

Confrontation Clause Analysis
After Crawford v. Washington

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I. The Crawford holding

In its holding in Crawford v. Washington (2004) 124 S.Ct. 1354, the U.S. Supreme Court abandoned 24 years of Sixth Amendment precedent dating back to its earlier holding in Ohio v. Roberts (1980) 448 U.S. 56 (1980).

Crawford holds that whenever the state offers hearsay evidence against the accused that is “testimonial” in nature, the Sixth Amendment Confrontation Clause requires a showing of

- 1.unavailability; and
- 2.a prior opportunity for cross examination (Crawford supra, at p. 1374.)

Thus, for “testimonial” hearsay, the rule in Ohio v. Roberts that focuses on the “reliability” of the hearsay is no longer valid.

Two big questions immediately arise: what is meant by the term “testimonial” and what is the fate of the Roberts rule for “non-testimonial” hearsay. These will be discussed below.

II. **What does the term “testimonial” hearsay mean?**

Since this term is so critical, it would have been preferable if the Court had chosen to define it. Unfortunately, the Court chose to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial’ .” (Crawford, supra, at p. 1363.)

The Court gives hints to its meaning, however, and these are basically twofold.

First, the court provides three possible “formulations” of the “core class of ‘testimonial’ statements” without endorsing any.

These three formulations are as follows:

- 3.“*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,” Brief for Petitioner 23;

4. “extrajudicial statements. . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *White v. Illinois*, 502 U.S. 346, 365, 112 S. Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment);

5. “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,” Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3.

(Crawford, supra, at p. 1364)

Secondarily, the court provided an irreducible minimum, holding that “whatever 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, supra, at p. 1374).

Thus, in Crawford itself, the court had no difficulty determining that the tape recorded statement of defendant’s wife, obtained during her interrogation as a suspect, was “testimonial” hearsay and, thus, subject to Crawford’s stringent standard.

1. Problems in applying the term “testimonial.”

Some cases are easy to decide. For instance, a videotaped statement made by a crime victim to police and admitted under Evidence Code section 1380 is “testimonial” and the structure provided by Section 1380 for preserving pre-trial testimony of victims of elder abuse by videotape renders it unconstitutional. People v. Pirwani (2004) 119 Cal. App. 4th 770.

Similarly, the interview of two witnesses tape recorded by the police (and admitted under an unclear theory of hearsay) is “testimonial” hearsay that cannot be received in evidence over defense objection. (People v. Lee (2004) 124 Cal. App. 4th 483.

By contrast, “a person who makes a casual remark to an acquaintance” is not making a “testimonial” statement. (Crawford, supra, at p. 1364).

Beyond that, however, the courts have been in considerable disarray over defining the term, with many seeking to give it a very limited meaning.

The problem cases group into two large categories, by and large. The first category clusters around the issue of whether all (or which) statements made to police are “testimonial”. The second category raises the issue of whether some form of government involvement in the taking of the statement is necessary to render the statement “testimonial”. We will look at each.

2. Are all statements made to police officers “testimonial”?

Certainly, not every statement made to a police officer is “testimonial”. For example, a volunteered, excited utterance seeking help that blames no particular suspect (i.e., “Can you help me? I’m bleeding”) is probably not what the court had in mind. However, once the declarant begins to provide information about a crime and/or the cop begins to question the declarant about the details, the declarant’s statements arguably become “testimonial” under one of two separate rationales:

3. The police officer is “interrogating” the witness, bringing the hearsay within one of the Court’s irreducible minimum examples of “testimonial” hearsay (Crawford, supra, at p. 1364); or

4. An objective witness would “reasonably [...] believe that the statement would be available for use at a later trial.” (the third of the Court’s three “formulations”, Crawford, supra, at p. 1364).

Virtually any time a person knowingly makes a statement to the authorities about criminal activity (particularly when that person directs blame at an individual), it is hard to see why it is not an accusatorial statement that qualifies as “testimonial” under both the terms of Crawford and its basic rationale.

The Sixth Circuit has adopted an interpretation of “testimonial” that is very close to this (see U.S. v. Cromer (Sixth Cir., 2004) 2004 WL 2711130) but many California Courts of Appeal have sought, in various ways, to limit the definition of “testimonial” to something far less sweeping.

5. The Crime Scene cases.

There are series of California Court of Appeal crime scene cases that have sought to determine whether statements made at the scene are testimonial or not. Many of these have limited the inquiry to whether the statements were the product of police “interrogation,” eschewing the option of analyzing the evidence through the filter of Crawford’s witness intent formulation. In other words, the focus is on how the police saw

things rather than how the declarant did, when Crawford directs our attention in both directions.

Just as with the term “testimonial” the court declined to define the term “interrogation”. While noting that they were using the term interrogation “in its colloquial, rather than any technical legal sense,” (Id., f.n.4 at p. 1365) they pointed out that various definitions of the terms exist and “we need not select among them in this case.” (Id., f.n. 4 at p. 1365).

The government has, in subsequent cases, sought to give the term “interrogation” a narrow construction, attempting to limit Crawford to its facts (structured police questioning of a suspect in custody that was being recorded) or something close to those facts. This argument usually focuses on Scalia’s historical analogies to examinations by justices of the peace in England and some of his choice of language (such as his use of an 1828 edition of Webster’s Dictionary to define “testimonial”) to suggest a certain formality is necessary to constitute actual “interrogation.”

There are two problems with this approach.

First, the argument overlooks another part of the Crawford opinion, where Scalia points out that justices of the peace in those times were not magistrates as we understand the office and that they performed investigative functions that we currently associate with the police. (Crawford, supra, at p. 1365). Thus, the reference is not necessarily to court-like proceedings.

Secondly, and more important, treating formality as a prerequisite for categorizing a statement as “testimonial” misses the larger point of Crawford which is that statements made to the authorities by persons who should reasonably expect that the statement would be used against the accused in investigating and prosecuting a crime are precisely the sort of accusatory statement the Confrontation Clause was designed to address, regardless of the formality of the setting. (The best articulation of this comes from the Sixth Circuit rather than a California Court of Appeal. See U.S. v. Cromer (Sixth Cir., 2004) 2004 WL 2711130). Cromer quotes at length from a law review article by Prof. Richard Friedman (Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011 (1998)). This article was cited approvingly by the Crawford court (Crawford, supra at p. 1370) and Prof. Friedman co-authored one of the more influential amicus briefs before the Crawford Court). Cromer cites Friedman for a formulation that is arguably far superior to any adopted by recent California Court of Appeal opinions but one which is certainly true to the logic of Crawford: “A statement made knowingly to the authorities that describes criminal activity is almost always “testimonial.” Cromer, supra at p. 9).

This keeps the focus where it belongs – on the out of court declarant, whose reliability is in question.

Any other approach invites potential witnesses to testify in informal ways to avoid confrontation.

6. The California Crime Scene Cases

1. People v. Corella (2004) 122 Cal.App.4th 461. Mostly a 911 call case, but it also deals with follow-up statements made to a responding police officers. The Second District holds these statements are not in response to interrogation because “under Crawford a police interrogation requires a relatively formal investigation where a trial is contemplated.” (Corella, supra, at p. 468). For the reasons stated earlier, this requirement of formality is arguably an unduly restrictive reading of Crawford.

2. People v. Kilday (2004), 123 Cal.App.4th 406 [1st District]. This is probably one of the better opinions of those which insist on analyzing “testimonial” in terms of whether the police were “interrogating.” The First District finds the victim’s first statement to officers responding to the scene was not testimonial because the police were dealing with “a frightened and upset [victim], the area was uncertain.” (Kilday, supra at p. 421). (Thus, the victim’s detailed account to the police about how she was beaten, cut and thrown into the street is not “testimonial”). However, the second statement of the victim, taken a bit later at the scene by a different officer (a female officer summoned specifically to talk to the victim) was taken by police in an “investigative capacity to produce evidence” (Kilday, supra, at p. 420) and, thus, was found to be taken in response interrogation. The First District specifically rejects the suggestion in Corella regarding the necessity of formality. Instead, Kilday holds that “we believe that an interpretation of Crawford that makes the presence or absence of indicia, of formality determinative is inconsistent with the Supreme Court focus on “the production of testimonial evidence ... which may occur during relatively informal questioning in the field.” (Kilday, supra, at p. 422). This opinion is better than Corella, but not nearly as good as the Sixth Circuit opinion (Cromer, supra).

3. People v. Sisavath (2004) 118 Cal.App. 4th 1396. Although principally about a videotaped statement made to a private child abuse center, the Fifth District finds a statement the alleged child victim made to a police officer who responded to a complaint by the mother to be “testimonial.” Without much analysis, the Court finds “This statement was ‘knowingly given in response to structured police questioning.’” (Sisavath, supra, at p. 1402).

4. A Third District case that just came down (People v. Morgan, Jan. 12, 2005, 2005 DJDAR 486) finds statements made by a caller to a house

where a search warrant was being executed (and which were intercepted by a police officer) not to be testimonial. (The caller's requests for drugs was introduced as evidence that the defendant possessed drugs for sale.)

This case wades into the age old evidence battle over whether implied assertions can be treated as hearsay. California law is pretty clear that they are not viewed as hearsay (People v. Nealy (1991) 228 Cal. App. 3d. 447; People v. Ventura (1991) 1 Cal. App. 4th 1515). Consequently, under the traditional view implied assertions raise no confrontation clause issue because, as discussed elsewhere, Crawford is quite explicit that "The clause ... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (Crawford, supra, at p. 1369, f.n. 9).

The Third District, however, was persuaded by the Jefferson Benchbook (1 Jefferson, Cal. Evidence Benchbook (Cont. Ed. Bar 3d ed. 2004 § 1.20 p. 16) that this line of cases is wrongly decided and that such statements should be viewed as hearsay. The court, however, quickly went on to hold that such statements are reliable and then judicially created a new hearsay exception to cover them. (Id. at p. 489).

So, what's the difference? The statements get in whether you call them non-hearsay or hearsay that fits as exception. The difference is that once you find them to be hearsay you are back in confrontation clause country. The court recognized as much but found the statements to be "non-testimonial" because "the informal statement made in an unstructured setting does not resemble the police interrogation in Crawford ... [and] the officer's minimal response to the caller is not the 'involvement of government officers in the production of testimony with an eye toward trial [that] presents unique potential for prosecutorial abuse.'" (Id. at p. 490).

This would be pretty convincing if all that was admitted was the caller's initial inquiry about drugs. However, the police officer pretended to be an associate of the defendant and went on to elicit what amount of drugs was needed as well as to invite the caller to come over (which had the effect of confirming the intent to buy). The police officer had no reason to engage in this charade except to gain further incriminating evidence of defendant's sales operation and, as such, it is difficult to see why the police officer's actions don't amount to "interrogation" under Crawford. Given its unique facts, Morgan is unlikely to be as significant as other cases in the meaning of the term "testimonial".

7. California Crime Scene Cases Where Review Has Been Granted

1. People v. Cage (2004), *formerly at* 2004 DJDAR 8563; *rev. granted* 2004 DJDAR 12601. Quite restrictive on two different issues.

The fact that the California Supreme Court took this case is hopefully a sign that they will disapprove the reasoning in Cage. Here a police officer went to the hospital to question the victim specifically about being assaulted by the defendant. The Court held that “police questioning is not necessarily police interrogation.” To constitute, interrogation the statement must be made in a relatively formal proceeding that contemplates a trial. It even suggests the statement must be memorialized somehow.

2. People v. Ochoa (2004) *formerly at* 121 Cal.App.4th 1551; *rev. granted* 2004 DJAR 13950. Good on this issue (insistence on formality is inconsistent with core message of Crawford); bad in issue of what is sufficient cross-examination at preliminary hearing to use statements from that hearing.

3. People v. Adams (2004) *formerly at* 120 Cal. App. 4th 1065; *rev. granted*, 2004 Cal. LEXIS 9652. Forty-five minute interview of complainant at hospital is testimonial.

F. The 911 Cases

Certainly some 911 calls are “non-testimonial.” This is easiest to see where someone merely calls 911 seeking assistance. (“Help. Someone is breaking into my house.”) However, as soon as the caller starts providing facts about the offense and particularly when the caller provides information about the identity of the perpetrator, it is hard to see why such calls are not “testimonial.” (“My husband, George, is here again in violation of his restraining order.”) This is so under either the Court’s third proposed “formulation” of the term “testimonial” (the reasonable witness perspective) and possibly so under the concept of “interrogation” (particularly when the operator seeks to question the caller about details that would identify a specific perpetrator or detail his culpability.) However, most of the decided 911 cases have resisted such a conclusion.

1. People v. Corella (2004) 122 Cal. App. 4th 461. The defendant’s wife calls 911 to report that her husband hit her. This is found to be non-testimonial because it was not “knowingly given in response to structured police questioning.” (Corella, supra, at p. 468).

2. People v. Caudillo *formerly at* (2004) 122 Cal. App. 4th 1417, *as modified* 2004 DJDAR 13470 *rev. granted* 2005 DJDAR 492 . A third party, non-victim, calls 911 to report “men with guns.” This anonymous caller provides a license plate number and description of the car from which the gunshots were fired, as well as a description of the car fired upon. Even though the 911 call in this case was made for the specific purpose of providing the police with the information necessary to apprehend the shooters, the court finds the call was “non-testimonial,”

because it was not “made under circumstances that would lead an objective witness reasonably to believe the statement would be available for later use at trial.” (Caudillo, *supra*, at p. 12445).

6. Two New York cases – 1 good; 1 bad

a. People v. Moscat (2004) 777 N.Y.S. 2d 875. One of the first post-Crawford cases and one of the most widely cited. Its analysis is consistent with Corella and Caudillo, above. Typical of its reasoning is the following: “A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call it is the citizen who summons the government to her aid.” (Moscat, *supra* at p. 880). The trial court in Moscat was apparently misled factually about the circumstances surrounding the call (see Nov. 26, 2004 N.Y. Times, “Legal Precedent Doesn’t Let Facts Stand in the Way”) although this has had little impact upon the widespread reliance by other courts on its reasoning or holding.

b. People v. Cortes (2004) 781 N.Y.S. 2d 401. Here, a 911 call by a third party witness to a shooting was found to be testimonial. “When a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for the investigation, prosecution and potential use at a judicial proceeding; it makes no difference what the caller believes. The 911 statement is made orally but it is recorded as would a statement to a police officer, a prosecutor, or a prosecutor’s stenographer.” (Id at p. 415).

III. Does a statement have to be made to police or governmental authorities in order to be “testimonial” under Crawford?

The government has made the argument in a number of cases that in order to qualify as “testimonial,” hearsay statements must have been made to governmental authorities. Although this argument has mostly been rejected, it was adopted in one California Court of Appeal case (People v. Cage, *supra*). However, the California Supreme Court quickly granted review in Cage and, so, currently there is no published authority for this argument.

The textual basis in Crawford for the proposition that “testimonial” statements must be made to government authorities is two-fold:

7. None of Scalia’s core examples of testimonial statements involve statements to private persons.

2. Scalia’s history lesson, with its focus on the civil law mode of criminal procedure and particularly its use of ex parte examinations as evidence against the accused, could be viewed as being exclusively concerned with government involvement in the creation of the hearsay.

The principal arguments against are also twofold:

1. Two of the three “formulations” of “testimonial” hearsay that Scalia provides focus on whether a “declarant” or “an objective witness” would “reasonably [...] believe that the statement would be available for use at a later trial.” (Crawford, supra, at p. 1364). Such a test would certainly cover some statements made to private persons.

2. The full implications of such a limitation on the meaning of the term “testimonial” would make a mockery of the Crawford holding. It would mean, for example, that videotaped statements by the victim or a witness, taken by a rape counselor, domestic violence counselor, private attorney, or any other private person, would all be exempt from the sweep of Crawford. Using Scalia’s prime example, that would mean Sir Walter Raleigh could still have been convicted on ex parte affidavits so long as they were taken by private persons. It is hard to imagine that is what Scalia had in mind.

Two published California cases decline to adopt this private person limitation: People v. Cervantes (2004) 118 Cal.App. 4th 162 and People v. Sisavath (2004) 118 Cal.App.4th 1396.

In Cervantes the statement was made by a co-defendant to a neighbor (in the process of seeking medical help). Although the court found the statement to be “non-testimonial,” it assumed statements to private persons could qualify as “testimonial” and found the third “formulation” to be determinative on whether they actually are. The court found that the statement in that case was not “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” and, thus, the statement was “non-testimonial” because the statement focused on getting medical care rather than making an accusation – not because it was made to a private person.

In Sisavath, the hearsay was a videotaped statement by an alleged child abuse victim given to a private child abuse center. The Court specifically rejected the state’s argument that it could not be “testimonial” because it was not given to a government employee. The Court held, instead, that the pertinent question is whether an objective observer would reasonably expect the statement to be available for use in a prosecution.” (Id. at p. 1402). Using this test, the court found the statement to be “testimonial”. Its rejection of the broader argument regarding the proposed exemption for statements made to private parties was made easier by the fact that the “private” interview in that case was attended by the prosecutor and the prosecutor’s investigator.

In People v. Cage, the case on review before the California Supreme Court, the Court of Appeal bought this argument completely for a statement made by the victim to a doctor at the emergency room, emphasizing that the doctor was

neither a police officer nor an agent of the police. It is presumed that the Supreme Court took the case with the intent of re-examining that approach.

One last point with regard to use of Crawford's "Third Formulation" by both Sisavath and Cervantes. Each defines the test differently. Cervantes sticks close to the language of Crawford and asks whether "a reasonable person in [the declarant's] position would reasonably believe the statement would be used at trial." (Cervantes, supra at p. 174.)

Sisavath rejects that approach, observing "It is more likely that the Supreme Court meant simply that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial." (Sisavath, supra at p. 1402).

This distinction between what would be thought by a reasonable declarant as opposed to a reasonable observer was not determinative in either of these cases. However, when the declarant is a child, some very old person or someone else who arguably has no awareness of the possible trial usage of their statements, the distinction could be critical.

IV. Is "non-testimonial" hearsay still governed by the Roberts rule or is it outside the scope of the Confrontation Clause?

Scalia made several comments in Crawford which could be read as suggesting that the Confrontation Clause applies only to "testimonial" evidence and that "non-testimonial" hearsay is outside the scope of the Sixth Amendment. If this were true, Roberts would be overruled in its entirety and the only limit on the state's use of such hearsay would be the rules of evidence.

Although it seems quite clear that the Supreme Court chose to reserve this issue (see below), at one point Scalia did say, "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states' flexibility in their development of hearsay law – as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." (Crawford, supra, at p 1374.

While exempting non-testimonial hearsay altogether from Sixth Amendment scrutiny might be on Scalia's agenda, it is less clearly on the agenda of the other justices who joined his opinion in Crawford. Thus, the court simply reserved the issue in Crawford.

First of all, they pointed out that in White v. Illinois (1992) 502 U.S. 346, at 352-353, they had previously rejected the proposal that they apply the Confrontation Clause only to testimonial statements. They then went on to say that, "Although our analysis in this case [Crawford] casts doubt on that holding, we need not definitively resolve whether it survives our decision today." (Crawford, supra, at p. 1370.)

Several California cases have noted that this leaves the issue unresolved. See People v. Kilday (2004) 123 Cal.App.4th 406, 421, n. 7; and People v. Giles, formerly at (2004) 123 Cal.App.4th 475, 487; *rev. granted*, 2004DJDA15246. People v. Cervantes (2004) 118 Cal.App.4th 162 noted the flexibility Crawford might provide the states in such circumstances (Id. At p. 173) but then actually went on to apply the Roberts test of reliability to the non-testimonial hearsay in that case. (Id. at p. 174 and at p. 177).

Other non-California cases which have applied the Roberts reliability test to non-testimonial hearsay include Horton v. Allen (1st Cir. 2004) 370 F.3d 75, 83 and U.S. v. Manfre (8th Cir. 2004) 368 F.3d 832, 838, fn 1.

If Roberts is found not to apply to non-testimonial hearsay, one could argue that such hearsay should still be governed by due process. The Court has fallen back on due process in other contexts where the confrontation clause is found not to apply to prosecutorial use of hearsay. (See e.g. Morrissey v. Brewer (1972) 408 U.S. 471; Gagnon v. Scarpelli (1973) 411 U.S. 778 and the use of hearsay at probation revocation hearings).

In Parle v. Runnels, (2004) 2004DJDA13377, the Ninth Circuit made the obvious point that Roberts controls non-testimonial hearsay that was admitted pre-Crawford.

V. **What does Crawford not do?**

There are a number of contexts in which the Sixth Amendment Confrontation Clause is simply not applicable and, thus, Crawford is not applicable. Some of this is made quite clear by Crawford; some is hinted at by Crawford; and the rest is the product of pre-Crawford caselaw that seems to be left undisturbed by Crawford.

1. Statements which are not hearsay are not covered.

Crawford was quite explicit about non-hearsay use of testimonial statements. At the conclusion of a long footnote (f.n. 9 at p. 1369) Scalia says, "The clause ...does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See Tennessee v. Street, 471 U.S. 409 (1985)..." (In Street, the co-defendant's confession was offered in rebuttal to show that it did not say what defendant testified it said. Thus, it was not offered for its truth but, rather, to impeach defendant.)

The California Supreme Court has recently relied on this to hold that a co-defendant's statements made during a videotaped re-enactment of the crime (done jointly by defendant and co-defendant) do not raise confrontation clause issues because they were not offered for a hearsay purpose. (In the court's view, the defendant adopted his co-defendant's statements and they were not offered for their truth but, rather, to supply meaning to defendant's conduct or silence in the face of them.) (People v Combs (Dec. 16, 2004 WL 2902506).

2.No. Sixth Amendment Issue When the Witness Testifies

In that same footnote (Crawford, *supra*, f.n. 9 at p. 1369) the court also said, “. . . [W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See California v. Green, 339 U.S. 149 (1970).” Thus, whether or not the hearsay statement is testimonial, the Confrontation Clause is satisfied if the declarant is present in court, testifies, and is subject to cross-examination.

Thus, in People v. Morrison, (2004) 2004 WL 2813484, a death penalty case, the California Supreme Court held that the introduction of a witness's prior identification of defendant (which was admitted as a spontaneous declaration (Calif. Ev. Code § 1240)) raised no Sixth Amendment issues because the witness testified at trial and was subject to cross-examination about the statement.

In People v. Harless (Dec. 20, 2004) 2004 DJDAR 15101, the Sixth District applied this principle to a situation where the witness was impeached by a prior inconsistent statement which she maintained she could not recall. The court found the witness was subjected to effective cross-examination about the hearsay statement. Despite her partial failure of memory, she tried to explain her statements and the jury had a chance to assess her demeanor.

Although one could question whether Crawford is satisfied when the witness claims a total failure of memory, there is prior case law holding that a significant failure to recollect does not necessarily deprive the defendant of the cross-examination guaranteed by the Sixth Amendment (California v. Green, *supra*; People v. Perez (2000) 82 Cal. App. 4th 760, 762). Harless is arguably bound by its facts (the witness did attempt to explain away her statement). One could argue that a total failure to recollect deprives the defendant of the cross-examination guaranteed by Crawford. A recent 9th Circuit case (U.S. v. Wilmore (9th Circ. 2004) 381 F.3d 868) held that restrictions on cross-examination can render use of a prior statement violative of Sixth Amendment confrontation rights under Crawford. Other cases holding that limiting the scope of cross-examination violates the Sixth Amendment include Smith v. Illinois (1968) 390 U.S. 129; Davis v. Alaska (1974) 415 U.S. 308; and Delaware v. Van Arsdall (1986) 475 U.S. 673. All three of these cases stand for the proposition that evidence rules that significantly undermine the effectiveness of cross-examination offend the Sixth Amendment, even though the witness has been questioned in open court.

This thread of Crawford intersects with another line of Sixth Amendment caselaw – the Bruton-Aranda line of cases (Bruton v. U.S. (1968) 391 U.S. 123; People v. Aranda (1965) 63 Cal. 2d 518). The Bruton-Aranda rule holds that in a joint trial of two or more defendants, the out-of-court statement of a non-testifying defendant is inadmissible against the other defendants. However, the rule provides further that the Sixth Amendment is not applicable in such a situation if the co-defendant who made the confession testifies and is subject to cross-

examination. This is true whether the co-defendant admits or denies the confession. (Nelson v. O'Neil (1971) 402 U.S. 622; People v. Boyd (1990) 222 Cal. App. 3d 541). It would seem that the Bruton-Aranada rule is consistent with Crawford – both in terms of what it prohibits and what it permits.

Whether the admission of a co-defendant's statement is viewed as violating Bruton-Aranada or Crawford, a limiting instruction will not cure the error. (People v. Song (2004) 122 Cal.App.4th 1500, 1509).

3.The Defendants Own party Admissions

It is a staple of evidence law that the very theory underlying the use of a party's statements against him (under the party admissions exception) is the belief that a party can hardly complain about a lack of an opportunity to cross-examine himself (Calif. Ev. Code § 1220 (comment)). Nothing in Crawford suggests an intent to go beyond this hoary principle and allow the defendant a new basis for excluding his own statements.

D. Sixth Amendment Does Not Apply to Many Non-Trial Situations

8.Probation Revocation Hearings

Traditionally, probation revocation hearings are not viewed as being part of a criminal prosecution. Thus, the full range of Sixth Amendment protections do not apply at a revocation proceeding. (Morrisey v. Brewer (1972) 408 U.S. 471; Gagnon v. Scarpelli (1973) 411 U.S. 778).

However, the loss of liberty at such a proceeding is a serious deprivation requiring that the probationer be accorded due process (Gagnon, supra at p. 781.) This due process guarantee requires that the defendant generally be given the right “to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation.)” (Id at p. 786).

Thus, a defendant at a probation revocation hearing has a right to confrontation, albeit one not as complete as the one guaranteed at trial by the Sixth Amendment.

The California Supreme Court had applied this right, pre-Crawford, to hold that the state may not introduce a transcript of a witness's preliminary hearing testimony at a revocation hearing without a showing of unavailability or other good cause. People v. Winson (1981) 29 Cal. 3d 711, 713-714; People v. Arreola (1994) 74 Cal. 4th 1144, 1148.

On the other hand, in People v. Maki (1985) 39 Cal. 3d 707 the California Supreme Court did uphold the admissibility at a probation

revocation hearing of hearsay evidence of a documentary nature (a car rental invoice and a hotel receipt).

In these pre-Crawford cases, the California Supreme Court's discussion of the values protected by due process bore a striking resemblance to those values articulated in Crawford as being at the heart of the historic meaning of the Sixth Amendment. For example, in People v. Winson (supra at p. 717), the court observed that the need for confrontation is particularly important where the evidence is testimonial because of the opportunity for observation of the witness's demeanor.

Thus, the recent post-Crawford decision of the First District in People v. Johnson (2004) 121 Cal. App. 4th 1409, is somewhat surprising in terms of the summary manner with which it disposed of defendant's Crawford claims.

Johnson held that Crawford simply has no application to a probation revocation hearing because the Sixth Amendment does not control such hearings. Thus, it found no error in the admission of a laboratory report showing the defendant to have possessed rock cocaine.

One might question the conclusion in Johnson that Crawford has nothing to tell us about the dimensions of the due process right to cross-examination. As pointed out earlier, many of the pre-Crawford cases rely on Sixth Amendment values to flesh out the contours of this lesser due process right.

One can absolutely question the further observation in Johnson that the lab report was not "testimonial." This portion of the opinion was dicta, given the broader holding in the case that the Sixth Amendment simply did not apply. However, the lab report contained an expert determination of the narcotic quality of the substance possessed by defendant. It was prepared by the Alameda County Crime Laboratory. Surely, such a report was "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, supra at p. 1364).

9. Preliminary Hearings

The California Supreme Court has held that the Sixth Amendment confrontation clause does not apply to the preliminary hearing. (Whitman v. Superior Court (1991) 54 Cal. 3d 1063.)

The U.S. Supreme Court has frequently described the confrontation clause as a "trial right." (Barber v. Page (1968) 390 U.S. 719; Pennsylvania v. Ritchie (1987) 480 U.S. 39. On the other hand, it can be argued that the U.S. Supreme Court has never explicitly held (as did the

Calif. Supreme Court in Whitman) that the Sixth Amendment does not apply to preliminary hearings. They came close to so holding in Barber v. Page, supra, but it was not essential to the outcome and was, thus, dicta. Much of the hearsay used at preliminary hearings is very “testimonial” within the meaning of Crawford. The U.S. Supreme Court is likely to go the way of Whitman when faced with the issue, but, arguably, it has not done so yet.

4. Dying Declarations and “Forfeiture by Misconduct”

Dying declarations are probably exempt from Crawford analysis under either of two different rationales set forth in Crawford: 1.) they represent an historic exception to the confrontation clause that is incorporated as part of Crawford's effort to capture the historic meaning of the Sixth Amendment (with Scalia you may live by the history lesson but you may also die by the history lesson); or 2.) they are admissible under Scalia's equitable theory of “forfeiture by misconduct” (i.e. if you prevented the witness from testifying you can't be heard to complain of an inability to cross-examine the witness.) Let us look at each.

10. Dying Declarations as an Exception to the Confrontation Clause

Scalia addresses this in footnote 6 of Crawford. There he cites historians for the proposition that dying declarations were the only recognized criminal hearsay exception at common law. Therefore, he concludes, “Although many dying declarations may be testimonial, there is authority for admitting even those that clearly are.” However, he ultimately reserves the issue, concluding “We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.” (Crawford, supra, p. 1387, f.n.6).

The California Supreme Court seized upon this suggestion in People v. Monterosso, (Dec. 13, 2004) 2004 DJDAR 14707, a death penalty case, to hold that dying declarations do not violate the confrontation clause. Doing its own historical analysis, the court concluded that dying declarations were a recognized exception at common law and Crawford teaches that the Confrontation Clause must be read as it existed at that time.

A curious aspect of the Monterosso opinion appears in footnote 5. There the Court tells us “We do not decide whether [the declarant's] statement was testimonial within the meaning of Crawford, nor whether the statement was admissible on other grounds.” It is possible that this could lead to an argument that dying declarations that are clearly testimonial could yet be excluded. This seems like a slender reed, however.

11. Forfeiture by Misconduct

At another point in Crawford, Scalia adopted the concept of “forfeiture by wrongdoing” as a separate and distinct exception to the Confrontation Clause, but then declined to give us any insight into what its contour might be. Distinguishing exceptions based on the reliability analysis of Roberts (which he disavowed), Scalia tells us “[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.” (Crawford, supra at p. 1370).

That’s all the Court had to say on the doctrine. Nonetheless, forfeiture by wrongdoing is potentially a very powerful doctrine and could extend well beyond dying declarations. By its very terms, it can apply any time it can be shown that the defendant had a hand in the declarant’s unavailability. (This equitably created exception to the confrontation clause must carefully be distinguished from the hearsay exception of Evidence Code Section 1350, which creates a hearsay exception in serious felony cases for hearsay statements made by unavailable witnesses when “There is clear and convincing evidence that the declarant’s unavailability was knowingly caused by, aided by, or solicited by the party against whom this statement is offered.” If Crawford stands for anything, it is that the meaning of the confrontation clause is not to be determined by states’ hearsay laws.) Thus, the confrontation clause exception that Scalia adopts resembles the hearsay exception, but is conceptually and functionally distinct.

The California Supreme Court has not previously addressed the applicability of such an exception to the confrontation clause but has just taken the issue in a grant of review to two similarly named cases: People v. Giles (2004) *formerly at* 123 Cal. App. 4th 475; *rev. granted* (2004) 2004 DJDAR 15246; and People v. Jiles (2004) *formerly at* 122 Cal. App. 4th 504; *rev. granted* (2004) 2004 DJDAR 15202. The order granting review listed two issues: whether the forfeiture doctrine applies on the facts of these cases and whether the doctrine applies when the alleged “wrongdoing” is the same as the offense for which defendant was on trial.

In brief, the Court of Appeal (4th District) in the Giles case upheld the admission of a dying declaration pursuant to the forfeiture doctrine and the Court of Appeal (Second District), in the Jiles case applied the forfeiture doctrine to statements of the victim that were admitted under Ev. Code Section 1370 and which

were made a few weeks before the shooting that led to the murder charges against the accused.

Forfeiture doctrine raises a host of thorny issues that were discussed in some detail in the Giles opinion and pretty much ignored in the Jiles opinion.

The most obvious problem is the one noted for briefing by the California Supreme Court: should the doctrine apply when the alleged “wrongdoing” is the same as the offense for which the defendant is on trial. This would require the trial court to determine, as a predicate for admissibility, that the defendant is guilty of the crime for which he is charged.

The Court of Appeal in Giles found no problem with this, holding that courts are not precluded from determining preliminary facts necessary for an evidentiary ruling merely because they coincide with an ultimate fact in the case.

A second issue is whether application of the doctrine should require proof that defendant’s acts of wrongdoing were committed with the specific intent of preventing testimony about that crime. A fairly recent Federal Court of Appeal opinion (U.S. v. Houlihan (1st Cir. 1996) 96 F.3d 1271, 1280) specifically imposes such a requirement as part of the equitable underpinnings of the doctrine. The Second District in Giles declined to impose such a requirement although it did require proof that defendant did commit an intentional criminal act.

Although hearsay rules do not govern confrontation issues any more, it is worth noting that both the California and Federal hearsay exceptions in this area (Calif. Ev. Code §1350; Fed. Rule of Evid. 804(b)(6)) both require proof of such intent.

Another issue is what burden of proof should control the judge’s decision. The Court of Appeal’s decision in Giles and the California hearsay exception require clear and convincing proof.

Lastly, and perhaps most importantly, there is the question of what would be the sweep of such a doctrine if it is adopted as an exception to the confrontation clause. The Nov.-Dec. ’04 issue of “Prosecutor” magazine argues that the doctrine be applied in all domestic violence cases where the spouse victim refuses to testify. It is not hard to see expansion of this approach to include all child abuse cases where the victim recants or refuses to testify.

Needless to say, such an exception carries the potential to swallow up the newfound protections afforded by the Crawford opinion. To guard against this, it would seem that courts should at a minimum, take seriously the arguments that clear and convincing evidence be required to extinguish this constitutional right and that proof of intent to interfere with testimony also be demanded.

One last point: it should be noted that in Crawford, itself, the defendant kept his wife from testifying by invoking Washington's marital privilege. The state argued that the defendant had waived the protections of the confrontation clause, an argument that could easily be recast in forfeiture terms. The state court rejected this argument reasoning that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." (Crawford, *supra* at p. 1359, f.n. 1). The state did not pursue this issue on appeal, and the Supreme Court specifically noted it was expressing no opinion on this matter. (*Id*)

VI. Is Crawford retroactive?

Probably not.

Crawford is certainly applicable to all cases, state or federal, pending on direct review or not yet final on the date of its decision. (Griffith v. Kentucky (1987) 479 U.S. 314. The real question is whether it can be applied retroactively to cases with final judgments.

The California Supreme Court recently reserved judgment on this issue. (People v. Combs (2004) 2004 DJDAR 14981 at p. 14986). However, the Court may have given a hint as to how it might ultimately resolve this issue by quoting from Rehnquist's concurring opinion in Crawford where he spoke about the "mantle of uncertainty" created by this "new rule." (Crawford supra at p. 1374).

The problem, of course, is Teague v. Lane (1989) 489 U.S. 288, which denies retroactive application of new rules of criminal procedure to cases that have proceeded to final judgment. A second bar to retroactivity in federal court may be the independent non-retroactivity rule imposed by AEDPA in § 2254 (d) (1).

It is difficult to argue that a rule that has been described as creating "a paradigm shift in confrontation clause analysis" (People v. Cage (2004) 2004 *formerly at* DJDAR 8563; *rev. granted* 2004 DJDAR 12601) is not a new rule within the meaning of Teague.

However, Scalia does go out of his way to argue at length that "Our case law has been largely consistent" with the principles driving the Crawford decision. (Crawford, *supra* at p. 1367). In fact, all of Section IV of the opinion is dedicated to the argument that Roberts was the departure not Crawford. Nonetheless, it is probably quite a hard sell

to contend that this is not a rule that “breaks new ground or imposes a new obligation on the States or the Federal Government.” (Teague, supra at p. 301).

One other possibility is arguing that Crawford establishes a “watershed” rule of criminal procedure, thereby coming within one of the two exceptions to Teague’s non-retroactivity rule. (Teague, supra, at p. 311). This argument has just been rejected by the Second Circuit. (Mungo v. Duncan (2004) 2004 U.S. App. LEXIS 26972).