

WINNING STRATEGIES SEMINAR



**Crawford: A Sixth
Amendment Revolution in
the Use of Hearsay at Trial**

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

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I. Evolving Confrontation Clause standards.

- A. *Ohio v. Roberts*, 448 U.S. 56 (1980): evidence was admissible over a Confrontation Clause challenge if it fell within a firmly rooted exception to the rule against hearsay or if it otherwise bore sufficient indicia of reliability.
- B. *Crawford v. Washington*, 541 U.S. 36 (2004): a prior **testimonial** statement is inadmissible in a criminal trial unless (1) the defendant had a prior opportunity to cross examine the declarant and (2) the declarant is unavailable to testify.

Note that *both* are required.

II. What is testimonial?

The *Crawford* Court offered at least three possible formulations, demonstrating both its concern with the Government's role in extracting ex parte statements and with a declarant's reasonable expectations about how such statements would be used:

- A. Ex parte in-court testimony or its functional equivalent (affidavits, custodial examinations, prior testimony, or pretrial statements that the *declarant would reasonably expect to be used prosecutorially.*) *Crawford*, 541 U.S. at 51–52; *see also id.* (“for use at later trial”).
- B. Extrajudicial statements contained in formalized materials, such as affidavits, depositions, prior testimony, or confessions. *White v. Illinois*, 502 U.S. 346, 365 (1992), *quoted at Crawford*, 541 U.S. at 52.
- C. Statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Crawford*, 541 U.S. at 52.

III. Statements that are testimonial, under *Crawford*:

- A. Prior testimony at a preliminary hearing, before a grand jury, or at a former trial.
- B. Most police interrogations.
 - 1. Note that “interrogation” is meant in its colloquial sense, rather than any

technical, legal sense.

2. *Davis v. Washington*, 547 U.S. 813 (2006), provides much elaboration on *Crawford* standards for interrogations.

a. Interrogations are testimonial when the circumstances, viewed objectively, indicate there is no ongoing emergency and that the primary purpose of the encounter is to establish or prove past events potentially relevant to criminal litigation.

b. Interrogations are not testimonial if the circumstances objectively indicate that the primary purpose is to enable police to meet an ongoing emergency.

c. It is unclear from whose perspective the purpose of the statements are to be viewed, but the Court held that, in the final analysis, it's the answers, not the questions, that determine whether the statements are testimonial.

d. 911 calls may be either testimonial or nontestimonial.

e. Statements made in absence of interrogation may be testimonial.

f. Persons who are not technically law enforcement officers may be "agents" sufficient to implicate the Confrontation Clause.

g. Court again leaves unresolved the significance of the level of formality of the encounter, although it is clearly a factor.

C. Allocutions, guilty pleas, and other formal admissions of guilt. *Crawford*, 541 U.S. at 64.

D. Accomplice confessions. *Crawford*, 541 U.S. at 58.

IV. Definitely/probably not testimonial:

A. Co-conspirator statements made in furtherance of a conspiracy. *Crawford*, 541 U.S. at 56.

B. Statements not offered for their truth. *Crawford*, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409 (1985)).

1. Examples: statements relied on by experts to formulate opinions or statements supposedly offered to explain officers' actions.

2. Argument: Under *Street*, the prosecutor should have to show that he or she has a real and genuine need for the hearsay and that the evidence cannot be

redacted to blunt the risk of improper use. See Jeffrey Fisher, *The Truth About the 'Not for the Truth' Exception to Crawford*, 32 FEB. CAMP. 18 (Jan./Feb. 2008).

- C. Business records. *Crawford*, 541 U.S. at 56. But see *Johnson v. State*, 929 So.2d 4 (Fla. App.–2d. Cir. 2005); see also below, records and reports.

V. What's being debated or left for debate.

- A. Statements made by child witnesses/victims.

- 1. To whom was the statement made?

- a. If to family members or other private entities, majority of courts say nontestimonial. See, e.g., *Pantano v. State*, 138 P.3d 477 (Nev. 2006), cert. denied, 127 S.Ct. 957 (2007).
- b. If to police, usually testimonial.
- c. Medical personnel: can depend on timing, primary purpose. Compare *United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2005), cert. denied, 127 S.Ct. 42 (2006) (statements made for diagnosis/treatment presumptively nontestimonial), with *State v. Snowden*, 867 A.2d 314 (Md. 2005) (interviews conducted for express purpose of preserving children's testimony elicited testimonial statements).

- 2. From whose perspective do we judge the purpose of the statement?

- a. at what age?

- 3. What about mixed-purposes statements?

- B. Dying declarations. *Crawford* says these may be *sui generis* -- an exception without a principled basis. See *People v. Monterroso*, 101 P.3d 956 (Cal. 2004) (dying declarations excepted from *Crawford* rule).

- C. Records and Reports: What did *Crawford* mean regarding business records, what doesn't fit within the exception, and how far does the exception extend?

- 1. Lab reports: *Commonwealth v. Melendez-Diaz*, 870 N.E.2d 676 (Mass.App.Ct. 2007), cert. granted, 128 S.Ct. 1647 (2008) (certificates of drug analysis not testimonial); *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), cert. filed (Dec. 14, 2007) (toxicology data is not testimonial).

2. Various documents found in an alien defendant's A-file: *See, e.g., United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005) (certificate of nonexistence is not testimonial, even though prepared for litigation).
3. If the Government's theory is that the document is a business record and *Crawford* excludes business records, argue that this exception does not include documents prepared for litigation. *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Thomas v. United States*, 914 A.2d 1 (D.C. 2006), *cert. denied*, 128 S.Ct. 241 (2007); FRE 803(6). *But see United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006) (lab report admissible under business-record exception; whether or not prepared in advance of litigation is important, but not dispositive, factor).
4. If the Government's theory is that the document is a public record under FRE 803(8), argue that matters observed by police officers are excluded against the defendant and that, under *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), documents disqualified as public records cannot be "backdoored" as business records.

VI. Testimonial evidence is inadmissible unless:

- A. The Government can prove witness was unavailable. *See Barber v. Page*, 390 U.S. 719, 722–25 (1968) (setting out unavailability standard).
 1. Some examples of an unavailable witness include:
 - a. A dead witness.
 - b. A witness who has asserted a valid privilege, such as the marital privilege asserted in *Crawford*.
 - c. Perhaps a witness who is incompetent to testify. *See Idaho v. Wright*, 497 U.S. 805, 816 (1990) (assuming, without deciding, that incompetency establishes unavailability).
 - d. A witness whom the Government, using good-faith efforts, cannot locate or bring to trial.
 - 1) Witness is not unavailable if Government allowed him to abscond. *Motes v. United States*, 178 U.S. 458, 470-71 (1900).
 - 2) Government allowed witness to return to Israel on witness's "promise" that he would return to testify; witness refused to return. Court held Government must use diligent effort to procure witness. *United States v. Yida*, 498 F.3d 945 (9th Cir. 2007).

2. May the Government merely point out to the defendant that the witness is available to be subpoenaed, without putting the witness on the stand itself? *See Lowery v. Collins*, 988 F.2d 1364, 1370 (5th Cir.1993) (Government may not put defendant to choice between confrontation and right to put Government to its burden of proof). *But see State v. Campbell*, 719 N.W.2d 375 (N.D. 2006) (upholding statute allowing introduction of lab report if defendant fails to subpoena it), *cert. denied*, 127 S.Ct. 1150 (2007).
- B. The witness was subject to cross examination.
1. Must be adequate; at a prior trial or preliminary hearing, for example, where defendant had counsel.
 - a. FRE 804(b)(1) requires that the defendant have had a opportunity and similar motive to develop the testimony in the prior proceeding.
 2. If there was no counsel at the preliminary hearing (*Pointer v. Texas*, 380 U.S. 400, 406–408 (1965)), or the testimony came from a prior trial in which the defendant was not a party (*Kirby v. United States*, 174 U.S. 47, 54–57 (1899)), opportunity would not be adequate. *Always* make a record if you feel cross examination is not adequate, for possible future proceedings.

VII. Confrontation Clause challenges are subject to a harmless error analysis. Because the error is a constitutional one, the Government bears the burden of showing that it was harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986). Harm determinations are made based on several factors:

- A. The importance of the testimony.
- B. Whether there was a prior opportunity to cross examine. Note that the question of cross-examination will thus arise twice—once to determine whether an error has occurred and, again, to determine whether the error is harmless. Remember that, for the first question, cross examination is not, by itself, sufficient; the witness also must be unavailable.
- C. Presence or absence of corroborating witnesses.
- D. Overall strength of the Government’s case.

VIII. Forfeiture.

Confrontation rights can be forfeited if the defendant’s wrongdoing renders the witness unavailable. *Crawford*, 541 U.S. at 62.

- A. *Giles v. California*, 128 S. Ct. 2678 (2008)

Forfeiture does not apply if defendant did not intend to silence witness

B. What is the standard of proof for forfeiture?

IX: Retroactivity: *Crawford* is not retroactive. *Whorton v. Bockting*, 127 S.Ct. 1173 (2007).

X: Non-trial contexts: Although some have argued that matters that will increase a defendant's sentence beyond a statutory or guideline maximum sentence should be subject to Confrontation Clause protections, no court has agreed.