How a Conservative Supreme Court Justice Rocked the Criminal Evidence World by Giving Defendants New Constitutional Rights: The Legacy of 2004's *Crawford v. Washington*

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ASK ANY SECOND-YEAR LAW STUDENT just finishing Evidence class and they can tell you all about the hearsay rule and its many exceptions, which serve to establish the reliability of second-hand evidence in trials. From 1980 until 2004 (which constituted the lion's share of my prosecutorial practice in San Francisco), criminal trial attorneys seeking to introduce an out-of-court statement by an unavailable declarant only had to contend with finding the appropriate firmly-rooted hearsay exception to demonstrate that such statement had adequate "indicia of reliability".[1] But beginning with his seminal opinion in *Crawford v. Washington* (2004) 541 U.S. 36, Justice Antonin Scalia penned a jurisprudential oeuvre that created significant hurdles *for prosecutors only* in eliciting even reliable hearsay, by requiring the state to deal with an additional defense objection based on the defendant's Sixth Amendment right to confront witnesses.[2] Now, nearly a decade and a half later, not only has this growing body of Sixth Amendment law continued to evolve and provide new avenues for the defense to object to out-of-court statements, but it has also required law school evidence professors to add at least an entire class of essentially constitutional law and criminal procedure to their curricula.

In *Crawford*, Scalia reached back not just to the original text of the Constitution and criminal practice during the founding era of the Republic, but to the infamous 1603 trial of Sir Walter Raleigh, convicted and executed

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1. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
2. Crawford v. Washington, 541 U.S. 36, 68 (2004).

based solely on two out-of-court hearsay statements.[3] The Scalia opinion for seven justices[4] (with two concurring justices) rejected *Roberts'* reliability of the hearsay test and created a new rule that barred *testimonial* statements by out-of-court witnesses under the Confrontation Clause, with certain exceptions.[5] Before attempting to clarify the definition of "testimonial," one should look to those certain black-letter exceptions to the new *Crawford* rule. First, this new rule only applies in criminal cases, and only when the hearsay is offered against the defendant.[6] Therefore, civil litigants and criminal defendants seeking to offer hearsay on their own behalf need not worry about this Confrontation Clause hurdle.[7] Secondly, non-testimonial hearsay is not barred by the Sixth Amendment, so long as a traditional hearsay exception applies.[8] This exception, of course, begs the question: 'what is testimonial?' which I'll answer soon enough. Finally, even testimonial hearsay is permitted, subject to the normal exceptions, when the declarant is available to be cross-examined at the trial, or even when unavailable if the defense had an opportunity to cross examine the declarant at a former hearing such as a preliminary examination.[9] It is this final, large exception that causes the most litigational strategy by the advocates, where the prosecution has to ensure calling sufficient witnesses at trial (or at least at the preliminary examination) to satisfy any defense Sixth Amendment objection. One additional exception, relatively rare, is based on historical practice from Eighteenth Century trials: certain founding-era hearsay exceptions (such as forfeiture by wrongdoing and dying declarations)[10] even where the declarant is unavailable, and the defense had no prior opportunity to cross examine, may well be admissible even despite the lack of any confrontation right.[11] So, for example, a criminal defendant may not claim evidentiary error from admission of his wife's prior statement in a domestic violence murder trial when he killed her to prevent her testimony; nor would there be a bar to admission of a victim's statement made to the police as he was dying.

Now it's time to finally define 'testimonial'; but doing so is most clear by giving examples rather than any clear definition.[12] Sworn statements of

3. *Id.* at 44.
4. *See id.* at 37, 69.
5. *Id.* at 60–68.
6. *See generally*, U.S. CONST. amend. XI.
7. *Id.*
8. *See generally*, CAL. EVID. CODE Div. 10, Ch. 2.
9. *Id.*
10. *Crawford*, 541 U.S. 36 at 68.
11. *Id*. at 73.
12. *See Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial'."). It is similar to the Supreme Court's definition of

out-of-court witnesses before a grand jury, or pretrial hearing, or former trial, are examples of testimonial evidence.[13] As are affidavits, such as the sworn lab reports of narcotics testing experts.[14] But the most problematic testimonial example for the prosecution are the statements of victims and witnesses to the police, in a post-crime setting (such as a station house) where the primary purpose of the interview is to produce evidence for an eventual prosecution.[15] Such was the out of court testimony that literally killed Sir Walter Raleigh, and the factual scenario in the seminal *Crawford* case.[16]

What began in *Crawford* but took years of subsequent authority (some of it authored by Justice Scalia before his death) developed the body of examples of non-testimonial evidence (thus not subject to the Sixth Amendment confrontation hurdle by the defense). These examples include the following:

- business records, and statements in furtherance of a conspiracy;[17]
- a defendant's own statement to police (*Miranda* law aside), because he is of course present at his own trial to confront himself as declarant;[18]
- statements made to private parties, not state actors such as law enforcement;[19]
- testimonial statements offered not for the truth, but for some other non-hearsay purpose, such as establishing bias or other motive;[20]
- statements made to 911 dispatchers;[21] and
- statements made to police while the emergency is still on-going and the suspect still at large.[22]

Thus, both prosecution and defense (prosecution well before trial, or even before the preliminary hearing; and defense at trial) need to understand this complex and growing body of Sixth Amendment law when dealing with hearsay from unavailable declarants at trial. This new constitutional analysis

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pornography: can't say what it is exactly, but know it when they see it.)

13. *Id.* at 49.
14. *Id.* at 71.
15. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009).
16. *See Crawford*, 541 U.S. 36 at 72; *see also*, *Melendez-Dias*, 557 U.S. 305 at 308.
17. *Crawford*, 541 U.S. 36 at 47.
18. U.S. CONST. amend. VI.
19. *See* Davis v. Washington, 547 U.S. 813, 823 (2006).
20. *See id.* at 830.
21. *See id.* at 840.
22. *See* Michigan v. Bryant, 562 U.S. 344, 374 (2011).

(relying on history and policies hundreds of years old) has given defense counsel new power to object to hearsay and has given prosecutors headaches if their witnesses become unavailable. Justice Antonin Scalia may well be remembered as an originalist and staunch conservative, but in this corner of criminal evidence law, he is a defendant's steadfast ally.