# *CRAWFORD v. WASHINGTON*: THE UNSETTLED 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. 36 (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, and the Michigan courts continued to do so even after the U.S. Supreme Court unanimously reaffirmed in *Lilly v. Virginia*, 527 U.S. 116 (1999), that police statements from non-testifying accomplices and co-defendants were inadmissible. *See Schutte*, 613 N.W.2d at 376 (finding police statement of non-testifying codefendant admissible under *Roberts* test and concluding *Lilly* did not bind Michigan courts).

### 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*, 541 U.S. at 68 (emphasis added). 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 68.

### 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*, 541 U.S. at 59 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 57 (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 own 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 45.

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

### A. The Possible Definitions of "Testimonial."

The biggest issue left open in *Crawford*, by far, is the definition of "testimonial." As a result of the decision in *Crawford*, the definition of the term is absolutely critical because the Confrontation Clause now absolutely bars prosecutors from introducing out-

of-court testimonial statements from non-testifying declarants (except for a few narrow exceptions discussed below), while the Confrontation Clause is simply inapplicable to non-testimonial statements from such declarants.

In *Crawford*, the Court favorably cited three possible definitions of "testimonial": (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*, 541 U.S. at 51-52 (emphasis added).

The first and third proposed definitions are almost identical. Both the first and third definitions would cover virtually any *accusatory* statement made out of court by a declarant who is, in fact, intending to accuse someone else of wrongdoing in a situation in which one might reasonably expect that the listener would report the wrongdoing or otherwise do something about it. The only real difference between the first and third definitions is that the first definition turns on what the declarant herself should reasonably expect would happen to her accusation, while the third definition turns on what a reasonable person in the declarant's position should expect would happen with the accusation. This slight difference might matter if the declarant is the type of person, such as a small child, who could not reasonably be expected to understand what would happen with her accusation.

The second proposed definition is obviously much narrower. It is limited to "formalized" statements, including police confessions, sworn statements, and testimony.

The Court, however, did not choose which of these three proposed definitions was correct. Instead, 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 68 (emphasis added).

### B. The Gaping Split Between Michigan and the Sixth Circuit.

After *Crawford* was decided, Michigan courts almost immediately began to take 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). Thus, the Sixth Circuit in *Cromer* adopted essentially the third proposed definition of testimonial from *Crawford*.

On March 24, 2005, however, the Michigan Court of Appeals flatly rejected the *Cromer* definition of testimonial. *People v. Walker*, 265 Mich. App. 530, 697 N.W.2d 159 (2005). Instead, the majority in *Walker* emphasized the "at a minimum" language from *Crawford* and concluded that statements, including *written statements*, made by a non-testifying alleged domestic violence victim to her neighbor and *to the police* were all admissible as "nontestimonial hearsay" under the excited utterance exception.

The majority's conclusions drew a strong dissent from Judge Cooper, who complained that "the majority ignores *Crawford* by allowing a hearsay exception to trump a defendant's constitutional right of confrontation." Judge Cooper concluded that the *Cromer* definition of testimonial was most consistent with *Crawford*.

On June 17, 2005, however, the Michigan Supreme Court granted leave to appeal in *Walker* and another case (*People v. Mileski*) and ordered the parties in both cases to brief, among other questions, "whether each of the victim's hearsay statements was 'testimonial' in nature and thus inadmissible under the rule of *Crawford v. Washington*." It appears, therefore, that we are likely to have a definition of testimonial from the Michigan Supreme Court within a few months.

### C. The Admissibility of Various Types of Out-of-Court Statements Under the *Cromer*/Friedman Definition of Testimonial

If, as I believe it eventually will, the United States Supreme Court eventually adopts either the first or third definition of testimonial or some other similar definition as the Sixth Circuit did in *Cromer*, many statements that are currently admissible in Michigan courts, especially in light of *Walker*, 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]

1. **Prior Testimony.** Unquestionably testimonial under any definition and therefore barred unless the witness is both: (1) currently unavailable; and (2) the defendant (and not someone else) had an adequate opportunity for prior cross-examination. *Crawford*, 541 U.S. at 57-58.

2. **Statements Made During Police Interrogation**. Unquestionably testimonial under any definition. *Crawford* at 68. *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* at 53 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). But in *Walker*, the majority came to the opposite conclusion.

3. **Allocutions and Guilty Pleas**. Unquestionably testimonial. *See Crawford* at 64 (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

[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. Mr. Fisher's list is available online at http://www.dwt.com/lawdir/publications/CrawfordOutline.pdf

evidence under *Crawford*), *reversed on other grounds*, 472 Mich. 343, 697 N.W.2d 144 (2005).

4. **Letters (or Similar Communications) to Governmental Officials Accusing Others of Wrongdoing.** Unquestionably testimonial. *See Crawford* at 44 (noting that an accusatory letter was used in the infamous trial of Sir Walter Raleigh).

5. **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*, most courts have 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). On October 13, 2005, the Michigan Court of Appeals reached the same conclusion in *People v. Lonsby*, ___ Mich. App. ___, ___ N.W.2d ____ (Oct. 13, 2005), in reversing a CSC conviction in which the prosecution introduced a crime lab report without the testimony of the forensic scientist who produced the report testify. The precedential effect of *Lonsby* is unclear, however, because two of the three judges on the panel concurred "in the result only."

6. **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* at 58 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); *State v. Snowden*, 867 A.2d 314 (Md. 2005) (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); *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) (holding testimonial child's statements to

"forensic interviewer"). 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, e.g., 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).

7. **Statements by Confidential Informants to Police**. Obviously such statements are testimonial, as the Sixth Circuit held in *Cromer*. After *Walker*, the Michigan Court of Appeals would probably hold such statements non-testimonial so long as the police did not "interrogate" the informant.

8. **Witness Statements Reporting Crimes to 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). In *Walker*, the Michigan Court of Appeals majority took a ludicrously expansive view of the "excited utterance" exception to include the alleged victim's written statements to the police and held that since she was excited, her statements were not testimonial.

In *People v. Jackson*, 472 Mich. 884, 695 N.W.2d 67 (2005), the Michigan Supreme Court granted leave to a defendant to argue that the admission of a statement made to the police by a non-testifying accuser some six hours after the alleged crime violated his Confrontation Clause rights. In *Jackson*, the Michigan Court of Appeals held, pre-*Crawford*, that the statement was both an excited

utterance and sufficiently reliable to come in under the catch-all hearsay exception.

9. **Accusatorial Statements Made During 911 Calls.** These statements should be testimonial under the *Cromer*/Friedman approach because, by definition, a call to 911 accusing someone else of committing a crime is a statement that one would reasonably expect the authorities to use against that person (indeed, that is the entire point of reporting a crime to the authorities). *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, once again usually relying on a supposed "excited utterance" exception to the testimonial rule. *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). In *Walker*, the Michigan Court of Appeals majority joined these jurisdictions by allowing in the non-testifying alleged victim's 911 call.

10. **Statements to Friends, Family, Acquaintances, Co-Conspirators, Accomplices, etc.** Clearly not testimonial. *Crawford* at 51. *See also People v. Shepherd*, 263 Mich. App. 665, 689 N.W.2d 721 (2004) (holding codefendant's statements to relatives and letter to defendant not testimonial); *People v. DeShazo*, 469 Mich. 1044, 679 N.W.2d 69 (2004) (peremptorily reversing order suppressing statement by codefendant to acquaintance that defendants hired him to kill victim; statement was non-testimonial).

11. **Statements to Undercover Officers or Informants.** Not testimonial. *Crawford* at 58.

12. **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. 541 U.S. at 56 n.6. Most lower courts since *Crawford* have seized upon this footnote to conclude that dying declarations are exempted from the *Crawford* testimonial rule. *See, e.g.*, *People v. Monterroso*, 101 P.3d 956 (Cal. 2004) (treating dying declaration as exception to testimonial rule). Under the approach taken by the Michigan Court of Appeals in *Walker*, however, such statements will surely be admissible even if the exception is not recognized because the dying declaration

will almost certainly also fall within Michigan's overbroad definition of an excited utterance.

## 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 in dicta that it accepted the "rule of forfeiture by wrongdoing" which "extinguishes confrontation claims on essentially equitable grounds." 541 U.S. at 62.

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 very 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) (emphasis added). 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. In this view, it does not matter *why* the defendant caused the declarant to be unavailable; all that matters is that the defendant did commit an act of wrongdoing that did, in fact, cause the declarant to be unavailable.

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 be 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").

The Sixth Circuit has now weighed in on this conflict and ruled in favor of the broader view. *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005). The court explained in *Garcia-Meza* that since *Crawford* was intended to decouple the Confrontation Clause from the rules of evidence, the fact that the rules of evidence require an intent to keep the witness from testifying is irrelevant to the question of whether the Confrontation Clause also requires such an intent. Instead, the Sixth Circuit viewed the forfeiture by wrongdoing doctrine as "essentially equitable." Therefore, the court reasoned, the defendant should forfeit his right to confront the witness if his wrongdoing caused the witness' unavailability, regardless of the defendant's motive.

The Sixth Circuit's view, if eventually adopted by the Supreme Court, would create a very large exception to *Crawford*, especially in homicide cases, that would generally allow anything the victim ever said into evidence (so long as the statements also fit within a local hearsay exception) . The Michigan courts have not yet ruled on the forfeiture by wrongdoing exception, but it would be surprising if they did not also adopt the broader definition.