

The Confrontation Clause under *Crawford v. Washington* and Its Progeny

By James A. Nofi

The Supreme Court's 2004 decision in *Crawford v. Washington*¹ almost single-handedly resurrected the Sixth Amendment's Confrontation Clause² in criminal trials. It overruled *Ohio v. Roberts*,³ which had been the leading Supreme Court decision on the application of the Confrontation Clause for almost a quarter of a century. Under *Roberts*, the Court had permitted the admission of out-of-court statements of a witness who was unavailable at trial if the statement bore adequate "indicia of reliability," such as the existence of a firmly rooted hearsay exception or other particularized guarantees of trustworthiness. *Crawford* changed the analysis from whether the statement was reliable to whether the statement was testimonial. If testimonial, the statement is now admissible only if the Confrontation Clause is satisfied. *Crawford* marked the beginning of a new Confrontation Clause jurisprudence.

The Reliability Standard of *Ohio v. Roberts*

In *Ohio v. Roberts*, the Supreme Court held that the preliminary hearing testimony of a witness who was unavailable to testify at trial was admissible under a standard based upon its consideration of the "relationship between the Confrontation Clause and the hearsay rule with its many exceptions."⁴ The Court recognized that a literal reading of the Confrontation Clause would require the exclusion of any statement made by a declarant not present at trial. It noted that, if the Clause were so applied, then it would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme."⁵ Instead, the Court rejected the literal application of the Clause. While the Court had emphasized in earlier cases that the Clause reflected a preference for face-to-face confrontation at trial, it had also previously "recognized that competing interests, if 'closely examined,' . . . may warrant dispensing with confrontation at trial."⁶ One such concern was described as the "strong interest

of every jurisdiction in effective law enforcement and the development and precise formulation of rules of evidence applicable in criminal proceedings."⁷

The Court asserted that it had sought to accommodate these competing interests in a series of cases. "True to common-law tradition, the process has been gradual, building on past decisions, drawing on new experiences, and responding to changing conditions."⁸ Rather than set out a bright line rule, the Court set forth the general approach based upon its prior rulings.

The *Ohio v. Roberts* standard for the Confrontation Clause restricted the range of admissible hearsay by imposing two requirements: unavailability and reliability. First, the prosecution had to demonstrate the unavailability of the declarant whose statement it wished to introduce against the defendant. Second, the hearsay had to be trustworthy and bear such "indicia of reliability" that permitted it to be placed before the jury even when there was no confrontation of the declarant.⁹ "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."¹⁰

The Court recognized that certain hearsay exceptions rest upon such solid foundations that the admission of virtually any evidence within them comports with the substance of the constitutional protection. The Court specifically noted that dying declarations, cross-examined prior to trial testimony, and properly administered business and public records exceptions were such firmly rooted exceptions.

The Court noted that none of the outpouring of scholarly commentary on the complexity of reconciling the Confrontation Clause and the hearsay rules suggested that the Court had misidentified the basic interests to be accommodated. No commentator demonstrated that the prevailing analysis was contrary to the intentions of the Framers.

Applying this standard, the Court held

that preliminary hearing testimony that had been subject to cross-examination was no different from cross-examined prior-trial testimony, which the Court had already deemed admissible under the Confrontation Clause. Since there was an opportunity for cross-examination at the preliminary hearing—and counsel availed himself of that opportunity—the transcript of the prior testimony bore sufficient “indicia of reliability” and afforded the jury a satisfactory basis for evaluating the truth of the prior statement.¹¹

From 1980 through 2004, both prosecutors and defense attorneys approached confrontation clause issues as classic hearsay questions. If the out-of-court statement was either subject to a firmly rooted hearsay exception or showed particularized guarantees of trustworthiness, it was admissible.

Crawford v. Washington Resurrects the Confrontation Clause

In 2004, however, the Supreme Court upended the rationale behind the *Roberts* test in *Crawford v. Washington*. In *Crawford*, the defendant was charged with stabbing a man who allegedly tried to rape his wife. At trial, defendant asserted the state marital privilege to preclude his wife from testifying. The prosecution then sought to introduce the wife’s tape-recorded statement to the police, under a hearsay exception for statements against penal interest, as evidence that the stabbing was not in self-defense. Defendant argued that this violated his federal constitutional right to confront witnesses against him. The trial court admitted the statement on the grounds that it bore “particularized guarantees of trustworthiness,” and the jury convicted the husband of assault. The Washington Supreme Court unanimously concluded that, even though the wife’s statement did not fall under a firmly rooted hearsay exception, it did bear guarantees of trustworthiness and was admissible.

The Supreme Court, in an opinion by Justice Scalia, noted that whether the *Roberts* reliability approach comported with the Confrontation Clause could not be resolved by examining the text of the Sixth Amendment.¹² The Court’s lengthy review of the historical background of the Confrontation Clause went back to Roman times but concentrated on the Marian bail and examinations statutes of the sixteenth century and various seventeenth- and eighteenth-century English cases. The Court concluded that the development of the right of confrontation was to limit the abuse of using the civil examination procedures under the Marian statutes as evidence at criminal trials. The Court’s review of early American cases also demonstrated that most such decisions permitted the admission of prior trial testimony in criminal

cases only if the defendant had a prior opportunity to cross-examine the declarant.

The Court concluded that the Confrontation Clause was directed against the civil-law mode of criminal procedure and particularly its use of *ex parte* examinations against the accused and that such application was not governed by the law of evidence.¹³ The Court further concluded that the constitutional text of the clause, like the history underlying the common-law right of confrontation, reflected an acute concern with a specific type of out-of-court statement. Thus, the Court held that the Confrontation Clause only applied to “testimonial statements.”

While not precisely defining when such statements are testimonial, the Court noted several formulations of what it termed the “core class” of testimonial statements. These examples included

ex-parte in-court testimony or its functional equivalent—that is material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . ; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions . . . ; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.¹⁴

The Court declared that some statements would qualify as testimonial under any definition, such as *ex parte* testimony at a preliminary hearing, and held that statements taken by a police officer in the course of interrogations are testimonial even under a narrow standard.¹⁵

The Court turned to the historical record again to support the second prong of admissibility under the Confrontation Clause: The Framers would not have allowed the 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 of cross-examination. The common law as it existed in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment incorporated those limitations, including the only exception that the Court could find—dying declarations—which the Court accepted on historical grounds.

The Court’s review of prior Supreme Court precedent led it to hold that “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”¹⁶ The Court concluded that, while its earlier decisions had gener-



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ally been decided correctly, the rationale used by the *Roberts* Court departed from these historical principles. The *Roberts* test was both too broad (it applied the same analytical mode whether or not the hearsay consisted of ex parte testimony) and too narrow (it admitted statements that did consist of ex parte testimony upon a mere finding of reliability).¹⁷ The Court held that the *Roberts* test admitted core testimonial statements that the Confrontation Clause meant to exclude, such as accomplice confessions, plea allocutions, grand jury testimony, and prior trial testimony.¹⁸

In remanding the case to the Washington Supreme Court, the Court set out its ultimate holding, which established a new test for determining admissibility under the Confrontation Clause:

Where 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 does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.¹⁹

Under this new rule, practitioners no longer focus on the reliability of an out-of-court statement under the Confrontation Clause. Rather, the analysis now must be whether it is a testimonial statement that the defendant has had the opportunity to cross-examine.

The Confrontation Clause after *Crawford v. Washington*

The Supreme Court continued to outline the new boundaries of its Confrontation Clause jurisprudence and give further guidance to practitioners in the 2006 case of *Davis v. Washington*.²⁰ *Davis* raised the issue whether statements made to law enforcement personnel during a 911 call or at a crime scene are “testimonial” and subject to Confrontation Clause requirements. *Davis* was a domestic violence case in which Adrian Davis was convicted of felony violation of a domestic no-contact order. The court admitted, over *Davis*' objection, the tape recording of his girlfriend's 911 call that established that *Davis* was her assailant. The Washington Supreme Court affirmed on the grounds that the portions of the 911 conversation that identified *Davis* as the assailant were not testimonial.

In the companion case of *Hammon v. Indiana*, the court admitted the affidavit of Mrs. Hammon

that was prepared after she gave her account of the domestic disturbance to the police officer at the scene. The trial court admitted the affidavit in the absence of Mrs. Hammon's appearance at trial as “present sense impression” and Mrs. Hammon's statements as “excited utterances” that were permitted in these kind of cases even if the declarant was not available to testify. The Indiana Supreme Court affirmed and held that the statement was admissible as an excited utterance and that the oral statement was not testimonial since it was not made in significant part for purposes of preserving it for potential use in legal proceedings.

The Supreme Court determined more precisely which types of police interrogations produce testimony.

Statements are nontestimonial when made in the course of police interrogation under circumstances indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.²¹

The Court held that the Confrontation Clause applied only to testimonial hearsay. It noted that in *Crawford* it had described testimony as a solemn declaration or affirmation made for the purpose of establishing or proving some fact and that an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. According to the Court, “[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely the ‘core,’ but its perimeter.”²²

The Court then held that a 911 call, at least the initial interrogation in such a call, is ordinarily not designed to establish or prove some past fact but rather to describe current circumstances requiring police assistance. After reviewing the differences between the nontestimonial interrogation in the *Davis* 911 call and the testimonial one in *Crawford*, the Court concluded that the primary purpose of the interrogation in *Davis* was to enable police assistance to meet an ongoing emergency. The caller was not acting as a witness and was not testifying.²³

The interrogation in *Hammon*, however, was clearly part of an investigation into possibly past criminal conduct. No emergency was in progress, the declarant was physically separated from the defendant, and the statement deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. The Court held such a statement to be inherently testimonial.²⁴

The Court later made explicit its total rejection of *Roberts* in all aspects. In *Whorton v. Bockting*,²⁵ the Court unambiguously declared that *Crawford* eliminated the Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. “Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.”²⁶

The Supreme Court has continued to refine its Confrontation Clause jurisprudence in more recent cases. In *Giles v. California*,²⁷ the Court ruled that the doctrine of forfeiture by wrongdoing—that the defendant in effect waived his right of confrontation when he committed a wrongful act that caused the witness to be unavailable to testify at trial—recognized in *Crawford* and *Davis* was limited in murder cases to those in which one of the purposes of the killing was to prevent the declarant’s testimony.

Giles was accused of murdering his ex-girlfriend, and the trial court had admitted into evidence statements that the woman had made to police officers who had responded to a domestic violence report three weeks earlier. The California appellate courts affirmed Giles’s conviction and held that Giles had forfeited his right to confront the declarant because he had committed the murder for which he was on trial and it was his intentional criminal act that made her unavailable.

After another extensive review of both the state of the English common law at the time of the founding and of American case law dating back to the founding, the Court held that the common law uniformly excluded unconfrosted inculpatory testimony of murder victims—except testimony given with the awareness of impending death—in the innumerable cases in which the defendant was on trial for killing the victim but was not shown to have done so for the purpose of preventing testimony.

The most recent Supreme Court case applied the Confrontation Clause to scientific and forensic evidence that is admitted through certificates of analysis. For years, many states have had statutes to permit the introduction of some kinds of routinely generated expert evidence by forensic scientists without any testimony at all. In *Melendez-Diaz v. Massachusetts*,²⁸ the Massachusetts court had admitted into evidence affidavits or certificates of analysis, which showed that the material seized by the police from the defendant was cocaine. The trial court overruled the defendant’s Confrontation Clause objection and ruled that, pursuant to Massachusetts statute, the certificates were admit-

ted as prima facie evidence of the composition, quality, and net weight of the narcotic. The case was affirmed under a Massachusetts Supreme Judicial Court precedent that held that authors of certificates of analysis were not subject to confrontation under the Sixth Amendment.²⁹

The Supreme Court, however, reversed and held that the certificates of analysis or affidavits “fell within ‘the core class of testimonial statements’” described in *Crawford*.³⁰

The “certificates” are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.” Here, moreover not only were the affidavits “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . but under Massachusetts law the sole purpose of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance . . . Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to “be confronted with” the analysts at trial.³¹

Conclusion

Under the *Roberts* test, out-of-court statements in criminal trials were admissible if they were reliable—a classic hearsay analysis. The *Crawford* case replaced the concept of reliability with a more literal reading of the right of confrontation as the Court deemed it to exist at common law at the time of adoption of the Sixth Amendment.

The current focus in the jurisprudence of the Confrontation Clause is whether the out-of-court statement is testimonial. If testimonial, then the statement is admissible only if the declarant is unavailable and the defendant has had the prior opportunity to cross-examine the declarant. If the statement is not testimonial, then the Confrontation Clause is not applicable at all and such statements may be admitted without any further judicial determination of reliability.

Whether a statement is testimonial appears to depend upon the purpose for which it was made. If it was made to establish facts for use at trial or if such use was reasonably foreseeable, then the statement is testimonial. Testimony at a prior trial or preliminary hearing clearly qualifies. Forensic certificates of analysis, which are simply affidavits, are testimonial since their sole purpose is to be used at trial. Police interrogations that are designed to find out what happened are testimonial, but 911 calls of an emergency nature are not.

In sum, out-of-court testimonial statements are not admissible in a criminal trial under the Confrontation Clause unless the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the witness. The only exceptions to this rule are when the testi-

monial statement was either a dying declaration or if the defendant had caused the declarant to be absent to prevent his or her testimony. Given that the Supreme Court has issued five decisions on the Confrontation Clause since 2004 and the issue often arises in criminal trials, it is likely that the Court is not yet done with this issue.

Endnotes

1. *Crawford v. Washington*, 541 U.S. 36 (2004).
2. The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."
3. *Ohio v. Roberts*, 448 U.S. 56 (1980).
4. *Id.* at 62.
5. *Id.* at 63.
6. *Id.* at 64 (citations omitted).
7. *Id.*
8. *Id.*
9. *Id.* at 65.
10. *Id.* at 66.

11. *Id.* at 73.
12. *Crawford*, 541 U.S. at 42.
13. *Id.* at 50.
14. *Id.* at 51–52 (citations omitted).
15. *Id.* at 52.
16. *Id.* at 59.
17. *Id.* at 60.
18. *Id.* at 63.
19. *Id.* at 68.
20. *Davis v. Washington*, 547 U.S. 813 (2006).
21. *Id.* at 822.
22. *Id.* at 823–824.
23. *Id.* at 828.
24. *Id.* at 829–830.
25. *Whorton v. Bockting*, 549 U.S. 406 (2007).
26. *Id.* at 420.
27. *Giles v. California*, ___ U.S. ___, 128 S. Ct. 2678 (2007).
28. *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527 (2009).
29. *Commonwealth v. Verde*, 444 Mass. 279, 283–285 (2005).
30. *Melendez-Diaz*, 129 S. Ct. at 2532.
31. *Id.* (emphasis in original and citations omitted).