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Confrontation Clause Reshaped: *Crawford v. Washington*

name redacted
Legislative Attorney
American Law Division

Summary

In *Crawford v. Washington*, 124 S.Ct. 1354 (2004), the United States Supreme Court held that to admit hearsay testimonial evidence in criminal prosecutions the Sixth Amendment, the Confrontation Clause, requires that (1) the witness be unavailable *and* (2) the accused had a prior opportunity to cross-examine the witness. This decision overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), where the Supreme Court had advanced a test requiring only that the statement from unavailable witnesses fall within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness" in order to be admissible. In *Crawford*, the Court conducted an historical analysis of the Confrontation Clause concluding that a prior opportunity to cross-examine was a necessary condition for testimonial statements to be admitted against an accused. The Court held that admitting statements on a judicial finding of reliability was contrary to constitutional requirements. The Court declined to provide a comprehensive definition of "testimonial," but provided some examples, such as testimony at a preliminary hearing, before a grand jury, or at a former trial, or statements made during police interrogations. This report provides a summary of the Court's ruling.

Background

The Sixth Amendment to the United States Constitution, the Confrontation Clause, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."[1] Its purpose is to ensure that an individual who has been accused of a crime has the opportunity to test the reliability of testimony presented against him or her by cross-examining the witness. In *Crawford v. Washington*,[2] the Court held that the Sixth Amendment does not allow hearsay[3]

[1] U.S. CONSTITUTION, Amendment VI.

[2] 124 S.Ct 1354 (2004).

[3] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or (continued...)

testimonial evidence to be admitted, regardless of its "reliability," unless the witness is unavailable **and** the defendant had a prior opportunity for cross-examination. In so holding, the Court abrogated the rule set out in *Ohio v. Roberts*[4] which made said statements admissible if the court deemed them reliable.

Crawford v. Washington

Facts and Proceedings.

Petitioner, Michael Crawford, was tried and convicted for stabbing a man, Kenneth Lee. When Crawford was arrested the detectives interrogated him and his wife, Sylvia, twice. Eventually, Crawford confessed that they had gone to Lee's apartment looking for him because Crawford was upset over an earlier incident in which Lee had allegedly tried to rape Crawford's wife. After finding Lee, a fight broke out in which Crawford stabbed Lee.[5]

Crawford and Sylvia both gave the detectives similar accounts of the events leading up to the fight. Crawford stated that he could "swear he had seen [Lee] going for something before, right before everything happened," and that he thought Lee had pulled something out and Crawford was cut when he grabbed for it.[6] However, Sylvia's account of the fight was arguably different from Crawford's particularly with respect to whether Lee had drawn a weapon before Crawford assaulted him. Sylvia stated that Lee had lifted his arms up when Crawford came up to him, then Lee reached into his right-hand pocket just before Crawford stabbed him. Lee then fell to the ground with his hands open. Sylvia did not notice any weapons in his hands at that time.[7]

Crawford was charged with assault and attempted murder. At trial, he claimed self-defense. His wife did not testify at trial because of the state marital privilege.[8] Since in the state of Washington the marital privilege does not extend to statements made out-of-court, the State sought to introduce Sylvia's statement to the detectives under a hearsay exception.[9] The State intended for the statement to refute the self-defense argument. In response, Crawford argued that admitting the statement would violate his Sixth

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[3] (...continued)
hearing, offered in evidence to prove the truth of the matter asserted." The statements need not be verbal but may also include a written assertion or nonverbal conduct if intended as an assertion. Federal Rules of Evidence 801.

[4] 448 U.S. 569 (1980).

[5] *Crawford*, 124 S.Ct. at 1357.

[6] *Id.*

[7] *Id.*

[8] The marital privilege generally bars a spouse from testifying against his/her spouse without the latter's consent. Wash. Rev.Code § 5.60.060(1) (1994).

[9] *Crawford*, 124 S.Ct. at 1358; see *State v. Burden*, 841 P.2d 758, 761 (1992). The State argued that since Sylvia had admitted that she led Crawford to Lee's apartment and, therefore, had facilitated the assault, her statement was admissible under the hearsay exception for statements against penal interest. Wash. Rule Evid. 804(b)(3).

Amendment right to be confronted with the witnesses against him. The trial court admitted the statement on the basis of the Supreme Court's decision in *Ohio v. Roberts* which allowed admission of unavailable witness's statements if the statement bears "adequate indicia of reliability" and bears "particularized guarantees of trustworthiness."[10] The prosecution played the tape for the jury and argued during closing argument that it was "damning evidence" that completely refuted Crawford's claim of self-defense.[11] The jury convicted Crawford of assault.

On appeal, the Washington Court of Appeals reversed the finding. In reversing, the court applied a test to determine if Sylvia's statement bore "particularized guarantees of trustworthiness."[12] The Washington Supreme Court reinstated the conviction on the grounds that Sylvia's statement did bear guarantees of trustworthiness.[13] The court found that Sylvia's statement overlapped Crawford's statement, they were virtually identical and neither statement clearly stated that Lee had a weapon in hand at the time of the stabbing.[14] Crawford petitioned the Supreme Court for review and the Court granted certiorari.[15]

The issue presented was whether the State's use of Sylvia's statement violated the Confrontation Clause. On March 8, 2004, the Court reversed the judgment of the Washington Supreme Court and remanded the case holding that the State's use of Sylvia's statement violated the Confrontation Clause because, as far as testimonial evidence is concerned, confrontation is the only indicium of reliability sufficient to satisfy constitutional demands.[16]

History of the Confrontation Clause.

As noted, the Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ."[17] In deciding the case, the Court found that the Constitution alone did not resolve the case since "witnesses against" a defendant may mean those who actually testify at trial, those whose statements are offered at trial, or something in-between.[18] Accordingly, the Court found it necessary to examine the historical background of the Confrontation Clause to understand its meaning.

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[10] *Id*. at 66. The rule set out in *Roberts* also allowed statements from unavailable witnesses to be admitted when the statement falls within a "firmly rooted hearsay exception."

[11] *Crawford*, 124 S.Ct. at 1358.

[12] *Id*.

[13] *Id*.

[14] *Id*., citing 54 P.3d 656, 653-654 (2002).

[15] *Crawford v. Washington*, 539 U.S. 914 (2003).

[16] 124 S.Ct. at 1359-1374. Justice Scalia delivered the opinion for the Court. Chief Justice Rehnquist, joined by Justice O'Connor, filed a concurring opinion in judgement.

[17] U.S. CONSTITUTION, Amendment VI.

[18] *Id*. at 1359.

The Court found that the concept of an accused's right to confront his or her accuser dates back to the Roman times;[19] however, the source of the concept for the Constitution was the English common law.[20] Of particular interest to the Court was the trial of Sir Walter Raleigh for treason. In that trial, Raleigh had been implicated by an alleged accomplice, Lord Cobham, in an examination before the Privy Council and in a letter.[21] Raleigh, arguing that "[t]he Proof of the Common Law is by witness and jury" demanded that the judges call Cobham to appear at the trial.[22] The judges refused and Raleigh was consequently sentenced to death. After the Raleigh trial, the courts developed unavailability rules, admitting examinations only if the witness was unable to testify in person.[23]

Around the time of the American Revolution many declarations of rights were adopted by the states which guaranteed a right of confrontation.[24] In addition, the First Congress included the Confrontation Clause in a proposal to amend the Constitution. This became the Sixth Amendment.[25]

The Court reasoned that this history supported two inferences about the meaning of the Sixth Amendment: First, "the principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure," particularly the use of *ex parte* examinations as evidence against the accused.[26] Therefore, the Court rejected the view that the Confrontation Clause applies only to in-court testimony and that the applicability to out-of-court statements introduced at trial depends on the rules of evidence.[27] Second, the Court reasoned 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."[28] The Court noted that the text of the Sixth Amendment does not suggest that the courts can develop exceptions to the Confrontation Clause, but rather that only those exceptions established at the time of its creation are allowed.[29] Based on its interpretation of the historical sources, the Court concluded that a prior opportunity to cross-examine was a necessary,

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[19] *Id.* See also, *Coy v. Iowa*, 487 U.S. 1012 (1988).

[20] *Crawford*, 124 S.Ct. at 1359.

[21] *Id.*

[22] *Id.* at 1360.

[23] *Id.*

[24] *Id.* at 1362.

[25] *Id.* at 1363.

[26] *Id.*

[27] *Id.* at 1364.

[28] *Id.* at 1355.

[29] *Id.*. See also *Mattox v. United States*, 156 U.S. 237, 243 (1895); cf. *Houser*, 26 Mo. at 433-435.

not merely a sufficient, condition for testimonial statements to be admitted against an accused.[30]

Ohio v. Roberts.

Before its decision in *Crawford*, the Court had allowed a narrow class of exceptions to the mandatory confrontation of the Sixth Amendment. In *Ohio v. Roberts*, 1980, the Court had established the "reliability exception" ruling that certain witness statements could be allowed into evidence without cross-examining the witness if a judge found that the statements were sufficiently reliable so as to be trustworthy.[31] In deciding *Crawford*, the Court overruled *Roberts* on the basis that admitting testimony which has not been subject to cross-examination on a mere judicial determination of reliability is "akin to dispensing with jury trial because a defendant is obviously guilty."[32] That, the Court stated, was not what the Sixth Amendment prescribes.[33] Therefore, the Court concluded that, for testimonial evidence from a witness not appearing in court to be admissible against an accused, the witness must be unavailable *and* the accused must have had a prior opportunity to cross-examine the witness.[34]

Holding.

In sum, the Court held that the lower court failed to take into account the constitutional requirement of confrontation that the statement be subject to cross-examination when admitting Sylvia's statement to the police at trial. The lower court had relied on the Supreme Court's prior holding in *Ohio v. Roberts* which allowed hearsay statements to be admitted at trial based on a judicial finding of reliability. However, in *Crawford*, the Court held that the "reliability" test announced in *Ohio v. Roberts* was contrary to constitutional requirements. The Court limited its holding to testimonial evidence stating that where nontestimonial hearsay is at issue, it is consistent with constitutional requirements to afford the States flexibility in their development of hearsay law.[35] However, the Court did not provide a comprehensive definition of what qualifies as "testimonial" evidence except to say that at a minimum it includes testimony at a preliminary hearing, grand jury or at a former trial, and statements made during police interrogations.[36]

The Court stressed that the Confrontation Clause does not place any constraints in the use of prior testimonial statements when the declarant appears at trial, and it does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Furthermore, the Court left the door open for a possible exception to the

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[30] *Id*. at 1366-1377.

[31] *Roberts*, 448 U.S. at 66.

[32] *Crawford*, 124 S.Ct. at 1371.

[33] *Id*.

[34] *Id*. at 1374.

[35] *Id*.

[36] *Id*. The Court states that they "leave for another day any effort to spell out a comprehensive definition of 'testimonial'."

confrontation requirement based on historical grounds: dying declarations. The Court stated that it is possible that the Sixth Amendment incorporates an exception for testimonial dying declarations, however, it did not rule so conclusively.[37]

Chief Justice Rehnquist, joined by Justice O'Connor, concurred in the result but dissented from the majority's decision to overrule *Roberts*. They found that the Court's interpretation and historical analysis of the Confrontation Clause were unnecessary to decide the case. Instead, they wrote, the Court's holding in *Idaho v. Wright*[38] where the Court held that an out-of-court statement is not admissible simply because its truthfulness is corroborated by other evidence at trial, was dispositive of the case. Furthermore, they criticized the Court for not providing a definition of "testimonial" evidence since it created uncertainty for future trials.[39]

Commentators have suggested that *Crawford* is one of the most important Supreme Court decisions for the criminal litigator in recent years.[40] *Crawford* significantly changes what out-of-court statements will be admissible against a criminal defendant at trial. It replaces the "reliability analysis" for admission of out-of-court statements of unavailable witnesses and replaces it with the requirement of prior opportunity to cross-examine. The holding in *Crawford* could potentially impact a number of hearsay exceptions used currently to admit statements from unavailable witnesses. However, the extent of its impact on the hearsay exceptions is yet to be determined as the Court did not provide a concrete definition of "testimonial" evidence. Until the Court provides a definition of "testimonial" evidence, it will be up to prosecutors and defense attorneys to argue the issue in court.

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[37] *Id*. at n. 9. For example, statements can be introduced to show the state of mind of the witness at the time of the events.

[38] 497 U.S. 804 (1990).

[39] *Id*. at 1375-1378.

[40] See Linda Greenhouse, *Court Alters Rule on Statement of Unavailable Witnesses*, NEW YORK TIMES, March 9, 2004; *U.S. Supreme Court Changes Approach to Admissibility of Out-of-Court Statements*, CRIMINAL LAW REPORTER, Vo. 74, No. 23 (March 10, 2004) *available* at [http://litigationcenter.bna.com/pic2/lit.nsf/id/BNAP-5WXSRV?OpenDocument].