

Revitalization Of The Confrontation Clause

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“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”¹

I. Introduction: A Return To The Framers’ Wisdom

Can you protect your client from hearsay? The Supreme Court has announced its response in *Crawford v. Washington*²: testimonial statements demand Confrontation. The result is a fundamental change in the way evidence can be admitted in criminal trials.

Our Founding Fathers considered the right of confrontation to be essential to justice. This right, also known as the Confrontation Clause, has long been reinforced by the hearsay rule, which traditionally disallowed any statement made outside the proceeding when offered into evidence by someone other than the declarant to prove the truth of the matter asserted. Over time, however, numerous exceptions to the hearsay rule have eroded the right of confrontation.

Signaling a return to the Framers’ wisdom, *Crawford v. Washington*³ has confirmed a defendant’s right of confrontation and established new criteria for determining whether that right has been violated. Prior to *Crawford*, admissibility of a hearsay statement was contingent on its meeting a sufficient “indicia of reliability.”⁴ After *Crawford*, admissibility hinges on whether the hearsay statement is *testimonial* in nature. If deemed testimonial, evidence can only be admitted if the defendant is given a prior opportunity to cross-examine the witness.

A. Case Facts and Procedural History

Petitioner Michael Crawford claimed to have acted in self-defense after he was charged with assault and attempted murder. To discredit his

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1. U.S. CONST. amend. VI (emphasis added).
2. 124 S. Ct. 1354 (U.S. 2004).
3. 124 S. Ct. 1354 (U.S. 2004).
4. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

claim of self-defense, the State of Washington introduced a recorded statement made by Crawford's wife during a custodial, police interrogation. Although Crawford's wife did not testify at the trial, the jury heard her tape-recorded statement. Crawford argued this admission violated his Sixth Amendment right "to be confronted with the witnesses against him."⁵

Relying on the test set forth in *Ohio v. Roberts*,⁶ the state introduced the recording as a statement against penal interest.⁷ Under the *Roberts*' test, evidence is admissible if it falls within either a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."⁸ The state argued that no Sixth Amendment violation occurred because the statement bore the "adequate indicia of reliability."⁹

On appeal, the introduced statement was found unreliable and Crawford's conviction was overturned.¹⁰ But the Washington Supreme Court upheld the conviction, reasoning that while the statement was not a "firmly rooted exception," it met the *Roberts*' test because it was sufficiently interlocked with defendant's statements to the police.¹¹ The U.S. Supreme Court disagreed, holding 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."¹²

B. The Confrontation Clause

The right of confrontation appeared early in states' Declarations of Rights,¹³ and three years after the Sixth Amendment was adopted, *State v. Webb*¹⁴ held that "[i]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."¹⁵ Since then, firmly rooted, as well as statutory, exceptions have become sanctioned by the *Roberts* rule which allows hearsay offered as substantive evidence if it meets "particularized guarantees of trustworthiness."¹⁶

5. U.S. CONST. amend. VI.

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

7. *Crawford v. Washington*, 124 S. Ct. 1354, 1358 (U.S. 2004).

8. *Ohio v. Roberts*, 448 U.S. at 65-66.

9. *Crawford*, 124 S. Ct. at 1358; *Roberts*, 448 U.S. at 66.

10. *State v. Crawford*, 107 Wash. App. 1025 (Wash. Ct. App. 2001).

11. *State v. Crawford*, 147 Wash. 2d 424, 439 (Wash. Sup. Ct. 2002).

12. *Crawford*, 124 S. Ct. at 1374.

13. *Crawford*, 124 S. Ct. at 1362 (Virginia, Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire).

14. *Crawford*, 124 S. Ct. at 1363, citing 2 N.C. 103 (1794) (deposition read against a defendant had to be taken in the accused's presence).

15. *Crawford*, 124 S. Ct. at 1363.

16. *Ohio v. Roberts*, 448 U.S. at 66.

Writing for the majority, Justice Scalia reached two inferences in *Crawford*. First, the Confrontation Clause was directed at the “civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”¹⁷ Second, the Framers did not want *testimonial* statements by non-appearing witnesses introduced at trial unless the witness was unavailable and the accused had a prior opportunity to conduct cross-examination.¹⁸ Consistent with the common law tradition of adversarial testing, Scalia rejected restricting the Confrontation Clause solely to in-court testimony, because leaving out-of-court statements to the law of evidence makes the clause powerless to prevent even the most “flagrant inquisitorial practices.”¹⁹

II. Discussion

A. From Reliability to Testimonial

Finding that its own decisions were usually faithful to the meaning of the Confrontation Clause, but not always its rationales, the *Crawford* Court rejected the reliability test of *Roberts* because it was both too broad and too narrow. *Roberts* applied the same test, regardless if the hearsay was *ex parte*. Because this not only allowed admission of “reliable” statements, but also resulted in “close constitutional scrutiny” where unnecessary, it was too broad.²⁰ And the admission of “*ex parte* testimony upon a mere finding of reliability,” made *Roberts* too narrow.²¹ The *Crawford* approach instead focuses on why the statement was made, thereby resolving the subjectivity and inconsistencies presented by *Roberts*.

Crawford’s holding can thus be summarized as follows: if a witness is *not* available to appear at trial, testimonial evidence is admissible against the criminal defendant *only if* the government made reasonable efforts to procure the witness,²² *and* there was a prior opportunity for cross-examination.²³

B. Post-Crawford Interpretations

Since the Court left a definition of testimonial evidence “for another day,” the question remains: What is testimonial evidence?²⁴ Testimonial evidence is commonly understood to be a “person’s testimony offered to

17. *Crawford*, 124 S. Ct. at 1363.

18. *Crawford*, 124 S. Ct. at 1365.

19. *Crawford*, 124 S. Ct. at 1364.

20. *Crawford*, 124 S. Ct. at 1369.

21. *Crawford*, 124 S. Ct. at 1370.

22. *Cooper v. McGrath*, 314 F. Supp. 2d 967, 985 (Cal. Dist. Ct. 2004).

23. *Crawford*, 124 S. Ct. at 1369.

24. *Crawford*, 124 S. Ct. at 1374.

prove the truth of the matter asserted.”²⁵ Despite its unwillingness to define testimonial, the *Crawford* Court said it “[a]pplies 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.”²⁶

Testimonial and Nontestimonial Evidence

The subsequent application and interpretation of *Crawford* by the lower courts offers a range of opinions. Some of the decisions appear to fall neatly within the *Crawford* guidelines, while others test the limits and lend support to the Chief Justice’s claim that failure to define “testimonial” would “cause interim uncertainty.”²⁷

For example, business records, statements made in furtherance of a conspiracy, and dying declarations were found to be nontestimonial.²⁸ A drug laboratory report was not deemed testimonial, but rather “routine documentary evidence.”²⁹

Statements made while in custody,³⁰ or during a *Terry* stop,³¹ are testimonial. A videotaped statement to police and a statement to a social worker, both testimonial, have rendered California’s hearsay exception for statements made to law enforcement officials by elderly or dependent adults³² unconstitutional.³³ A co-defendant’s statement against interest in response to in-home questioning³⁴ and a plea allocution by a co-conspirator have been deemed testimonial.³⁵ Declarations in support of a temporary restraining order have also been found testimonial.³⁶ These holdings offer little surprise or controversy in light of *Crawford*.

Law Enforcement and Government Questioning

When it comes to statements given to the police, or other government officials, *Crawford*’s application requires closer scrutiny since these state-

25. Black’s Law Dictionary 600 (8th ed. 2004).

26. *Crawford*, 124 S. Ct. at 1374.

27. *Crawford*, 124 S. Ct. at 1374.

28. *Crawford*, 124 S. Ct. at 1367.

29. *People v. Johnson*, 121 Cal. App. 4th 1409, 1413 (Cal. Ct. App. 2004).

30. *Terry v. Ohio*, 392 U.S. 1 (U.S. 1968); *Hiibel v. Sixth Judicial Dist. Court*, 124 S. Ct. 2451, 2463 (U.S. 2004).

31. *United States v. Nielsen*, 371 F.3d 574, 581 (9th Cir. 2004).

32. Cal. Evid. Code § 1380.

33. *People v. Pirwani*, 119 Cal. App. 4th 770, 774 (Cal. Ct. App. 2004).

34. *U.S. v. Saner*, 313 F. Supp. 2d 896, 902 (Ind. Dist. Ct. 2004).

35. *U.S. v. McClain*, 377 F.3d 219, 221-22 (2d Cir. 2004).

36. *People v. Pantoja*, 122 Cal. App. 4th 1, 9 (Cal. Ct. App. 2004).

ments are the type which present the risk of “civil-law abuses the *Confrontation Clause* targeted.”³⁷ “Just as various definitions of ‘testimonial’ exist, one can imagine various definitions of ‘interrogation’ . . .”³⁸ This variance requires that the focus be directed to the stage of the investigation and whether responding officers have moved beyond assessing the circumstances and securing the scene into an investigative phase.³⁹

While statements made during a criminal investigation will likely be considered testimonial, it does not necessarily follow that all preliminary information is testimonial. When the police responded to a domestic violence call, their initial questioning of the victim wife led to her husband’s arrest. The Court did not consider her statements to be testimonial, but rather excited utterances, reasoning that “[w]hatever else police ‘interrogation’ might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred.”⁴⁰

A California Appellate Court agreed, finding that statements by a domestic violence victim to the responding officers were not testimonial because the officers “[w]ere not producing evidence in anticipation of a potential criminal prosecution”⁴¹ But the victim’s second statement to a female officer, summoned by responding officers in an effort to get a “more detailed statement” from the victim, was testimonial.⁴² The *Kilday* Court noted “*Crawford’s* emphasis on purposeful conduct by government officers,” but was also careful to state that they were not adopting a “blanket rule.”⁴³ Rather, analysis must be made on a case-by-case basis.⁴⁴ The *Sisavath* court posed the question as “whether an objective observer would reasonably expect the statement to be *available for use* in a prosecution.”⁴⁵ There, responses given by a child abuse victim to structured police questioning were found testimonial.⁴⁶

The California Supreme Court, apparently noting inconsistencies for statements to law enforcement, has granted review of a California Appellate Court opinion which found a statement made to a physician to be non-testimonial even if the victim believed it would be repeated to law en-

37. *Crawford*, 124 S. Ct. at 1364.

38. *Crawford*, 124 S. Ct. at 1365.

39. *People v. Kilday*, 123 Cal. App. 4th 406, 422 (Cal. Ct. App. 2004).

40. *Fowler v. State*, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004). *But see* *People v. Kilday*, 123 Cal. App. 4th at 422.

41. *Kilday*, 123 Cal. App. 4th at 422.

42. *Kilday*, 123 Cal. App. 4th at 419.

43. *Kilday*, 123 Cal. App. 4th at 419-22.

44. *Kilday*, 123 Cal. App. 4th at 422.

45. *People v. Sisavath*, 118 Cal. App. 4th 1396, 1402-03 (Cal. Ct. App. 2004).

46. *Sisavath*, 118 Cal. App. 4th at 1402-03.

forcement.⁴⁷ Pushing the outer limits of *Crawford*, the same court further held that statements to a deputy at the hospital were not testimonial as there was “no particular formality to the proceedings,” and “[n]o suspect was under arrest.”⁴⁸

3. *Emergency Calls to Police Dispatchers and 911*

The interpretation of testimonial becomes even murkier when applied to statements in emergency calls. Where the declarant is merely seeking help, statements to police dispatchers have been found nontestimonial.⁴⁹ Calls to 911 to report a crime in progress have also been found nontestimonial.⁵⁰ A domestic violence victim’s statements in the 911 call and to police at the scene “qualified as spontaneous statements and were not testimonial statements under *Crawford*.”⁵¹ New York State has issued two decisions in conflict on this issue.⁵²

Thus, *Crawford* allows for elicitation of a general rule: testimonial evidence is any statement given in response to police interrogation;⁵³ “affidavits, depositions, prior testimony, or confessions;”⁵⁴ or any statement made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at trial.

C. Retroactivity and *Crawford*

“[T]he new rule articulated in *Crawford* is procedural in nature and does not apply retroactively”⁵⁵ And revocation hearings are unaffected by *Crawford*: the right to confront a witness in a revocation hearing is a mechanism of due process, not the Sixth Amendment.⁵⁶

III. Conclusion

Crawford constitutes a fundamental change in the way hearsay evidence will be used in criminal trials. The initial question is whether the

47. *People v. Cage*, 120 Cal. App. 4th 770, 782 (Cal. Ct. App. 2004).

48. *Cage*, 120 Cal. App. 4th at 783-84.

49. *Leavitt v. Arave*, 371 F.3d 663 (U.S. Ct. App. 2004).

50. *People v. Caudillo*, 122 Cal. App. 4th 1417, 1440 (Cal. Ct. App. 2004). *But see* *People v. Cortes*, 4 Misc. 3d 575, 579 (N.Y. Misc. 2004).

51. *People v. Corella*, 122 Cal. App. 4th 461, 464 (Cal. Ct. App. 2004). *But see* *People v. Kilday*, 123 Cal. App. 4th at 422.

52. *See* *People v. Moscat*, 3 Misc. 3d 739, 745 (N.Y. Misc. 2004); *People v. Cortes*, 4 Misc. 3d 575, 579 (N.Y. Misc. 2004).

53. *Crawford*, 124 S. Ct. at 1365.

54. *Crawford*, 124 S. Ct. at 1364.

55. *Hiracheta v. Att’y Gen.*, 105 Fed. Appx. 937, 938 (9th Cir. 2004). *See also* *Evans v. Luebbbers*, 371 F.3d 438, 444-45 (8th Cir. 2004).

56. *U.S. v. Barazza*, 318 F. Supp. 2d 1031, 1034 (Cal. Dist. Ct. 2004). *But see* *Ash v. Reilly*, No. 03-2007, 2004 U.S. Dist. LEXIS 24451, at 16, 17 (D.D.C. Dec. 7, 2004).

statement sought to be introduced is testimonial; if so, the defendant must have been given an opportunity to cross-examine the declarant. What might initially appear to be a return to the simplicity of the Framer's wisdom is causing its share of uncertainty, and *Crawford's* implications are yet to be seen.