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CRAWFORD V. WASHINGTON

by Richard D. Friedman

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On June 9, by granting *certiorari* in *Crawford v. Washington*, 02-9410, the Supreme Court signaled its intention to enter once again into the realm of the Confrontation

Clause, in which it has found itself deeply perplexed. This time there was a difference, however, because the grant indicated that the Court might be willing to rethink its jurisprudence in this area.

Crawford, like *Lee v. Illinois*, 476 U.S. 530 (1986), and *Lilly v. Virginia*, 527 U.S. 116 (1999), presents a classic case of what might be called station-house testimony. Michael Crawford was accused of stabbing another man. His wife, Sylvia, was present at the scene, and later that evening made a recorded statement to the police, in the station-house. In context, the statement was damaging to Michael's contention of self-defense. Sylvia was unavailable to testify at trial.¹ Accordingly, the prosecution offered the station-house statement. It was admitted over Michael's objection that it violated his right "to be confronted with the witnesses against him." Michael was convicted, and eventually the Washington Supreme Court upheld the conviction. It deemed Sylvia's statement to be sufficiently reliable to withstand scrutiny under *Ohio v. Roberts*, 448 U.S. 56 (1980), because it "interlocked" to a significant degree with a station-house statement made by Michael himself.

The petition for *certiorari* posed two questions. One was a narrow one, within the

¹ Formally, Michael asserted the spousal privilege that Washington law affords him, but this does not appear to affect the case, and has barely been mentioned in the papers before the Supreme Court; it is apparent that Sylvia, who later pled guilty to a charge arising out of the incident, was unwilling to testify against Michael, and she could have refused on the basis of her privilege against self-incrimination.

Roberts rubric, addressing the admissibility of a statement interlocking with one made by the accused. The chief interest of the case, though, lies with the second question:

Whether this Court should reevaluate the Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

The *certiorari* grant was unqualified, and the petitioner's brief concentrates primarily on the second question. So do two *amicus* briefs filed in support of the petitioner — one for the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and the ACLU's Washington affiliate, and the other by me for eight other law professors and myself. By the way, the State did us a favor by not consenting to us file these briefs. As far as I was concerned that did us a big favor. It meant that I could include nice biographical sketches of the signers of our brief in a motion for leave to file — which I am relieved to say the Court has granted — without it counting against our page limit: the statement of interest in the brief itself just referred to the motion.

Under *Roberts*, any hearsay by an out-of-court declarant poses a potential confrontation problem. If the statement is deemed reliable — a conclusion that may be drawn if the statement fits within a "firmly rooted" hearsay exception — it is usually admissible nevertheless, though in the case of former testimony and perhaps some other statements the hearsay is still not admissible unless the declarant is unavailable to testify at trial. This framework is utterly unsupported by the text of

the Confrontation Clause, which does not refer to hearsay or reliability, and by its history. The history of the Clause makes clear that it was meant to ensure that — in contrast to some systems used on the European Continent and courts like the Star Chamber that followed their model — witnesses against a criminal defendant were brought “face to face” with the accused, at trial if reasonably possible, to give their testimony. The scope of the Clause therefore is limited to statements that by their nature are testimonial. The exact bounds of the category of testimonial statements may not be exact, but the essence is clear: If a statement is made in circumstances in which a reasonable person would realize that it would likely be used (if allowed) as evidence in a criminal prosecution, then it is testimonial, for the declarant is knowingly creating evidence. Station-house statements are paradigmatic examples of the focus of the Clause — testimonial statements made without confrontation.

If the scope of the Clause is limited to testimonial statements, there is no need to ring it with exceptions. Just like the rights to a jury and to counsel, the right to confront witnesses should be regarded as absolute within its bounds, not to be overcome by a judgment that it is not necessary in the particular case because the evidence against the accused is so strong. The right can be waived or forfeited, however. Thus, if the reason that a witness cannot testify against an accused at trial is that the accused killed the witness, the accused has forfeited his right to prevent a statement by the witness from being admitted on confrontation grounds, whether the fatal blow was struck before or after the witness made the statement.

So that is a very short summary of one (my) version of the testimonial approach. The

State’s brief is, frankly, rather lackadaisical. It contends, for example, that there is no basis for rendering all hearsay inadmissible — but of course nobody has advocated that position. Far more interesting is an *amicus* brief submitted the Solicitor General’s Office

In *White v. Illinois*, 502 U.S. 346 (1992), the Government advocated something like the testimonial approach, and now it does so again, with a clearer emphasis on the testimonial nature of statements that are covered by the Clause. But now the Government contends that, even if a statement is testimonial but the accused has not had an opportunity for confrontation, it may nevertheless be admitted if the witness is unavailable and the statement is deemed reliable.

One might say that this prosecutorial-minded argument seeks to take the bitter without the sweet — it seeks to limit the scope of the Confrontation Clause as defined by *Roberts* but not to bolster the force of the Clause within the reduced scope. For at least three reasons, I believe it would be most unfortunate to couple adoption of the testimonial approach with retention of reliability analysis for unavailable witnesses.

(1) *Results*: So far as I am aware, there never has been a case in which the Supreme Court has allowed use of a testimonial statement that was made without the accused having had an opportunity for cross-examination. Reliability rhetoric has been a way of allowing in non-testimonial statements, which should not be covered by the Clause in the first place. If, as I believe, the testimonial approach is compatible with all the results of Supreme Court precedents (though not with their

language), then the only impact of retaining reliability testing can be to reduce the right.

(2) *Principle*: If a live witness at trial becomes unavailable before cross, the response of our adjudicative system is not, “Oh well, let the jury use the evidence for what it’s worth.” Rather, the evidence is struck. Why is there any better case for allowing use of the evidence if the testimonial statement is made and the unavailability occurs before trial? If anything, this is the weaker case, because it does not present the situation in which the testimony has already been heard by the jury before the problem occurs.

(3) *Problems unsolved*: Retaining reliability testing for unavailable declarants would retain most of the unpredictability and vulnerability to manipulation that has characterized the *Roberts* approach. It would be similarly unjustified by the text or history of the Clause. The problems might be somewhat confined — to justify bringing non-testimonial statements outside the Confrontation bar, we would not have to make specious statements about their reliability — but where they existed, in the domain of testimonial statements, they would be no less troublesome than under the current framework.

The case is scheduled for argument on November 10 — probably before this newsletter reaches its audience. I am scheduled to sit at counsel table with the petitioner’s lawyer, Jeffrey Fisher, an extremely able advocate who is, I am glad to say, an alum of the University of Michigan Law School. I confess that I am very excited by the prospect that this case offers for rediscovering the essence of one of the central rights of our system of criminal justice.