CRAWFORD v. WASHINGTON: THE SUPREME COURT OPTS FOR A NEW (OLD?) APPROACH TO THE CONFRONTATION CLAUSE

by

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1. The Prosecutor offers an out-of-court statement in a criminal trial; the Defendant objects on hearsay and Sixth Amendment Confrontation Clause grounds.

2. Assuming P cites an applicable hearsay exception, we have to analyze the applicability of the Confrontation Clause to the statement. To do so, we ask: was the statement "testimonial"?

3. If the statement was "testimonial," then the statement is inadmissible against D, even though it satisfies a hearsay exception, unless P

a. Calls the declarant as a witness; or

b. Establishes declarant unavailability and shows that D had an opportunity to cross-examine the declarant's "testimonial" statement; or

c. Demonstrates that the statement is admissible for a non-hearsay purpose, e.g. per *Tenn. v Street*; or

d. Demonstrates that the defendant has "forfeited" his Confrontation Clause objection by wrongdoing that prevented the prosecutor from eliciting the desired testimony from the declarant at trial (see, e.g., FRE 804(b)(6)): *Crawford,* Part V A ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; ...".)

4. Which statements are "testimonial"?

For sure:

* any testimony given at a formal proceeding – preliminary hearing, grand jury, motion to suppress, prior trial.

* Statements made during police interrogation of a suspect or arrestee.

* guilty plea allocutions (e.g. of coconspirators, to prove that a conspiracy existed). *Crawford,* Part V B.

Probably:

* all forensic lab reports – whether revealing drugs, fingerprints, firearms evidence, blood, DNA, etc. (The Court did not address such documents, but the very purpose for which most such reports are created is "testimonial.")

* affidavits.

* most (all?) witness statements made to police officers or other law enforcement officials in response to police questioning (although most would not survive a hearsay objection anyway).

Perhaps:

* statements made by people in response to questions by public officials who are *not* law enforcement officers. (Example: when a Child Services worker interviews a mother during an investigation to determine whether the mother is capable of having custody. Ditto when the worker interviews the mother's neighbors.)

* dying declarations made to police officers. But perhaps dying declarations are "sui generis" and thus are exempt from the Confrontation Clause altogether even though they are "testimonial."

* dying declarations made to non-police officers (may be classified as non-"testimonial" even if dying declarations to police officers *are* categorized as "testimonial").

* excited utterances MADE TO POLICE OFFICERS, although that's not altogether clear – see Scalia's reference to *White v Illinois* in footnote 8. But excited utterances made to someone other than a police officer or other public official presumably would not be considered "testimonial."

* Any document falling within: 803(9), 803(11) - 803(15), 803(22)-803(22). 803(9) involves a public record. The other exceptions listed here are private documents (church records, family records listing births, deaths, marriages, documents effecting an interest in property, etc.), and are rarely made with criminal litigation in mind. On the other hand, such records are made and kept with the purpose of providing "evidence" (albeit in a non-courtroom sense) of the events or relationships recorded therein.

5. What statements are clearly not "testimonial"?

* co-conspirator statements. See *Crawford,* Part VB

* any statement made "casually" (*Crawford,* Part III A) rather than for purposes

of "going on record" with a government agent or agency. This should include most statements that fit within the following exceptions (so long as not made to a police officer or other public official): 803(1) - 803(4).

* 803(6) - 803(8); 803(10), so long as the primary reason the record was not use as "evidence." See *Crawford,* Part VB (text immediately preceding note 6, referring to "business records"). But if the record was created with the expectation that it would be used as evidence, it should be classified as "testimonial." (Thus, forensic reports should be considered "testimonial.")

* Statements against interest NOT made to public officials (e.g. a "casual remark to an acquaintance" *Crawford* Part III A) are not "testimonial."

6. If the statement is not "testimonial," what then? Does the Confrontation Clause apply at all? If so, how, and what standard is used to measure whether it complies with the Clause?

a. In Part V, Justice Scalia notes that critics of the *Ohio v. Roberts* "trustworthiness" approach have proposed "that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law," but that in "In *White [v. Illinois,* 502 U.S. 346 (1992)], we considered the first proposal and rejected it. 502 U.S., at 352-353. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today,..." Perhaps the Court will reconsider *White* and hold that non-testimonial statements are simply not subject to a Confrontation Clause objection at all.

b. But until the Court revisits the issue, the possibility exists that some aspects of the *Roberts/Inadi* approach will survive. holding that non-testimonial statements that fall within firmly rooted ("FR") exceptions which cover statements that have independent evidentiary significance ("IES") – "FRIES" exceptions – automatically satisfy the Confrontation Clause.

c. It is even possible that the Court will retain some sort of the "trustworthiness" approach for at least some non-testimonial hearsay statements.