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Confrontation Update

Introduction

The Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), rewrote the constitutional rules governing the admission of out-of-court statements at criminal trials. Until *Crawford*, the admission of these statements was governed by *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that an out-of-court statement by an unavailable declarant could be used against the defendant if it either fell within a "firmly rooted hearsay exception" or bore particularized guarantees of trustworthiness. In *Crawford*, the Court overruled *Ohio v. Roberts* and in so doing dramatically expanded the protection afforded to defendants by the Confrontation Clause.

At issue in *Crawford* was the admissibility of out-of-court statements made by the spouse of the defendant during a police interrogation. The spouse invoked Washington state's marital privilege before trial and so was not available to testify. The trial court admitted the spouse's statement on the ground that the statement bore particularized indicia of reliability. The Washington Supreme Court upheld the conviction. But the United States Supreme Court, in an opinion by Justice Scalia, reversed.

The Court's analysis was largely centered on the recognition of a new distinction between "testimonial" and "nontestimonial" out-of-court statements. After carefully analyzing the history of the Confrontation Clause, the Court said the Clause "reflects an especially acute concern with a specific type of out-of-court statement," namely statements that resemble the "ex parte examinations" that had so frequently been abused in early English trials. The Court accordingly held that statements of this kind – "testimonial" statements – are admissible under the Confrontation Clause only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine the declarant. *Roberts*, the Court said, was both too broad and too narrow in that it "applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony" and it "admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability."

What Qualifies as a "Testimonial" Statement?

Crawford raised as many questions as it answered. First, the decision raised questions about the precise content of the distinction between testimonial and nontestimonial hearsay. The Court itself said that the development of a "comprehensive definition of 'testimonial'" would have to be left "for another day." The decision does

provide some guidance on the meaning of "testimonial," however. The Court held, of course, that the statement by Crawford's spouse during interrogation by police qualified as testimonial. And the Court also said: "Whatever else the term ["testimonial"] 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. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause." The Court further hinted that a definition of "testimonial" might include, first, "extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" and, second, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial."

The effort to arrive at a definition of "testimonial" has, not surprisingly, generated a good deal of disagreement among the lower courts. The issue has arisen most often in domestic violence cases, where the success of the prosecution often will depend on the admission of either (1) statements made during a "911" call or (2) statements made to responding police officers at the scene of the crime. Courts addressing the admissibility of these statements can be roughly divided into three camps.

First, some courts have held that "excited utterances" made either to a police dispatcher or to an officer on the scene of the crime are nearly always nontestimonial. For example, in *People v. King*, 2005 WL 17027 (Colo. App. 2005), the Colorado Court of Appeals held that "where, as here, the victim makes an excited utterance to a police officer, in a noncustodial setting and without indicia of formality, the statement is nontestimonial under *Crawford.*" Likewise, in *United States v. Luciano*, 2005 WL 1594576 (1st Cir. 2005), the First Circuit appeared to assume that any statement falling within the "excited utterance" hearsay exception was nontestimonial.

At the other end of the spectrum, some courts appear to have held, in effect, that a statement is "testimonial" if the declarant could reasonably have anticipated that it might eventually be used against the defendant. On this basis, courts have concluded that statements made to investigating officers at the scene of a domestic violence offense are testimonial and so are subject to exclusion under *Crawford. See, e.g., Miller v. State*, 2005 WL 143393 (Ga. App. 2005) (holding that statement made to responding officer by "extremely upset" domestic violence victim was testimonial); *cf. State v. Branch*, 865 A.2d 673 (N.J. 2005) (expressing doubt as to whether excited utterances that are a product of police questioning qualify as nontestimonial).

There is, of course, a substantial middle ground in this debate, occupied by courts that have refused either to automatically exclude or to automatically admit statements made to police during 911 calls or at the scene of the crime. These courts have adopted a bewildering array of tests, some favorable to the defense and some favorable to the prosecution. The Indiana Supreme Court, for example, has adopted a test that focuses both on the declarant's motives for making the statement and on the police officer's motives for eliciting it. The question, said the Indiana court, is whether the statement "is one given or taken in significant part for purposes of preserving it for potential future use

in legal proceedings." *Hammon v. State*, 829 N.E.2d 444, 456 (Ind. 2005). By way of contrast, the Washington Supreme Court has adopted a test that focuses on "the manner and mode of [the statement's] making." Under this test, a statement will qualify as testimonial if it either (1) was made "in response to structured police questioning" that bore the same "formal or official quality of the statements deemed testimonial by *Crawford*; or (2) if it was made for the purpose of "bearing witness" in contemplation of future legal proceedings. *Washington v. Davis*, 111 P.3d 844 (Wash. 2005).

In recognition of the disagreement among lower courts, the Supreme Court granted certiorari in both *Hammon* and *Davis*. In *Hammon v. Indiana*, the question presented is "Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington.*" *Davis v. Washington* raises a similar question: "Whether an alleged victim's statements to a 911 operator naming her assailant – admitted as 'excited utterances' under a jurisdiction's hearsay law – constitute 'testimonial' statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington.*" The Court's decision in these cases, which were argued together, will likely go a long way toward clearing up the current confusion.

Are Nontestimonial Statements Still Subject to Ohio v. Roberts?

In neither *Hammon* nor *Davis* is the Supreme Court likely to reach a second question left unanswered by *Crawford*: whether out-of-court statements deemed *non*testimonial fall wholly outside the scope of the Confrontation Clause and so are admissible regardless of whether they satisfy the standard of *Ohio v. Roberts.* In *Crawford*, the Court recognized that nontestimonial hearsay is "far removed from the core concerns of the [Confrontation] Clause." And it accordingly said that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." Though the Court did not specifically overrule the *Roberts* approach with respect to nontestimonial hearsay, the Court said that an alternative approach "that exempted such statements from Confrontation Clause scrutiny altogether" would be consistent with the Framers' intent.

In spite of this, courts appear generally have assumed that they should continue to apply the *Ohio v. Roberts* test to nontestimonial hearsay until they receive additional guidance from the Supreme Court. In *United States v. Hendricks*, 395 F.3d 173, 179 (3d Cir. 2005), for example, the Third Circuit said that "unless a particular hearsay statement qualifies as 'testimonial,' *Crawford* is inapplicable and *Roberts* still controls." And in *United States v. Holmes*, 406 F.3d 337, 348 (5th Cir. 2005), the Fifth Circuit said that "[w]ith respect to nontestimonial statements ... *Crawford* leaves in place the *Roberts* approach to determining admissibility."