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Crawford Surprises: Mostly Unpleasant

By Richard D. Friedman

C*rawford v. Washington* should not have been surprising. The Confrontation Clause guarantees a criminal defendant the right “to be confronted with the witnesses against him.” The doctrine of *Ohio v. Roberts*, treating the clause as a general proscription against the admission of hearsay—except hearsay that fits within a “firmly rooted” exception or is otherwise deemed reliable—had so little to do with the constitutional text, or with the history or principle behind it, that eventually it was bound to be discarded. And the appeal of a testimonial approach to the clause seemed sufficiently strong to yield high hopes that ultimately the Supreme Court would adopt it. After all, on its face the clause establishes a categorical, unqualified right to be confronted with the adverse “witnesses,” and witnesses are those who give testimony. Plainly, the clause was meant to ensure that prosecution witnesses give their testimony face to face with the accused.

The oral argument of *Crawford* suggested that as many as seven justices would agree to the testimonial approach. And that is what happened. Despite Justice Scalia’s protestation at argument that he would be unwilling to adopt the approach if it left significant problems to be resolved in the future, his dramatic majority opinion wisely avoided deciding more than necessary. It did not offer a comprehensive definition of what statements should be considered testimonial in nature, because it did not have to: Sylvia Crawford’s videotaped statement to the police, made the night of the incident at issue, qualified under any conceivable definition.

I suppose I should not have been surprised that prosecutors would work energetically to limit the impact of *Crawford*. But I do confess to being surprised by the willingness of many judges to go along. One particular incident illustrates the point well. In the summer 2004 issue of its journal, *Juvenile and Family Justice Today*, the National Council of Juvenile and Family Court Judges published an article saying, essentially, that

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Crawford could be ignored in domestic violence cases by treating excited utterances as non-testimonial. Jeff Fisher, my colleague Bridget McCormack, and I wrote a brief, responsive essay, saying that a faithful application of *Crawford* required treating as testimonial many statements that had previously been admitted by characterizing them as excited utterances. Did the council welcome this differing point of view from three observers who had been on the winning side of *Crawford*? It did not. It rejected our essay on the supposed ground that its tone was unacceptable—which mystified me, especially because I offered to make any tonal changes necessary. More about this incident, and the suppressed essay, may be found under the heading *A Case of Censorship?* on “The Confrontation Blog” (which I maintain) at www.confrontationright.blogspot.com.

The more important manifestation of this circle-the-wagons approach, of course, lies in judicial opinions. *Crawford* identified a core set of statements that are clearly testimonial—but some courts have treated this set as if it is exhaustive. *Crawford* said that “interrogations by law enforcement officers fall squarely within” the class of testimonial statements—but some courts have acted as if *only* such statements are testimonial (as if an affidavit shoved under the courthouse door would not be testimonial). *Crawford* said that “Sylvia’s recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition” of interrogation—but some courts have acted as if *only* such questioning constitutes interrogation. *Crawford* contrasted two polar situations, “a formal statement to government officers” and “a casual remark to an acquaintance”—and some courts have acted as if a statement not made formally, or not made to government officers, cannot be testimonial, no matter how clear was the anticipation that the statement would be used in prosecuting crime.

All these courts treat as testimonial only those statements that bear a close resemblance to in-court testimony. But that is precisely wrong. As some courts have recognized, the point of the Confrontation Clause was to ensure that testimony be given at trial, or at some other formal adversarial proceeding, in the presence of the defendant. It makes no sense, therefore, to say that a statement does not fit within the clause because it

does not resemble trial testimony. If a statement is made with the anticipation that it will be used in investigating or prosecuting crime, lack of the characteristics of trial testimony does not make the statement nontestimonial; rather, it means that the statement is *unacceptable* as a form of testimony.

I have been *pleasantly* surprised by one aspect of the post-*Crawford* judicial reaction. I believe that if the judge in a homicide case finds as a preliminary matter that the accused killed the victim, the accused should be deemed to have forfeited the confrontation

right, thus allowing the victim's dying statement to be admitted. This is a difficult, even counterintuitive theory, but several courts have accepted it, presumably recognizing how much preferable it is to reading the odd "dying declaration" hearsay exception into the confrontation right.

The willingness of courts to embrace forfeiture theory has one feature in common with their tendency to view the meaning of "testimonial" narrowly: They both favor the prosecution. And I suppose that means these should not be surprises at all. ■