

CRAWFORD v. WASHINGTON: THE UNRESOLVED ISSUES

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I. *Crawford* Basics

A. Overruling the *Roberts* Test (and a Lot of Michigan Cases)

In *Crawford v. Washington*, 541 U.S. ___, 124 S.Ct. 1354 (2004), the Supreme Court overruled the infinitely malleable two-prong test from *Ohio v. Roberts*, 448 U.S. 56 (1980), that had permitted prosecutors to use out-of-court statements from non-testifying declarants if the statement either fit within a “firmly-rooted” hearsay exception or if the statement had adequate “indicia of reliability.” The Court observed that lower courts had consistently manipulated the *Roberts* test to admit statements that the Confrontation Clause clearly was meant to exclude, such as police statements from non-testifying co-defendants, even though the Supreme Court had long held that the Confrontation Clause flatly forbids the admission of such statements against criminal defendants. See, e.g., *Bruton v. United States*, 391 U.S. 123 (1968). As an example of a lower court opinion improperly using the *Roberts* test to admit such statements, the Supreme Court cited the Michigan Court of Appeals’ decision in *People v. Schutte*, 240 Mich. App. 713, 613 N.W.2d 370 (2000). In fact, as Professor Roger Kirst documented in his article, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 Syracuse L. Rev. 87 (2003), the Michigan appellate courts, perhaps more often than the courts in any other state, had consistently violated the *Bruton* rule by manipulating the *Roberts* test in favor of the prosecution.

B. The *Crawford* “Testimonial” Standard.

The new Confrontation Clause test announced in *Crawford* bars the prosecution from introducing a “testimonial” statement from a non-testifying declarant, even if the statement squarely falls within a hearsay exception and even if the statement is exceptionally reliable. The Court declined to precisely define “testimonial,” but observed, “[w]hatever 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.” *Crawford*, 124 S.Ct. at 1374. If a statement from a non-testifying declarant is testimonial, it can never be admitted against a criminal defendant unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant about the statement at some earlier proceeding. The only exception to this *per se* rule is that a testimonial statement may be admitted if the defendant wrongfully made the declarant unavailable to testify. If, on the other hand, a statement is not testimonial, the Court suggested (but did not hold) that it may be admitted against the defendant without implicating the Confrontation Clause at all, though such statements may still be inadmissible under local hearsay rules. *Id.* at 1374.

C. What *Crawford* did not change.

Several categories of out-of-court statements are unaffected by the holding in *Crawford* and therefore may be admitted without violating the Confrontation Clause, so long as they otherwise satisfy the rules of evidence:

- (1) Out-of-court statements not offered for the truth of the matter asserted. *Crawford*, 124 S.Ct. at 1369 n.9 (citing *Tennessee v. Street*, 471 U.S. 409 (1985)).
- (2) Out-of-court statements made by declarants who do testify. *Id.* (citing *California v. Green*, 399 U.S. 149 (1970)).
- (3) Out-of-court statements made by unavailable declarants when the defendant had an adequate opportunity to cross-examine at a prior hearing. *Id.* at 1367 (citing *Mattox v. United States*, 156 U.S. 237 (1895)).
- (4) Out-of-court statements introduced into evidence by the defense (since the Confrontation Clause only protects the defendant).
- (5) Out-of-court statements made by the defendant (since the Confrontation Clause has never protected a defendant from his own testimony). *But see People v. Baugh*, No. 247548, at *6 (Mich. Ct. App. 10/28/2004) (concluding erroneously that defendant's statement not covered by *Crawford* only because it was not testimonial).

Crawford also did not change the unavailability requirement for the use of prior testimony when the defendant did have an opportunity for cross-examination. Therefore, a testimonial statement from a non-testifying declarant will be admissible only if the defendant had an adequate opportunity for prior cross-examination and the prosecution meets its burden of proving that “the witness is demonstrably unable to testify in person” at trial. *Id.* at 1360.

II. What Types of Out-of-Court Statements Are Testimonial?

The biggest issue left open in *Crawford*, by far, is the definition of “testimonial.” The Court favorably cited three possible definitions: (1) “*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;” (2) “extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;” and (3) “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.” *Crawford*, 124 S.Ct. at 1364 (emphasis added). The Court decided to “leave for another day any effort to spell out a comprehensive definition of “testimonial”” but concluded that the term applies, “at a

minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* at 1374 (emphasis added).

Since *Crawford* was decided, Michigan courts have taken the view that the “at a minimum” language in *Crawford* actually described the maximum coverage of testimonial and have consistently refused to view any other types of statements as testimonial. By contrast, other courts around the United States have concluded that testimonial statements include not only formal testimony and police interrogations but also other accusatorial statements which the declarant reasonably should know could be used to prosecute the defendant.

Most significantly, the Sixth Circuit, after reviewing post-*Crawford* developments in other federal courts, adopted the definition of testimonial proposed by Professor Richard D. Friedman of the University of Michigan Law School, who concluded that a statement is testimonial if it is:

made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime. Based on his proposed definition, Friedman offers five rules of thumb: A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial. And neither is a statement made in the course of going about one's ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.

United States v. Cromer, 389 F.3d 662, 673-74 (6th Cir. 2004) (quotation marks and citation omitted).

If, as I believe it will, the Supreme Court eventually adopts a definition of testimonial similar to the one proposed by Professor Friedman and endorsed by the Sixth Circuit in *Cromer*, many statements that are currently being admitted in Michigan courts will be strictly inadmissible. The following is a list of types of statements and whether they should be regarded as testimonial for purposes of *Crawford* under the Friedman/*Cromer* approach.¹

- A. Prior Testimony.** Unquestionably testimonial and therefore barred unless the witness is now unavailable and the defendant had an adequate opportunity for prior cross-examination.

¹ The organization and many of the cases in this list are borrowed from a similar list produced by Jeffrey Fisher, who successfully argued *Crawford* before the Supreme Court.

- B. Statements Made During Police Interrogation.** Unquestionably testimonial. *Crawford*, 124 S.Ct. at 1374. *See also* *People v. Bell*, 264 Mich. App. 58, 689 N.W.2d 732 (2004) (holding testimonial co-defendant's statements made during police interrogation). Even though the Supreme Court took pains to stress that "We use the term 'interrogation' in its colloquial, rather than any technical, legal, sense," *Crawford*, 124 S.Ct. at 1365 n.4, the Michigan Court of Appeals has repeatedly concluded that some statements made in response to police questioning are not testimonial. *See* *People v. Bechtol*, No. 246345 (Mich. Ct. App. Nov. 30, 2004) (statement by victim to police investigating crime not testimonial because it was not "structured police interrogation"); *People v. Bryant*, No. 247039 (Mich. Ct. App. Aug. 31, 2004) (same). By contrast, any accusatory statement made to the police is testimonial under the view adopted by the Sixth Circuit in *Cromer*, and even the Michigan Court of Appeals has recognized a few such statements as testimonial without requiring formal custodial interrogation. *See* *People v. McPherson*, 263 Mich. App. 124, 687 N.W.2d 370 (2004) (recognizing eyewitness statement to police implicating defendant was testimonial).
- C. Allocutions and Guilty Pleas.** Unquestionably testimonial. *See* *Crawford*, 124 S.Ct. at 1372 (abrogating six lower court cases that had allowed pleas allocutions to be used against others). *See also* *People v. Shepherd*, 263 Mich. App. 665, 689 N.W.2d 721 (2004) (holding transcript of co-defendant's guilty plea to be inadmissible testimonial evidence under *Crawford*).
- D. Letters (or Similar Communications) to Governmental Officials Accusing Others of Wrongdoing.** Unquestionably testimonial. *See* *Crawford*, 124 S.Ct. 1360 (noting that an accusatory letter was used in the infamous trial of Sir Walter Raleigh).
- E. Police Lab Reports, Coroner Reports, etc.** Testimonial. In fact, the Supreme Court held nearly a century ago that defendants were entitled to confront authors of such reports. *United States v. Diaz*, 223 U.S. 442, 450 (1912). Since *Crawford*, courts have consistently held that such reports are admissible only if the author testifies because the reports are prepared, like affidavits, in anticipation of litigation. *See* *City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004); *People v. Rogers*, 780 N.Y.S.2d 392 (N.Y. App. Div. 2004).
- F. Child Hearsay Statements to Police, Doctors, Social Workers, etc.** In *Crawford*, the Court suggested that its decision in *White v. Illinois*, 502 U.S. 346 (1992), which had upheld the admission of "spontaneous declarations" by a child victim to an investigating police officer,

would not survive the testimonial approach. *See Crawford*, 124 S.Ct. at 1368 n.8. Under the approach adopted by the Sixth Circuit in *Cromer*, it is clear that such statements are testimonial because they are accusatorial statements that a reasonable person (i.e., a reasonable adult) would recognize have prosecutorial value. In fact, most courts since *Crawford* have recognized that accusatorial statements made by children to police, social workers or doctors are squarely testimonial. *See State v. Mack*, 101 P.3d 349 (Or. 2004) (holding testimonial statement by three-year old to social worker during police-directed interview); *Snowden v. State*, 846 A.2d 36 (Md. App. 2004) (holding testimonial interview of child victim); *People v. Sissivath*, 13 Cal. Rptr. 3d 419 (Cal. App. 2004) (holding testimonial child's statement to interview specialist at private victim assessment center); *State v. Courtney*, 682 N.W.2d 185 (Minn. App. 2004) (holding testimonial statements to child protective services worker); *In re T.T.*, 815 N.E.2d 789 (Ill. App. 2004) (holding testimonial statements by child to police, social worker, and examining physician); *T.P. v. State*, ___ So.2d ___ (Ala. App. Oct. 29, 2004) (holding testimonial child's statements to police officer and social worker). Against all of this authority stands the Michigan Court of Appeals' decision in *People v. Geno*, 261 Mich. App. 624, 683 N.W.2d 687 (2004), which held that a child victim's statements to a social worker were not testimonial because the social worker worked for a private agency under contract with the F.I.A. Suffice it to say that *Geno* is impossible to square even with authority issued before *Crawford*. *See Idaho v. Wright*, 497 U.S. 805 (1990) (holding admission of child's statements to private physician performing examination in coordination with police violated Confrontation Clause).

G. Statements by Confidential Informants to Police. Clearly testimonial, as the Sixth Circuit held in *Cromer*.

H. Witness Statements to Responding Officers. These statements are almost always testimonial under the *Cromer*/Friedman approach. It should not matter whether these statements are "excited utterances" or not, although the lower courts have split since *Crawford* on that issue. *Compare United States v. Neilsen*, 371 F.3d 574 (9th Cir. 2004) (holding testimonial statement made during execution of search warrant); *Moody v. State*, 594 S.E.2d 350 (Ga. 2004) (holding testimonial victim's statement to police at scene shortly after crime); *Wall v. State*, 143 S.W.3d 846 (Tex. App. 2004) (holding testimonial victim's statement to police at hospital shortly after assault); *Lopez v. State*, 888 So.2d 693 (Fla. App. 2004) (holding testimonial statement to responding officer even though it was excited utterance); *with Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir. 2004) (holding not testimonial victim statement to responding officer); *Fowler v. State*,

809 N.E.2d 960 (Ind. App. 2004) (holding not testimonial statements made in response to questions from responding officers); *Cassidy v. State*, 149 S.W.3d 712 (Tex. App. 2004) (holding not testimonial victim's statement to police immediately after event).

- I. Accusatorial Statements Made During 911 Calls.** These statements should be testimonial under the *Cromer/Friedman* approach. See Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 Pa. L. Rev. 1171 (2002) (arguing that admission of accusatorial statements made during 911 calls from non-testifying declarants violates the Confrontation Clause). The lower courts are split on this issue since *Crawford*, although most have allowed in the calls. See *State v. Powers*, 99 P.3d 1262 (Wash. App. 2004) (holding testimonial 911 call to report domestic violence); *State v. Wright*, 686 N.W.2d 295 (Minn. App. 2004) (holding non-testimonial 911 call made moments after the event and "under the stress of the event"); *People v. Caudillo*, 19 Cal. Rptr. 3d 574 (Cal. App. 2004) (holding statements in 911 call non-testimonial).

- J. Statements to Friends, Family, Acquaintances, Co-Conspirators, Accomplices.** Clearly not testimonial. *Crawford*, 124 S.Ct. at 1364. See also *People v. Shepherd*, 263 Mich App. 665, 689 N.W.2d 721 (2004) (holding co-defendant's statements to relatives and letter to defendant not testimonial); *People v. DeShazo*, 679 N.W.2d 69 (Mich. 2004) (peremptorily reversing order suppressing statement by co-defendant to acquaintance that defendants hired him to kill victim; statement was non-testimonial).

- K. Statements to Undercover Officers or Informants.** Not testimonial. *Crawford*, 124 S.Ct. at 1368.

- L. Dying Declarations.** In *Crawford*, the Court suggested, but did not hold, that dying declarations may be admissible as a *sui generis* historical exception to the principles of the Confrontation Clause. 124 S.Ct. at 1367 n.6. See also *People v. Monterroso*, 101 P.3d 956 (Cal. 2004) (treating dying declaration as exception to testimonial rule).

III. What Counts as Forfeiture of the Right to Confrontation?

Besides the definition of testimonial, the other big issue left open in *Crawford* is under what circumstances a testimonial statement of an unavailable witness may be admitted against the defendant, even though the defendant never had an adequate prior opportunity for cross examination, because the defendant caused the witness to be unavailable. In *Crawford*, the Court stated that it accepted the "rule of forfeiture

by wrongdoing” which “extinguishes confrontation claims on essentially equitable grounds.” 124 S.Ct. at 1370.

The forfeiture rule, by its terms, requires “wrongdoing” by the defendant that causes the witness to be unavailable. Therefore, in *Crawford* itself, there was no forfeiture even though the only reason that Sylvia Crawford could not testify against her husband was because he had invoked the spousal testimonial privilege. It was not “wrongdoing” on Mr. Crawford’s part to invoke his right to exclude his wife’s testimony under the local rules of evidence.

The hard question left open is whether the “wrongdoing” that causes the witness to be unavailable must be done with the intent to “procure the unavailability of the declarant as a witness.” Fed. R. Evid. 804(b)(6). If so, a defendant will have forfeited his or her right to confront a witness only if the defendant caused the witness to be unavailable specifically to prevent the witness from testifying. But another view of the “forfeiture by wrongdoing” doctrine would permit statements from unavailable witnesses if the defendant wrongfully caused the witness to be unavailable for any reason.

The difference between these two points of view is most critical in homicide cases. If the broader view prevails, any prior testimonial statement by the homicide victim will be admissible so long as the prosecutor can prove, by a preponderance, that the defendant wrongfully killed the victim. See *People v. Giles*, 19 Cal. Rptr. 3d 843 (Cal. App. 2004) (holding that killing must merely wrongful to allow statement from victim). On the other hand, if the narrow view is upheld, such statements can come in only in the unusual case in which the prosecutor can prove that the defendant killed the victim specifically to prevent him or her from testifying. See *United States v. Houlihan*, 2 F.3d 1271 (1st Cir. 1996) (holding that to invoke evidentiary forfeiture provision, prosecutor must prove wrongdoing “undertaken with the intention of preventing the potential witness from testifying at a future trial”).