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Crawford at Two: Testimonial Hearsay
And the Confrontation Clause

by H. Patrick Furman

On March 8, 2004, the U.S. Supreme Court handed down Crawford v. Washington, significantly changing the landscape of hearsay law. Crawford established a new rule by which a certain category of hearsay evidence offered against a criminal defendant must be evaluated. "Testimonial hearsay" was deemed inadmissible unless the defendant had an opportunity to confront and cross-examine the declarant at the time the statement was made.

Since Crawford, virtually all state and federal circuit courts have attempted to delineate the precise boundaries of "testimonial hearsay." This article, on the two-year anniversary of the Court's decision, provides an overview of many of these cases, specifically focusing on Colorado opinions.

History of the Confrontation Clause

The Court's analysis of the history of the Confrontation Clause was central to its decision that the Sixth Amendment required more protection than had been provided by previous decisions. The Court conducted a comprehensive review of early English statutes, common law, colonial practices, and early state constitutions and decisions before concluding that this historical record supported two propositions. First, it supported the proposition that the principal evil addressed by the Confrontation Clause was "the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." Second, this history supported the proposition that the Framers would not have allowed the admission of testimonial statements of a witness who did not appear at trial un-

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This article addresses the response of Colorado courts, and that of certain other jurisdictions, to the 2004 U.S. Supreme Court decision in Crawford v. Washington.
less the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine him or her.8

The central purpose of the Confrontation Clause is to ensure that testimony introduced against an accused is reliable.9 Although there are many ways to ensure reliability—most hearsay exceptions are based on reliability grounds—Crawford held that the Confrontation Clause requires that reliability be established by rigorous testing of the sort that occurs in an adversary proceeding before a trier of fact.10 The American judicial system always has placed great value on cross-examination as essential to determining the truth of a matter. Crawford takes this a step further and makes the opportunity to cross-examine a precondition to the admission of certain types of hearsay statements.

What is Testimonial Hearsay?

Dictionary definitions served as a starting point for the Court when defining “testimonial hearsay” that might offend the Confrontation Clause. The Court defined “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”11 The Court also drew a distinction between formal statements (which might be testimonial hearsay) and casual remarks (which generally would not be testimonial hearsay):

“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”12

The Court then listed three possible formulations of “testimonial hearsay”:

1) “Ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”;
2) “Extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, deposition, prior testimony, or confessions”;
3) “Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”13

Although it did not explicitly adopt any of these formulations, the Court noted that they all “share a common nucleus.”14

The Court then provided examples of statements that clearly are included within any of these formulations, stating that “at a minimum,” testimonial hearsay includes prior testimony at a preliminary hearing, at a prior trial, or before a grand jury, as well as police interrogations.15

However, even this list of core statements has significant limitations. For example, the Court specifically defined statements made in police interrogations as testimonial, but then stated that “[j]ust as many definitions of ‘testimonial’ exist, one can imagine various definitions of ‘interrogation.’”16

When Does Crawford Apply?

Before trying to make sense of these definitions and lists, practitioners first must ask: does Crawford even apply to the situation at hand? Crawford does not apply to all criminal proceedings, because the Sixth Amendment right to confront one’s accusers is a trial right.17 Colorado courts have held that Crawford does not apply to sentencing hearings,18 suppression hearings,19 or probation violation hearings.20 Other state and federal courts have held that there is no confrontation right at, inter alia, preliminary hearings,21 in camera hearings to determine why a witness refused to answer a question,22 and post-conviction relief proceedings.23

Practitioners also should question Crawford’s application when handling cases decided before the Supreme Court’s opinion was issued. In Teague v. Lane,24 the U.S. Supreme Court held that “new constitutional rules of criminal procedure” are not applicable in cases where the conviction was final before the new rule was announced, unless the new rule is a “watershed” rule.25 The definition of a “watershed rule” is very narrow and requires the rule to fulfill two criteria: (1) “[i]nfringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction”; and (2) “the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”26 Because the majority of courts have concluded that Crawford announces a new rule, the struggle has been over whether the new rule falls within the “watershed” exception and should be applied retroactively.

The Colorado Supreme Court has held that the Crawford rule does not apply to cases involving convictions that became final before the decision was announced.27 Crawford does apply retroactively to cases pending on direct appeal at the time the decision was announced.28 Although a few federal circuits have held that the Crawford rule is a watershed rule and may be applied to post-conviction review, specifi-
cally habeas review, the Tenth Circuit joins the majority of circuits holding that it does not.20

Finally, counsel must remember that Crawford does not apply if the declarant also testifies at trial; if a witness testifies, there is no Crawford issue. Cross examination of the witness at trial is sufficient for Confrontation Clause purposes.20

**Colorado’s Analysis of “Testimonial Hearsay”**

The Colorado Court of Appeals has issued a number of opinions since Crawford, some of which are discussed below. The Colorado Supreme Court recently issued People v. Vigil,31 which provides a comprehensive review and analysis of Crawford.

Vigil was convicted of sexual assault on a child. The trial court had ruled that the child was unavailable and admitted statements the child made (1) to his father and to a friend of his father, which were deemed admissible as excited utterances; and (2) to a doctor, which were deemed statements for the purposes of medical diagnosis and treatment.32 The Colorado Supreme Court held that these were not testimonial hearsay.33 The Court also implicitly adopted the court of appeals’ conclusion that the child’s statements to the police were testimonial hearsay, but held that the admission of those statements was not plain error.34 In reaching these conclusions, the Court created a two-part analysis to determine whether statements are “testimonial” for Crawford purposes.

**Vigil Analysis: Part I**

First, the trial court should determine whether the statements fall within one of the four specific categories of testimonial hearsay defined by Crawford:

1. statements made in the course of a preliminary hearing;
2. statements made in front of a grand jury;
3. statements made at a prior trial; and
4. statements made in the course of police interrogation.35

If the statements fall within one of these categories, the statements are testimonial.

The child’s statements to his father and his father’s friend clearly fall outside these four categories. The child’s statements to the police clearly fall within the police interrogation category. The defendant argued that the child’s statement to the doctor fell within the police interrogation category because the doctor was part of a child protection team, was engaging in a sexual assault examination, and knew that the child's statements would be used by the prosecution. The Court acknowledged that the police interrogation category does not require the actual involvement of the police; only the “functional equivalent” of police interrogation is required.36 However, the Court rejected the argument that the doctor’s questioning was the functional equivalent of police interrogation in this case, noting that the primary purpose of the doctor was to get medical information, not to prepare testimony for use by the prosecution. Without a “more direct and controlling police presence” the Court held that the doctor should not be deemed a government official.37 The Court also noted that the trial court excised those portions of the child’s statements to the doctor that might be labeled “investigatory” and admitted only those portions that were “diagnostic.”38
**Vigil Analysis: Part II**

The second half of the Vigil analysis must be undertaken if the statements do not fall within one of the four categories. In that event, the trial court must determine whether the statements fall into one of the three formulations of testimonial hearsay that were set forth in Crawford. In Vigil, this analysis involved an evaluation of whether an objective witness would reasonably believe that his or her statement would be used later at trial; if the witness so believed, the statements of the witness are testimonial hearsay. The defendant argued that “objective witness” means “an objectively reasonable adult observer trained in the law,” but the Court rejected this interpretation and ruled that “objective witness” means “an objectively reasonable person in the declarant’s position.”

The Court used this interpretation to analyze the child’s statements to the doctor, as well as the statements to the child’s father and his father’s friend. With respect to the statements to the doctor, the Court noted that the child was a 7-year-old who was interested in feeling better, who expected that his statements to the doctor would help him feel better, and who would not foresee that his statements would be used at a trial. With respect to the statements to the father and the father’s friend, the Court noted that the child made these statements shortly after the assault and was at home speaking informally to the two men. In the Court’s estimation, an objectively reasonable person in the declarant’s position—that is, an objectively reasonable child—would assume that the men were interested in finding out what happened, determining whether the child was hurt, and comforting the child. There was no indication that the child thought that these statements were any sort of attempt to develop testimony for trial. Accordingly, the Court ruled that the statements to the doctor, to the father, and to the father’s friend were not testimonial hearsay.

Having determined that these statements did not run afoul of Crawford, the Colorado Supreme Court also reviewed the statements for admissibility under the Colorado Confrontation Clause and determined them admissible under that standard, as well. People v. Dement sets forth the Colorado test and requires the prosecution to establish both that the witness is unavailable and that the statement bears sufficient indicia of reliability. Neither Crawford nor Vigil purports to alter the manner in which this test is employed. A brief review of the Dement test is provided in the accompanying sidebar entitled “Practice Tip: Use Roberts Test for Non-Testimonial Statements.”

**The Boundaries of Testimonial Statements**

Vigil, like Crawford, does not establish the precise boundaries of “testimonial evidence.” The Colorado Court of Appeals has addressed a number of specific fact situations and a discussion of those issues follows. Even though most of the cases were decided before Vigil, a comparison of these decisions with the Vigil analysis suggests that the conclusions reached remain valid.

**911 Calls**

The Colorado Court of Appeals addressed statements made during 911 calls and adopted a case-by-case analysis of whether such statements are testimonial. This analysis is used to assess the intent of the caller—specifically, whether the caller made the call for the purpose of getting help or for the purpose of providing information for investigative purposes. The court concluded that the statement at issue was not testimonial because “the caller was seeking immediate help for the victim; the circumstances were exigent; and the statement . . . was neither elicited by nor made to anybody with authority.” It is unlikely that this result will be affected by Vigil, as Vigil also employed a case-by-case analysis that ultimately focused on the objective intent of the declarant.

Colorado’s approach to 911 calls is consistent with the majority of jurisdictions that have addressed this issue. Some of these courts employ a case-by-case approach that limits the admission of statements made during 911 calls to those statements that qualify as excited utterances.

Courts that have not adopted a case-by-case approach to 911 calls have adopted different per se rules. Some courts have held that statements made in a 911 call are never testimonial. The rationale of this approach is that Confrontation Clause concerns are not present, because the purpose of the 911 call is “to obtain assistance, not to make a record against someone.” Other courts have held that all 911 calls are testimonial. These courts reason that a declarant making a 911 call, regardless of the circumstances surrounding it, should reasonably expect that the statements will be used prosecutorially.

This issue soon may be resolved. The U.S. Supreme Court has granted certiorari in Davis v. Washington, a decision that employed the case-by-case analysis of 911 calls that has been adopted by the majority of other courts.

**Excited Utterances**

The Colorado Supreme Court has addressed the issue of an excited utterance made to a friend of the declarant. In Compan v. People, the Court held that such statements, at least in the factual context presented, were non-testimonial, because an objective person in the declarant’s position would not think his or her informal statements to a friend would be used at trial.

The Colorado Court of Appeals has addressed the more difficult issue of excited utterances made to a police officer. In People v. King, the court adopted the case-

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**Practice Tip: Use Roberts Test for Non-Testimonial Statements**

Even though Crawford eliminated the widely used Roberts test with regard to testimonial hearsay, the decision did not affect the use of that test when non-testimonial hearsay was at issue. In People v. Compan, the Colorado Supreme Court held that Roberts still applied with full force to non-testimonial hearsay offered against the accused. Roberts requires courts addressing the admissibility of non-testimonial statements to determine whether the statements: (1) bear sufficient indicia of reliability by falling within a "firmly rooted hearsay exception"; or (2) were made by an unavailable declarant and bear "particularized guarantees of trustworthiness." Colorado essentially adopted Roberts in People v. Dement; however, Dement did not explicitly abandon the unavailability requirement for statements falling within firmly rooted hearsay exceptions.

3. Id.
6. Compan, supra note 2 at 885.
by-case reasoning of other courts and held that where the victim made an excited utterance to a police officer in a non-custodial setting without indica of formality, the statement was not testimonial. Presumably, the same analysis would be applied to the statements of declarants who were not crime victims.

In making this determination, the court reviewed the formality of the statement both with regard to the setting where it was made and how it was elicited. It was important to the court that the statement was not made in a police station or given in response to police interrogation. Additionally, the court reviewed the state of mind of the declarant, noting that the classification of a statement as an excited utterance supported the conclusion that it was non-testimonial. Because the victim remained under the stress of excitement, the court concluded that it was not reasonable to believe that the declarant believed the statement would be used later at trial. It is unlikely that this analysis will be affected by Vigil, because this analysis reviewed the question of whether the statements were made as a result of police interrogation, and also focused on the objective intent of the declarant.

This case-by-case approach means that practitioners must carefully evaluate the facts surrounding the making of any excited utterances. The startling event giving rise to an excited utterance often diminishes a declarant's ability to recognize the legal ramifications of the statements—an awareness that otherwise would render the statement testimonial. To determine whether this concern has been sufficiently addressed, some courts evaluate whether a reasonable person in the declarant's circumstances appreciated that the statements were being gathered for trial and that the declarant had the capacity to make a testimonial statement. Other courts consider the intent of both the declarant and listener.

Courts that follow this approach reason that even though the declarant of an excited utterance ordinarily will lack the awareness that the statement may be used for trial, the interrogating officer may have this motivation.

Not all courts use a case-by-case approach. Some courts have held that excited utterances are per se non-testimonial. The rationale behind this approach is that these statements are made in response to the startling event, rather than in response to interrogation or in anticipation of trial. Other courts take a fundamentally different approach, disregarding the excited nature of the statement and instead focusing on the objective expectations of a witness in similar circumstances who is not excited.

**Other Statements to Police**

No Colorado case directly addresses the appropriate classification of other types of statements made to police officers first responding to a crime scene. In Vigil, however, the Colorado Supreme Court indicated that there is a presumption that statements made to a police officer are testimonial: "ordinarily, if a law enforcement official is involved during the course of questioning, such questioning would be considered a "police interrogation." There are at least three approaches that have been taken by other state and federal courts. One approach has been to classify responses made to police questions as per se non-testimonial. The rationale for this approach is that the police are not gathering the declarant's statements for use at trial but rather simply to assess what has happened at the crime scene.

A second approach taken has been to adopt a bright-line rule that all statements made to police officers engaged in the initial inquiry of what happened are per se testimonial. The rationale is that the police officer's involvement indicates to the declarant that the statements will be used prosecutorially.

The most common approach seems to be a case-by-case analysis of the specific circumstances surrounding the interaction between the declarant and police officer. Often, the analysis asks whether a reasonable witness in the declarant's position would believe his or her statements would be used at trial. Factors the courts have considered include:

- the identity of the declarant
- why the declarant spoke to the police
- who initiated the exchange
- the location where the statements were made
- the declarant's emotional state
- the officer's purpose in contacting the declarant
- whether the statements were recorded.

Some courts have held that the intent of the listener, the police officer in these cases, is the most important consideration.

Practitioners should be aware that this issue also may soon be resolved. The U.S. Supreme Court recently granted certiorari in Hammon v. Indiana, a decision that addressed the interplay between police interrogation and "testimonial hearsay.

**Statements by Children**

The Vigil case involved a child's statements to a doctor, to the child's father and his father's friend, and to police. The Colorado Supreme Court applied the previously described two-part analysis to determine whether the child's statements were admissible. The first step of the analysis asks whether the statements fall...
within the four categories of testimonial evidence defined by Crawford. The child's statements to the police fell within the police interrogation category and were thus considered to be testimonial hearsay. The child's statements to his father, his father's friend, and the treating doctor did not fall within any of the four categories. The Court therefore employed the second half of the analysis, which asks whether the statements fall within any of the three formulations of testimonial hearsay described in Crawford—the relevant formulation in Vigil was whether an objectively reasonable person in the declarant's position would believe that his or her statements would be used at a later trial.

Answering this inquiry requires an analysis of both the extent to which government officials were involved in producing the statement and the purpose of the questioning. When police are involved in producing the statement, the government involvement is great and it is likely that the court will find that interrogation occurred. This is consistent with prior Colorado decisions holding that videotaped statements by child witnesses to police investigators in forensic interviews are testimonial. Conversely, child witness statements made to a parent or family friend likely will not be testimonial. Most courts have held that some governmental involvement is required for the statements to be classified as testimonial.

The analysis is more difficult when the child's statements are made to doctors, social workers, or forensic interviewers, for example, because these persons are not automatically classified as government officials in the same way that police officers are so classified. Vigil focused on whether these individuals were acting as "agent[s] of the police." To determine whether this type of interviewer is acting as an agent of the police, the trial court should review the purpose of the questioning. In Vigil, the Court cited with approval decisions that statements were testimonial, and therefore not admissible, when the interviews by a non-police officer were conducted to gather evidence for trial. For example, a statement to a social worker who was present with a police officer and held the police report in her hand as she questioned a child has been deemed testimonial.

To determine the understanding of an objective person in a child's position, Colorado courts engage in a case-by-case analysis. Vigil provides a list of several factors drawn from other cases. These factors include: (1) the declarant's age; (2) the declarant's awareness of government involvement; and (3) the declarant's awareness that the defendant faces the possibility of criminal punishment.

In reviewing these factors, courts have looked at the presence or absence of statements by the children indicating that they understand the consequences of their responses to the questions. For example, a child's response that a defendant should "go to jail" indicated that the child understood the statements would be used for prosecution purposes, and the statements were testimonial. The absence of any such statements has been used as evidence that the child did not have awareness that the statements may be used later at trial. Courts also have considered what the child has been told by the interviewer. The fact that an interviewer indicated that the child also would need to talk to a "friend" of hers who worked at the district attorney's office to put the defendant in jail for a long time played a part in the Court's decision that the statements were testimonial.

Courts often require that there be some government presence before they will find that the objective person in the child's position would know the statements will be used for trial. Only a few courts have recognized that children who make accusatory statements without the presence of a government official may understand that they are "essentially tattling." Other Statements

Statements made by a crime victim to her training manager have been deemed not testimonial in nature. The court of appeals reasoned that the statements were not made to police, and there was nothing that indicated that the training manager was acting as an agent of the police. This reasoning is consistent with the analysis subsequently adopted in Vigil.

Crawford itself specifically noted that it does not apply to business records or co-conspirator statements. The Court held that these statements are not by "their nature" testimonial. Since this opinion, courts have struggled with what documents should be included within the business record exception.

The Colorado Court of Appeals held that public records are analogous to business records and should not be considered testimonial. Further, the affidavits by judges and court clerks that accompany the public records—in this case, records of prior convictions—do not implicate the Sixth Amendment because their sole purpose is to verify chain of custody and authenticity; not to provide ex parte testimony.

Other courts have applied similar reasoning to admit immigration records, medical records, or certification records for machines used to measure intoxication levels. Even though it could be anticipated that some of these reports may be used in court, they are non-testimonial because they are used for foundational purposes, not as substantive evidence of a particular offense—evidence that would fall within the Sixth Amendment's prohibition of evidence "against" the defendant.

There has been some debate as to whether laboratory reports should be admitted under a business records rationale. The Colorado Court of Appeals held that Crawford does not apply to laboratory and scientific reports. This approach also has been followed in many other state courts. However, other courts have determined that laboratory reports are a combination of testimonial (the report writer's opinions) and non-testimonial.
(routine, factual, descriptive, and non-analytical) statements. It has been argued that these reports fit within the various formulations of testimonial evidence when they were prepared with the reasonable expectation that they would be used at trial. The classification of dying declarations also is unsettled. Crawford acknowledged that some dying declarations can be classified as testimonial statements, but stated that even these statements may be admissible. The Court did not decide whether the Sixth Amendment incorporated an exception for dying declarations, but did recognize that the exception for dying declarations pre-dated the adoption of the Sixth Amendment and has been considered "a general rule of criminal hearsay law." Lower courts have reached opposing conclusions on this issue, and no Colorado court has addressed the issue.

Post-Crawford decisions have held that statements made during plea allocations and in front of grand juries are testimonial. In People v. Couillard, the Colorado Court of Appeals held that it was improper for a court to take judicial notice of statements made by the defendant's counsel in a plea agreement to establish an element of the crime charged against the defendant. The court noted that Crawford specifically referenced plea allocations as impermissible testimonial hearsay.

The Colorado Supreme Court has applied Crawford to preliminary hearing testimony, reasoning that the defendant's opportunity to cross-examine witnesses at a preliminary hearing is restricted by the limited purpose of such hearings. In the absence of a full opportunity to cross-examine, such statements are barred by Crawford.

**Conclusion**

Like any other two-year old, Crawford is growing and changing. Although it is possible that the U.S. Supreme Court might impose significant changes on the principles of Crawford, it seems more likely that the basic contours of the rule will remain the same, and that courts will continue to flesh out the precise boundaries of the rule. Because new decisions are being issued on a weekly basis, counsel must make sure to stay up-to-date in this area of law before litigating the issues raised by Crawford and its progeny.

**NOTES**

2. Id.
3. Id at 53.
4. Id at 68.
5. Id.
6. Id at 43-51.
7. Id at 50.
8. Id at 53-54.
10. Crawford, supra note 1 at 67-68.
11. Id at 51.
12. Id.
13. Id at 51-52.
14. Id at 52.
15. Id at 68.
16. Id at 53.
17. People v. Fry, 92 P.3d 970, 980 (Colo. 2004).
22. LaChappelle v. Moran, 699 F.2d 560, 564-65 (1st Cir.1983).
25. Id.
29. Brown v. Uphoff, 381 F.3d 1219 (10th Cir. 2004).
30. See People v. Argomaniz-Ramirez, 102 P.3d 1015, 1018 (Colo. 2004).
32. Id at 919.
33. Id.
34. Id.
35. Id at 921-22.
36. Id at 922.
37. Id at 923-24.
38. Id at 924.
39. Id, citing Crawford, supra note 1 at 51-52.
40. Id.
41. Id.
42. Id at 927-28.
45. See id. (citations omitted).
46. See id. at *12.
47. See id.; State v. Wright, 701 N.W.2d 802, 811 (Minn. 2005).
49. Leavitt v. Arawe, 371 F.3d 663 (9th Cir. 2004).
50. See Cevallos-Acosta, supra note 44 at *12.
52. People v. Compan, 121 P.3d 876, 882 (Colo. 2005).
53. Id.
55. Id.
57. See id.
60. Id.
61. Brito, supra note 48 at 60 (citations omitted).
62. Id. (citations omitted).
63. Id. (citations omitted).
64. Vigil, supra note 31 at 922.
67. State v. Wright, supra note 47 at 812 (citations omitted).
68. People v. Mackey, 785 N.Y.S.2d 870, 874 (Crim. Ct. 2004).
71. Hammon, supra note 59.
72. Vigil, supra note 31, citing Crawford, supra note 1 at 51-52.
73. Id at 922.
74. Id.
76. Vigil, supra note 31 at 926.
78. Vigil, supra note 31 at 923-24.
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79. Id. at 922-23.
80. Id. at 923, citing State v. Snowden, 385 Md. 64 (2005).
81. Id. at 925-26; People v. Sharp, 2005 WL 2877807 (citations omitted).
82. See Sharp, supra note 81 at *5.
83. See Vigil, supra note 75 at 262.
84. See Sharp, supra note 81 at *5 (citations omitted).
85. See Vigil, supra note 75 at 263.
86. See Monnat, supra note 77.
87. Id.
89. Crawford, supra note 1 at 56.
90. Id.
92. Id.
93. United States v. Cervantes-Flores, 421 F.3d 825, 831-34 (9th Cir. 2005).
101. See Crawford, supra note 1 at 56 n.6.
102. Id.
103. Id.
104. Latimar, supra note 65 at 375.
105. See id. at 372 (citations omitted).
107. Id.
108. Crawford, supra note 1 at 64.
109. Fry, supra note 17 at 970 (preliminary hearing not considered prior opportunity to cross-examine).