Crawford v. Washington - Early Observations On Admitting Evidence Under The Confrontation Clause

A sea change of constitutional dimensions occurred when the Supreme Court issued its Confrontation Clause decision in Crawford v. Washington, *541 U.S. 36, 158 L. Ed. 2d 177, 124 S.Ct. 1354 (Mar. 8, 2004) (No. 02-9410). Among other things, the Supreme Court overturned precedent that had been applied for nearly a quarter of a century, including* Ohio v. Roberts *(applying "particularized guarantees of trustworthiness" standard to admission of statements of an unavailable witness).*

Landmark Decision

In *Crawford*, the Supreme Court reversed an assault conviction of a husband who stabbed another man who allegedly tried to rape his wife. The wife was *Mirandized* and interrogated by detectives. At trial, the wife's tape-recorded statement to the police describing the stabbing was played; she did not testify at trial based on the state marital privilege. The Supreme Court held the admission of the wife's statement violated the Confrontation Clause:

> "Where *testimonial* evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at __, 124 S.Ct. at 1374 (emphasis added).

Key Issue - "Testimonial" Statements

After *Crawford*, a central Confrontation Clause question is whether statements to be admitted in evidence are "testimonial." *Crawford* created a class of "testimonial" hearsay statements, which at minimum includes statements made to law enforcement officials engaged "in the production of testimony with an eye toward trial." These statements may arise in a variety of forms. They range from "affidavits, custodial examinations,…depositions, prior testimony, or confessions" [124 S.Ct. at 1364, 1367 n.7] to, at the other end of the spectrum, "casual remarks," which are not considered "testimonial." [1364]

Open Issues After *Crawford*

A unique aspect of the *Crawford* case is the number of open issues the Supreme Court explicitly left unresolved. Chief among them, the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial'," even recognizing that "our refusal to articulate a comprehensive definition in this case will cause interim uncertainty." [1374 n.10] The Court suggested that the meaning of law enforcement "interrogation" is another term that will be revisited. [1365 n.4] *Crawford* also calls into question some prior Supreme Court decisions, including *White v. Illinois*, which upheld the admission of a child victim's statements to a police officer, and which the Court called "arguably in tension" with the *Crawford* rule. [1372 n.8] There are at least seven open issues after *Crawford* (*see* Table: "*CRAWFORD WATCH*: Status Of *Crawford* Issues," below). These and other unresolved questions ensure that the contours of the *Crawford* decision will continue to unfold for several years.

Early "Testimonial" Cases

A few early insights can be offered from the first decisions applying *Crawford*. Some cases have begun to explore the meaning of "testimonial" statements. For example, statements made during the execution of a search warrant and a confession of a fugitive to law enforcement are "testimonial" statements under *Crawford*. While not surprising, this conclusion reinforces the point that statements obtained in the law enforcement process with a view towards prosecution are testimonial. In contrast, recorded statements to a confidential informant made as a statement against penal interest and coconspirator statements have been found to be "non-testimonial". Whether a statement is testimonial or not will often turn on the facts of the case, the "[i]nvolvement of government officers in the production of testimony with an eye toward trial" [1367 n.7], and the declarant's knowledge of the law enforcement role in obtaining the statement.

Residual Impact On *Ohio v. Roberts* ?

An important question left in the wake of *Crawford* concerns what remains of prior precedent regarding admission of statements by witnesses unavailable at trial. This issue calls into question *Ohio v. Roberts*, 448 U.S. 56 (1980), which permitted statements of an unavailable witness to be admitted as long as the statement fell:

1. "under a "firmly rooted hearsay exception" or
2. bore "particularized guarantees of trustworthiness."

The *Crawford* majority repudiated *Roberts* on several grounds:

> ❖The *Roberts* standard was deemed "amorphous," "malleable," "[v]ague" and "manipulable", resulting in subjective, "unpredictable and inconsistent application." [1369, 1370, 1372, 1373] Indeed, the Court noted that there were "countless" reliability factors used by the lower courts, and that the same factors have been used to admit and exclude statements under the Confrontation Clause. [1371]
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> ❖"[S]ome of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial." [1372 (emphasis in original)]
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> ❖The *Crawford* majority expressed a distrust of judges to safeguard the Confrontation Clause rights based upon "manipulable" standards: "The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." [1370]

The dissent also agreed that *Roberts* had been overruled. [1374] With such an evisceration, what, if anything, could be left of *Roberts*? Are there any circumstances in which its "amorphous," "malleable," "[v]ague" and "manipulable" standard could be applied in the Confrontation Clause context? If its application is so unpredictable and subjective, when, if ever, can it survive or be used in any case? Was the overruling complete or more limited?

Two appellate courts have suggested that *Roberts* survives by applying it to non-testimonial statements. Is this an area where the circuits will split? What could explain this result? Perhaps in the wake of *Crawford*, the courts will strive for some identifiable standards to apply—If not the *Roberts* standard in non-testimonial cases, then what standard? *Roberts*, with its faults highlighted by the *Crawford* majority, at least was a known and used standard for nearly a quarter of a century. Only time will reveal the answers to these questions.

Issues Addressed In Recent Decisions In the Wake Of *Crawford*

Some recent decisions have highlighted some of the issues evolving after *Crawford*:

> ❖**Retroactive Application**: Will *Crawford* apply to cases decided before its decision date of March 8, 2004? This issue is certain to be raised on collateral attack in federal and state habeas petitions. In September 2004, one court considered whether *Crawford* applies retroactively to grand jury testimony used to impeach a witness's trial testimony (*United States v. Wilmore*, 381 F.3d 868 (9th Cir. Aug. 25, 2004)). (p. 96)
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> ❖ **"Testimonial" Statements**: Another court decided whether recorded statements between the defendant and a government agent were "testimonial" (*United States v. Cianci,* 378 F.3d 71 (1st Cir. Aug. 10, 2004)). (p. X)
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> ❖**Non-Testimonial Statements**: If the statement in issue is "non-testimonial", what standards should apply in weighing the admissibility of the statement? The options include merely applying the Federal Rules of Evidence to reverting to the *Ohio v. Roberts* standard to some other yet undefined constitutional standard.

Period Of Uncertainty

Crawford left so many open issues that the circuits are likely to split on important Confrontation Clause questions in the next several years. Ultimately, the Supreme Court will be cancelled to resolve these questions and divisions. As the majority recognized, in the interim, its decision will cause a period of uncertainty in this important constitutional area.

CRAWFORD WATCH: Status Of *Crawford* Issues As Of August 2004

This table highlights some of the pending *Crawford* issues as the courts continue to wrestle with the application of this landmark decision.

Open Issue	*Guidance*	Recent Cases
Defining the Scope of "testimonial" statements – The scope of "testimonial" statements is the central issue in the wake *Crawford* to be resolved in the coming years	*See Crawford*, 541 U.S. at __ (noting open issue concerning meaning of "testimonial" statements; at minimum, "testimonial" statements includes statements made to law enforcement such as "affidavits, custodial examinations, … depositions, prior testimony, or confessions")	*United States v. Nielsen,* 371 F.3d 574, 581 & n.1 (9th Cir. 2004) (statements made during execution of a search warrant were "testimonial"); *United States v. Jones*, 371 F.3d 363 (7th Cir.. 2004) (fugitive co-defendant's redacted, written confession to law enforcement was "testimonial")
Admissibility of Co-conspirator Statements – Based on recent cases, the admissibility of co-conspirator statements turns on whether the statement was or was not "testimonial"	*See Crawford*, 541 U.S. at __ & n.7 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial — for example, business records or statements in furtherance of a conspiracy.")	**NON TESTIMONAL STATEMENT CASES:** *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004) (coconspirator statement was not "testimonial"); *United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004) (concluding *Crawford* did not bar non-testimonial statements under FRE 801(d)(2)(E); *United States v. Robinson*, 367 F.3d 278, 292 n.20 (5th Cir. 2004) Rule 801(d)(2)(E) statement was admissible post-*Crawford* "because the statement challenged as hearsay was made during the course of the conspiracy and is non-testimonial in nature"), *cert. denied*, 125 S.Ct. 623 (2004); *United States v. Reyes*, 362 F.3d 536, 540 n.4 (8th Cir. 2004) (statements which were admissible under Rule 801(d)(2)(E) were unaffected by *Crawford* since the co-conspirator statements were nontestimonial; "*Crawford* did not provide additional protection for nontestimonial statements, and indeed, questioned whether the Confrontation Clause protects non-testimonial statements.") **TESTIMONAL STATEMENT CASES:** *United States v. McClain*, 377 F.3d 219, 221 (2d Cir. 2004) (noting "a plea allocution constitutes testimony, as it is formally given in court, under oath, and in response to questions by the court or the prosecutor"; "a plea allocution by a co-conspirator who does not testify at trial may not be introduced as substantive evidence against a defendant unless the co-conspirator is unavailable and there has been a prior opportunity for cross-examination")
Definition of "Casual" Remarks - Since "casual remarks" are admissible under *Crawford*, the definition of "casual remarks" relative to "testimonial" statements became important	*See Crawford,* 541 U.S. at __, 124 S.Ct. at 1364 (noting issue: "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.")	No Recent Cases

CRAWFORD WATCH: Status Of *Crawford* Issues As Of August 2004

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Open Issue	*Guidance*	Recent Cases
Meaning of Law Enforcement "Interrogation" – At issue under *Crawford* is what constitutes "interrogations"	*Crawford,* 541 U.S. at __ n.4, 124 S.Ct. at 1364 n.4 (noting issue: "Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case.")	No Recent Cases
Retroactive application of *Crawford* on collateral review	Retroactivity is certain to arise as a result of a landmark case like *Crawford* that impacts an area of evidence law	See *United States v. Wilmore*, page 86, where the court considered whether *Crawford* applies retroactively to grand jury testimony used to impeach a witness's trial testimony
Continued application of *Ohio v. Roberts* (applying the "particularized guarantees of trustworthiness" standard)	The *Crawford* majority repudiated *Roberts* because it was "amorphous," "malleable," "[v]auge" and "manipulable", resulting in subjective, "unpredictable and inconsistent application," [1369, 1370, 1372, 1373] noting the "countless" reliability factors used by the lower courts in which the same factors have been used to admit and exclude statements under the Confrontation Clause, and a distrust of judges to safeguard the Confrontation Clause rights based upon "manipulable" standards of *Roberts*. Even the dissent in *Crawford* agreed that *Roberts* had been overrulled: "The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." [1370]	*United States v. Saget*, 377 F.3d 223 (2nd Cir. July 28, 2004) (applying *Ohio v. Roberts* to non-testimonial statements); *Horton v. Allen,* 370 F.3d 75, (1st Cir. 2004) (non-testimonial state of mind exception statements were admissible as a firmly rooted exception under the analysis of *Ohio v. Roberts)*
Impact on *White v. Illinois* (concerning admissibility of spontaneous statements of a child victim to law enforcement)	In *Crawford*, the Supreme Court questioned the continued vitality of *White v. Illinois*, along with other precedent. *Crawford*, 541 U.S. at __, 124 S.Ct. at 1372 n.8 (noting issue: "One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois.*")	No Recent Cases