

Open Issues: Fifth Circuit Notes Open Issue Whether *Crawford* Confrontation Clause Case Applies Retroactively

In a murder-for-hire conspiracy case, the Fifth Circuit noted as an open issue which it declined to decide: whether *Crawford* applied retroactively. As the circuit explained it was unnecessary to resolve the issue: “Whether retroactive or not, an issue unresolved in this circuit, *see Lave v. Dretke*, 416 F.3d 372, 378-79 (5th Cir. 2005) (granting Certification Of Appeal on the issue), and which we decline to reach, *Crawford* does not control here.” [877]



There is a current split in the circuits on whether *Crawford* applies retroactively. *See Circuit Split, The Retroactivity Of Crawford Confrontation Clause Analysis*, 2 FED. EVID. REV. 173 (March 2005).

Most circuits considering the issue have declined to apply *Crawford* retroactively on collateral review:

❖ **Second Circuit:** *Mungo v. Duncan*, 393 F.3d 327, 335-36 (2d Cir. 2004) (holding the *Crawford* decision was not retroactively applicable under the *Teague* doctrine, as neither of the two exceptions applied) (discussed in 2 FED. EVID. REV. 17 (Jan. 2005))

❖ **Sixth Circuit:** *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005) (applying *Ohio v. Roberts* instead of *Crawford* on collateral review)

❖ **Seventh Circuit:** *Murillo v. Frank*, 402 F.3d 786, 789-91 (7th Cir. 2005) (declining to apply *Crawford* retroactively on collateral attack after review other cases and applying *Teague* doctrine)

❖ **Eighth Circuit:** *Evans v. Luebbers*, 371 F.3d 438, 444-45 (8th Cir. 2004) (noting without deciding “the *Crawford* Court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions

to *Teague v. Lane*’s non-retroactivity doctrine”)

❖ **Tenth Circuit:** *Brown v. Uphoff*, 381 F.3d 1219, 1225-27 (10th Cir. 2004) (holding the new rule in *Crawford* was not retroactively applicable under the two exceptions of the *Teague* doctrine) (discussed in the October 2004 issue of the FEDERAL EVIDENCE REVIEW))

The Ninth Circuit is the only circuit to date which has decided to apply *Crawford* retroactively on collateral review, in a divided decision:

❖ **Ninth Circuit:** *Bockting v. Bayer*, 399 F.3d 1010, 1012 (9th Cir. 2005) (holding *Crawford* was a “new” rule, largely in departing from the decisions in *Ohio v. Roberts*, and *White v. Illinois*, and the *Crawford* decision was a “watershed rule” under the second *Teague* exception) (discussed in 2 FED. EVID. REV. 173 (March 2005))

Case Reference

Cross-Reference: For other evidence issues in this case, *see* Sixth Amendment (p. 65), FRE 104(a) (p. 76), and FRE 801(d)(2)(E) (p. 142).

Citation: *Summers v. Dretke*, 431 F.3d 861 (5th Cir. Dec. 2, 2005) (No. 04-70017) (Jones, Benavides, Clement).

Type of Action, Claim Or Charge: Civil; 28 U.S.C. § 2254 (federal habeas corpus review of state court judgment). 