Case at a Glance

In *Crawford v. Washington*, the Supreme Court interpreted the Confrontation Clause to bar "testimonial evidence" but to allow admission of out-of-court statements when the maker of the statement is unavailable to testify at trial and the defendant has had a prior opportunity to cross-examine him or her. The *Crawford* Court did not define the term "testimonial." These cases ask the Court to decide whether a victim's report of a crime to a 911 operator or police investigator is "testimonial" under *Crawford*.

When Can a Witness's Statements Be Admitted into Evidence Without the Witness First Taking the Stand?

by Alan Raphael

1PREVIEW of United States Supreme Court Cases, pages 292–297. © 2006 American Bar Association.

Alan Raphael is an associate professor of law at Loyola University Chicago School of Law. He can be reached at araphae@luc.edu or (312) 915-7140.

ISSUE

Are a victim's or other witness's statements to a 911 operator or to police investigating a possible crime "testimonial evidence" under *Crawford v. Washington*, 541 U.S. 36 (2004), and thus barred from evidence because they were not made under oath and subjected to cross-examination by the defendant?

FACTS

Davis v. Washington

Michelle McCottry called the 911 center in Kent, Washington, on February 6, 2001. She told the operator that her boyfriend, Adrian Davis, had just left her house after "jumping" and "using his fists" against her. Davis's presence in the house violated an order of protection McCottry had obtained, prohibiting Davis from contacting her. Police officers quickly responded to McCottry's house.

When the officers arrived, McCottry was in tears, upset, and packing her bags to get out of the house. Mark Jones, a paramedic as well as a police officer, observed that McCottry had several injuries, including abrasions to her forearm, a red mark close to the elbow of her other arm, and a red mark near her eye. He concluded that the injuries were recent. A police photographer took pictures of the injuries. McCottry told the officers that Davis had hit her in the face and that she tried to block as many blows as she could.

The state brought charges against Davis and he was convicted of a felony violation of the court order of protection and of a misdemeanor intentional assault. He received a 15-month sentence. At trial, Davis objected to the introduction into evidence of the tape of the 911 call and the statements made to the police. The state argued that these materials should be allowed under the hearsay exception for "excited utterances." The trial court ruled that the 911 tape should be admitted after some material was edited out but ruled against admitting the

DAVIS V. WASHINGTON
DOCKET NO. 05-5224
FROM: THE SUPREME COURT OF WASHINGTON
ARGUMENT DATE:
MARCH 20, 2006

HAMMON V. INDIANA
DOCKET NO. 05-5705
FROM: THE INDIANA SUPREME COURT
ARGUMENT DATE:
MARCH 20, 2006

police testimony about McCottry's statements to them.

McCottry was under subpoena to testify at the trial but did not appear and could not be located. The officers testified about McCottry's behavior and injuries. The 911 tape and the court order prohibiting Davis from contacting McCottry were put in evidence.

On appeal to the intermediate appellate court, the convictions were upheld and the introduction of the 911 evidence was held to be proper. The Washington Supreme Court agreed to hear Davis's appeal and ruled that the 911 tape was not testimonial and thus its admission did not violate the Sixth Amendment Confrontation Clause, which allows a defendant to confront witnesses against him. The Washington Supreme Court held that the 911 tape with McCottry's call could be admitted into evidence despite Davis's inability to cross-examine McCottry either when she made the call or at trial. In the alternative, the court held that any error in admission of the tape was harmless beyond a reasonable doubt. *Washington v. Davis*, 111 P.3d 844 (Wash. 2005).

Hammon v. Indiana

On February 26, 2003, Peru, Indiana, police officers responded to a call regarding a domestic disturbance at the home of Hershel and Amy Hammon. Officer Jason Mooney observed Amy on the front porch of the house, acting "timid and frightened." Mooney asked Amy if anything was wrong, to which she answered several times that there was no problem. Mooney believed that Amy might be afraid to indicate any problems and asked to enter her house to look around. Amy consented. Mooney saw that the living room was in disarray and observed shattered glass from the front panel of a gas heater in the living room. Mooney saw Hershel in the kitchen and asked him if everything was okay and if they had been arguing. Hershel admitted that they had argued but denied that it ever became physical.

Mooney then questioned Amy, who told him that during the argument Hershel began breaking things in the living room and threw her down into the glass of the broken heater. According to Mooney, Amy said that her face had been pushed into the glass and that Hershel had twice punched her in the chest. Upon further questioning, Amy said that her head hurt from being pushed into the glass.

At the officer's request, Amy filled out a battery affidavit recounting what she had told Mooney. Hershel was then arrested and prosecuted for a misdemeanor domestic battery. Amy was subpoenaed by the prosecution to testify, but she did not appear at trial. Over Hershel's objections, the trial court admitted Mooney's testimony regarding Amy's oral statements to him as "excited utterances." The affidavit was admitted under the hearsay exception of being a "present sense impression." Hershel was convicted and received a one-year jail sentence, which was suspended except for 20 days. The Indiana Court of Appeals affirmed the conviction and upheld the trial court's admission of Mooney's testimony regarding Amy's oral statements and the affidavit. The Indiana Supreme Court agreed to hear Hershel's appeal and affirmed the conviction. It found that the oral statement was properly admitted; the state supreme court ruled that the affidavit should have been excluded but concluded that its admission was harmless error. *Hammon v. Indiana*, 829 N.E.2d 444 (2005).

The Indiana Supreme Court's reasoning was that evidence is testimonial and thus must be subject to cross-examination under *Crawford v. Washington*, if "a principal motive of either the person making a statement or the person or organization receiving it is for the purposes of preserving it for potential future use in legal proceedings." 829 N.E.2d at 446. Clearly testimonial, in its view, would be "documented structured questioning recorded in written, audio, or video devices ... permitting the questions and statements to be preserved and presented to a court." *Id.* at 456. In this case, the Indiana Supreme Court concluded that the police were exerting "efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." *Id.* at 457. Normally, statements would not be deemed to be testimonial if taken in "responses to initial inquiries by officers arriving at a scene... ." *Id.* The questions and responses in this case were of such a nature and thus did not constitute testimony; accordingly, they could be admitted without being subject to cross-examination. On the other hand, cross-examination would be required if the statement was obtained by the police with the intent of preserving it for use in evidence. *Id.*

The U.S. Supreme Court granted a writ of certiorari to review these cases to determine whether these convictions violated the defendants' Sixth Amendment Confrontation Clause right.

Case Analysis

Elaborate rules of evidence have evolved regarding the admission of hearsay evidence—the testimony of one person about statements made by another person and used to show the truth of the statements, rather

(Continued on Page 294)

than for some other purpose. Although the general rule is that such statements are excluded from trials, a great many exceptions have been recognized that allow such evidence. These hearsay rules and their exceptions are adopted in each jurisdiction and reflect a long history of development by court decisions.

The Sixth Amendment Confrontation Clause, made applicable to state prosecutions through the Fourteenth Amendment Due Process Clause, provides that "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." For many years, the U.S. Supreme Court held that an unavailable witness's out-of-court statement could be admitted against a defendant if it is shown to be reliable, either because it falls within a "firmly rooted hearsay exception" or because it bears "particularized guarantees of trustworthiness." *Roberts v. Ohio,* 448 U.S. 56, 66 (1980). In 2004, the Supreme Court abandoned the *Roberts* rule and substituted a new rule under C*rawford v. Washington.*

Crawford involved an appeal from the conviction of Michael Crawford for the nonfatal stabbing of Kenneth Lee. Michael and his wife Sylvia had gone to Lee's apartment, angered by an earlier incident in which Lee had allegedly tried to rape Sylvia. It was clear that Michael got into an argument and stabbed Lee with a knife. Both Michael and Sylvia gave statements to the police about the fight. Michael indicated that he might have seen Lee reach for a weapon. Sylvia's statement indicated that Lee had nothing in his hands and was holding his hands up to ward off Michael's attack, although she did at one point mention that Lee put a hand in his pocket. Sylvia did not testify at trial because of Washington's state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. The police officer who obtained Sylvia's statement testified to what she said. This testimony met the *Roberts* test because it was reliable and trustworthy, as a result of her being an eyewitness to the attack, her being questioned by a police officer, and her corroborating much of her husband's story.

In *Crawford*, the Court reviewed the historical record preceding the adoption of the Confrontation Clause. Although it traced the right to confront one's accusers to Roman times, most of the Court's analysis focused on English and colonial precedents in the 200 years prior to the adoption of the Bill of Rights. One famous trial that influenced legal analysis was the treason trial of Sir Walter Raleigh in 1603. The main evidence against Raleigh consisted of the answers made by Lord Cobham, Raleigh's alleged accomplice, when questioned before the Privy Council. The proceeding was closed to the public and was not made in Raleigh's presence. Cobham's testimony was read to the jury trying Raleigh.

Raleigh's defense was that Cobham was giving the testimony in order to obtain mercy and that he would not have repeated his allegedly inaccurate testimony if required to speak at Raleigh's trial. The judges refused to order Cobham to testify, as demanded by Raleigh, and convicted him and ordered his execution. Because of the subsequent view that Raleigh's trial had been unfair, English law was changed to require face-to-face giving of testimony at trials for treason. 13 Car. 2, c. 1, sec. 5 (1661). A subsequent decision of the Court of King's Bench in 1696 barred admission of the statements of a person who had died before trial when the initial statement had been made without the defendant having an opportunity to cross-examine the maker of the statement. *King v. Paine,* 5 Mod 163, 87 Eng. Rep. 584 (1696).

The *Crawford* Court indicated that its review of history underlying the passage of the Sixth Amendment led to two conclusions. First was that the main evil at which the Confrontation Clause was directed was the use of *ex parte* examinations of witnesses as evidence against the accused, that is, at the use of testimony not given live at trial in the presence of the defendant and subject to cross-examination. 541 U.S. at 51. The second conclusion was that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. In the Court's view, these requirements were not subject to court-created exceptions beyond possibly those already existing at common law. *Id.* at 54. These involved admission of business records, statements in furtherance of a conspiracy, and dying declarations.

Six other justices joined Justice Scalia's opinion in *Crawford;* it held that the meaning of the Sixth Amendment protection of the right of confrontation should not be left to changing evidence rules or to unclear determinations of reliability. *Id.* at 61. The Court criticized *Roberts* because it "allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. The Raleigh trial involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution

responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory, that they were not made in the heat of passion, and that they were not 'extracted from him upon any hopes of promise of Pardon.'" *Id.* at 61-62.

As a result of *Crawford*, evidence is subject to different treatment depending on whether it is deemed to be testimonial. That evidence is admissible under state evidentiary rules because the evidence is found to be reliable does not necessarily satisfy the constitutional requirement of the Confrontation Clause. The constitutional requirement applies only to testimonial evidence; any other evidence is admissible if it meets evidentiary tests such as the hearsay rules. *Id.* at 68. As to testimonial evidence, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* The *Crawford* Court found the evidence in that case to have been inadmissible because it was testimonial and had not been subject to cross-examination.

The decision did not spell out the definition of the term "testimonial" but indicated that it included "at a minimum ... prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* Because Sylvia's statement was used against her husband in his trial, was obtained during police questioning, and was not subject to cross-examination by Michael either when it was made or at trial, its admission violated the Confrontation Clause and necessitated reversal of Michael's conviction.

In addition to not defining "testimonial," the Court did not define "police interrogation," which it indicated was one category of testimonial statements. Consequently, it is unclear whether all or only some statements obtained by police are excluded from evidence because they were not subjected to cross-examination. The Court did not define "interrogation" or limit it to a technical meaning but found that Sylvia's statement was "knowingly given in response to structured police questioning, [and thus] qualifies under any conceivable definition." *Id.* at 54 n. 4.

As to the other categories that the *Crawford* Court clearly identifies as testimonial, there usually should be no bar to introduction at a trial of the testimony of an unavailable witness whose statement had been made at a prior trial or preliminary hearing because defendants are present and are allowed to cross-examine. Grand jury testimony, another category of statements held to be testimonial, is given outside the presence of the defendant or counsel; therefore, it would be inadmissible under this test. Similarly, any statements obtained by the police that are held to be testimonial would be inadmissible because they, too, will not have been subjected to cross-examination.

Davis asks the Court to rule that any statement made after a crime has been committed should be viewed as testimonial. He would distinguish those statements from ones made during the commission of a crime, which would not be testimonial and could be admitted under hearsay exceptions without being subjected to cross-examination. In his view, 911 calls, like all reports to government of crime, should be viewed as testimonial and be barred from introduction into evidence because they had not been made in the presence of the defendant and subjected to cross-examination. As a fallback position, he contends that the Court could determine that 911 calls seeking help might be admissible but that 911 calls reporting completed crimes should be barred from evidence.

According to the State of Washington, a 911 call differs from the statements deemed testimonial because the 911 call is not the record of an investigation, has not been put into affidavit form, and does not resemble the types of proceedings that led to the adoption of the Confrontation Clause. Unlike the statements recorded by investigating magistrates in the 16th or 17th century, the 911 call is simply a means of obtaining a swift response by police, fire departments, or emergency medical technicians, and neither the operator nor the caller is contemplating making a record for use in a criminal prosecution. Washington argues that testimonial evidence includes interrogation by a police officer, such as the questioning of Sylvia Crawford, because it resembles the Privy Council questioning in the Raleigh case, but that the 911 call bears no such resemblance and should not be held to be testimonial.

Questioning by 911 personnel or others associated with the police is unlike structured police interrogation, the state argues. The 911 questioning lacks the formality and structure required for a statement to qualify as testimonial. Washington asks the Court to find that requests for emergency assistance should be admissible without being subject to cross-examination. Nor, in its view, should efforts by police to discover whether a crime has been committed or whether a danger to the public or to an individual exists be termed testimonial, because such questioning serves a community caretaking function rather than an interrogation function.

(Continued on Page 296)

Hammon asks the Court to adopt the following rule: "A statement made to a known police officer (or other government agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial within the meaning of *Crawford*." Pet. Br. at 15. In his view, the use made by a statement creates the dividing line between testimonial and nontestimonial statements: "The determination of whether a statement is testimonial in nature therefore depends not on whether the statement has the characteristics of trial testimony but on whether the statement fulfills the function of testimony." *Id*. If it does, it must be barred from evidence because the defendant did not have the opportunity to cross-examine the maker of the statement.

Indiana suggests that the applicable rule should be that "[e]xtrajudicial statements are 'testimonial' only when they resemble the forms of testimony that were produced by the abusive inquisitorial practices that gave rise to the Confrontation Clause." Statements produced by interrogation are among those which are testimonial, but the term "interrogation" should be limited to formal, coercive, tactically structured police questioning." Res. Br. at 9. Any statement obtained by the police when they are acting out of objectively reasonable concern for the immediate safety of persons or property should not be excluded because the police actions are not similar to those that gave rise to the Confrontation Clause

It is clear that the proposed Indiana standard is meant to find relatively few interrogations to be testimonial. Beyond that, the meanings of several of the terms the state proposes are unclear. In the context of an interrogation, it is uncertain what the requirements of formality and structure mean. They could refer to questions that are recorded or to police inquiries occurring in certain settings such as police stations or to those directed at persons viewed as crime suspects. The suggested requirement that the questioning be coercive is also unclear. Statements obtained by coercion are independently barred under the Fifth Amendment; if those are the only statements barred by the Sixth Amendment, then the *Crawford* case is meaningless as to interrogations, and the result in *Crawford* is hard to understand because there was nothing coercive about the questioning in that case, but the Court did find its admissions to be a Sixth Amendment violation.

SIGNIFICANCE

These are among the most significant criminal procedure cases to have been heard by the Supreme Court in recent years. The issues will affect a large number of criminal prosecutions and have already been the subject of numerous conflicting state and federal decisions. The Supreme Court has the opportunity to provide clarification to a new rule of law it announced only two years ago. The resolution of these cases will have a significant impact on the meaning of the Confrontation Clause and on the ability of prosecutors to bring charges against defendants when the victim or other crucial witness has implicated the defendant but is not willing or available to testify at trial. In both of the cases, it is likely that holdings that the evidence should not have been admitted because it was not subjected to cross-examination would preclude the successful prosecution of the defendants at retrials.

Both of these cases involved domestic assaults. In such cases, as well as in sexual attacks and abuse of children, the victims are often unwilling to testify at trials of their alleged assailants. A ruling that allowed their statements to the police to be introduced in evidence without testimony in court from the alleged victim would increase the frequency that such assaults could be prosecuted and the defendants convicted. Any ruling in this case would not be limited to those kinds of crimes, nor would it be limited to allowing in the statements of victims. The same rule would likely be applicable as to the statements to police or to emergency responders or operators made by any witness.

The *Crawford* decision was made only two years ago. All the justices agreed with the result in the case and all but two justices (O'Connor and Rehnquist—neither still on the Court) agreed to overrule *Ohio v. Roberts*. No party before the Court questions the appropriateness of the *Crawford* holding. Because it is so recent a ruling and had such overwhelming support, it certainly will provide the framework for deciding these two cases.

It is likely that the historical record as to the intent of the framers of the Sixth Amendment will be crucial to the decision of these cases, as it was to the *Crawford* decision. The basic meaning of the Confrontation Clause is to have witnesses accusing a defendant of a crime appear before him, in open court, and make their accusations under oath and in a face-to-face manner, with the defendant having the opportunity to cross-examine the witness. *Crawford* created a clear rule that testimonial out-of-court evidence against a defendant is allowed to be admitted at trial only if the maker of the statement is unavailable and if the prior statement could be subjected to cross-examination when it was made. The Court has to provide more guidance to state and federal courts regarding which statements to police or other government per-

sonnel constitute testimony for purposes of Confrontation Clause analysis. In these cases, it should determine whether a statement made under informal conditions or as part of an effort to discover the nature of an emergency situation and to ascertain if help is needed or that a crime has been committed constitutes testimonial evidence under *Crawford*.

If the Court focuses on the nature or effect of the statement—that it provides evidence or a direct accusation of wrongdoing by the defendant—then it may well find one or both of the statements in these cases to be testimonial and reverse the convictions based upon admission of the out-of-court statements. The Court could reason that it should not strike a balance between the rights of the defendant and the needs of the victim and the community, on the ground that the Sixth Amendment made that decision by requiring live testimony subject to cross-examination, which obviously did not occur in these two cases.

If the justices instead emphasize the purposes for which the questioner obtained the information, the result is less certain. The Court could accept the arguments of the two states here and declare that statements obtained in emergency situations or to determine whether there has been a crime are not testimonial. The purposes for police questioning may be mixed: to learn the nature of an emergency or to obtain assistance for a victim, but also to obtain information, which may be used in evidence in a trial. Perhaps the Court could set a standard that looks to the predominant purpose of the questioning, which may sometimes be difficult to determine but which is the type of task judges are frequently asked to perform.

Another possibility is that the Court could look to the understanding of the person making the statement, so that statements that the maker would reasonably have known would be used at trial might be barred absent an opportunity for cross-examination, but other statements would be admitted. The state claims that the victims in this case were giving their statements to help clarify the situations and to obtain emergency assistance, rather than to provide evidence to be used at trial.

Crawford indicated that some kinds of hearsay evidence such as business records could still be admitted against a defendant because they are not testimonial, although they may well be evidence against the defendant. It further indicated that the framers of the Amendment were familiar with the admission of one kind of testimonial evidence, dying declarations; if such testimonial statements are still to be admitted after *Crawford*, the Court may justify that exception on the historical record or may incorporate that exception into a broader set of exceptions or a different definition of the term "testimonial." There are other factual settings and issues that will require further cases, such as whether statements made to a doctor for the purpose of obtaining medical care are excluded from evidence if the patient is unavailable to testify at trial. The cases currently before the Court will likely answer significant questions about the meaning of *Crawford* and may furnish a framework for deciding remaining questions about its scope.

Attorneys for the Parties

For Adrian Davis (Jeffrey L. Fisher (206) 622-3150)

For Hershel Hammon (Richard D. Friedman (734) 647-1078)

For the State of Washington (James M. Whisman (206) 296-9660)

For the State of Indiana (Thomas M. Fisher (317) 232-6201)

Amicus Briefs

In Support of Adrian Davis and/or Hershel Hammon

American Civil Liberties Union, et al. (Jordan Gross (206) 516-3800)

National Association of Criminal Defense Lawyers (Timothy P. O'Toole (202) 628-1200)

Public Defender Service for the District of Columbia et al. (Timothy P. O'Toole (202) 628-1200)

In Support of the State of Washington and/or the State of Indiana

Cook County, Illinois (Richard A. Devine (312) 603-5496)

Illinois et al (Gary Feinerman (312) 814-3698)

National Association of Counsel for Children (Anthony J. Franze (202) 942-5000)

National District Attorneys Association (Mark Ryan Dwyer (212) 335-9000)

National Network to End Domestic Violence et al. (Antonia B. Ianniello (202) 429-3000)

United States (Paul D. Clement, Solicitor General (202) 514-2217)

Wayne County, Michigan (Timothy A. Baughman (313) 224-5792)