Confrontation and *Crawford*

Identifying Testimonial Statements

By Hon. Mark A. Randon

Fast Fact

A "testimonial statement" is best defined as a statement about a past event or fact that the declarant would reasonably expect to be used later in a criminal prosecution.

In 2004, the United States Supreme Court redefined the Sixth Amendment's confrontation requirement regarding the admission of hearsay statements in criminal cases. *Crawford v Washington*[1] replaced the unpredictable "reliability" test with a straightforward bar of *testimonial* statements made by witnesses who do not testify at trial unless (1) they are unavailable[2] and (2) the defendant has had a prior opportunity to cross-examine them. While the Supreme Court's pronouncement in *Crawford* was clear, the ruling's application has challenged trial courts and practitioners alike. The reliability test did not distinguish between *testimonial* and *nontestimonial* statements. However, this determination is now critical to applying the correct standard for admission. This article provides a framework for understanding and identifying testimonial statements in light of *Crawford* and its progeny.

The Meaning and Purpose of Confrontation

The Confrontation Clause is one of the fundamental protections afforded by the Sixth Amendment to individuals facing criminal prosecution. It guarantees a criminal defendant the right to confront adverse witnesses. The Confrontation Clause had its roots in the English common-law tradition, requiring face-to-face testimony subject to cross-examination,[3] which the United States Supreme Court has recognized is the "'greatest legal engine ever invented for the discovery of truth.'"[4]

The Reliability Test

Before *Crawford,* the controlling authority on the Confrontation Clause's application to hearsay statements was *Ohio v Roberts*.[5] In *Roberts,* the United States Supreme Court reasoned that a literal interpretation of the Confrontation Clause would require the exclusion of every hearsay statement made by a nontestifying witness and would lead to "extreme" and "unintended" results.[6] Therefore, the Court held that because the Confrontation Clause and hearsay rules protect similar values, a defendant's right to confront an unavailable witness could be overcome if the hearsay statement "bore a sufficient 'indicia of reliability.'"[7]

Under *Roberts,* a statement was considered "reliable" if it fell within a "firmly rooted" hearsay exception or if the court found it had other "particularized guarantees of trustworthiness."[8] However, this determination often required courts to engage in a subjective weighing of factors and produced results that were frequently unpredictable and offensive to the Framers' intent in establishing the Confrontation Clause.[9]

The *Crawford* Test

Some 24 years later, the Court overruled the *Roberts* "reliability" test in *Crawford.* Justice Scalia wrote this cogent statement of the facts:

> Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia.
>
> * * *
>
> The State charged the petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege,...so the State sought to introduce Sylvia's tape recorded statements to the police as evidence that the stabbing was not in self-defense.[10]

After reviewing the history pertaining to confrontation from seventeenth-century England through the drafting of the Sixth Amendment, the Court reached two conclusions:

> First, 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.
>
> * * *
>
> [And second] that the Framers would have not allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. [Emphasis added.][11]

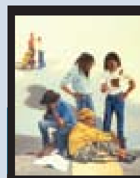
The Court rejected the notion that the compliance with hearsay exceptions also satisfies the Confrontation Clause. It reasoned that confrontation is a procedural rather than a substantive guarantee and that its main protection is the requirement of adversarial testing.[12] "Dispensing with confrontation because testimony is obviously reliable," the Court wrote, "is akin to dispensing with jury trial because a defendant is obviously guilty."[13] Therefore, the Confrontation Clause's protection now properly rests with the accused, through his or her right to challenge adverse testimony by cross-examination, and it cannot be supplanted with evidentiary "safeguards" dependent on judicial analysis.

The Testimonial to Nontestimonial Continuum

The Supreme Court's focus on testimonial statements was based on the following observations: (1) the Confrontation Clause provides a right to confront "witnesses," (2) a "witness" is defined as one who bears testimony, and (3) testimony is "typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[14] Consequently, nontestimonial statements could not have been the central ill that the Framers sought to address.

While the Supreme Court declined to give a comprehensive definition of a testimonial statement, in *Crawford* it did provide examples of clearly testimonial and clearly nontestimonial statements. The examples can be summarized as follows:[15]

Clearly Testimonial	**Clearly Nontestimonial**
Formal police interrogations	Casual remarks to acquaintances
Prior testimony	Off-hand, overheard remarks
Plea allocutions	Statements in furtherance of a conspiracy
Depositions	Statements unwittingly made to informants
	Business records



The Yard by Maurice Scott

> "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."

These cases form the outer limits of what will be referred to as the "testimonial to nontestimonial continuum." Following *Crawford,* a significant gray area existed between the outer limits of the continuum. In *Davis v Washington,* a gray-area case, the United States Supreme Court clarified the definition of "testimonial statement."[16]

911 Calls and Crime-Scene Investigations

Davis involved two companion cases before the Supreme Court, *Davis v Washington* and *Hammon v Indiana.* In these cases, the Court was required to determine when statements made to 911 operators and to police at a crime scene are testimonial. With respect to 911 operators, the Court held that a declarant who makes statements to a 911 operator about his or her current situation to get help for an *ongoing emergency* is not acting as a witness or testifying. However, statements made to 911 operators designed primarily to establish *past facts,* unrelated to a present emergency, are testimonial if the facts are "potentially relevant to later criminal prosecution."[17]

Hammon, the case involving the crime-scene investigation, arose out of a police response to a domestic-violence incident. When the police arrived at the scene, the conflict had ended, so they separated the accuser from the defendant, interviewed her, and had her sign an affidavit. Although the accuser did not appear at the trial, the judge allowed the police officers to testify about her statements at the scene and admitted her affidavit.

Using the same analysis as for 911 cases, the United States Supreme Court reversed, holding that the statements arising from the crime-scene investigation were testimonial and required confrontation. There was no ongoing emergency when the statements were taken, and the police questioned the declarant about "how potentially criminal past events began and progressed."[18]

Identifying Testimonial Statements in Future Cases

As guidance, *Crawford* offered, but declined to adopt, three possible "formulations" of a definition of "testimonial statements":

> "[1] ex parte in-court testimony or its functional equivalent—that is, materials 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," [or 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."[19]

However, if the Court adopts one of these formulations in the future, it will most likely be the first formulation, for the following reasons. First, it appears that the Court's decision in *Davis* was an implicit rejection of the second formulation.[20] The appropriateness of this narrow formulation is also questionable in light of *Crawford*'s discussion of *White v Illinois,* the case from which the formulation arose.[21]

Additionally, although the third formulation offers the broadest definition of a "testimonial statement," its breadth makes it prone to the vagaries that plagued the "reliability test."[22] Instead, the first formulation is the soundest of the three. The last phrase of the first formulation includes as a testimonial statement one that the declarant "would reasonably expect to be used prosecutorially." Therefore, in light of *Crawford* and its progeny, I contend that a "testimonial statement" is best defined as a statement about a past event or fact that the declarant would reasonably expect to be used later in a criminal prosecution when made.

Introduction to the Flowchart

A flowchart is provided as a guide for identifying *presumptively* testimonial and presumptively nontestimonial statements. The flowchart uses the catch-all phrasing of the first formulation as the "bright-line." That is, every statement that is not clearly testimonial or nontestimonial is categorized by whether the declarant reasonably expected it to be used prosecutorially when made. In addition, pursuant to *Crawford* and its progeny, the flowchart distinguishes between statements made to governmental or nongovernmental agents[23] and differentiates statements that are solicited from those that are unsolicited.[24] For governmental officials, formally solicited statements are presumptively testimonial.[25] Unsolicited statements to nongovernmental officials or individuals are also scrutinized to weed out those that are self-serving.

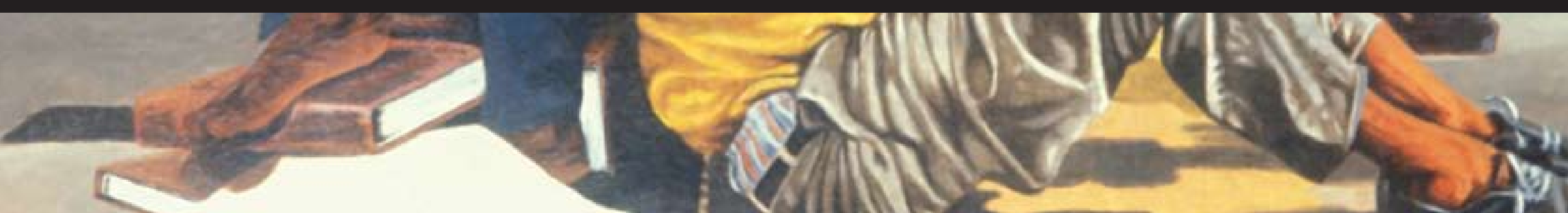
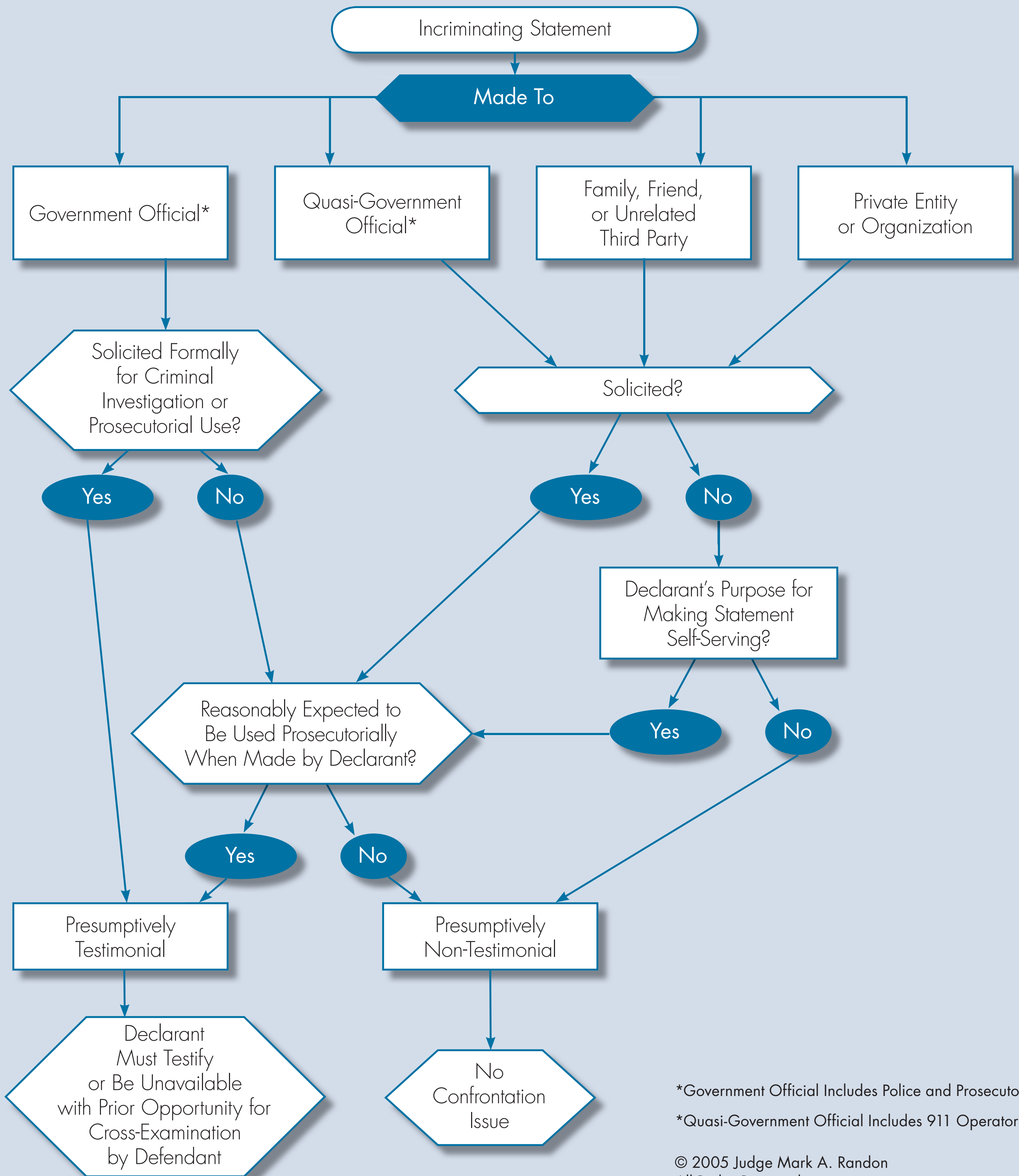


Exhibit A: Flowchart to Assist in Identifying Testimonial and Nontestimonial Statements



*Government Official Includes Police and Prosecutor

*Quasi-Government Official Includes 911 Operator

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Other Issues

Crawford is Not Retroactive

In 2007, the United States Supreme Court held that *Crawford* does not apply retroactively.[26] The Court resolved the split that had existed among the circuit courts by concluding that the *Crawford* holding was not a watershed rule that implicated the fundamental fairness and accuracy of criminal proceedings.

Dying Declarations

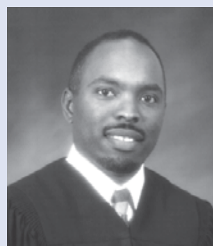
Crawford left open the possibility that "nontestimonial dying declarations" may nevertheless satisfy the Confrontation Clause because historically they were not excluded.[27] Following this reasoning, the Michigan Court of Appeals has recently held that dying declarations "are an historical exception to the Confrontation Clause."[28]

Forfeiture by Wrongdoing

Although not at issue in *Davis or Hammon,* the Court also reaffirmed the rule of forfeiture by wrongdoing: an accused forfeits the right to confront a witness whose absence he or she procured.[29] For example, suppose that an accused threatened to kill a witness if he testified in court, and the witness in fact failed to appear. The right of the accused to confront that witness would be extinguished. Forfeiture by wrongdoing is an equitable remedy that the court must decide.

Conclusion

The *Crawford* decision was a significant step forward in restoring the constitutional right of the accused to confront adverse witnesses. What is and what is not a testimonial statement, subject to the Confrontation Clause's protections, has yet to be fully developed. However, since *Crawford,* the Supreme Court has provided additional guidance, which should assist courts and practitioners in properly admitting or excluding incriminating hearsay statements from unavailable witnesses. ■



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FOOTNOTES

1. *Crawford v Washington,* 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).
2. *Barber v Page,* 390 US 719, 724–725; 88 S Ct 1318; 20 L Ed 2d 255 (1968) (holding that a witness is constitutionally unavailable for purposes of the Confrontation Clause if he or she is absent and the prosecutor made a good-faith effort to obtain the witness's presence at trial).
3. *Crawford, supra* at 43.
4. *California v Green,* 399 US 149, 158; 90 S Ct 193; 26 L Ed 2d 489 (1970), quoting Wigmore on Evidence.
5. *Ohio v Roberts,* 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980).
6. *Id.* at 63.
7. *Id.* at 66.
8. *Id.*
9. *Crawford, supra* at 60.
10. *Id.* at 38–40.
11. *Id.* at 50–54.
12. *Id.* at 61.
13. *Id.* at 62.
14. *Id.* at 51 (citation omitted).
15. *Id.* at 51–52, 56–58; see also *Davis v Washington,* 547 US ___; 126 S Ct 2266, 2275; 165 L Ed 2d 224 (2006).
16. *Davis, supra* at 2274.
17. *Id.* at 2273–2274; see also *People v Walker,* 273 Mich App 56; 720 NW2d 754 (2006) (following *Davis* in concluding that statements made during a 911 call were nontestimonial).
18. *Id.*
19. *Crawford, supra* at 51 (citations omitted).
20. *Davis, supra* at 2276 (holding that the statements given to the police by the accuser were not "formalized testimonial materials" but were the result of an initial crime-scene investigation, not a formal custodial interrogation).
21. *Crawford, supra* at 58 n 8, discussing *White v Illinois,* 502 US 346; 112 S Ct 736; 116 L Ed 2d 848 (1992).
22. *Davis, supra* at 2271–2272 (rejecting the formulation of the Indiana Supreme Court in *Hammon,* which had concluded that the victim's crime-scene statement to the police was nontestimonial).
23. *Crawford, supra* at 56 n 7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact . . . with which the Framers were keenly familiar.").
24. *People v Shepherd,* 263 Mich App 665, 675; 689 NW2d 721 (2004).
25. *Crawford, supra* at 51.
26. *Whorton v Bockting,* 549 US ___; 127 S Ct 343; 166 L Ed 2d 15 (2007).
27. *Crawford, supra* at 56 n 6.
28. *People v Taylor,* 275 Mich App 177; 737 NW2d 790 (2007).
29. *Davis, supra* at 2279–2280; *Crawford, supra* at 62.