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Confrontation and the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of Crawford?

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I. INTRODUCTION

A foreign traveler flies into John F. Kennedy International Airport, supposedly on a business trip.[1] At the airport, a customs inspector detains him after discovering what appear to be bags of cocaine concealed in his luggage.[2] The traveler speaks limited English, so the inspector requests the aid of a certified government interpreter to question him.[3] An English-speaking Drug Enforcement Administration ("DEA") agent thereafter interrogates the traveler by having the interpreter translate his questions to Spanish, the traveler's native tongue.[4] The interpreter then translates the traveler's responses from Spanish to English, and the inspector records the translated responses.[5] At trial, the court denies the traveler's motion to suppress his statements to the customs inspector and DEA agent.[6] The jury subsequently convicts him.[7]

This fact pattern comes from an influential Second Circuit case illustrating an evidentiary tool long used by courts to assess the reliability of out-of-court, translated statements offered against criminal defendants. Popularly referred to as the "language conduit theory," this tool allows courts to infer an agency relationship between

1. United States v. Da Silva, 725 F.2d 828, 829 (2d Cir. 1983).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 830.
7. *Id.*

a defendant and an interpreter for hearsay purposes if certain factors are met.[8] These factors vary among the federal circuits but generally aim to ensure that translations are reliable. For instance, courts often ask if the interpreter had a motive to mislead or if there is reason to believe that the translation is inaccurate.[9] If the facts suggest that the statements are reliable, then they are admissible as nonhearsay under Federal Rules of Evidence 801(d)(2)(C) or (D).[10]

Although federal courts initially designed the language conduit theory as an evidentiary tool, they gradually extended its reasoning to the Sixth Amendment context.[11] The Sixth Amendment's Confrontation Clause grants every defendant the right to confront the witnesses against him.[12] Thus, a strict textualist reading indicates that defendants have the right to confront their interpreters when prosecutors seek to introduce the translated statements against them. However, courts and prosecutors have often invoked the language conduit theory to circumvent this constitutional requirement.[13] If the theory's factors support a finding that the interpreter's statements are reliable, then the statements can be attributed to the defendant himself and properly admitted as nonhearsay.[14] Under this logic, the

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8. *E.g.*, *id.* at 831–32. Another similar evidentiary tool used by some state courts to admit out-of-court, translated statements is the residual, or "catchall," exception based on Rule 803(24) of the Federal Rules of Evidence. Under this hearsay exception, a statement bearing sufficient "guarantees of trustworthiness" is admissible if the proffering party shows that the statement is relevant, that it is more probative than any other reasonably available evidence, and that the purpose of the hearsay rules and the interests of justice will be served by admitting the statement. *See* State v. Terrazas, 783 P.2d 803, 806 (Ariz. Ct. App. 1989); State v. Rodriguez-Castillo, 151 P.3d 931, 938 (Or. Ct. App. 2007), *rev'd on other grounds*, 188 P.3d 268 (Or. 2008). This exception raises a more glaring Confrontation Clause issue than the language conduit theory. *See* Joseph S. Powell, Note, *No Comprende, No Justice: An Analysis of Applying Hearsay Exceptions to Interpreted Statements and the Impact on Iowa's Increasingly Diverse Residents, Workforce, and Justice System*, 57 DRAKE L. REV. 759, 775–77 (2009); *infra* Part II.A–B.

9. *Da Silva*, 725 F.2d at 832. Many circuits have adopted four common factors to evaluate the accuracy of a translation: (1) which party supplied the interpreter; (2) whether the interpreter had a motive to mislead or distort; (3) the interpreter's qualifications and language skills; and (4) whether actions taken subsequent to the conversation were consistent with the statements translated. *See* United States v. Vidacak, 553 F.3d 344, 352 (4th Cir. 2009); United States v. Martinez-Gaytan, 213 F.3d 890, 892 (5th Cir. 2000); United States v. Nazemian, 948 F.2d 522, 527 (9th Cir. 1991).

10. *Da Silva*, 725 F.2d at 832. Specifically, the interpreter's statements could be viewed as either authorized by the defendant or made by an agent or employee of the defendant on a matter within the scope of their relationship. FED. R. EVID. 801(d)(2)(C)–(D).

11. *E.g.*, *Nazemian*, 948 F.2d at 525–27.

12. U.S. CONST. amend. VI.

13. *See, e.g.*, *Nazemian*, 948 F.2d at 525–27 (applying the language conduit test as a "threshold matter" to determine whether the interpreter's statements could be properly viewed as the defendant's own before reaching the Confrontation Clause issue).

14. *See id.* at 527–28.

defendant cannot complain that he was denied the opportunity to confront himself.[15]

Until recently, the language conduit, as applied in the Sixth Amendment context, met little opposition across federal circuits. But in 2004, the Supreme Court held in *Crawford v. Washington* that "testimonial statements" of an unavailable witness could not be admitted unless the defendant had a prior opportunity to cross-examine the witness.[16] Admitting such statements would violate the Confrontation Clause.[17] Since this landmark decision, federal circuits have disagreed on whether the language conduit theory remains a viable tool to deny defendants the right to confront their interpreters.[18]

This Note analyzes the continued validity of the language conduit theory in the wake of *Crawford* and its progeny. Part II traces the evolution of the Supreme Court's Confrontation Clause jurisprudence from *Ohio v. Roberts* through the *Crawford* line of cases and provides a brief history of the language conduit theory before *Crawford*. Part III analyzes three different approaches that federal circuits have taken in dealing with the language conduit theory in light of *Crawford*. Lastly, Part IV proposes a solution that closely embodies the spirit of *Crawford*: requiring confrontation for all translated statements that are testimonial hearsay.

II. BACKGROUND

A. Ohio v. Roberts: *The Confrontation Clause Does Not Bar the Admission of Reliable Hearsay Evidence Against Defendants*

Before 2004, the Supreme Court's Confrontation Clause jurisprudence gave judges broad discretion to assess the reliability and admissibility of hearsay evidence against criminal defendants.[19] Specifically, in *Ohio v. Roberts*, the Court held that hearsay statements offered against a defendant are admissible, in accordance with the Sixth Amendment's confrontation requirement, if the prosecution shows that the declarant is unavailable to testify and that

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15. *Id.* at 525–26.

16. Crawford v. Washington, 541 U.S. 36, 53–59 (2004).

17. *Id.*

18. *Compare* United States v. Charles, 722 F.3d 1319, 1327–30 (11th Cir. 2013) (holding that the language conduit theory could not resolve the Confrontation Clause issue), *with* United States v. Orm Hieng, 679 F.3d 1131, 1139–1141 (9th Cir. 2012) (holding that *Crawford* did not foreclose the use of the language conduit theory to circumvent Confrontation Clause issues).

19. *See Crawford*, 541 U.S. at 62 ("The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.").

the statements bear adequate "indicia of reliability."[20] This "indicia of reliability" test requires that the evidence falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."[21] Because these factors were judicial determinations, courts possessed broad discretion to determine whether a hearsay statement violated the Confrontation Clause.

The *Roberts* Court formulated its test based on the observation that the Framers did not intend for the Confrontation Clause to exclude all hearsay evidence absent the opportunity for confrontation at trial.[22] Otherwise, the Clause would abrogate virtually every common-law hearsay exception, a result that courts have long rejected.[23] The *Roberts* Court thus valued consistency between the hearsay and Confrontation Clause analyses. It believed that statements that would otherwise be properly admissible under the hearsay rules should also be admissible under the Confrontation Clause, at least in situations in which the declarant is genuinely unavailable to testify.[24] The underlying rationale for this interpretation is that both the hearsay rules and Confrontation Clause aim to determine the reliability of evidence. Therefore, if evidence is sufficiently reliable to be admitted under the hearsay rules, the Confrontation Clause should not operate to bar its admission.[25] In sum, the *Roberts* Court was satisfied with the ability of the hearsay rules to assess reliability and did not read the Sixth Amendment as conferring an absolute right to confrontation.

B. Crawford v. Washington: *A Witness's Testimonial Statements Are Inadmissible Absent the Opportunity for Confrontation*

In 2004, the Supreme Court overruled *Roberts* in *Crawford v. Washington*.[26] In doing so, the Court held that the Confrontation Clause forbids the admission of "testimonial statements" of a witness who does not appear at trial unless the witness is unavailable to testify and the defendant has had a prior

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20. Ohio v. Roberts, 448 U.S. 56, 65–66 (1980).

21. *Id.*

22. *Id.* at 63.

23. *See id.* at 62–63.

24. *Id.* at 65–66.

25. *See id.* at 66 ("[H]earsay rules and the Confrontation Clause are generally designed to protect similar values . . . and stem from the same roots." (quoting California v. Green, 399 U.S. 149, 155 (1970) and Dutton v. Evans, 400 U.S. 74, 86 (1970)) (internal quotation marks omitted)).

26. Crawford v. Washington, 541 U.S. 36, 60 (2004).

opportunity to cross-examine him.[27] Unlike *Roberts*, *Crawford* endorsed confrontation as the best tool for determining reliability of hearsay evidence.[28] The Court noted that although the Clause's ultimate goal is to ensure the reliability of evidence, it is a "procedural rather than a substantive guarantee."[29] In reaching this conclusion, the Court carefully examined the historical background of the Confrontation Clause.

1. History of the Right to Confrontation in England

The *Crawford* Court began by discussing the infamous 1603 trial of Sir Walter Raleigh, in which the absence of confrontation deprived Raleigh of a fair trial.[30] Cobham, Raleigh's alleged accomplice, had implicated him in a pretrial examination and letter.[31] At trial, Raleigh argued that Cobham had lied to save himself and demanded that the judges call him to appear in court.[32] When the judges refused, the jury convicted Raleigh, and he was sentenced to death.[33] Due to the unjust outcome of this case,[34] English law later developed a right to confrontation and relatively strict rules regarding witness unavailability.[35]

Raleigh's case did not resolve the question of whether an unavailable witness's pretrial examination could be admitted without giving the defendant an opportunity for cross-examination.[36] In 1696, however, an English court held in the misdemeanor libel case of *King v. Paine* that even if a witness was dead, his testimony was not admissible unless the defendant had an opportunity to cross-examine him.[37] In the mid-nineteenth century, Parliament formally extended this common-law requirement to felony cases as well.[38]

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27. *Id.* at 53–54, 59.

28. *Id.* at 61.

29. *Id.*

30. *Id.* at 44.

31. *Id.*

32. *Id.*

33. *Id.*

34. One 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.* (quoting 1 D. JARDINE, CRIMINAL TRIALS 435, 520 (1832)).

35. *Crawford*, 541 U.S. at 44–45.

36. *Id.* at 45.

37. *Id.*

38. *Id.* at 47.

2. History of the Right to Confrontation in the United States

The right to confrontation in the United States originated in the early days of our nation's history. At the Massachusetts ratifying convention of the federal Constitution, Abraham Holmes objected to the absence of such a right for fear that it would lead to the civil-law practice of acquiring evidence by ex parte testimony.[39] Similarly, a prominent antifederalist writing under the pseudonym "Federal Framer" criticized the use of written evidence and the omission of a right to cross-examine witnesses.[40] In response, the First Congress included the Confrontation Clause in a proposal that later became the Sixth Amendment.[41]

Early state court decisions also shed light upon the original understanding of the common-law right to confrontation.[42] In *State v. Webb*, a case decided a mere three years after the adoption of the Sixth Amendment, the court held that only depositions taken in an accused's presence could be read against him.[43] Rejecting a broader reading of English authorities, the court held that "no man shall be prejudiced by evidence which he had not the liberty to cross examine."[44] Similarly, in *State v. Campbell*, South Carolina's highest court excluded an ex parte deposition taken by a coroner in the absence of the accused.[45] The court noted that the South Carolina Constitution implicitly guaranteed the accused the opportunity to cross-examine the witnesses against him.[46]

3. The Original Meaning of the Confrontation Clause

From an analysis of the common-law history of the right to confrontation, the *Crawford* Court drew two inferences about the original meaning of the Confrontation Clause.[47] First, the principal evil that the Confrontation Clause intended to redress was the civil-law mode of criminal procedure that used ex parte examinations as evidence against the accused.[48] The Founders designed the Clause to

39. *Id.* at 48–49.
40. *Id.* at 49.
41. *Id.*
42. *Id.*
43. *Id.* (quoting State v. Webb, 2 N.C. (1 Hayw.) 103 (1794)).
44. *Id.* (quoting *Webb*, 2 N.C. (1 Hayw.) 103).
45. *Id.* (citing State v. Campbell, 30 S.C.L. (1 Rich.) 124, 125 (1844)).
46. *Id.* at 49–50.
47. *Id.* at 50.
48. *Id.*

prevent the injustice from trials like Raleigh's.[49] As a result, the Court rejected the notions that the Confrontation Clause applied only to in-court testimony and that its application to out-of-court statements introduced at trial was governed by the "law of evidence."[50] The Court qualified that its holding only included testimonial statements because casual statements bear little resemblance to the civil-law abuses the Confrontation Clause targeted.[51] Without attempting to formulate an exhaustive list of statements that should be classified as testimonial, the Court adopted the generic view that statements made under circumstances "which would lead an objective witness reasonably to believe that the statement would be available for use at later trial" would constitute testimonial hearsay.[52] For example, statements taken by police officers in the course of interrogations would be testimonial.[53]

Second, the Court concluded that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination.[54] This holding effectively overruled *Roberts*'s "indicia of reliability" test.[55] While the Court acknowledged several well-established exceptions to the hearsay rule by the end of the eighteenth century that allowed certain statements to be admissible notwithstanding confrontation, it concluded that most of these exceptions addressed nontestimonial statements.[56] The Court did not believe that the Framers intended these exceptions to apply to testimonial statements against a criminal defendant.[57]

4. Flaws of the *Roberts* Test

The *Crawford* Court concluded that the *Roberts* test had two major flaws: subjectivity and unpredictability.[58] The Court noted that reliability itself is an "amorphous, if not entirely subjective, concept"

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49. *Id.*

50. *Id.* at 50–51.

51. *Id.* at 51.

52. *Id.* at 51–52 (internal quotation marks omitted).

53. *Id.* at 52.

54. *Id.* at 53–54.

55. *See id.* at 60 (explaining that the *Roberts* test departs from historical understanding of the Confrontation Clause because it is both too broad and too narrow).

56. *See id.* at 56.

57. *Id.*

58. *Id.* at 62–63.

that depends heavily on which factors the judge considers and how much weight he accords each of them.[59]

The lower court proceedings leading up to *Crawford* exemplified both of the *Roberts* test's flaws.[60] Petitioner Michael Crawford had stabbed a man who allegedly tried to rape his wife, Sylvia.[61] At his trial, the State played Sylvia's tape-recorded statement to the police describing the stabbing, even though Washington State's marital privilege prevented Crawford from cross-examining his wife.[62] Crawford objected that admitting the evidence would violate his Confrontation Clause rights, but the trial court overruled the objection after finding that the statements displayed particularized guarantees of trustworthiness under the *Roberts* test.[63] The jury subsequently convicted Crawford of assault; however, the Washington Court of Appeals reversed the jury verdict after applying a nine-factor test and concluding that Sylvia's statements did not bear particularized guarantees of trustworthiness.[64] Finally, the Washington Supreme Court reinstated the conviction after finding that Sylvia's statements did in fact bear particularized guarantees of trustworthiness.[65]

The *Crawford* Court characterized the state courts' conflicting outcomes as a direct result of *Roberts*'s "unpredictable and inconsistent application."[66] During the police interrogation, Sylvia had initially implicated her husband in the stabbing and arguably undermined his self-defense claim.[67] Nonetheless, the trial court admitted her statement, listing several reasons why it was reliable.[68] The Washington Court of Appeals, however, listed several other reasons why the statement was not reliable.[69] And lastly, the Washington Supreme Court relied exclusively on the similarities between Sylvia and her husband's statements, while disregarding

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59. *Id.* at 63.

60. *Id.* at 65.

61. *Id.* at 38.

62. *Id.* at 40. The Washington State marital privilege generally bars a spouse from testifying without the other spouse's consent, but does not extend to a spouse's out-of-court statements admissible under a hearsay exception. *See* State v. Burden, 841 P.2d 758, 761 (Wash. 1992). Hence, the state invoked the hearsay exception for statements against penal interest to admit Sylvia's statements. WASH. R. EVID. 804(b)(3); *Crawford*, 541 U.S. at 40.

63. *Crawford*, 541 U.S. at 40.

64. *Id.* at 41 (noting that her statement contradicted one she had previously given).

65. *Id.* at 41–42 (noting that when a codefendant's confession is virtually identical to that of a defendant, it may be deemed reliable).

66. *Id.* at 66.

67. *Id.* at 65.

68. *Id.*

69. *Id.*

every other factor the lower courts had considered.[70] The *Crawford* Court concluded that this case provided a prime example of *Roberts*'s shortcomings.[71]

C. What Makes a Statement "Testimonial" in Nature?

While the *Crawford* Court did not spell out a comprehensive definition of "testimonial,"[72] the Court revisited the issue in *Davis v. Washington*. The *Davis* Court consolidated two domestic violence cases.[73] Pointing out the contextual differences in the statements made in each case, the Court used these two cases to illustrate the differences between testimonial and nontestimonial statements.

In the first case, a woman (McCottry) called 911 during a domestic disturbance with her ex-boyfriend Davis.[74] In the 911 recording, McCottry told the operator that Davis hit her and then ran out of the house.[75] The operator asked her to identify Davis, which she did.[76] At Davis's trial, the court admitted the recording of McCottry's exchange with the 911 operator without the opportunity for Davis to confront McCottry.[77] A jury subsequently convicted Davis of violating a domestic no-contact order.[78]

The Supreme Court affirmed the conviction, holding that statements are nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police to meet an ongoing emergency."[79] A 911 call fits this description because it generally describes current circumstances requiring police assistance.[80] The interrogation here differed from the one in *Crawford*, the Court noted, because McCottry was not describing past events, but rather events as they were happening.[81] Moreover, any reasonable listener would recognize that McCottry, unlike the witness Sylvia in *Crawford*, was facing an ongoing emergency.[82] A third difference was

70. *Id.* at 65–66.
71. *Id.*
72. *Id.* at 68.
73. Davis v. Washington, 547 U.S. 813, 817 (2006).
74. *Id.*
75. *Id.* at 817–18.
76. *Id.* at 818.
77. *Id.* at 819.
78. *Id.* at 819–20.
79. *Id.* at 822.
80. *Id.* at 827.
81. *Id.*
82. *Id.*

that the objective purpose of what the authorities asked here was to resolve an ongoing emergency rather than to learn about what happened in the past.[83] And lastly, Sylvia's organized interview at a station house was considerably more formal than McCottry's frantic phone call.[84] Thus, the Court concluded that the primary purpose of McCottry's interrogation was to enable police to meet an ongoing emergency.[85] Her statements could not be testimonial, for she was simply not testifying as a witness.[86]

The second case addressed in the *Davis* decision involved a reported domestic disturbance at the home of Hershel and Amy Hammon.[87] When the police arrived and found evidence of domestic assault, they took Amy aside and questioned her.[88] Amy proffered an affidavit stating that Hershel physically assaulted her and her daughter.[89] At Hershel's trial, the court admitted Amy's statements and affidavit despite her absence from the trial, holding that under state law, her affidavit was a "present sense impression" and her statements were "excited utterances."[90]

The Supreme Court reversed Hershel's conviction, holding that the statements here were similar to the testimonial statements in *Crawford*.[91] Specifically, the Court held that out-of-court statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.[92] Here, it was "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct."[93] The interrogation did not take place in an emergency setting, and the police questioning Amy were not trying to determine "what is happening," but "what happened."[94]

Although the interrogation was less formal than the one in *Crawford*, it was nonetheless formal enough for Amy's statements to

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83. *Id.*

84. *Id.*

85. *Id.* at 828.

86. *Id.*

87. *Id.* at 819.

88. *Id.*

89. *Id.* at 820.

90. *Id.* Federal Rules of Evidence 803(1) and (2) except from the hearsay rule present sense impressions and excited utterances regardless of whether the declarant is available as a witness or not.

91. *Id.* at 829, 834.

92. *Id.* at 822.

93. *Id.* at 829.

94. *Id.* at 829–30.

be considered testimonial.[95] The Court emphasized the fact that Amy's interrogation was conducted in a separate room, away from her husband, with the police officer documenting her replies for use in his investigation.[96] Her interrogation strongly resembled the civil-law ex parte examinations that the Confrontation Clause was intended to address.[97] Therefore, Hershel's Confrontation Clause rights were violated when he was denied the opportunity to cross-examine Amy at trial, regardless of whether Amy's statements fell under a hearsay exception.

In *Melendez-Diaz v. Massachusetts*[98] and *Bullcoming v. New Mexico*,[99] the Court further developed its "testimonial statement" analysis in the context of certifying laboratory test results. In *Melendez-Diaz*, the Court held that three certificates of analysis offered to show the results of a forensic test performed on the petitioner's seized substances were testimonial statements and hence required that the petitioner be given the opportunity to confront the analysts themselves.[100] After opining that this case was a "rather straightforward application" of *Crawford*, the Court rejected the respondent's argument that the analysts were exempt from confrontation because the certificates were results of "neutral, scientific testing" and were not "prone to distortion or manipulation."[101] The Court recited *Crawford*'s holding that the Confrontation Clause is a procedural rather than a substantive guarantee, for "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[102] Additionally, the Court noted that such "neutral scientific testing" might not be all that neutral because law enforcement agencies administer the majority of laboratories producing forensic evidence.[103] As a result, forensic analysts responding to a request from law enforcement officials "may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution."[104]

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95. *Id.* at 830.
96. *Id.*
97. *See id.*
98. 557 U.S. 305 (2009).
99. 131 S. Ct. 2705 (2011).
100. 557 U.S. at 310–11.
101. *Id.* at 312, 317.
102. *Id.* at 317–18 (quoting Crawford v. Washington, 541 U.S. 36, 62 (2004)).
103. *Id* at 318.
104. *Id.*

The Court reinforced *Melendez-Diaz*'s holding in *Bullcoming*. There, the prosecution also proffered a certificate of analysis of the results of the petitioner's blood test signed by an analyst who was unavailable at trial.[105] Except this time, the government tried to call a different analyst to verify the results.[106] The testifying analyst was familiar with the laboratory's testing procedures but had neither participated in nor observed the petitioner's blood test.[107] The Court again found the defendant's inability to confront the original analyst a Confrontation Clause violation.[108] In so holding, the Court rejected the New Mexico Supreme Court's rationales for allowing a third-party analyst to verify the petitioner's test results—namely, that the original analyst "was a mere scrivener" and that the analyst who testified at trial was an adequate "surrogate."[109] In response to the first rationale, the Court again emphasized that the obvious reliability of a testimonial statement does not dispense with the Confrontation Clause.[110] And in response to the second, the Court explained that such "surrogate" testimony does not allow for the petitioner to expose any "incompetence, evasiveness or dishonesty" on the certifying analyst's part.[111]

*D. History of the Language Conduit Theory and Its Application in the Sixth Amendment Context pre-*Crawford

The Ninth Circuit was the first federal court of appeals to invoke the language conduit theory in dealing with the admissibility of translated statements.[112] In *United States v. Ushakow*, the defendant challenged the admissibility of an interpreter's testimony regarding a conversation between the defendant and a drug dealer on hearsay grounds.[113] The court rejected this argument, noting that the interpreter "was translating and was merely a language conduit" between the defendant and the drug dealer.[114] Thus, the court held that the third party testimony fell within the same hearsay exception

105. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710–12 (2011).
106. *Id.* at 2712.
107. *Id.*
108. *Id.* at 2715.
109. *Id.* at 2714–16.
110. *Id.* at 2715.
111. *Id.*
112. United States v. Ushakow, 474 F.2d 1244, 1245 (9th Cir. 1973) (per curiam).
113. *Id.*
114. *Id.*

that allows admission of a defendant's own statements when the defendant and another are speaking the same language.[115]

The Second Circuit expanded on *Ushakow*'s reasoning in *United States v. Da Silva*.[116] There, the hearsay issue was more complicated. Instead of an interpreter testifying directly to what the defendant had said, a Drug Enforcement Administration ("DEA") agent testified to the interpreter's translations.[117] The court began its analysis by noting that had the DEA agent been able to speak with the defendant directly, his testimony of the defendant's statements would have been nonhearsay admissions under Rule 801(d)(2)(A).[118] But since the DEA agent could not speak to the defendant directly and could only testify to the interpreter's translations, there was an additional level of hearsay to consider.[119] The court resolved this extra hearsay step by invoking Rules 801(d)(2)(C) and (D).[120] Rule 801(d)(2)(C) excludes from the definition of hearsay a statement offered against an opposing party if the statement is made by a person whom the party authorized to make a statement on the subject.[121] Similarly, Rule 801(d)(2)(D) excludes from the definition of hearsay such a statement if made by the opposing party's agent or employee concerning a matter within the scope of that relationship while it existed.[122] The court concluded that when a court finds the translated statements reliable, an agency relationship exists between an interpreter and declarant that renders the former a mere language conduit.[123] In such circumstances, the interpreter's statements do not

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115. *Id.* The hearsay exception that the court was referring to is Federal Rule of Evidence 801(d)(2)(A), which excludes statements made by an opposing party, if offered against that party, from the definition of hearsay.

116. 725 F.2d 828 (2d Cir. 1983).

117. *Id.* at 829–30.

118. *Id.* at 831.

119. *Id.* When an interpreter is testifying directly to what the declarant said, as in *Ushakow*, there is only one hearsay jump: declarant → interpreter → court. In these cases, the jump can be resolved using Rule 801(d)(2)(A) if the statement is offered against the declarant. But when the interpreter is absent from trial and a third-party witness is forced to testify to the interpreter's translations, an additional hearsay jump is present. The hearsay diagram now becomes declarant → interpreter → third-party witness → court. While the first jump can still be resolved by Rule 801(d)(2)(A), a different hearsay exception is needed to resolve the second jump. *See* FED. R. EVID. 805 (requiring each hearsay jump to be covered by an exception in order for the statement to be admissible).

120. *Da Silva*, 725 F.2d at 831.

121. FED. R. EVID. 801(d)(2)(C).

122. *Id.* 801(d)(2)(D).

123. *Da Silva*, 725 F.2d at 832. The court also held that if the interpreter has sufficient capacity and there is no motive to misrepresent, an agency relationship will be presumed. *Id.* at 831–32 (quoting 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(C)[01], at 801–158 n.34 (1981)).

fall within the definition of hearsay pursuant to Rule 801(d)(2)(C) or (D).[124] After this case, many federal courts, including those in other circuits, followed the Second Circuit's usage of the language conduit theory.[125]

Of the pre-*Crawford* cases that dealt with Confrontation Clause challenges to translated, out-of-court statements,[126] courts largely used *Roberts*'s "indicia of reliability" test to support the applicability of the language conduit theory. For instance, in *United States v. Nazemian*, the Ninth Circuit held that the *Roberts* test required the government to prove that the *declarant's* statements were trustworthy.[127] It then applied the language conduit test to determine whether the defendant could properly be viewed as the declarant of the interpreter's translated statements.[128] In the end, it affirmed the district court's finding that the interpreter's statements were trustworthy after concluding that the factors of the language conduit test weighed in the government's favor, such that a "testimonial identity" existed between the defendant and the interpreter.[129]

Similarly, in *United States v. Koskerides*, the Second Circuit allowed the admission of a third party's testimony regarding a witness's translated statements against the defendant absent the opportunity for cross-examination.[130] The witness testified for the government through the aid of an interpreter but had passed away before the defendant's trial.[131] Although the interpreter was not present at trial either, the Second Circuit nonetheless admitted the testimony because it deemed the interpreter a mere language conduit and the witness's statements reliable.[132] The court concluded that a finding of reliability "sufficient to admit a statement against penal interest will normally satisfy Sixth Amendment concerns."[133] Thus, because of the broad judicial discretion that the indicia of reliability test gave to courts, the government often invoked the language

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124. *Id.* at 832.

125. *See* United States v. Nazemian, 948 F.2d 522, 525–27 (9th Cir. 1991); United States v. Beltran, 761 F.2d 1, 9 (1st Cir. 1985); United States v. Alvarez, 755 F.2d 830, 859–60 (11th Cir. 1985).

126. The defendant in *Da Silva* did not raise a Confrontation Clause challenge.

127. *Nazemian*, 948 F.2d at 525.

128. *Id.* at 526–28.

129. *Id.* at 527–28.

130. United States v. Koskerides, 877 F.2d 1129, 1134–36 (2d Cir. 1989).

131. *Id.* at 1134–35.

132. *Id.* at 1134–36.

133. *Id.* at 1136 (quoting United States v. Stratton, 779 F.2d 820, 830 (2d Cir. 1985)).

conduit theory to deny defendants the right to confront witnesses without violating the Sixth Amendment.

In the wake of *Crawford*, however, the language conduit theory's backbone appears weakened. As the *Da Silva* court explained, the theory serves as an evidentiary tool that provides a hearsay exception only when the translated statements are found reliable.[134] But with *Roberts*'s indicia of reliability test obsolete and *Crawford*'s new test in place, it is unclear whether the theory can survive Confrontation Clause challenges when the translated statements are testimonial in nature. The next Part will discuss the different ways three federal circuits have analyzed the language conduit theory post-*Crawford*.

III. ANALYSIS

Crawford created a circuit split over whether the language conduit theory is still a viable means of avoiding confrontation. Of the three circuits that have squarely addressed the issue post-*Crawford*, however, only the Ninth Circuit has continued to consistently apply the language conduit test in determining whether a defendant has a constitutional right to confront his interpreter.[135] The Eleventh Circuit, on the other hand, has rejected the test as inapplicable for purposes of the Confrontation Clause,[136] while the Fourth Circuit has declined to address whether the test can apply to testimonial hearsay.[137]

A. The Ninth Circuit Held that the Language Conduit Theory Is Not Clearly Inconsistent with Crawford

As the first circuit to squarely address the applicability of the language conduit theory to Confrontation Clause challenges post-*Crawford*, the Ninth Circuit upheld the theory's validity in *United*

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134. *See* United States v. Da Silva, 725 F.2d 828, 832 (2d Cir. 1983) (explaining that an agency relationship may properly exist only when "there is no motive to mislead and no reason to believe the translation is inaccurate").

135. *See* United States v. Orm Hieng, 679 F.3d 1131, 1139–41 (9th Cir. 2012) (holding that circuit precedent regarding the language conduit theory is not clearly inconsistent with the Supreme Court's recent Confrontation Clause jurisprudence).

136. United States v. Charles, 722 F.3d 1319, 1328–29 (11th Cir. 2013).

137. *See* United States v. Shibin, 722 F.3d 233, 248–49 (4th Cir. 2013) (rejecting the defendant's Confrontation Clause challenge to the admissibility of his interpreter's out-of-court, translated statement because *Crawford* "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted") (quoting United States v. Ayala, 601 F.3d 256, 272 (4th Cir. 2010)).

States v. Orm Hieng.[138] In *Nazemian*, the Ninth Circuit had developed several factors to consider when determining whether to attribute the interpreter's statements to the defendant and, as a result, to treat the interpreter and the defendant as identical for testimonial purposes.[139] These "relevant factors" included which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skills, and whether actions taken subsequent to the conversation were consistent with the statements as translated.[140] If the factors weighed in favor of the prosecution, then a witness could testify regarding statements made by the defendant through an interpreter without risking Confrontation Clause violations, because the defendant could not claim that he was denied the opportunity to confront himself.[141]

In response to the defendant's argument that *Crawford* overruled *Nazemian*, the *Orm Hieng* court countered that its language conduit jurisprudence was not "clearly irreconcilable" with the *Crawford* line of cases.[142] While acknowledging that *Crawford* made it clear that the Sixth Amendment requires confrontation to introduce testimonial statements as evidence, the court attempted to distinguish *Nazemian* on the basis that *Crawford* did not address the pertinent question of whether "when a speaker makes a statement through an interpreter, the Sixth Amendment requires the court to attribute the statement to the interpreter."[143] As a result, the court concluded that the Confrontation Clause simply did not apply because the defendant could not complain that he was denied the opportunity to confront himself.[144]

The court further acknowledged that its language conduit jurisprudence stems from "principles of the law of evidence" and that there is "some tension" between the *Nazemian* analysis and the *Crawford* line of cases.[145] By overruling *Ohio v. Roberts*, one could read *Crawford* as essentially "divorcing Sixth Amendment analysis from the law of evidence."[146] Nevertheless, the court refused to abandon *Nazemian* because *Crawford* and its progeny "continue[d] to

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138. *Orm Hieng*, 679 F.3d at 1141.

139. United States v. Nazemian, 948 F.2d 522, 527–28 (9th Cir. 1991).

140. *Id.* at 527.

141. *See id.* at 525–26 (explaining that "if the [translated] statements are viewed as Nazemian's own, they would constitute admissions properly characterized as nonhearsay under Federal Rule of Evidence 801(d)(2)(C) or (D)").

142. *Orm Hieng*, 679 F.3d at 1139–40.

143. *Id.* at 1140.

144. *Id.*

145. *Id.*

146. *Id.*

use vocabulary of the law of evidence in their Sixth Amendment analyses."[147] The court gave two examples of this: (1) the use of the term "hearsay" when referring to the type of out-of-court statements that may require confrontation and (2) the part of *Crawford*'s holding that allows admission of testimonial statements without confrontation if they are offered "for purposes other than establishing the truth of the matter asserted" (and therefore do not constitute hearsay).[148] Based on these aspects of *Crawford*, the court concluded that the *Crawford* line of cases "provide[s] no clear guide with respect to the interplay, if any, between the Confrontation Clause and the law of evidence."[149]

The Ninth Circuit's decision to uphold the language conduit theory reflects an emphasis on stare decisis.[150] The language conduit theory has long been an established judicial tool in American jurisprudence, and the court did not want to overrule decades of precedent in the wake of a case that did not directly address the constitutional validity of the theory. By waiting for a "further pronouncement from the Court,"[151] the Ninth Circuit chose to take a conservative approach by adhering to its precedent for the time being.

Nevertheless, the Ninth Circuit's primary stated justification for upholding the theory appears weak and superficial.[152] While acknowledging that *Crawford* could very well be read as divorcing the Sixth Amendment analysis from the law of evidence, the Ninth Circuit ultimately refused to endorse such a reading because *Crawford* and its progeny continued to "use vocabulary of the law of evidence in their Sixth Amendment analyses."[153] However, it is difficult to see why the use of evidentiary terms such as hearsay in the Sixth Amendment context would support the notion that the Court did not intend to fully separate the two analyses. The *Crawford* Court could simply have been trying to use a term familiar to the legal community to differentiate out-of-court statements that require confrontation from those that do not.

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147. *Id.*

148. *Id.* at 1140–41 (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)).

149. *Id.* at 1141.

150. *See id.* at 1139 ("As a three-judge panel, we are bound by circuit precedent unless the United States Supreme Court or an en banc court of our circuit has undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." (internal quotation marks omitted)).

151. *Id.* at 1141.

152. *But see* Powell, *supra* note 8, at 777 (supporting the Ninth Circuit's approach of adhering to judicial determinations regarding when the language conduit theory is properly applicable).

153. *Orm Hieng*, 679 F.3d at 1140.

B. The Fourth Circuit Declined to Rule on Whether the Language Conduit Theory Is Applicable to Testimonial Hearsay

In *United States v. Shibin*, the Fourth Circuit also validated the use of the language conduit theory in the context of a Confrontation Clause challenge.[154] There, the prosecution called FBI Agent Coughlin as a witness to rebut testimony by defense witness Ali.[155] Coughlin had conducted Ali's pretrial interviews with the assistance of an FBI interpreter and manually recorded what the interpreter said.[156] During his testimony at trial, Ali denied making some of the recorded statements.[157] After Ali concluded his testimony, the government called Coughlin as a rebuttal witness, and Coughlin testified that Ali did in fact make the statements he denied making.[158]

On appeal, defendant Shibin argued that the district court erred in admitting Coughlin's testimony because the interpreter's absence from trial prevented Shibin from being able to challenge, by cross-examination, the reliability of the out-of-court statements that the government offered against him.[159] The Fourth Circuit rejected Shibin's argument, however, because *Crawford* "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[160] Because the statements were introduced as prior inconsistent statements made by a witness rather than for their truthfulness, the court held that they did not constitute hearsay.[161] Therefore, the interpreter was nothing more than a mere language conduit.[162] *Shibin* thus leaves open the question of whether an out-of-court testimonial statement that *is* introduced to establish the truth of the matter asserted—testimonial hearsay—can be admitted under the language conduit theory.

Like the Ninth Circuit, the Fourth Circuit chose to take a somewhat conservative approach by deciding the case on narrow grounds instead of ruling on the continued validity of the language conduit theory. This court also seemed to place high value on stare

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154. United States v. Shibin, 722 F.3d 233, 248–49 (4th Cir. 2013).

155. *Id.* at 247–48.

156. *Id.* at 248.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004)).

161. *Shibin*, 722 F.3d at 248. Federal Rule of Evidence 613(b) allows the admission of extrinsic evidence of a witness's prior inconsistent statement if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.

162. *Shibin*, 722 F.3d at 248.

decisis, for it purposely avoided the difficult constitutional question of whether the language conduit theory can survive in the wake of *Crawford* and its progeny.[163] But by avoiding controversy, the court left behind much uncertainty. Future litigants will not know whether the theory is still a viable safeguard against confronting interpreters whose translated statements *would* ordinarily constitute testimonial hearsay. It seems inevitable that the Fourth Circuit will have to address the question eventually, unless the Supreme Court answers it first.

C. The Eleventh Circuit Shielded Confrontation Clause Challenges from the Reach of the Language Conduit Theory

In 2013, the Eleventh Circuit became the first and only circuit thus far to explicitly reject the language conduit theory in a Confrontation Clause challenge in the wake of *Crawford*.[164] In *United States v. Charles*, the defendant Charles had just arrived from Haiti when Miami International Airport security detained her on suspicion of using a fraudulent passport.[165] A Customs and Border Protection ("CBP") officer eventually used an over-the-phone interpreter service to interrogate Charles.[166] The interpreter translated the officer's questions from English to Creole for Charles and Charles's responses from Creole to English for the officer.[167] At trial, the officer testified to the truth of the interpreter's translated statements.[168] The government did not call the interpreter to testify, and the court convicted Charles.[169] On appeal, Charles argued that admitting the officer's testimony had violated her Sixth Amendment right to confront and cross-examine the interpreter.[170]

In reaching its decision that Charles had a Sixth Amendment right to confront the interpreter, the Eleventh Circuit explained that the interpreter, not Charles, was the declarant of the out-of-court testimonial statements that the government sought to admit through

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163. *See id.*

164. *See* United States v. Charles, 722 F.3d 1319, 1327 (11th Cir. 2013) ("Even though an interpreter's statements may be perceived as reliable [under the language conduit theory] and thus admissible under the hearsay rules, the Court, in *Crawford*, rejected reliability as too narrow a test for protecting against Confrontation Clause violations.").

165. *Id.* at 1320–21.

166. *Id.* at 1321.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1322.

the CBP officer.[171] The court emphasized the fact that the CBP officer testified as to the interpreter's statements, not those of Charles.[172] Given the nature of language interpretation, the interpreter's and Charles's statements are not one and the same.[173] Rather than interpreting word for word, interpreters convey meaning by reproducing the content of the ideas being expressed.[174] In addition, external forces, such as dialect and unfamiliarity of colloquial expressions, often frustrate the interpretation of semantic meaning.[175] Thus, language interpretation necessarily requires the interpreter to understand "the contextual, pragmatic meaning of a specific language" so that "much of the information required to determine the speaker's meaning is not contained in the words of the speaker, but instead is supplied by the listener."[176] Accordingly, the court held that Charles had the constitutional right to confront her interpreter in order to ascertain the accuracy of the translations.[177]

The Eleventh Circuit outright rejected the government's reliance on the circuit's precedent in *United States v. Alvarez*.[178] The government argued that under *Alvarez* and the language conduit theory, the defendant should be treated as the declarant of the interpreter's English statements for Sixth Amendment purposes.[179] In response, the court noted that *Alvarez* essentially adopted the Second Circuit's reasoning in *Da Silva* in holding that a witness's testimony about an interpreter's out-of-court translations was admissible as nonhearsay under Rules 801(d)(2)(C) or (D).[180] The *Alvarez* court thus viewed the interpreter, for hearsay purposes, as an agent of the defendant, thereby making the interpreter's translated statements of what the defendant said attributable to the defendant under the language conduit theory.[181]

However, the Eleventh Circuit noted that neither *Alvarez* nor *Da Silva* held that the defendant was the *declarant* of the interpreter's

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171. *Id.* at 1323.

172. *Id.* at 1324.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 1324–25; *see also* Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 43 (2009) ("The parties involved, the setting, and the social context change the meaning, connotation, and expected response stemming from identical language.").

177. *See Charles*, 722 F.3d at 1325.

178. *See id.* at 1325–29.

179. *Id.* at 1325.

180. *Id.*; *see* text accompanying notes 107–15 (explaining the *Da Silva* court's reasoning).

181. *Charles*, 722 F.3d at 1325.

statements.[182] Just as in *Alvarez*, the *Da Silva* court admitted a law enforcement officer's testimony of an interpreter's translations during an interrogation under Rules 801(d)(2)(C) or (D), not Rule 801(d)(2)(A).[183] The *Da Silva* court explained that had the law enforcement officer spoken directly with the defendant—and thus had been able to testify to the defendant's answers—his testimony would have been admissible as nonhearsay under Rule 801(d)(2)(A).[184] But because the officer could *not* directly testify to what the defendant had said, the court instead treated the interpreter as someone the defendant had authorized to make a statement on the subject or as an "agent" of the defendant.[185] As a result, the court admitted the testimony under Rules 801(d)(2)(C) or (D).[186]

From the holdings in *Da Silva* and *Alvarez*, the *Charles* court recognized a meaningful distinction between a defendant's own statements made directly to the testifying witness, which would be admissible under Rule 801(d)(2)(A), and ones that are merely *attributable* to the defendant when another person made them to the testifying witness.[187] Both types of statements are admissible but only under distinct hearsay rules.[188] Which rule authorizes the admission of the translated statements has important implications for identifying the rightful declarant of the statements (defendant or interpreter) and consequently for whether the defendant has a right to confrontation.[189]

The *Charles* court further opined that the characterization of an interpreter as a language conduit in *Da Silva* and *Alvarez* for purposes of the hearsay rules does not ensure the validity of such a characterization for purposes of the Confrontation Clause.[190] *Da Silva*'s rationale behind applying the language conduit theory—which *Alvarez* adopted—depended on the interpreter having no motive to mislead and there being no reason to believe that the translation was inaccurate.[191] In essence, the courts premised their use of the language conduit theory on an assessment of the interpreter's reliability and trustworthiness.[192] Although a statement's reliability

182. *Id.* at 1326.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1326–27.
188. *Id.* at 1327.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*

may be sufficient to admit it under the hearsay rules of evidence, the *Charles* court noted that *Crawford* clearly rejected reliability as too narrow a test for protecting against Confrontation Clause violations.[193] After examining the Supreme Court's post-*Crawford* jurisprudence, the *Charles* court concluded that where the admission of a declarant's testimonial statements is at issue, the Confrontation Clause permits admission only if the declarant is legitimately unable to testify and the defendant has had a prior opportunity to cross-examine the declarant.[194]

Of the three approaches taken thus far, the Eleventh Circuit's approach of removing the language conduit theory from Sixth Amendment analysis is most consistent with the spirit of *Crawford* and its progeny. The language of *Crawford* strongly suggests that the Court intended to divorce Sixth Amendment analysis from that of the law of evidence, at least in the testimonial hearsay context.[195] The Eleventh Circuit explained that as an evidentiary rule, the language conduit theory's purpose was to determine "competence and trustworthiness" of an interpreter's translated statements.[196] The factors courts typically employ in determining whether the theory is properly applicable also display such a purpose. Hence, when courts find such translated statements reliable and trustworthy for evidentiary purposes, courts have often admitted them under the rationale that they are fairly attributable to the defendants themselves.[197]

But, as *Crawford* and its progeny made clear, the standard for assessing reliability for Sixth Amendment purposes is stricter than that for assessing reliability for evidentiary purposes. While the law of evidence often gives judges the discretion to weigh different factors, the Sixth Amendment requires confrontation to introduce testimonial hearsay as evidence.[198] There is no good justification for relaxing the Sixth Amendment standard when dealing with translated statements that would normally constitute testimonial hearsay, or for empowering judges to make a reliability determination that would ultimately avoid the confrontation requirement altogether. Sensing this peculiarity, the Eleventh Circuit concluded that the admission of

193. *Id.*

194. *Id.* at 1328–29.

195. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("Where testimonial statements are involved, we do not think the Framers meant to leave Sixth Amendment protection to the vagaries of the rules of evidence.").

196. *Charles*, 722 F.3d at 1327 n.9.

197. *E.g.*, United States v. Nazemian, 948 F.2d 522, 525–28 (9th Cir. 1991).

198. *Crawford*, 541 U.S. at 67–69.

translated, testimonial statements required confrontation.[199] Moreover, it held that defendants may raise two distinct admission challenges to testimonial statements, one based on the law of evidence and one based on the Sixth Amendment.[200] In sum, the Eleventh Circuit approach strictly adheres to *Crawford* by explicitly divorcing Sixth Amendment analysis from that of the law of evidence.

The Eleventh Circuit approach also has the benefit of reducing uncertainty, unlike the Fourth Circuit's approach. Future litigants now know that when the government is seeking to introduce *any* testimonial statements against the defendant, the defendant has a constitutional right to cross-examine the witness who made those statements, even if the witness is a mere translator. In addition, the government now knows that the defendant can raise both an evidentiary and Confrontation Clause challenge, so it can prepare for both.

Despite its clarity, the constitutional right to cross-examine any witness who made testimonial statements that the prosecution is seeking to admit carries certain drawbacks as well. Interpreters may be less willing to translate out of fear that they may be required to testify. Relatedly, law enforcement may be less willing to request the aid of interpreters out of fear that some may falter when called to the stand. This could result in less accurate translations or increased costs associated with training and hiring more experienced translators. In the long run, the efficiency of the government's language interpretation system might suffer.

Another potential criticism of the Eleventh Circuit's approach is that it departs from stare decisis. Unlike the Ninth and Fourth Circuits, the Eleventh Circuit chose to depart from decades of precedent that had allowed judicial determinations of reliability for all out-of-court statements that the prosecution sought to admit.[201] Instead, it interpreted *Crawford* as requiring the opportunity for confrontation for all testimonial statements, including translated ones.[202]

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199. *Charles*, 722 F.3d at 1327–28.

200. *Id.* at 1328.

201. *E.g.*, United States v. Alvarez, 755 F.2d 830, 859–60 (11th Cir. 1985); United States v. Da Silva, 725 F.2d 828, 831–32 (2d Cir. 1983).

202. *Charles*, 722 F.3d at 1323.

Lastly, the *Charles* court could be faulted for deciding a difficult constitutional question that did not need to be resolved in deciding the case. Although the court held that the Creole interpreter's statements were testimonial and hence required confrontation, it ultimately ruled against the defendant because the district court's decision was not plain error.[203] Specifically, an error cannot be plain when there is no binding circuit or Supreme Court precedent directly addressing the issue.[204] Because the case could have been decided on this narrower ground (similar to the Fourth Circuit's approach in *Shibin*), the special concurrence argued that the majority went too far in deciding "a novel and difficult question of constitutional law in an area where the Supreme Court's jurisprudence is still evolving."[205] Declining to address an unnecessary constitutional question carries its own benefits, the special concurrence argued, for it pays tribute to the timeliness of the interests affected and avoids expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case.[206] Because of these potential weaknesses, one could argue that the Eleventh Circuit's approach is not optimal, despite the fact that it most closely embodies the spirit of *Crawford*.

IV. SOLUTION: LIMITING CONFRONTATION CLAUSE PROTECTION TO TESTIMONIAL HEARSAY

In order to resolve the circuit split in light of *Crawford*, it is necessary to establish whether judges still have the power to determine the admissibility of an interpreter's translated statements absent the opportunity for cross-examination. First, this Part will discuss why the answer must be no when such statements are testimonial. Next, it will discuss why the Ninth Circuit's reasoning behind vesting judges with such powers under the language conduit theory is weak and inconsistent with *Crawford*. Finally, based on *Crawford*'s rationale, this Note proposes a two-prong test to determine when out-of-court, translated statements should be afforded confrontation protection in the absence of the interpreter. Specifically, the court should first determine whether the statements are testimonial in nature. If so, the burden of proof should shift to the prosecution to show that the statements should nonetheless be admissible as nonhearsay. If the prosecution fails the second prong,

203. *Id.* at 1330–31.

204. *Id.* at 1331.

205. *Id.* at 1332 (Marcus, J., concurring).

206. *Id.* at 1334.

then *Crawford* should apply, meaning the statements of the absent interpreter are not admissible unless the defendant has had a prior opportunity for cross-examination.

A. Judicial Power to Admit Third-Party Testimony Absent the Opportunity for Confrontation Is Inconsistent with Crawford *When Such Statements Are Testimonial in Nature*

The language conduit theory is essentially an evidentiary tool used primarily to assess reliability and trustworthiness.[207] *Crawford*, however, explained that reliability is an "amorphous, if not entirely subjective, concept."[208] The historical background of the Confrontation Clause and *Crawford*'s case history illustrate the dangers of leaving such subjective determinations fully in judges' hands, an outcome the Court strongly believed was contrary to the Framers' intent.[209] The Framers developed the Sixth Amendment in response to these dangers, and it reflects a judgment that cross-examination is the best means for assessing the reliability of testimonial statements.[210]

As the inconsistent findings of the lower courts in *Crawford* demonstrate,[211] there is a risk that the broad judicial discretion in applying the factors of the language conduit test will lead to differing results. For instance, a common factor of the language conduit test evaluates the interpreter's qualifications and language skill.[212] How qualified and skilled an interpreter must be is not clear. Certain courts may find a degree in language translation sufficient despite little practical experience, while other courts may find a certified translator who recently obtained his license unqualified. The Confrontation Clause—as interpreted by *Crawford*—eliminates such a risk of judicial inconsistency by creating a categorical test that dictates when cross-examination is required.

Similarly, the factor of the language conduit test that inquires into whether the interpreter had any motive to mislead or distort can be indeterminate of reliability.[213] Subconscious biases pervade human perception. Confrontation allows the trier of fact to evaluate a witness's subtle biases and resulting reliability. The language conduit

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207. *Id.* at 1327; United States v. Orm Hieng, 679 F.3d 1131, 1131 (9th Cir. 2012).
208. Crawford v. Washington, 541 U.S. 36, 63 (2004).
209. *See supra* Part II.B.
210. *Crawford*, 541 U.S. at 61.
211. *Id.* at 65–67.
212. *E.g.*, *Orm Hieng*, 679 F.3d at 1139.
213. *Id.*

theory, on the other hand, places the entire burden on judges to identify these biases without ever meeting the witness.

Moreover, the language conduit factors that courts commonly apply do not necessarily show that the translated statements are reliable. As the *Charles* court explained, language interpreters do not interpret words, but concepts, because the nature of language translation involves many external forces.[214] These forces include differences in dialect and unfamiliarity with colloquial expressions, which frustrate the accurate interpretation of semantic meaning.[215] Given this inherent difficulty, even the most skilled and experienced interpreters might not be able to capture exactly what the defendant meant when dealing with certain subjects.[216] As a result, cross-examining the interpreter may be the better approach to ascertain exactly what the defendant said.

Having a third-party witness testify to the truth of an interpreter's out-of-court, translated statements is also analogous to having a third-party analyst testifying to the accuracy of a defendant's forensic tests.[217] In both instances, the original witness—interpreter or certifying analyst—who interacted directly with the defendant is absent from trial and replaced by a "surrogate," hindering the defendant's ability to expose any potential "incompetence, evasiveness or dishonesty" of the original witness via cross-examination.[218] Arguably, cases involving interpreters demand even stronger *Crawford* protection because, unlike certifying analysts who merely record test results, interpreters must take an active role in communicating the speaker's intended message when his words lack a direct translation.[219] And because the government often employs such interpreters, they may also feel pressured to "alter the evidence in a manner favorable to the prosecution."[220] All in all, application of the language conduit test, at least where testimonial statements are involved, is not consistent with the *Crawford* line of cases.

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214. United States v. Charles, 722 F.3d 1319, 1324 (11th Cir. 2013).

215. *Id.*

216. *See* Presentation, Holly Mikkelson, The Art of Working with Interpreters: A Manual for Health Care Professionals, Int. Interpretation Res. Center (1995), *available at* http://acebo.com/papers/artintrp.htm, *archived at* http://perma.cc/QN3E-RA9P (identifying use of technical terms and idioms as a common linguistic problem in health interpretation).

217. *See supra* Part II.C–D (discussing *Melendez-Diaz* and *Bullcoming*).

218. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2714–16 (2011) (explaining why a substitute analyst is insufficient to satisfy *Crawford*).

219. *See Charles*, 722 F.3d at 1324 (explaining that language interpreters typically convert concepts in the foreign language to equivalent concepts in the native language); McKeown & Miller, *supra* note 176, at 43 (explaining that in any speech setting, the parties work together to generate meaning).

220. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009).

B. The Ninth Circuit's Approach Is Inconsistent with Crawford's *Separation of the Sixth Amendment and Law of Evidence Analyses*

Although the Ninth Circuit recognized "some tension" between its language conduit analysis and the *Crawford* line of cases, the *Orm Hieng* court refused to stray from circuit precedent, for it did not believe that the *Crawford* line of cases "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable."[221] On the contrary, with regard to testimonial hearsay, *Crawford* did exactly that. The *Orm Hieng* court acknowledged that the language conduit theory "stems from principles of the law of evidence."[222] Yet, *Crawford* undoubtedly held that when testimonial hearsay is at issue, reliability must be assessed through confrontation.[223] Hence, by upholding the applicability of the language conduit theory to *all* third-party testimonies regarding the truth of an interpreter's out-of-court translations, the Ninth Circuit's approach is overbroad.

Despite the inconsistency with respect to *Crawford*'s holding on testimonial hearsay, the *Orm Hieng* court attempted to justify its holding by pointing out that *Crawford* and its progeny "continue to use the vocabulary of the law of evidence in their Sixth Amendment analyses," such as the word hearsay.[224] This reasoning is weak, however, for the mere use of evidence vocabulary gives little, if any, support to the conclusion that "the Court's recent Confrontation Clause cases provide no clear guide with respect to the interplay, if any, between the Confrontation Clause and the law of evidence."[225]

In fact, *Crawford*'s use of the term hearsay serves precisely to highlight the line between statements that require and those that do not require confrontation. For while testimonial hearsay is the Sixth Amendment's primary object, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."[226] Similarly, the Ninth Circuit's observation that courts may admit even testimonial statements without confrontation

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221. United States v. Orm Hieng, 679 F.3d 1131, 1139–40 (9th Cir. 2012) (quoting Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (internal quotation marks omitted)).

222. *Id.* at 1140.

223. Crawford v. Washington, 541 U.S. 36, 61 (2004).

224. *Orm Hieng*, 679 F.3d at 1140.

225. *Id.* at 1141.

226. *Crawford*, 541 U.S. at 53, 68.

if they are offered for nonhearsay purposes[227] underscores the *Crawford* distinction between statements that do and do not require confrontation. *Crawford*'s Confrontation Clause analysis was limited to testimonial hearsay, as the Court specifically noted that "[t]he Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[228] Therefore, contrary to the Ninth Circuit's conclusion, *Crawford* could hardly have been clearer with respect to the relationship between the Confrontation Clause and the law of evidence: where testimonial hearsay is at issue, prior cross-examination of an absent witness is required notwithstanding the statements passing any reliability tests grounded in the law of evidence.[229]

C. A Rule that Protects "Testimonial Hearsay" Translations from the Language Conduit Theory Is Most Consistent with the Spirit of Crawford

Crawford intended to limit the Confrontation Clause's reach to testimonial hearsay; interpreters' translations should receive the same degree of protection. In other words, when a third-party witness testifies in court to an interpreter's out-of-court translations, the defendant should have a right to cross-examine that interpreter only if the statements constitute "testimonial hearsay." Such a rule is not only consistent with the holdings in the *Crawford* line of cases, but also reflects the Framers' intent that the reliability of testimonial hearsay be assessed in a particular manner, namely under the crucible of cross-examination.[230]

Specifically, this Note proposes a two-step test to determine whether translated statements should be afforded confrontation protection when a third-party witness is testifying to those statements in the absence of the interpreter. First, the court must determine whether the statements are testimonial in nature in light of the *Crawford* line of cases. For instance, if the statements were made under circumstances objectively indicating that that the primary purpose of the police interrogation was to enable police to resolve an ongoing emergency (e.g., a 911 call), then the statements would be nontestimonial under *Davis*.[231] But if the statements were made under

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227. *Orm Hieng*, 679 F.3d at 1141.

228. *Crawford*, 541 U.S. at 59 n.9 (quoting Tennessee v. Street, 471 U.S. 409, 414 (1985)) (internal quotation marks omitted).

229. *Id.* at 53–54, 61.

230. *Id.* at 61.

231. Davis v. Washington, 547 U.S. 813, 822 (2006); *supra* Part II.C.

nonemergency circumstances, and the primary purpose of the police interrogation was to establish or prove past events potentially relevant to future criminal prosecution, then the statements would likely be testimonial.[232] Such testimonial statements would also include ex parte testimony at preliminary hearings, formalized testimonial materials such as affidavits and depositions, or, generally, statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial.[233]

If the court finds the statements to be testimonial, a presumption of inadmissibility applies. To rebut this presumption, the second prong of the proposed test shifts the burden of proof to the prosecution to show that the statements should nonetheless be admissible because they are not hearsay.[234] The prosecution can do so by showing either that the statements are not offered for their truth or that they fall within one of the Rule 801(d)(2) hearsay exemptions for party-opponent admissions.[235]

Of the Rule 801(d)(2) exemptions, the ones most likely to apply are Rules 801(d)(2)(C) and (D), under which statements are usually admitted if they pass the language conduit test.[236] This Note proposes, however, that the prosecution can only qualify for the 801(d)(2)(C) or (D) exemptions upon a showing that the defendant *affirmatively* authorized the interpreter to make a statement on his behalf. For instance, prior to interrogating a non-English-speaking defendant, the government agent could give the defendant a set of instructions informing him that, if he is tried, he has a right to cross-examine his interpreter in court, unless he waives this right by expressly

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232. *Davis*, 547 U.S. at 822; *supra* Part II.C.

233. *Crawford*, 541 U.S. at 51–52.

234. *Crawford*'s confrontation requirement only applies to testimonial hearsay. *See Crawford*, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985) (holding that an accomplice's confession, when offered for nonhearsay purposes, raised no Confrontation Clause concerns)).

235. The Federal Rule of Evidence 801(d)(1) exemptions from the hearsay definition would not apply because they require the declarant to testify and be available for cross-examination. Since the defendant is *not* the declarant of the interpreter's translations, and the proposed solution only deals with cases where the interpreter is unavailable to testify, the 801(d)(1) prerequisites will never be met. Some states treat Rule 801(d)(2) party admissions as exceptions to the hearsay rule rather than exemptions from the hearsay definition. *See, e.g.*, State v. Richardson, No. COA08-788, 2009 WL 678466, at *5 (N.C. Ct. App. Mar. 17, 2009). The prosecutors in these jurisdictions will not be able to use Rule 801(d)(2) to rebut the presumption of inadmissibility because *Crawford* subjects *all* testimonial hearsay to the confrontation requirement. *Crawford*, 541 U.S. at 54.

236. *E.g.*, United States v. Da Silva, 725 F.2d 828, 831 (2d Cir. 1983).

authorizing the interpreter to translate his statements as an agent on his behalf.[237] A showing of implicit consent is not enough.[238]

Evidentiary rules must yield when they would otherwise arbitrarily or disproportionately infringe on constitutional rights.[239] Since the Confrontation Clause specifically aims to protect the right of a defendant to confront the testimonial statements offered against him, if a statement is found to be testimonial, there should be a higher bar to its admissibility than under an ordinary analysis of the hearsay rules. Otherwise, prosecutors can continue to circumvent the Confrontation Clause, as in the pre-*Crawford* days, simply by invoking the reliability factors of the language conduit theory to mold the translated statements into nonhearsay. Such trivialization of the role of testimonial statements is largely inconsistent with *Crawford* and creates a high risk of abridging the constitutional right to confrontation in the long run.

If the prosecution fails to meet its burden of proof, then the translated statements would constitute testimonial hearsay, and *Crawford* would apply. Under such circumstances, the statements of an absent interpreter would not be admissible unless the interpreter was unavailable to testify *and* the defendant had had a prior opportunity to cross-examine him.[240] In these instances, the language conduit test should not be applicable because reliability must be determined in a specific manner: through confrontation.[241] On the other hand, if the prosecution meets its burden of proving that the translated statements are not hearsay, or if the court did not find the statements to be testimonial in the first place, then *Crawford* would not apply. Courts would then be free to utilize their own reliability tools, including the language conduit theory, to determine admissibility.

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237. Such a waiver is also consistent with a defendant's ability to waive his Sixth Amendment rights. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3 (2009).

238. *Cf. Da Silva*, 725 F.2d at 832 (holding that defendant's "conscious reliance" on interpreter's translation amounted to authorization for hearsay purposes).

239. *See* Rock v. Arkansas, 483 U.S. 44, 55, 62 (1987) (invalidating a per se state evidentiary rule that excluded all post-hypnosis testimony as impermissibly infringing on the defendant's right to testify on his own behalf); Chambers v. Mississippi 410 U.S. 284, 302 (1973) (invalidating a state hearsay rule on the ground that it abridged the defendant's right to "present witnesses in his own defense").

240. Crawford v. Washington, 541 U.S. 36, 53–54 (2004).

241. *Id.* at 61.

D. Potential Criticisms and Responses

One potential criticism of this solution is that it assumes an ex ante assessment of the hearsay and testimonial natures of the translated statements. In other words, the court should determine the nature of the translated statements before deciding whether such statements may be fairly attributed to the defendant himself under the language conduit theory. The *Orm Hieng* court attacked such an assumption by suggesting that the proper ex ante determination is whether the interpreter's translated statements may be fairly attributed to the defendant.[242] If so, then confrontation concerns would not arise, for the subsequent *Crawford* analysis regarding the testimonial nature of the statements would be limited to the original speaker, and the defendant cannot complain that he was denied the opportunity to confront himself.[243] Thus, selecting the initial inquiry has important consequences, and it is not clear why courts should address the nature of the translated statements before the identity of the original speaker.

Although no court has squarely addressed this issue aside from the Ninth Circuit, assessing the nature of the translated statements ex ante is more consistent with the spirit of *Crawford*. *Crawford* held that the reliability of all testimonial hearsay must be assessed via confrontation,[244] so, logically, the first issue that should be resolved is whether the translated statements are hearsay and testimonial. Beginning with the speaker's identity, in an attempt to avoid the confrontation issue altogether, undermines *Crawford*'s intent to divest judges of the power to assess the reliability of testimonial statements.[245] By first determining that an interpreter's translated statements may be fairly attributed to the defendant without regard to whether the statements are hearsay or testimonial in nature, courts could bypass *Crawford*'s explicit holding and make certain reliability determinations forbidden by the Sixth Amendment. *Crawford* could not have intended such a loophole.

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242. United States v. Orm Hieng, 679 F.3d 1131, 1140 (9th Cir. 2012).

243. *Id.* at 1139; United States v. Nazemian, 948 F.2d 522, 525–26 (9th Cir. 1991).

244. 541 U.S. at 61–62.

245. *See id.* at 61 ("Admitting [testimonial] statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.").

Another potential criticism of this solution is that it may actually leave too many types of translated statements outside the ambit of confrontation protection. Specifically, few translated statements may pass the second prong, for after hearing the *Miranda*-type instructions, many defendants are likely to authorize an interpreter to make statements on their behalf and consequently waive their confrontation rights. This is due to the defendants' fear that, despite instructions to the contrary, not authorizing an interpreter to make statements on their behalf might give rise to an inference of guilt.

Even if the proposed solution has this effect, however, *Crawford* never indicated that nonhearsay statements should be afforded the same degree of constitutional protection as hearsay statements. The hearsay exemptions are clearly stated in the Federal Rules of Evidence and have long been invoked to admit statements that would likely otherwise be inadmissible as hearsay. The fact that this proposed solution might end up classifying and admitting a high percentage of translated statements as nonhearsay is thus not contrary to the historical norm. On a similar note, this solution may also ensure the survival of the language conduit theory in a large number of cases, an ideal result because courts would not have to completely abandon such a pervasive and firmly grounded judicial doctrine. By selectively preserving the language conduit theory while requiring confrontation in the remaining "testimonial hearsay" cases, this proposed solution takes a narrow approach in safeguarding the spirit of *Crawford*.

V. CONCLUSION

In overruling *Roberts*'s indicia of reliability test and affording defendants an opportunity to cross-examine witnesses who make testimonial statements against them, *Crawford*'s holding casts doubt on the language conduit theory. While the Ninth Circuit does not believe that applying the theory to all third-party testimony regarding out-of-court, translated statements would clearly run afoul of *Crawford*, the Eleventh Circuit now requires confrontation when such statements are testimonial in nature. In order to resolve this split, courts should adopt a two-prong test to determine when a defendant has a right to confront an interpreter. First, courts should determine whether the statements are testimonial in nature. If so, the burden of proof would shift to the prosecution to show that the statements should nonetheless be admitted as nonhearsay. Such a rule is likely to

preserve the language conduit theory in a large number of cases while simultaneously promoting *Crawford*'s key values.

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