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Crawford v. Washington: The Supreme Court Opts for a New (Old?) Approach to the Confrontation Clause

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CASE COMMENT

Crawford v *Washington:* the Supreme Court opts for a new (old?) approach to the Confrontation Clause*

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1. The Confrontation Clause

The Sixth Amendment to the United States Constitution is a code of criminal trial procedure in miniature. Part of the Bill of Rights, it was proposed in 1789 by the first Congress to sit under the new Constitution, and was ratified by the necessary three-fourths of the states in 1791. Its purpose was to preclude the federal government from engaging in a variety of practices employed by the Crown in the century or so before Independence.

One provision, known as the Sixth Amendment Confrontation Clause, reads: 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' (Its history and purpose will be discussed below.) Its scope depends on how two of its terms are defined: 'to be confronted', and 'witness'.

American courts have long agreed that 'to be confronted' means the right to be in the courtroom with a witness, to look at him face-to-face, and to cross-examine him.[1]

Thus, as Justice Scalia points out in *Crawford* v *Washington*,[2] the scope of the Confrontation Clause, at least to a textualist, really depends on how one reads the

* This case is also considered in H. L. Ho, 'Confrontation and Hearsay: A Critique of *Crawford*' (2004) 8 E & P 147.

1 '[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact': *Coy* v *Iowa*, 487 US 1012 at 1016 (1988).

2 124 SCt 1354 (2004).

word 'witness'. The narrowest view restricts 'witness' to someone who actually takes the stand and testifies at the defendant's criminal trial. This would assure the defendant the right to confront those who actually testify, but would leave all out-of-court (i.e. hearsay) statements beyond that scope of the clause, regulated solely by the rules of evidence governing hearsay. The broadest view is that the term 'witness' applies to anyone whose statement is offered against the defendant; the effect would be to preclude the prosecutor from introducing any hearsay evidence at all, unless the declarant actually testifies at trial—a view the United States Supreme Court has 'long rejected as unintended and too extreme'.[3] The middle view is that in addition to in-court testimony, the clause applies to some, but not all, hearsay evidence. American courts have always understood this middle approach to be the correct one.[4] The question, of course, is how to define which hearsay statements are subject to the clause, and which are not.

2. The 'trustworthiness' approach

In 1980, in *Ohio* v *Roberts*,[5] the United States Supreme Court, reasoning that the underlying goal of the Confrontation Clause was to safeguard against the use of untrustworthy evidence, held that a prosecutor could introduce a hearsay statement, without also calling the declarant as a witness, so long as the statement has sufficient 'indicia of reliability'.[6] There were two ways to establish reliability. One was to show that the statement came within a 'firmly rooted' hearsay exception. In various decisions, the Supreme Court has stated that the following exceptions had 'firm roots': the exceptions for business and public records;[7] testimony at a prior proceeding at which the defendant had an adequate opportunity to cross-examine the declarant;[8] 'dying declarations';[9] co-conspirator statements;[10] spontaneous utterances;[11] and statements made to medical personnel for purposes of diagnosis and treatment.[12]

If a hearsay statement did not fall within a 'firmly rooted' exception, a prosecutor could demonstrate the statement's reliability by making a 'showing of particularized guarantees of trustworthiness'.[13] Only the statement itself and the circumstances under which it was made could be considered in assessing whether the prosecutor

3 *Ohio* v *Roberts*, 448 US 56 at 63 (1980).
4 *White* v *Illinois*, 502 US 346 at 352 (1992); *Ohio* v *Roberts*, 448 US 56 at 68, n. 9 (1980).
5 448 US 56 (1980).
6 *Ohio* v *Roberts*, 448 US 56 at 66 (1980), quoting *Mancusi* v *Stubbs*, 408 US 204 at 213 (1972).
7 *Ohio* v *Roberts*, 448 US 56 at 66, n. 8 (1980).
8 This is the holding in *Ohio* v *Roberts* above.
9 *Ohio* v *Roberts*, citing *Mattox* v *United States*, 156 US 237 at 242 (1895).
10 *United States* v *Inadi*, 475 US 387 (1986).
11 *White* v *Illinois*, 502 US 346 (1992).
12 Ibid.
13 *Ohio* v *Roberts*, 448 US 56 at 66 (1980).

had shown the statement to be sufficiently trustworthy; extrinsic evidence corroborating the statement could not be considered.[14]

Precisely how the circumstances surrounding the making of a statement should be assessed for trustworthiness, however, proved to be a question of some difficulty. Federal and state court opinions can be found citing almost any circumstance as indicia of trustworthiness—or of its absence. The only constant in this area of the law was confusion.

3. *Crawford* v *Washington*

In *Crawford* v *Washington*, the Supreme Court considered whether statements made by a suspect during custodial interrogation by the police, which incriminated another suspect, could be admitted against the latter over Confrontation Clause objections. Although such statements are presumptively untrustworthy, because the suspect has a powerful motive to incriminate others (whether they are guilty or not) to curry favour with the authorities, courts nevertheless frequently concluded that they were sufficiently trustworthy, and admitted them.

(a) The facts

In the summer of 1999, a man named Kenneth Lee allegedly attempted to rape Sylvia Crawford. She told her husband Michael. Michael and Sylvia went to Lee's apartment to confront him; a fight broke out; Michael stabbed Lee, and was charged with attempted murder and assault. At trial, Michael claimed Lee had reached for and grabbed a weapon, and he stabbed Lee in self-defence; Lee denied doing anything of the sort. The third person present, Sylvia, never testified, because Michael, invoking the state marital privilege, prevented her from taking the stand.[15] Instead, the prosecutor offered in evidence a recording of Sylvia's statement to the police,[16] which to some extent corroborated Lee's denial that he had not reached for or grabbed a weapon before Michael stabbed him.

The defendant objected that the statement was inadmissible hearsay and violated his rights under the Confrontation Clause. The prosecutor persuaded the trial judge that Sylvia's statement came within the state hearsay exception for statements against penal interest,[17] thus overcoming the defendant's hearsay objection, and

14 *Idaho* v *Wright*, 497 US 805 (1990).
15 Wash. Rev. Code § 5.60.060(1) (1994).
16 In Washington, the privilege to preclude a spouse from testifying does not extend to a spouse's out-of-court statements admissible under a hearsay exception: *State* v *Burden*, 120 Wash 2d 371 at 377, 841 P2d 758 at 761 (1992).
17 Wash. R. Evid. 804(b)(3).

that her statement had sufficient 'guarantees of trustworthiness' to overcome the Confrontation Clause objection. The jury convicted Michael of assault. The Washington Court of Appeals reversed, concluding, after applying a nine-factor test, that Sylvia's statement was insufficiently trustworthy to satisfy the Confrontation Clause. The Washington Supreme Court in turn reversed the Court of Appeals and reinstated the conviction, concluding that, because Sylvia's statement was 'virtually identical to' Michael's own statement, 'it may be deemed reliable'[18]—a curious basis on which to rule, given that at the trial, the prosecutor described the difference between the two statements as 'damning evidence' that 'completely refutes [petitioner's] claim of self-defense'.[19]

The United States Supreme Court, by a 7:2 vote,[20] reversed. Justice Antonin Scalia, who had dissented or concurred separately in nearly every Supreme Court Confrontation Clause decision since he joined the court in 1985, wrote the seven-Justice majority opinion.

(b) Rejection of the 'trustworthiness' approach

Justice Scalia presented persuasive evidence that the Confrontation Clause was included in the Bill of Rights to preserve the 'common law tradition ... of live testimony in court subject to adversarial testing',[21] and to prevent the new American government from adopting the European civil-law practice that allowed *ex parte* witness statements, taken by justices of the peace or other officers, to be introduced at trial without requiring the declarant to appear and be cross-examined—a practice which, Justice Scalia noted, England had for a time adopted, particularly in 'the great political trials of the 16th and 17th centuries', the best known being the trial of Sir Walter Raleigh in 1603 for treason.[22]

Based on this history, Justice Scalia, who is well known as the member of the court who most consistently advocates a literal reading of the text of the Constitution, insisted that the clause was not merely intended as a procedural device to assure against unreliable evidence (i.e. a device which could therefore be ignored as long as the underlying purpose—trustworthy evidence—was satisfied). Rather, its purpose was precisely to secure the procedural right it explicitly guaranteed: a prosecutor could offer the testimony of a 'witness' only by bringing that witness into the courtroom for the defendant to confront and cross-examine.

18 The state supreme court rejected the state's argument that by invoking the marital privilege, the defendant effectively waived his Confrontation Clause rights, concluding that it was impermissible to require a defendant to waive a right guaranteed by the Constitution in order to assert a right granted by statute: 147 Wash 2d at 432, 54 P3d at 660.

19 *Crawford* v *Washington*, 124 SCt 1354 at 1373 (2004).

20 Chief Justice Rehnquist dissented, joined by Justice O'Connor.

21 *Crawford* v *Washington*, 124 SCt 1354 at 1359 (2004).

22 Ibid. at 1360.

Justice Scalia's majority opinion disdainfully dismissed the *Roberts* 'trustworthiness' approach as invalid historically, inconsistent with the underlying purpose of the Confrontation Clause, impossible to apply objectively, and therefore affording excessive discretion to judges in direct violation of a constitutional right. He pointed out, scathingly, that under the 'trustworthiness' approach, lower courts frequently admitted against a defendant a hearsay declarant's grand jury testimony or guilty plea allocution—precisely the sort of deposition testimony by a witness who was absent from trial that the clause was designed to prohibit.

(c) 'Testimonial' statements

Because 'the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused', Justice Scalia reasoned, the clause clearly applies to some hearsay; but not to all hearsay. Logically, it should apply only to 'testimonial' statements:

> This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.
>
> The text of the Confrontation Clause ... applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' 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. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.[23]

Thus, *Crawford* holds that the Confrontation Clause clearly applies to all 'testimonial' statements, however that term is defined (about which, more anon).

Applying the logic of Justice Scalia's approach, it seems just as clear that the Confrontation Clause should apply *only* to 'testimonial' statements; the admissibility

23 Ibid. at 1364, quoting N. Webster, *An American Dictionary of the English Language* (1828).

of non-'testimonial' hearsay should be governed solely by the rules of evidence, which legislatures or courts may revise as they see fit, unconstrained by the Confrontation Clause. The difficulty, as Justice Scalia acknowledged in *Crawford*, is that in 1992, in *White* v *Illinois*,[24] the court 'considered [this] proposal, and rejected it'.[25] He continued: 'Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition.'[26]

4. Questions answered and unanswered

(a) Answered

Crawford therefore provides a definitive answer to the question directly before it—the admissibility, over a Confrontation Clause objection, of a hearsay statement elicited from a declarant during custodial interrogation, when the declarant does not testify at trial. That answer is: 'No'. Noting that '[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England', the court held in *Crawford* that '[s]tatements taken by police officers in the course of interrogations are ... testimonial under even a narrow standard'.[27]

It also provides a definitive answer to related questions: may the state ever introduce, over a Confrontation Clause objection, a hearsay statement elicited from a declarant before a grand jury, or at an on-the-record guilty plea allocution, or a deposition, or any other formal proceeding in which the declarant was not subject to cross-examination by the defendant? Again, the answer is: 'No'. This is because, however 'testimony' is defined at the margins, clearly statements such as these must be considered 'testimonial'.

(b) Unanswered

(i) Defining 'testimonial'

In *Crawford*, the court observed that '[m]ost ... hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy'.[28] Another example provided by the court is 'a casual remark to an acquaintance ...'.[29] Thus, if a criminal 'casually' tells an acquaintance

24 502 US 346 (1992).

25 *Crawford* v *Washington*, 124 SCt 1354 at 1370 (2004), citing *White* v *Illinois*, 502 US 346 at 352–3 (1992). Indeed, in *White* v *Illinois*, Justices Scalia and Thomas had unsuccessfully urged that approach upon the court. *White* v *Illinois*, 502 US 346 at 366 (Justice Thomas, joined by Justice Scalia, concurring in part and concurring in the judgment).

26 *Crawford* v *Washington*, 124 SCt 1354 at 1370 (2004).

27 Ibid. Justice Scalia acknowledged the differences: police questioning is generally not under oath, and police officers are not justices of the peace; however, police questioning, whether under oath or not, has the same purpose, and presents the same risks of unconfronted evidence, as had questioning by a justice of the peace in the 16th and 17th centuries.

28 *Crawford* v *Washington*, 124 SCt 1354 at 1367 (2004).

29 Ibid. at 1364.

that he and X committed a crime together, a remark which in some circumstances would satisfy the statement-against-penal-interest hearsay exception, it would also be admissible against X over a Confrontation Clause objection.

Still, considerable uncertainty exists as to what makes a statement 'testimonial' or not. Consider:

1. *Statements made to the police that qualify for the excited-utterance or spontaneous-statement exception to the hearsay rule.* Does the spontaneity of such a statement, which presumably stills the opportunity to reflect and fabricate, take it out of the realm of 'a solemn declaration', and therefore render it not 'testimonial'?

2. *Statements made to public officials other than the police.* A social worker interviews the father of a young child, who admits that he and the mother sometimes leave the child alone in their apartment for several hours at a time. Such a statement would clearly fall within the 'statement-against-interest' hearsay exception, because the father is exposing himself to the possibility of losing custody of the child. Assuming later that the state seeks to prosecute the mother for endangering the child's welfare and the father cannot be found, could the state use the father's statement against the mother; or would his statement qualify as 'testimonial'?

3. *Statements made to private persons, such as employers.* DP, the director of personnel, calls employee E into her office and confronts E with evidence that E has been embezzling funds. E breaks down and admits it, adding that he was pressured to do so by F, a bookie, to whom E is heavily in debt. E's statement, if offered in a prosecution of F (whether for bookmaking or for soliciting E's embezzlement), arguably qualifies under the statement-against-interest hearsay exception. But if it is classified as 'testimonial', F's Confrontation Clause objection must be sustained.

4. *Dying declarations.* Such statements pose a problem, Justice Scalia acknowledged in *Crawford*, particularly if such a statement is made to a police officer. A statement made by someone convinced he is about to die, naming the person responsible for his impending death, certainly seems to be '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact' (the early 19th century definition of 'testimony' that Justice Scalia cited in his opinion). Yet the Supreme Court had exempted dying declarations from the Confrontation Clause in the

19th century,[30] long before the *Roberts* decision led the court's Confrontation Clause jurisprudence astray (in Justice Scalia's view) from the clause's roots and purpose. Perhaps, Justice Scalia suggested, dying declarations are 'sui generis'.[31] If not, such statements must now be categorised as 'testimonial', in which case the dying declaration exception will no longer be available to prosecutors.

(ii) Application of the clause to non-'testimonial' statements

It is clear that Justice Scalia believes that the Confrontation Clause ought not to apply at all to non-'testimonial' statements. It is equally clear that a majority of the court was not willing to go that far—at least, not in *Crawford*, whose facts did not require the court to resolve that issue.

Inevitably, that issue will reach the court. Until then, when a prosecutor offers non-testimonial, non-'firmly rooted' hearsay at a criminal trial, lower courts will simply have to guess: should they ignore the Confrontation Clause completely; or apply the now apparently discredited *Roberts* 'trustworthiness' test; or try to come up with something new?

A few weeks after the *Crawford* decision was handed down (and only a week or so after I had covered it in my Evidence class), Justice Scalia came to speak at Catholic University. One of my students asked him, 'How will the court apply the Confrontation Clause to non-"testimonial" statements?' Scalia smiled, shrugged his shoulders, and replied, 'Who knows?'

And that, for the foreseeable future, is the definitive answer.

30 *Mattox* v *United States*, 156 US 237 at 242 (1895).

31 See *Crawford* v *Washington*, 124 SCt 1354, n. 6 (2004). For this proposition, in addition to *Mattox*, n. 30 above, Justice Scalia cited, among other authorities, *King* v *Reason*, 16 How St Tr 1, 24–38 (KB 1722); D. Jardine, *Criminal Trials* (1832) 435; Cooley, *Constitutional Limitations* at *318; and G. Gilbert, *Evidence* 211 (C. Lofft ed., 1791); see also F. Heller, *The Sixth Amendment* 105 (1951) (asserting that this was the *only* recognised criminal hearsay exception at common law).