] By telling the police that Lee did not have a weapon, and hence did not

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[50] *Id.* at 61 ("The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.").

[51] *Id.* at 60 ("First, [the *Roberts* test] is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability.").

[52] *Id.*

[53] *Crawford*, 541 U.S. at 68-69 (2004) (emphasis added).

[54] *Id*. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"). The Court did, however, offer the following three possible standards, but opts not to chose among them:

> 1) "'[E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'";
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> 2) "'[E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions'"; and
>
> 3) "'[S]tatements 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."

Id. at 51-52 (citations omitted).

[55] *Id*. at 68 ("Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.").

pose a threat to Michael Crawford, Sylvia Crawford *bore witness*, or testified, against her husband. Because Sylvia Crawford did not appear at trial, Michael Crawford could not cross-examine her regarding her testimony. Thus, admitting Sylvia's statement as incriminating evidence against Michael Crawford constituted a paradigmatic Confrontation Clause violation.

In summary, with *Crawford*, "the U.S. Supreme Court radically transformed its doctrine governing the Confrontation Clause of the Sixth Amendment to the U.S. Constitution."[56] One commentator described the case as "a very positive development, restoring to its central position one of the basic protections of the common law system of criminal justice."[57]

Crawford, however, left many questions unanswered.[58] One such question is whether or not *Crawford*'s radical transformation[59] of Confrontation Clause interpretation should be applied retroactively to cases on collateral review.[60] In other words, will a defendant with a final conviction based on hearsay evidence admissible under *Roberts* yet inadmissible under *Crawford* be able to attack his conviction on collateral review alleging a *Crawford* violation? Although the Supreme Court has made retroactivity difficult to achieve,[61] certainly a rule that drastically reinterprets[62] a Constitutional guarantee as important[63] as the Confrontation Clause should suffice.

III. THE *TEAGUE* FRAMEWORK FOR RETROACTIVITY ANALYSIS

To resolve the question of retroactivity, one must analyze *Crawford*'s rule under the framework provided by *Teague v. Lane*.[64] Decided in 1989, *Teague* articulated the

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[56] Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection,* 19 CRIM. JUST. 5 (Summer 2004).

[57] *Id.*

[58] *Id.*; *see* Mosteller, *supra* note 7, at 623 ("*Crawford* leaves many important issues undecided regarding the scope of its application.").

[59] Mosteller, *supra* note 7, at 511.

[60] Richard Alan Ginkowski, *Introduction to* Friedman, *supra* note 56, at 5 ("Also unclear is whether the holding may be applied retroactively.").

[61] *See supra* notes 11-12 and accompanying text.

[62] *See supra* note 7.

[63] *See supra* notes 2-5.

[64] 489 U.S. 288 (1989). The *Teague* standard only governs if direct appeal has been completed. New rules apply retroactively to all criminal cases still pending on direct appeal. Schriro v. Summerlin, 542 U.S. 348, 358 (2004); Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

current governing standard by which retroactivity is to be determined.[65]

A. "New" or "Old"?

The threshold question under *Teague* is whether the rule at issue is "new" or "old."[66] Essentially, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government,"[67] or "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[68] In contrast, a rule is "old" for retroactivity purposes if it is a mere application of existing precedent.[69] In *Butler v. McKellar* the Court expounded further on the *Teague* definition of a "new rule," concluding that a rule is "new" if reasonable minds could have differed about the result of the decision before it was rendered.[70] The great weight of the authority suggests that *Crawford* announced a "new" rule.[71] Accordingly, this Note treats *Crawford*'s rule as "new" for the purposes of its analysis.[72] "New" rules trigger *Teague* scrutiny.

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[65] LAFAVE, *supra* note 9, at 1355-61.

[66] *Teague*, 489 U.S. at 301; *see also* People v. Eastman, 648 N.E.2d 459, 464 (N.Y. 1995) ("The threshold issue in determining whether to apply a constitutional rule retroactively is characterization of the rule as "new" or "old.").

[67] *Teague*, 489 U.S. at 301 (citing Rock v. Arkansas, 483 U.S. 44, 62 (1987)).

[68] *Id*. (citing Truesdale v. Aiken, 480 U.S. 527, 528-29 (1987) (Powell, J., dissenting)).

[69] *Id.*

[70] 494 U.S. 407, 417 (1990).

[71] Dorchy v. Jones, 398 F.3d 783, 788 (6th Cir. 2005) ("*Teague* thus prohibits Dorchy from availing himself of the new rule articulated in *Crawford*."); Bintz v. Bertrand, 403 F.3d 859, 866-67 (7th Cir. 2005) ("It seems clear that *Crawford* was a clean break from the line of precedent established by *Roberts*. *Crawford* considered and rejected the continuing application of *Roberts*. . . . *Crawford* was thus a new rule for purposes of *Teague*."); Murillo v. Frank, 402 F.3d 786, 790 (7th Cir. 2005) ("It is obvious to us . . . that *Crawford* establishes a new rule."); Bockting v. Bayer, 399 F.3d 1010, 1015-16 (9th Cir. 2005) ("On balance, an analysis of the historical application of the Confrontation Clause cases leads to the conclusion that *Crawford* announces a new rule . . . ."); Brown v. Uphoff, 381 F.3d 1219, 1226 (10th Cir. 2004) ("Thus, *Roberts* and its progeny did not dictate the result in *Crawford* and we conclude that it announces a new rule of constitutional law."); Mungo v. Duncan, 393 F.3d 327, 335 (2d Cir. 2004) (assuming for the purposes of *Teague* analysis that *Crawford* announced a new rule); *see also* Evans v. Luebbers, 371 F.3d 438, 444-45 (8th Cir. 2004) (applying, in dictum, *Teague*'s "new rule" framework to the *Crawford* rule).

[72] Some have argued that *Crawford* announced an "old" rule. For interesting arguments, see Bockting v. Bayer, 399 F.3d 1010, 1023 (9th Cir. 2005) (Noonan, J., concurring) ("*Crawford*, therefore, does not announce a new rule. Retroactivity is not an issue."); Murillo v. Frank, 316 F. Supp. 2d 744, 749-50 n.4 (E.D. Wisc. 2004) ("The question is close because although *Crawford* rejected the application of *Roberts* to

B. *Teague's "New" Rule Framework*

Essentially, *Teague* established a presumptive bar to the retroactive application of "new" rules on collateral review, subject to two exceptions. The first exception allows for retroactivity if the conduct for which the defendant was convicted has become constitutionally protected, and the second, if the "new" rule is a watershed rule of criminal procedure, implicit in the concept of ordered liberty.[73] The first exception certainly does not apply to *Crawford* since *Crawford*'s rule does not concern conduct. Therefore, if deemed a "new" rule, *Crawford*'s retroactivity hinges on whether it fits within the contours of the second exception. In other words, to warrant retroactivity *Crawford*'s rule must be deemed a watershed rule of criminal procedure implicit in the concept of ordered liberty.

C. *Teague's Second Exception as Interpreted by Subsequent Cases*

Teague's second exception is decidedly difficult to satisfy. In fact, the exception has grown "exceedingly narrow,"[74] including only a "small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty."[75] Indeed, "it is not enough that a new rule is aimed at improving the accuracy of trial, or even

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testimonial statements, the Court had never explicitly applied *Roberts* to such statements.' Thus, it can be argued that *Crawford* did not announce a new rule at all.") (citation omitted); Richardson v. Newland, 342 F. Supp. 2d 900, 924 (E.D. Cal. 2004) ("*Crawford* did not announce a new rule at all but rather is entirely faithful to the Supreme Court's prior decisions in this area").

If a rule is deemed "old" it is applied retroactively to all cases on collateral review. *See* Yates v. Aiken, 484 U.S. 211, 216 n.3 (1988) ("[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively."). Accordingly, only "new" rules are subject to analysis under the *Teague* exceptions.

[73] The standard adopted by *Teague* originated with Justice Harlan. Justice Harlan, however, advocated a more lenient second exception. Under Justice Harlan's standard a new rule would be retroactive if the previous rule created "an impermissibly large risk that the innocent will be convicted." Desist v. United States, 394 U.S. 244, 262 (1969). Thus, according to Justice Harlan "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Id. Teague*, however, narrowed the second exception, requiring a rule to be a watershed rule of criminal procedure.

[74] United States v. Mandanici, 205 F.3d 519, 528 (2d Cir. 2000).

[75] Beard v. Banks, 542 U.S. 406, 417 (2004) (quoting Graham v. Collins, 506 U.S. 461, 478 (1993)).

that it promotes the objectives of fairness and accuracy."[76] But the adoption of a "new" rule must be a "ground breaking occurrence,"[77] and one that "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[78] Moreover, the rule must signal "a sweeping change that applies to a large swathe of cases rather than a narrow right that applies only to a limited class of cases."[79] Notwithstanding the narrowness of *Teague*'s second exception, however, it must exist for a reason. Therefore, certain rules, like *Crawford*, must be capable of fitting within its narrow contours.[80]

Since *Teague* was decided in 1989 the Supreme Court has considered twelve "new" rules for retroactive application and has found them all insufficient.[81] The Court recently noted that "it should come as no surprise that [it] ha[s] yet to find a new rule that falls under the second *Teague* exception."[82]

Additionally, the Supreme Court has declared several times that to achieve "watershed" status a new rule must compare, in terms of significance, with the rule espoused in *Gideon v. Wainwright*,[83] which confered the right of counsel on indigent defendants.[84] Thus, when the Court considers a "new" rule as a candidate for retroactivity, the Court compares the importance of the new rule to that of *Gideon*'s rule.[85] No "new" rule has yet prevailed under this analysis.[86] None considered,

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[76] *Mandanici*, 205 F.3d at 528 (citation and internal quotations omitted).

[77] Caspari v. Bohlen, 510 U.S. 383, 396 (1994).

[78] Sawyer v. Smith, 497 U.S. 227, 241-42 (1990) (quoting Mackey v. United States, 401 U.S. 667, 693 (1971)).

[79] *Mandanici*, 205 F.3d at 528 (citation and internal quotations omitted).

[80] Bockting v. Bayer, 399 F.3d 1010, 1016 (9th Cir. 2005) ("[T]he bar is not absolute and the *Crawford* rule meets the Court's criteria.").

[81] *See Mandanici*, 205 F.3d at 529 ("[Since 1989, b]eginning with the rule at issue in *Teague*, the Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria for the second *Teague* exception and, in every case, has refused to apply the rule at issue retroactively on habeas review."). Moreover, since *Mandanici* the Supreme Court has extended that streak by two, failing to apply the second *Teague* exception in two more cases. Schriro v. Summerlin, 542 U.S. 348, 355-58; Beard v. Banks, 542 U.S. 406, 419-20 (2004).

[82] *Beard*, 542 U.S. at 417.

[83] 372 U.S. 335 (1963).

[84] Saffle v. Parks, 494 U.S. 484, 495 (1990); *see Beard*, 542 U.S. at 417.

[85] *See* Gray v. Netherland, 518 U.S. 152, 170 (1996); *Saffle*, 494 U.S. at 495 (stating that a rule must be of the "primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception"); *Mandanici*, 205 F.3d at 528-29 (citing O'Dell v. Netherland, 521 U.S. 151, 167 (1997)).

[86] *See supra* note 12.

however, has carried the constitutional significance of *Crawford*.[87]

IV. *CRAWFORD* IS A WATERSHED RULE OF CRIMINAL PROCEDURE ESSENTIAL TO FUNDAMENTAL FAIRNESS, AND THUS, SHOULD BE MADE RETROACTIVE PURSUANT TO *TEAGUE*'S SECOND EXCEPTION

Since the Supreme Court decided *Teague* it has not addressed the retroactivity of a "new" rule concerning the Confrontation Clause. Authority suggests, however, that *Crawford* satisfies *Teague*'s strictures. Although the Supreme Court, under the *Teague* standard, has not made a "new" rule retroactive, every rule considered lacked the significance of *Crawford*'s rule.[88] Indeed, *Crawford* is more akin to the *Gideon* rule[89] than any rule that has sought retroactivity before the Court.

Moreover, in both *Roberts v. Russell*[90] and *Barber v. Page*[91] the Supreme Court gave retroactive effect to a rule implicating the Confrontation Clause. Although these decisions predate *Teague*, they demonstrate that the public interests that weigh against retroactivity must yield when they conflict with the right of confrontation.[92]

Additionally, the Supreme Court's holding in *Cruz v. New York*[93] also implicated the Confrontation Clause,[94] and was made retroactive by both the New York Court of Appeals[95] and the U.S. Court of Appeals for the Second Circuit.[96] Both courts conducted retroactivity analysis under the *Teague* framework.[97]

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[87] *See infra* Part IV.A (arguing that *Crawford* is more significant that the other rules considered for retroactivity under *Teague*); *see also supra* note 12.

[88] *See supra* note 89 and accompanying text.

[89] Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (conferring the right of counsel on indigent defendants).

[90] 392 U.S. 293, 294 (1968) (giving retroactive effect to *Bruton v. United States*, 391 U.S. 123 (1968), which prohibited the admission, at a joint trial, of a codefendant's inculpatory extrajudicial confession).

[91] 390 U.S. 719 (1968).

[92] *Id.* at 294-95.

[93] 481 U.S. 186, 193 (1987) (barring admission of an interlocking confession of a non-testifying defendant).

[94] *Id.*

[95] People v. Eastman, 648 N.E.2d 459, 460 (N.Y. 1995).

[96] Graham v. Hoke, 946 F.2d 982, 993 (2d Cir. 1991).

[97] *See id.*; *Eastman*, 648 N.E.2d at 464-65.

Accordingly, if ever there could be a rule capable of satisfying *Teague*'s second exception, surely *Crawford*, giving new life to an essential and fundamental constitutional guarantee,[98] should be it.

A. Crawford *is More Significant Than All the Previous "New" Rules That the Supreme Court has Declined to Apply Retroactively*

The Supreme Court has contemplated the retroactive application of a "new" rule twelve[99] times, and each time determined that the rule at issue failed to satisfy the requirements of *Teague*'s second exception.[100] None of those rules, however, implicated the Confrontation Clause. The *Crawford* rule, according to the Supreme Court, corrects an "unpardonable [constitutional] vice."[101] *Crawford* is exactly the kind of rule contemplated by the second *Teague* exception. Indeed, *Crawford* has "the primacy and centrality of the rule adopted in *Gideon*,"[102] and must succeed where the others have failed.

Of the twelve "new" rules that have failed under *Teague*, nine concern sentencing, and hence, bear only

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[98] *See* discussion *supra* Parts I, II.

[99] *Teague* itself, while formulating the retroactivity standard, considered the retroactivity of the rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson* the Court held that if a defendant can establish a prima facie case that the prosecutor used peremptory challenges to eliminate members of the jury venire that were of the defendant's race, the burden shifts to the prosecutor to rebut the inference of discrimination. The prosecutor may rebut the inference of discrimination by showing a neutral reason for challenging the jurors, but if he cannot, the peremptory challenges constitute an Equal Protection violation. *Id.* at 96-97.

The petitioner in *Teague* sought the benefit of *Batson* "even though his conviction became final before *Batson* was decided." Teague v. Lane, 489 U.S. 288, 294 (1989). Before *Teague*, however, the Supreme Court in *Allen v. Hardy*, 478 U.S. 255 (1986), applying the pre-*Teague* retroactivity standard of *Linkletter v. Walker*, 381 U.S. 618, 636 (1965), found that *Batson* was not retroactive. *Teague* found *Allen v. Hardy* "dispositive," and hence, denied the petitioner the benefit of *Batson*. *Teague*, 489 U.S. at 296.

Accordingly, *Teague* did not apply the standard it enunciated to the *Batson* rule, it deferred to *Allen v. Hardy*'s evaluation of *Batson* under the then-governing *Linkletter* standard. Therefore, this Note does not address *Teague*'s holding with respect to the retroactivity of *Batson*.

[100] *See supra* note 12; *see also* Schriro v. Summerlin, 542 U.S. 348, 355-58 (2004) (declining to make a new rule retroactive); Beard v. Banks, 542 U.S. 406, 419-20 (2004) (same).

[101] Crawford v. Washington, 541 U.S. 36, 63 (2004).

[102] Saffle v. Parks, 494 U.S. 484, 495 (1990).

tangentially on the accuracy of the trial.[103] These sentencing rules are fundamentally different from, and less important to the truth-finding function than the *Crawford* rule. Most significantly, sentencing rules affect only the portion of the trial subsequent to the verdict. While the severity of a criminal defendant's sentence is substantially important to the criminal justice system, *Teague* requires "new" rules to impact guilt or

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[103] First, in *Schriro*, the Supreme Court declined to give retroactive effect to the rule announce in *Ring v. Arizona*, 536 U.S. 584 (2002). *Schriro*, 542 U.S. at 355-58. *Ring* declared that the existence of an aggravating factor which could make a defendant eligible for the death sentence must be proved to a jury rather than a trial judge. 536 U.S. at 609. The defendant in *Schriro* was sentenced to death under the previous rule, which allowed the trial judge, rather than the jury, to determine the presence of the aggravating factor. 542 U.S. at 350. The defendant, Summerlin, sought the benefit of the *Ring* rule on habeas review, and his request was denied by a five to four decision of the Supreme Court. *Id.* at 350, 358.

The next two cases, *Beard v. Banks*, 542 U.S. 406 (2004), and *Graham v. Collins*, 506 U.S. 461 (1993), the Supreme Court contemplated the retroactivity of "new" rules concerning the ability of the jury to consider mitigating factors in capital sentencing proceedings. In *Beard* the Supreme Court examined the "new" rule of *Mills v. Maryland*, 486 U.S. 367 (1988) which declared invalid capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously. *Id.* at 375. *Graham* dealt with a proposed rule declaring as unconstitutional jury instructions which disallowed sentencing juries to consider mitigating evidence. 506 U.S. at 464. Both rules fell short of the *Teague* standard. *Beard*, 542 U.S. at 419-20; *Graham*, 506 U.S. at 463.

Fourth, in *O'Dell v. Netherland*, 521 U.S. 151 (1997), the Court held that the rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994), which entitles a capital defendant to inform his sentencing jury that he is parole-ineligible if the prosecution claims that he is a future danger, *id.* at 161-62, failed under *Teague* analysis. *O'Dell*, 521 U.S. at 167.

Fifth, the rule announced in *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam), also failed under *Teague* to achieve retroactive application as a "new" rule. *Mandanici*, 205 F.3d at 529. *Espinosa* declared "that in certain states where a sentencing judge is required to give deference to a jury's advisory sentencing recommendation with respect to the death penalty, neither the jury nor the judge is permitted to consider invalid aggravating circumstances." *Id.*

Sixth, *Gray v. Netherland*, 518 U.S. 152 (1996), declined to make retroactive a rule that the state's failure to give adequate notice of some of the evidence it intended to use in the petitioners' capital sentence proceeding violated due process. *Id.* at 170.

Seventh, *Caspari v. Bohlen*, 510 U.S. 383, 386, 396 (1994), declined to make retroactive a rule declaring that "twice subject[ing] a criminal defendant to a *noncapital* sentence enhancement proceeding" violated the Double Jeopardy Clause.

Eighth, *Saffle*, declined to apply retroactively a rule that the trial court's instruction in the petitioner's capital sentencing proceeding, "telling the jury to avoid any influence of sympathy, violates the Eighth Amendment." 494 U.S. at 486.

Ninth, *Sawyer v. Smith*, 497 U.S. 227 (1990), subjected the rule of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) to *Teague* analysis, and like the others, the rule failed to satisfy *Teague*'s strict requirements. *Sawyer*, 497 U.S. at 241-45. *Caldwell*'s rule "prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence lies elsewhere." *Id.* at 233 (citing *Caldwell*, 472 U.S. at 328-29).

innocence to warrant retroactivity.[104] Therefore, even a "new" rule of sentencing impacting the imposition of the death penalty—the harshest sentence available—will likely fail under *Teague*, because sentencing rules simply do not concern the determination of guilt or innocence.[105]

In contrast, the *Crawford* rule interprets the right of confrontation, which is necessary to ferret out truth from an accuser's testimony. *Crawford* bears directly on the kind of information that reaches the jury, and it goes to the very heart of the truth-finding process. A rule that implicates the accuracy of the truth-finding process certainly has the likely potential to impact guilt or innocence, as required by *Teague*. Accordingly, *Crawford* comports with *Teague*'s vision of a retroactive rule, while rules concerning sentencing do not.

Of the "new" rule retroactivity candidates that did not concern sentencing, none were as important as *Crawford*. First, in *Goeke v. Branch* the Supreme Court refused to apply retroactively a rule that prohibited state appellate courts from dismissing the appeal of a recaptured fugitive.[106] The Court aptly observed that since "due process does not require a State to provide appellate process at all, a former fugitive's right to appeal cannot be said to be so central to an accurate determination of innocence or guilt as to fall within [the second] exception to the *Teague* bar."[107] On the contrary, the Constitution guarantees the right of confrontation, and the Supreme Court has incorporated it through the due process clause of the Fourteenth Amendment to apply to the states.[108] Therefore, since *Crawford* implicates a fundamental constitutional guarantee, it deserves retroactivity more than a rule concerning a non-constitutional right to appeal.

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[104] Teague v. Lane, 489 U.S. 288, 313 (1989) ("Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.").

[105] *Id*. Since the petitioner in *Teague* was not under a sentence of death the plurality limited its holding to the non-capital context. The plurality, however, explicitly confirmed that the finality concerns that drove its analysis applied also in the capital context. *Id.* at 314 n.2.

[106] Goeke v. Branch, 514 U.S. 115, 120-21 (1995) (per curiam).

[107] *Id.* at 120 (internal citations and quotation marks omitted).

[108] Pointer v. Texas, 380 U.S. 400, 403 (1965) ("We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.").

Gilmore v. Taylor[109] considered the retroactive application of the rule announced in *Falconer v. Lane*,[110] and the Court again decided that the "new" rule failed to satisfy *Teague*'s strictures.[111] *Falconer* declared that "the failure to instruct a jury that it could not return a murder conviction if it found that the defendant possessed a mitigating mental state violates due process."[112] A jury considers a mitigating mental state, however, only after it finds the facts constituting the underlying offense. Thus, the *Falconer* rule bears on culpability, not the accuracy of the facts. The *Crawford* rule, on the other hand, concerns the accuracy of the underlying facts. *Crawford* provides the jury greater access to information, which significantly increases the likelihood that the jury will arrive at an accurate decision.

Butler v. McKellar[113] declined to make retroactive the rule announced in *Arizona v. Roberson*,[114] which had declared that "the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation."[115] *Butler* concluded that "[b]ecause a violation of *Roberson*'s added restrictions on police investigatory procedures would not seriously diminish the likelihood of obtaining an accurate determination – indeed, it may increase that likelihood – . . . *Roberson* did not establish any principle that would come within the second exception."[116] Apparently, the *Butler* majority operated from the premise that a confession obtained in violation of the Fifth Amendment may be truthful nonetheless, and hence, its admission at trial may in fact conduce to a more accurate fact-finding process.[117] To be sure, the Fifth Amendment's right not to self-incriminate enjoys comparable constitutional stature to the right to confront one's accusers; however, the former aims to preserve the individual suspect's dignity, while the latter aims to insure

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[109] 508 U.S. 333 (1993).

[110] 905 F.2d 1129 (7th Cir. 1990).

[111] *Gilmore*, 508 U.S. at 345 (holding that the *Falconer* rule does not "fall[] into that small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty") (internal citations and quotation marks omitted).

[112] United States v. Mandanici, 205 F.3d 519, 529 (2d Cir. 2000) (summarizing the *Falconer* rule).

[113] 494 U.S. 407 (1990).

[114] 486 U.S. 675 (1988).

[115] *Butler*, 494 U.S. at 411 (citing *Roberson*, 486 U.S. at 682).

[116] *Id.* at 416.

[117] *Id.*

the accuracy of the trial. Accordingly, since *Teague* insists that a retroactive rule impact the determination of innocence or guilt,[118] *Crawford* is a better candidate for retroactivity than *Roberson*.

The Supreme Court has invoked *Gideon v. Wainwright*, which conferred the right to counsel upon indigent defendants,[119] to exemplify the type of case capable of satisfying *Teague*'s second exception.[120] *Crawford* is of *Gideon*'s ilk. *Gideon* declared that a fair trial "cannot be realized if the poor man charged with a crime *has to face his accusers* without a lawyer to assist him."[121] One might naturally doubt the utility of a lawyer, however, *without* the right to face one's accusers. Skilled lawyers and *pro se* litigants alike would be unable to mount a defense without the ability to confront adverse witnesses.

For example, Michael Crawford was represented by counsel, yet his lawyer was not allowed to cross-examine Sylvia. Had he been extended this "privilege," he may have inquired as to her vantage point during the incident. In turn she may have replied, truthfully in fact, that her eyes were closed.[122] Indeed, a lawyer is often essential to the fairness of a proceeding, but before a lawyer can be effective the proceeding must comport with *Crawford*, allowing the defendant to confront testimonial statements. In other words, the right of confrontation preserves and gives content to the right to counsel. Accordingly, since the Court uses *Gideon* as its retroactivity benchmark, and since *Crawford* is just as, if not more, important to fairness and trial accuracy, *Crawford* must be made retroactive.[123]

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[118] *See supra* note 104 and accompanying text.

[119] 372 U.S. 335, 344 (1963).

[120] Saffle v. Parks, 494 U.S. 484, 495 (1990) ("Although the precise contours of [the second *Teague*] exception may be difficult to discern, [the Court] ha[s] usually cited *Gideon v. Wainwright*, holding that a defendant has the right to be represented by counsel . . . to illustrate the type of rule coming within the exception." (citation omitted)).

[121] 372 U.S. at 344 (emphasis added).

[122] State v. Crawford, No. 25307-1-II, 2001 WL 850119, at *5 (Wash. App. Div. 2, July 30, 2001), *rev'd*, 54 P.3d 656 (Wash. 2002), *rev'd sub nom.*, *Crawford*, 541 U.S. 36 ("Sylvia stated that she shut her eyes during the stabbing. Cross-examination could show that she did not see Lee attack Michael because of this. We conclude that cross-examination could reveal that she lacked knowledge of what happened.").

[123] *See* Bockting v. Bayer, 399 F.3d 1010, 1019 (9th Cir. 2005) ("Recognizing that bedrock procedural rules are very few in number, it is no leap to conclude that the right of cross-examination as an adjunct to the constitutional right of confrontation joins the very limited company of *Gideon*.").

To be sure, *Teague* and its progeny make it quite difficult for a "new" rule to achieve retroactive effect. The twelve "new" rules that the Supreme Court has declined to make retroactive exemplify the narrowness of the *Teague* standard. Nevertheless, no rule as significant as *Crawford* has yet endured *Teague*'s scrutiny. The second *Teague* exception exists so that rules of the magnitude of *Gideon* and *Crawford* can achieve retroactive effect, while rules like the ones which hitherto have failed will not upset society's countervailing interests. The second *Teague* exception is narrow, but not closed, and *Crawford* satisfies its requirements.[124]

B. The Supreme Court's Language in Crawford *Indicates That the Confrontation Clause is a Bedrock Constitutional Guarantee Essential to a Fair Trial*

The Supreme Court's language in the *Crawford* opinion suggests that its rule is important enough to prevail under a *Teague* retroactivity analysis.[125] In *Crawford*, the Supreme Court expressly stated its view that the right of confrontation is a "bedrock procedural guarantee,"[126] and that *Roberts* constituted an egregious constitutional flaw. Although none of the Court's language speaks specifically to the retroactivity issue, one can reasonably infer from the Court's language that *Crawford* warrants retroactivity.

Justice Scalia consulted history, and determined that "the principal *evil* at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[127] Moreover, the Court declared that the

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[124] *See, e.g.*, Valladares, *supra* note 7, at 12, 16 ("There is a strong argument that *Crawford* is one of those very rare new rules that is essential to our concepts of fundamental fairness.").

[125] *See Bockting*, 399 F.3d at 1016 ("That the *Crawford* requirement is fundamental to our legal regime is beyond dispute. Justice Scalia's eloquent recitation of the history, purpose, and place of the Confrontation Clause and cross-examination answers this question."); People v. Watson, No. 7715/90, 2004 N.Y. Misc. LEXIS 2133, at *8 (N.Y. Sup. Ct. Nov. 8, 2004) ("The language used in the *Crawford* decision itself also lends support to the view that its declaration of the rule prohibiting the admission of testimonial statements at trial unless they have been subject to cross-examination is watershed.").

[126] Crawford v. Washington, 541 U.S. 36, 42 (2004).

[127] *Id.* at 50 (emphasis added). In particular, Justice Scalia recounted the 1603 treason trial of Sir Walter Raleigh. Raleigh's alleged accomplice, Lord Cobham, implicated Raleigh in letters. Cobham did not testify, but his letters were read at Raleigh's trial. According to Justice Scalia,

right of confrontation is the Sixth Amendment's "primary object,"[128] and deemed the right a "categorical constitutional guarantee[]."[129]

Additionally, the *Roberts* framework, according to *Crawford*, was "fundamentally at odds" with the Confrontation Clause[130] and hence, "[did] violence to [its] design."[131] While *Roberts* admitted hearsay based on notions of reliability,[132] *Crawford* declared that the only constitutionally permissible method by which to determine reliability is "testing in the crucible of cross-examination."[133] Indeed, the Court notes that Michael Crawford's conviction under *Roberts* "reveal[ed] a fundamental failure on [the Court's] part to interpret the Constitution in a way that secures its intended constraint on judicial discretion."[134]

Although *Crawford* did not contemplate retroactivity, it couched its holding in strong, unequivocal language, intimating that its rule should satisfy *Teague*. Indeed, to hold otherwise would render *Crawford*'s language meaningless rhetoric.

C. *Two Supreme Court Cases, Though Predating* Teague, *Dictate That* Crawford *Should Be Retroactive*

In two cases, *Roberts v. Russell*[135] and *Berger v. California*,[136] the Court deemed rules implicating the Confrontation Clause retroactive. Although both cases predate

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> Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favor." Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ." The Judges refused, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.

Id. at 44 (internal citations omitted). Justice Scalia then noted, "[O]ne of Raleigh's trial judges later lamented that 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" *Id.*

[128] *Id.* at 53.

[129] *Id.* at 67-68.

[130] *Id.* at 61.

[131] *Id.* at 68.

[132] *See supra* Part II (discussing the *Roberts* framework).

[133] Crawford v. Washington, 541 U.S. 36, 61 (2004).

[134] *Id.* at 67.

[135] 392 U.S. 293 (1968).

[136] 393 U.S. 314 (1969).

Teague, they are persuasive evidence of the high regard in which the Court holds the Confrontation Clause.

1. *Bruton v. United States*

Bruton v. United States[137] concerned Bruton, who had been convicted of robbery.[138] He was tried jointly with his alleged accomplice, Evans.[139] Evans did not testify at the trial, but the prosecution introduced his oral confession, which incriminated Bruton.[140] Bruton challenged his conviction, claiming that the trial judge erred by admitting Evans's confession in violation of his, Bruton's, confrontation right.[141] The Eighth Circuit Court of Appeals, however, applying *Delli Paoli v. United States*,[142] upheld Bruton's conviction because the trial judge instructed the jury not to consider Evans's confession when determining Bruton's guilt.[143] On appeal, the Supreme Court overruled *Delli Paoli*, and reversed the Eighth Circuit, holding that "despite instructions to the jury to disregard the implicating statements in determining the codefendant's guilt or innocence, admission at a joint trial of a

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[137] 391 U.S. 123 (1968).

[138] *Id.* at 124.

[139] *Id.*

[140] *Id.*

[141] *Id.* Evans also challenged his conviction and prevailed after the Circuit Court held that Evans's confession was obtained in violation of the recently decided *Miranda v. Arizona*, 384 U.S. 436 (1966). *Bruton*, 391 U.S. at 124, n.1.

[142] 352 U.S. 232 (1957). *Delli Paoli* allowed a codefendant's confession to be admitted at a joint trial if the judge gave limiting instructions. *Id.* at 239.

[143] *Bruton*, 391 U.S. at 124-25. The trial judge instructed the jury as follows:

> A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntarily and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.
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> . . . .
>
> It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him." *Id.* at 125 n.2 (quoting Evans v. United States, 375 F.2d 355, 362 n.6 (1967), *rev'd sub nom.*, *Bruton*, 391 U.S. 123) (alteration in original).

defendant's extra-judicial confession implicating a codefendant violated the codefendant's right of cross-examination."[144]

In *Roberts v. Russell*[145] the Supreme Court applied the *Bruton* rule retroactively. The *Russell* Court held that "the error" from *Delli Paoli* in admitting such statements "'went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination' of his guilt or innocence."[146] With "[d]ue regard for countervailing considerations," the *Russell* Court concluded that "even if the impact of retroactivity may be significant, the constitutional error presents a serious risk that the issue of *guilt or innocence may not have been reliably determined*."[147] Accordingly, the Court determined that the *Bruton* rule must apply retroactively to cases on collateral review.[148]

Although *Russell* was decided in 1968, twenty-one years before *Teague* narrowed the scope of habeas review, its holding remains significant even after *Teague*. *Teague* relied heavily on the importance of finality and the administration of justice.[149] The *Russell* Court clearly considered these "countervailing"[150] interests yet concluded that "the impact of retroactivity upon the administration of justice [did] not counsel against retroactivity of *Bruton*. The element of reliance [was] not persuasive . . . ."[151]

Moreover, *Teague*'s primary departure from existing retroactivity doctrine was the second prong of its second

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[144] Roberts v. Russell, 392 U.S. 293, 294 (1969).

[145] 392 U.S. 293.

[146] *Id.* at 294 (alteration in original) (quoting Linkletter v. Walker, 381 U.S. 618, 639 n.20 (1965)). The *Bruton* Court elaborated:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial.

Bruton, 391 U.S. at 135-36 (citations omitted).

[147] *Russell*, 392 U.S. at 295 (emphasis added).

[148] *Id.*

[149] Teague v. Lane, 489 U.S. 288, 309 (1989) ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.").

[150] *Russell*, 392 U.S. at 295.

[151] *Id.* (citation omitted) ("Due regard for countervailing considerations—reliance on the old standard of *Delli Paoli* and the impact of retroactivity upon the administration of justice—does not counsel against retroactivity of *Bruton*. The element of reliance is not persuasive . . . ." (citation omitted)).

exception,[152] which requires a new rule to be "watershed" and to "implicate the fundamental fairness of the trial."[153] Indeed, *Russell*, though not constitutionally required to do so (as *Teague* had not yet imposed the obligation), contemplated this aspect of the *Bruton* rule, and predicated its holding of retroactivity on the belief that to deny the benefit of the rule would "present[] a serious risk that the issue of guilt or innocence may not have been reliably determined."[154]

Additionally, the *Russell* Court likened the *Bruton* rule of Confrontation Clause interpretation to the rule of *Gideon v. Wainwright*.[155] Courts have often refused to hold "new" rules retroactive because the Supreme Court instructs that a new rule must be comparable to the *Gideon* rule to warrant retroactivity.[156] *Russell* cited *Gideon* to support its proposition that the Supreme Court has "retroactively applied rules of criminal procedure fashioned to correct flaws in the fact-finding process at trial."[157] Relying on *Gideon* as authority indicates that the Court believed the right of confrontation to be tantamount to the right to counsel.

It thus seems very reasonable to conclude that the *Russell* analysis, though not controlled by *Teague*, was just as demanding, and that even under the *Teague* standard the *Russell* Court would have applied *Bruton* retroactively. Since *Crawford*'s rule is similar to *Bruton*'s, *Crawford* deserves equal consideration when subjected to retroactivity analysis.

2. *Barber v. Page*

Likewise, the Supreme Court applied *Barber v. Page*[158] retroactively in *Berger v. California*.[159] *Barber v. Page* declared

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[152] *See supra* note 74.

[153] *Teague*, 489 U.S. at 311, 312.

[154] *Russell*, 392 U.S. at 295.

[155] *Russell*, 392 U.S. at 294 (comparing *Bruton* to *Gideon*).

[156] *See, e.g.*, Beard v. Banks, 542 U.S. 406, 417 (2004); Saffle v. Parks, 494 U.S. 484, 495 (1990). *Gideon v. Wainwright* conferred on indigent defendants the right to counsel. 372 U.S. 335, 344 (1963).

[157] *Russell*, 392 U.S. at 294 (quoting Stovall v. Denno, 388 U.S. 293, 298 (1967)).

[158] 390 U.S. 719 (1968).

[159] 393 U.S. 314, 315 (1969) ("[W]e can see no reason why *Barber v. Page* should not be given fully retroactive application."). *See generally* People v. Watson, No. 7715/90, 2004 N.Y. Misc. LEXIS 2133, at *8 n.5 (N.Y. Sup. Ct. Nov. 8, 2004) ("[A]t the time that *Berger v. California* and *Roberts v. Russell* were decided, the retroactivity of *any* new rule was determined under the [Linkletter v. Walker, 381 U.S. 618 (1965)] standard, regardless of when the defendant's conviction became final.").

that the preliminary hearing testimony of a witness currently outside of the jurisdiction is inadmissible absent a good faith effort by the state to secure the witness's presence.[160] In deeming the rule retroactive, the *Berger* Court determined that notwithstanding the state's "countervailing interests,"[161] the opportunity to cross-examine a witness has a "significant effect on the 'integrity of the fact-finding process.'"[162] *Barber* and *Crawford* alike make it more difficult for the prosecution to use evidence absent confrontation, and both cases stand on the proposition that the Confrontation Clause is essential to fairness. Since *Barber* was made retroactive, so should *Crawford* be.

In summary, *Crawford*'s rule is of comparable importance to the rules of *Bruton* and *Barber*. All three rules seek to give content to the same "bedrock procedural guarantee,"[163] the Confrontation Clause of the Sixth Amendment. *Bruton* held that a codefendant's confession may not be admitted as evidence at a joint trial, regardless of cautionary jury instructions,[164] and *Barber* made inadmissible statements of non-testifying, out-of-jurisdiction witnesses.[165] Similarly, *Crawford* held that "testimonial" statements were inadmissible absent the opportunity for cross-examination.[166] Each rule corrected a similar constitutional vice.[167] Since *Teague*, the Supreme Court has not considered the retroactivity of a "new" rule concerning the Confrontation Clause. Nevertheless, since *Berger* and *Russell* imply that Confrontation Clause violations affect the fairness and accuracy of the trial, even under *Teague*, both rules would

[160] *Barber*, 390 U.S. at 724-25 ("In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial. . . . The right of confrontation may not be dispensed with so lightly.").

[161] *Berger*, 393 U.S. at 315 ("California's claim of . . . countervailing interest[s] . . . is most unpersuasive.").

[162] *Id.* (quoting *Linkletter*, 381 U.S. at 639).

[163] Crawford v. Washington, 541 U.S. 36, 42 (2004).

[164] Roberts v. Russell, 392 U.S. 293, 293 (1968) (summarizing *Bruton*).

[165] *Barber*, 390 U.S. at 724-25.

[166] *Crawford*, 541 U.S. at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

[167] *See Russell*, 392 U.S. at 294; *Crawford*, 541 U.S. at 63 ("The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.").

deserve retroactivity.[168] *Crawford*, like *Bruton* and *Barber* before it, corrected an error in Confrontation Clause jurisprudence. Accordingly, *Crawford*, when subjected to *Teague*'s scrutiny, should be given full retroactive effect.

D. The Retroactivity of Cruz v. New York *Dictates that* Crawford *Qualifies for the Second* Teague *Exception*

Both the Second Circuit Court of Appeals[169] and the New York Court of Appeals[170] retroactively applied the Supreme Court's holding in *Cruz v. New York*.[171] Both courts analyzed retroactivity under *Teague*, and both concluded that the *Cruz* rule was sufficiently "watershed" to fit within *Teague*'s second exception. Since both *Cruz* and *Crawford* implicate the Confrontation Clause, and since *Crawford* is at least as, if not more, necessary to the fundamental fairness and accuracy of the trial, *Crawford* also deserves retroactive application.

Cruz v. New York concerned Eulogio and Benjamin Cruz, who were tried jointly for the felony murder of a gas station attendant.[172] At trial, prosecutors played a taped statement made by Benjamin, which incriminated Eulogio.[173] Benjamin did not testify at trial, and hence was unavailable to Eulogio for cross-examination.[174] The judge, recognizing that Benjamin's statement was inadmissible against Eulogio, instructed the jury not to consider Benjamin's statement when determining Eulogio's guilt.[175] Eulogio had also confessed, but his confession was found inadmissible. The jury returned a guilty verdict against Eulogio despite the lack of admissible

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[168] One court recently noted that

> [N]otwithstanding the fact that *Roberts v. Russell* and *Berger v. California* were not decided according to the *Teague* standard, they support the view that the constitutional right to confront witnesses is a watershed rule, because they indicate that a violation of this right implicates the fairness of the trial and the accuracy of the fact-finding process.

People v. Watson, No. 7715/90, 2004 N.Y. Misc. LEXIS 2133, at *8 (N.Y. Sup. Ct. Nov. 8, 2004).

[169] Graham v. Hoke, 946 F.2d 982, 983 (2d Cir. 1991).

[170] People v. Eastman, 85 N.Y.2d 265, 268 (1995).

[171] 481 U.S. 186 (1987).

[172] *Id.* at 189.

[173] *Id.* at 188-89.

[174] Cruz v. New York, 481 U.S. 186, 188-89 (1987).

[175] *Id.* at 189.

evidence linking him to the murder.[176] Eulogio's conviction was upheld on appeal because Eulogio's own confession, not admitted at trial, "interlocked" with Benjamin's.[177] In other words, Benjamin's statement was inadmissible against Eulogio, and Eulogio's own confession was also inadmissible against Eulogio, but since both statements were similar, or "interlocking," Eulogio's conviction was upheld despite the lack of admissible evidence.[178]

The Supreme Court, in *Cruz v. New York*, reversed Eulogio's conviction because it violated the Confrontation Clause.[179] Specifically, *Cruz* contemplated "interlocking confessions," and held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant."[180]

Before *Cruz*, statements of this sort were frequently admitted if they were "factually consistent" with or

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[176] *Id.* ("At the trial's end, however, Norberto's testimony stood as the only evidence admissible against Eulogio that directly linked him to the crime." But nevertheless, "the jury convicted both defendants.").

[177] The New York Court of Appeals explained "interlocking confessions" as follows,

> Confessions are "interlocking" if their content is substantially similar. The statements need not be identical, it is sufficient that both cover all major elements of the crime involved and are "essentially the same" as to motive, plot and execution of the crimes. Statements are substantially similar when defendant's confession is close enough to the codefendant's with respect to the material facts of the crime charged to make the probability of prejudice so negligible that the end result would be the same without the codefendant's statement. Confessions do not "interlock," however, if a codefendant's confession may be used to fill material gaps in the necessary proof against defendant.

People v. Cruz, 66 N.Y.2d 61, 70 (citations omitted). The court concluded that the Cruz brothers' statements did, in fact, "interlock":

> [T]he Cruz brothers agreed, in their separate statements, on the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how defendant was injured and the station attendant killed. Although Benjamin's statement was substantially longer, the details included did not contradict or modify the essential elements of defendant's statement.

Id. at 71.

[178] *Id.* at 65.

[179] *Cruz*, 481 U.S. 186, 189 (1987).

[180] *Id.* at 193. "*Cruz* . . . repudiated the interlocking confession exception to the *Bruton* rule that the *Parker* plurality and several Courts of Appeals . . . previously had recognized. . . . *Parker* commonly was perceived as having endorsed an interlocking confession exception to the *Bruton* rule." Graham v. Hoke, 946 F.2d 982, 993 (2d Cir. 1991).

"substantially similar" to the defendant's own statement.[181] The *Cruz* Court, however, declared the use of such statements constitutionally unsound, and in direct conflict with the precedent established in *Bruton*.[182] *Cruz*'s author, Justice Scalia, concluded that "[t]he law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted."[183]

Both the Second Circuit Court of Appeals and the New York Court of Appeals applied the *Cruz* holding retroactively under the second *Teague* exception. In their analyses, both courts determined that the *Cruz* rule involved a "bedrock procedural element."[184] New York's highest court, in *People v. Eastman*, proclaimed that "*Cruz* unquestionably . . . implicates a bedrock procedural element,"[185] while the Second Circuit Court of Appeals, in *Graham*, announced that "there [could] be little doubt that the decision altered our understanding of a bedrock procedural principle."[186] *Graham* continued that "[t]he 'bedrock procedural element' implicated in *Cruz* was the right of confrontation; a right which the Supreme Court long ago referred to as being 'one of the fundamental guarantees of life and liberty,'"[187] and cited with approval the notion that "[t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation."

Eastman and *Graham* then determined that, in addition to implicating a "fundamental procedural guarantee," application of the *Cruz* rule is essential to a fair trial.[188] According to the *Eastman* court, the *Cruz* rule is necessary in order for "the procedural apparatus of trial . . . [to] assure[] the

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[181] People v. Eastman, 85 N.Y.2d 265, 273-74, 274 n.4 (1995).

[182] Bruton v. United States, 391 U.S. 123, 137 (holding that a defendant is deprived of his Confrontation Clause rights when a codefendant's incriminating confession is introduced at their joint trial, even if cautionary instructions were given to the jury to disregard the statement).

[183] 481 U.S. at 193.

[184] *Graham*, 946 F.2d at 993; *Eastman*, 85 N.Y.2d at 276. *Graham* did not actually make the determination of whether *Cruz* announced a "new" or an "old" rule. However, the court reasoned that the rule is retroactive either way. *Graham,* 946 F.2d at 992 ("[W]e find it unnecessary to categorize the *Cruz* rule as either a 'new' or 'old' rule of constitutional criminal procedure. Rather, we . . . believe that regardless of whether the *Cruz* rule is characterized as a 'new' or 'old' rule it should be applied retroactively.").

[185] *Eastman*, 85 N.Y.2d at 276.

[186] *Graham*, 946 F.2d at 993.

[187] *Id.* at 994 (quoting Kirby v. United States, 174 U.S. 47, 55 (1899)).

[188] *Id.* at 993-94; *Eastman*, 85 N.Y.2d at 276.

defendant a fair determination of guilt or innocence,"[189] and the admission of the types of statements proscribed by *Cruz* "undermine[s] . . . fundamental fairness."[190] Similarly, *Graham* held that the *Cruz* rule is necessary to "ensure[] a fair proceeding."[191] *Graham* concluded that "[t]he *Cruz* rule . . . satisfies [*Teague*'s] second exception to the general rule against retroactive application of 'new' constitutional rules of criminal procedure,"[192] and that "[e]ven if the impact of retroactivity may be significant, the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined."[193]

The *Crawford* rule is analogous to the *Cruz* rule, and hence, deserves equal treatment for retroactivity purposes. Both rules severely limited the kind of evidence which may be admitted without cross-examination; *Cruz* rejected "interlocking" confessions,[194] while *Crawford* rejected all "testimonial" statements.[195] Both corrected flaws in the Court's Confrontation Clause jurisprudence.[196]

In fact, *Crawford* corrected an even greater affront to the Confrontation Clause than did *Cruz*. In *Cruz*, the defendant and codefendant were tried jointly, but the codefendant's statement was introduced only against the codefendant; the court explicitly directed jurors not to consider the statement in evaluating Cruz's guilt.[197] Even though the *Cruz* Court concluded that jurors could not reasonably be expected to obey such an instruction,[198] the resulting Confrontation Clause violation was still indirect. The *Cruz* trial court recognized that jurors should not consider the testimony at issue, and instructed the jury accordingly.

On the other hand, in *Crawford*, the trial court admitted testimonial hearsay directly against the defendant. Limiting instructions were never given, not even difficult or impossible-

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[189] *Eastman*, 85 N.Y.2d at 276.

[190] *Id.*

[191] *Graham*, 946 F.2d at 993-94.

[192] *Id.*

[193] *Id.* at 994 (quoting Roberts v. Russell, 392 U.S. 293, 295 (1968)).

[194] Cruz v. New York, 481 U.S. 186 (1987).

[195] Crawford v. Washington, 541 U.S. 36 (2005).

[196] *Id.* at 61 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."); *Cruz*, 481 U.S. at 193 ("The law cannot command respect if such an inexplicable exception to a supposed constitutional imperative is adopted.").

[197] *Cruz,* 481 U.S. at 189.

[198] *Id.* at 193.

to-obey ones.[199] The court invited the *Crawford* jury to consider the *ex parte* accusatory statement for its truth in deciding whether or not to convict.[200] Therefore, reason dictates that if *Cruz* twice achieved retroactive effect under *Teague*, then surely *Crawford*, correcting an even more egregious constitutional malady, should receive equal consideration.

E. Litigation Concerning Crawford*'s Retroactivity has Begun, and Lower State and Federal Courts Are in Disagreement*

Of the five federal circuits that have ruled on *Crawford*'s retroactivity, only one concluded that *Crawford*'s rule qualified under *Teague*'s second exception.[201] Those failing to find *Crawford* retroactive, however, have done so after only a cursory analysis.[202] Some have flatly stated that *Crawford* is not "watershed," effectively assuming that which they should be attempting to prove.[203] Others have chosen to make the fact that Confrontation Clause violations are subject to harmless

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[199] *See Crawford*, 541 U.S. at 40-41.

[200] *Id.* at 40.

[201] The Ninth Circuit has held *Crawford* retroactive under the second *Teague* exception. Bockting v. Bayer, 399 F.3d 1010, 1019-21 (9th Cir. 2005). The Second, Sixth, Seventh, and Tenth Circuits have decided not to make *Crawford* retroactive. Bintz v. Bertrand, 403 F.3d 859, 867 (7th Cir. 2005); Murillo v. Frank, 402 F.3d 786, 790 (7th Cir. 2005); Dorchy v. Jones, 398 F.3d 783, 788 (6th Cir. 2005); Mungo v. Duncan, 393 F.3d 327, 336 (2d Cir. 2004); Brown v. Uphoff, 381 F.3d 1219, 1227 (10th Cir. 2004). The Eighth Circuit has indicated that *Crawford* is not retroactive. Evans v. Luebbers, 371 F.3d 438, 444-45 (8th Cir. 2004) (suggesting in dicta that *Crawford* does not apply retroactively).

[202] *See, e.g., Bockting*, 399 F.3d at 1020 ("The flaw in this analysis [declining to make *Crawford* retroactive] is that the Second Circuit has substituted its judgment of whether the *Crawford* rule is one without which the accuracy of conviction is seriously diminished, for the Supreme Court's considered judgment."); People v. Watson, No. 7715/90, 2004 N.Y. Misc. LEXIS 2133, at *8 (N.Y. Sup. Ct. Nov. 8, 2004) ("For the most part, however, with little analysis, these courts have generally held that *Crawford* . . . did not announce a watershed rule of criminal procedure." The court continued that, "[w]here explanations have been proffered for this conclusion, these courts have generally pointed to the fact that a *Confrontation Clause* violation is subject to harmless error analysis.").

[203] *See, e.g.*, *Brown*, 381 F.3d at 1226; *Evans*, 371 F.3d at 444-45; Garcia v. United States, No. 04-CV-0465, 2004 WL 1752588, at *4 (N.D.N.Y. Aug. 4, 2004); Hutzenlaub v. Portuondo, 325 F. Supp. 2d 236, 237-38 (E.D.N.Y. 2004); Wheeler v. Dretke, No. Civ.A. 404CV026Y, 2004 WL 1532178, at *1 (N.D. Tex. July 6, 2004); Murillo v. Frank, 316 F. Supp.2d 744, 749 (E.D. Wis. 2004), *aff'd*, 402 F.3d 786. Some state courts have held similarly. *See, e.g.*, People v. Edwards, 101 P.3d 1118, 1122 (Ct. App. Colo. 2004), *aff'd*, 129 P.3d 977, No. 04SC565, 2006 WL 320992 (Colo. Feb. 13, 2006); People v. Khan, No. 499-90, 2004 WL 1463027, at *4-5 (N.Y. Sup. Ct. June 23, 2004).

error[204] analysis fatal to *Crawford*'s retroactivity.[205] The Supreme Court, however, has never indicated that a rule subject to harmless error analysis may not be deemed "watershed" under *Teague.*[206] In fact, the constitutional error corrected by *Cruz* was also subject to harmless error analysis, yet it was made retroactive by the New York Court of Appeals and the Second Circuit.[207] Therefore, that a Confrontation Clause violation may not require automatic reversal does not preclude the rule from fitting within the second *Teague* exception.

Two New York Appellate Division cases, citing *Eastman*, recently found *Crawford* retroactive under the second *Teague* exception. *People v. Watson*[208] and *People v. Dobbin*[209] both held that since *Eastman* declared that *Cruz* satisfied *Teague*, then so does *Crawford*.[210] The implicit logic in *Watson* and *Dobbin* is clear. Both courts analogized *Cruz* to *Crawford*, and concluded that the *Crawford* rule is at least as, if not more, constitutionally imperative than the *Cruz* rule. Thus, because *Cruz* satisfied *Teague*, *Crawford* does as well. Since the New York Court of Appeals and the Second Circuit applied *Cruz* retroactively on collateral review,[211] making *Crawford* retroactive was the only sensible conclusion.[212]

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[204] Harmless error review means that even if there was a mistake at trial the verdict will stand unless the mistake affected the substantial rights of the parties. *See* LAFAVE, *supra* note 9, at 1298.

[205] *See, e.g.*, *Brown*, 381 F.3d at 1226-27; *Garcia*, 2004 WL 1752588, at *4 (N.D.N.Y. 2004). "These courts have reasoned that because *Confrontation Clause* errors are subject to harmless error review, new rules altering the clause's application do not deprive a defendant of his or her fundamental right to due process and, therefore, [*Crawford*] cannot be considered a watershed rule." People v. Watson, No. 7715/90, 2004 N.Y. Misc. LEXIS 2133, at *8 (N.Y. Sup. Ct. Nov. 8, 2004) (citation omitted).

[206] *Watson*, 2004 N.Y. Misc. LEXIS 2133, at *10 n.7 ("The Supreme Court has never issued any decision . . . indicating that a rule which is subject to harmless error analysis cannot be considered a watershed rule."); *see also Bockting*, 399 F.3d at 1020 ("[W]hether a rule of constitutional law is subject to harmless error review does not answer the question whether it is a bedrock rule of procedure.").

[207] See discussion *supra* notes 167-91 and accompanying text.

[208] 2004 N.Y. Misc. LEXIS 2133.

[209] 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004).

[210] *Watson*, 2004 N.Y. Misc. LEXIS 2133, at *9 ("[A]pplying *Teague*'s teachings, this court finds that the rule announced in *Crawford* is a 'watershed' rule of Criminal Procedure, and thus applies to cases on collateral review."); *Dobbin*, 791 N.Y.S.2d at 905 ("[T]he *Crawford* rule must be applied retroactively on collateral review.") (italics added).

[211] *Watson* and *Dobbin* were New York Appellate Division cases. Thus, People v. Eastman, 85 N.Y.2d 265 (1995), decided by the New York Court of Appeals, was

V. CONCLUSION

With *Crawford* the Supreme Court corrected an "unpardonable"[213] flaw in its jurisprudence, and restored the Confrontation Clause to its rightful status as a bedrock constitutional guarantee essential to a fair trial. Notwithstanding the high bar set by *Teague* and its progeny, *Crawford* deserves to be applied retroactively.

As a "new" rule, *Crawford*'s retroactivity turns on whether it fits within the contours of the second *Teague* exception. *Teague* adopted a strict standard for the retroactive application of "new" rules, so strict in fact that the Supreme Court has yet to find a rule capable of satisfying it. The Court, however, has never applied the *Teague* framework to a rule as significant as *Crawford*'s. *Crawford* is more important than, and thus distinguishable from, its "new" rule predecessors, all of which failed under *Teague*.

What separates *Crawford* from other "new" rules not worthy of retroactivity is its subject, the Confrontation Clause. Prior to *Teague*, the Supreme Court twice gave retroactive effect to "new" rules concerning the Confrontation Clause, both times concluding that to deprive a defendant of the right of confrontation was to withhold a fundamental constitutional guarantee essential to a fair trial. Furthermore, the New York Court of Appeals and the Second Circuit both applied the Supreme Court's holding in *Cruz v. New York* retroactively, demonstrating that even under the strict *Teague* framework, the importance of the Confrontation Clause outweighs the negative implications of retroactivity.

Roberts's malleable test rendered the Confrontation Clause constitutionally infirm. With *Crawford*, the Supreme Court resuscitated the right of confrontation, and with it, the legitimacy of criminal trials. The Supreme Court admittedly "[did] violence to [the] design" of the Confrontation Clause

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binding precedent; Graham v. Hoke, 946 F.2d 982 (2d Cir. 1991), decided by the Second Circuit Court of Appeals, was merely persuasive.

[212] Recently the Second Circuit held that *Crawford* is not retroactive under *Teague*, yet failed to cite *Graham* in its analysis. Mungo v. Duncan, 393 F.3d 327, 336 (2d Cir. 2004). Nor did the court make any attempt to distinguish the *Cruz* rule, made retroactive in *Graham*, with the *Crawford* rule. *Id.* See Part IV.D, *supra*, for a comparison of *Crawford* to *Cruz*, and for an argument that *Crawford*, in fact, corrected an even more serious constitutional flaw.

[213] Crawford v. Washington, 541 U.S. 36, 63 (2004).

when it endorsed the *Roberts* test,[214] and limiting *Crawford* to prospective application would exacerbate *Roberts*'s damage.

In summary, neither history nor precedent leaves any doubt that the right of confrontation is crucial to a fair trial, *Roberts* denied criminal defendants the enjoyment of that right, and *Crawford* corrected *Roberts*'s mistake. Only one conclusion follows: *Crawford v. Washington* must be applied retroactively.

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[214] *Id.* at 67-68 ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.").

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