CRAWFORD & ITS PROGENY IN TEXAS & THE NATION'S OTHER STATE SUPREME COURTS

Dannye Holley
# CRAWFORD & ITS PROGENY in TEXAS & THE NATION'S OTHER STATE SUPREME COURTS

## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II. Crawford &amp; Its Progeny</td>
<td>4</td>
</tr>
<tr>
<td>III. State Supreme Courts &amp; The Crawford</td>
<td>8</td>
</tr>
<tr>
<td>Confrontation Right</td>
<td></td>
</tr>
<tr>
<td>A. “Testimonial”</td>
<td>9</td>
</tr>
<tr>
<td>B. Analysis of “True Exceptions” Claims to Crawford’s Confrontation Protection</td>
<td>12</td>
</tr>
<tr>
<td>C. Analysis of “Crawford Claims” &amp; Ineffective Assistance of Counsel, Waiver, &amp; Harmless Error</td>
<td>18</td>
</tr>
<tr>
<td>IV. The Texas Court of Criminal Appeals &amp; The Crawford Confrontation Right</td>
<td>19</td>
</tr>
<tr>
<td>A. “Testimonial”</td>
<td>19</td>
</tr>
<tr>
<td>B. Analysis of “True Exceptions” Claims to Crawford’s Confrontation Protection</td>
<td>21</td>
</tr>
<tr>
<td>C. Analysis of “Crawford Claims” &amp; Ineffective Assistance of Counsel, Waiver, &amp; Harmless Error</td>
<td>25</td>
</tr>
<tr>
<td>V. Summary-Perspectives-Recommendations</td>
<td>27</td>
</tr>
<tr>
<td>A. Summary &amp; Perspectives</td>
<td>27</td>
</tr>
<tr>
<td>B. Recommendations</td>
<td>30</td>
</tr>
</tbody>
</table>
Introduction

It is relatively rare for legal scholars and practitioners who specialize in trial work to share a visceral interest. The United States Supreme Court’s 2004 decision in Crawford v. Washington has created such an interest. The purpose of this article is to

---


describe and assess that interest.  


accomplished first by examining Crawford and its progeny in the United States Supreme Court.\(^4\) This interest will be documented and assessed next by generally surveying Crawford’s influence in the states, and particularly on state supreme courts.\(^5\) The verification of the significance of Crawford to the academy and practice will next be documented and examined by analyzing in more detail the influence of Crawford on one such state supreme court, The Texas Court of Criminal Appeals. \(^6\) In the conclusion, the article will provide perspectives based on the current interest in Crawford documented in the proceeding parts, and predict the most significant future implications of Crawford for the shared and individual interests of the academic and criminal trial practice elements of the legal profession. \(^7\)

I.  CRAWFORD IN THE United States SUPREME COURT

The national constitution's sixth amendment confrontation clause, as interpreted in “Crawford” and its progeny, provides an added dimension of protection against the use of pre-trial statements to convict defendant's in criminal cases.\(^8\) These decisions impose the

---

\(^4\) See infra notes 8 - 22, and accompanying text.
\(^5\) See infra notes 23 - 66, and accompanying text.
\(^6\) See infra notes 67 - 98, and accompanying text.
\(^7\) See infra notes 99 - 108, and accompanying text.
\(^8\) Bullcoming v. New Mexico, __ US __, 2-11 WL 2472799(Sotomayor) (2011)(statements made by analyst who certified of blood alcohol report were testimonial and accused was entitled to confront that declarant);  Michigan v. Bryant, 562 US __, 131 S.Ct. 1143, 7-2, (Sotomayor) (2011)(victim scene of crime statements held non-testimonial because the purpose of the conversation was to resolve a current crime emergency);  Melendez-Diaz v. Massachusetts, 557 US ___(2009); Giles v. California, 554 U.S. 353(2008)(6-3, Scalia)(allegation of fault for absence of the declarant rejected as broad basis for an exception to Crawford protection);  Davis v. Washington, 547 U.S. 813(2006); Hamlin v. Indiana, 547 U.S. 813(2006); Crawford v. Washington, 541 U.S. 36(2004)
requirement that all “testimonial” statements must be admitted via live prosecution witness testimony, unless the “declarant” is “unavailable” and the defendant had an opportunity to challenge the testimony under cross-examination type conditions.\textsuperscript{9} This national constitutional protection is independent of the current status of the hearsay exclusionary evidence rule, and its myriad of exceptions. This added dimension of protection is justified by the history of the right to physically confront witnesses at the time the Confrontation clause was adopted, and therefore cannot be substituted for by even reasonable findings that a particular instance or type of testimonial hearsay has indices of reliability.\textsuperscript{10}

“Testimonial” is a national constitutional term of art, and can be further broadened but not narrowed by state supreme courts, by relying on state law.\textsuperscript{11} Under the national constitutional definition of “testimonial” as crafted by the United States Supreme Court, whether a statement is “testimonial” requires a multi-factor assessment. The Court has endorsed as relevant factors: whether the statement when introduced at the trial served the same function for the prosecution as would live testimony, an objective evaluation of whether the primary purpose for the creation of the statement was for use or potential use by the prosecution to convict, whether it was created during a stage of the criminal investigation, whether the statement was a product of government agent questioning, whether the primary purpose of the questioning was to preserve evidence for trial, and whether a reasonable person in the declarant’s position would realize that what he was saying would be used to prosecute.\textsuperscript{12} A “testimonial”

\textsuperscript{9} Crawford v. Washington, 541 U.S. 36(2004); Davis v. Washington, 547 U.S. 813(2006); Hamlin v. Indiana, 547 U.S. 813(2006) The Court has recently held to its own definition of “unavailable” requiring only that the prosecution make a reasonable effort to bring the declarant to court; Hardy v. Cross, 132 S.Ct. 490, 493-494(per curiam)

\textsuperscript{10} Bullcoming v. New Mexico, \textsubscript{__} US \textsubscript{__}, 2-11 WL 2472799(2011)

\textsuperscript{11} See infra notes 104-106, and accompanying text.
statement is one that at the government's behest was obtained or written primarily for the purpose of potential use as presentment evidence to convict, or which when done expressly or by implication had such possible use.\textsuperscript{13} Hence statements in affidavits, depositions, before grand juries, and those produced as a result of police “interrogation” – a product of an active, but not imminent emergency police criminal investigations. are usually “testimonial”. \textsuperscript{14}

The U.S. Supreme Court has held certain statements not to be testimonial. Statements made during a 911 call when made in the context of evaluating and terminating an emergency that supposedly prompted the call.\textsuperscript{15} Statements by a crime victim, even though a product of police interrogation, when they were primarily sought during and for the purpose of investigating and resolving an on-going emergency situation (a mortally wounded person gave the statement) were also recently held by the court to be non-testimonial.\textsuperscript{16} The Court has also recently indicated multiple times that documents that qualify under most modern hearsay exception rules as business or public


\textsuperscript{15} Davis v. Washington, 547 U.S. 813(2006)

\textsuperscript{16} Michigan v. Bryant, 562 US \underline{__}, 131 S.Ct. 1143, 7-2, (Sotomayor) (2011) (victim statements at scene-but not clear if on-going emergency rationale was applicable)
records are normally non-testimonial because they are often created prior to the crime event or for purposes other than proving facts at a subsequent hearing or trial.\textsuperscript{17}

The Court has also recognized that exceptions to the exclusion of testimonial statements sanctioned at common law prior to the adoption of the confrontation clause were by implication excepted from the added protection of the clause and therefore Crawford.\textsuperscript{18} The two historical exceptions recognized to date by the Court are dying declarations, and the defendant’s forfeiture of the right to confront by engaging in conduct which prevents the live testimony of a person he knew or had reason to know was likely to serve as a witness against him.\textsuperscript{19}

Of course it is also true that testimonial statements that prosecutors seek to admit in proceedings which the U.S. Supreme Court has held are other than a “criminal prosecution”, the only proceeding to which sixth amendment protections apply, including confrontation, are therefore admissible over a confrontation clause objection.\textsuperscript{20} It is also true that testimonial statements which are relevant notwithstanding the truth of the matter asserted therein are not barred by the confrontation clause because the witness on the stand is the person who is purported to have heard such a statement.\textsuperscript{21}

\begin{flushright}
\footnotesize
\textsuperscript{17} Bullcoming v. New Mexico, __ US __, 2-11 WL 2472799(2011); Melendez-Diaz v. Massachusetts, 557 US ___(2009)
\end{flushright}

\begin{flushright}
\footnotesize
\textsuperscript{18} Giles v. California, 554 U.S. 353, 358-359(2008)
\end{flushright}

\begin{flushright}
\footnotesize
\textsuperscript{19} Giles v. California, 554 U.S. 353, 358-360(2008)
\end{flushright}

\begin{flushright}
\footnotesize
\textsuperscript{20} State v. Marquis, 257 P. 3d 775, 779-780(Mont., 2011)(national sixth amendment rights, including confrontation, held previously by the U.S. Supreme Court to be inapplicable to probation or parole revocation hearings).
\end{flushright}

\begin{flushright}
\footnotesize
\textsuperscript{21} Crawford v. Washington, 541 U.S. 36, 59(n.9)(2004). A plurality of the Court applied, probably erroneously, this principle recently to uphold admission of testimony by a witness who according to the court only assumed the truth a rape kit report in commenting upon a
Similarly, the Court has indicated that pre-trial testimonial statements are admissible when the declarant testifies at trial and is subject to cross-examination by the defense, even if the declarant denies making or contradicts the alleged pre-trial incriminating statement, and even if there is evidence to support the declarant’s trial testimony.\textsuperscript{22}

\section*{II. CRAWFORD IN THE STATE SUPREME COURTS OTHER THAN TEXAS}

In the first seven years after the Crawford decision, 2005-2011, there were approximately 700 State Supreme Court decisions which made reference to Crawford in the context of a confrontation clause analysis.\textsuperscript{23} This means that on average there were over fourteen supreme court decisions for each of the fifty state supreme courts, which have cited Crawford in the context of interpreting, applying, and ostensibly attempting to adhere to the standards of that case and its progeny.

Other commentators have surveyed and analyzed the reaction by state appellate courts, and more specifically state supreme courts to DNA profile in answering a prosecutor’s question; Williams v. Illinois, 132 S.Ct 2221(2012)(Alioto)

\textsuperscript{22} Crawford v. Washington, 541 U.S. 36, 59(n.9)(2004)

\textsuperscript{23} WestLaw key number search focused on the Confrontation clause : Criminal Law, Key 662 & Court(high) & date(aft 2004) & Crawford.
Crawford and its U.S. Supreme Court progeny. Commentators have characterized the reaction of some state supreme courts as hostile. For example, commentators have found such hostility in these courts’ reaction to the definition of “testimonial” crafted by the U.S. Supreme Court. A reaction one commentator characterized as outright disregard of Crawford’s definition of “testimonial”. A defiance which, at least in part, is hopefully and appropriately now fairly characterized as historical in light of the U.S. Supreme Courts continuing refinement of its definition of “testimonial” through its 2010-2011 term.

Yet in 2008 and 2011, state supreme courts declared statements allegedly made by a jointly tried co-defendant to a government jailhouse informant were non-testimonial, despite the fact that in one instance the government wired the cellmate to solicit the statements. These courts were thereby elevating, erroneously, the sole factor that the declarant did not know he was speaking to the government to a constitutional principle. Such a principle would create a gapping hole


27 Id.

28 See supra notes 12-17, and accompanying text.

29. State v. Smith, 960 A.2d 1006(Con., 2009)(cellmate sent in by government with a wire to record co-defendant incriminating statements); Fields v. Com., 2011 WL 3793149(Ky., 2011)
in the protection and policy underlying the Crawford decision. It would invite the government, even after the formal commencement of proceedings, to employ informants to solicit and elicit statements for prosecution and conviction as long as the declarant was unaware that the government had initiated the encounter. Hence an entire prosecution and conviction could be based on government agents repeating those statements or concocted statements.

Another state supreme court even resurrected the “Roberts” decision reliability standard by enfolding reliability considerations as one or more factors in evaluating if a statement was “testimonial”. In 2011 the Maine Supreme Court sanctioned a felony conviction based solely on the testimony of a single investigating officer, repeating only statements allegedly made by the victim of an assault who was not called to testify by the prosecution. The Court's conceptually flawed ruling was based on first finding that the victim’s statements were “excited utterances” and this supported a conclusion that they were sought and made, the officer might have reasonably concluded, to halt an on-going emergency. However, the constitutional standard makes what a non-declarant witness might subjectively believe insignificant, and the only emergency was to catch the alleged culprit.

On the other hand, state supreme courts have recently faithfully followed the U.S. Supreme Court’s evolving definition of

30 State v. Wright, 701 N.W.2d 802(Minnn., 2005)
31 Sate v. Metzger, 999 A.2d 947, 957-958(Maine, 2011)
32 Id. at
33 See also such other recent state supreme court decisions such as State v. Bonilla, 717 S.E.2d 166(Ga., 2011) in which a state supreme court added to the non-testimonial category of statements, res gestae statements of a victim of a stabbing made to persons at the crime scene.
“testimonial”. Perhaps even more significant as a federalism policy matter, state supreme courts have brought to a halt obvious prosecutor obstinacy and lower state court defiance of Crawford. For example, a state supreme court struck down a lower court decision admitting grand jury testimony to prove guilt at a subsequent trial, rejecting the premise of the lower court that the declarant’s reluctance to testify made him “unavailable”, and that unavailability sufficed to excuse compliance with Crawford.

———
34 State v. Bennington, 264 P.3d 440,446-454(Kan., 2011); Derr v. State, 29A.3d 533, 543-547(Mryl., 2011)

35 State v. Elliott, __ N.W. 2d __, WL 6003974(Iowa, 2011)(Iowa Supreme Court rejected intermediate appellate court’s affirmance of a trial court ruling excusing the calling a child declarant, the alleged victim of the crime, and substituting the testimony of a police officer who allegedly was repeating what he was told by the child); Derr v. State, 29A.3d 533, 533-34, 546-548(Mryl., 2011)(rejecting exception that DNA and serologist were mere scribes, and that surrogate oversight expert who did not participate in the evidence gathering can repeat and draw conclusions from the reports of these experts); State v. Cox, 779 N.W.2d 844, 845 and 852(Min., 2010); State v. Cabbell, 24 A.3d 758, 768(N.J., 2011)(reversing trial and lower appellate courts’ sanctioning keeping a crucial available prosecution witness from cross-examination before the trial jury, and admitting instead a highly suspect alleged statement of that witness ostensibly made to the police prior to trial); State v. Beadle, 265 P.3d 863(Wash., 2011)(alleged child victim’s statement to investigators was testimonial, and child must testify at trial); See also State v. Rainsong, __ N.W. 2d __(Iowa, 2011)(Court affirms trial court refusal to allow the government to play a videotape deposition of the alleged elderly victim rather than call him to testify)

36 State v. Cox, 779 N.W.2d 844, 845 and 852(Min., 2010);
State Supreme Courts have expanded Confrontation Clause protection by interpreting the definition of “testimonial” to include statements and categories of statements well beyond those specifically declared “testimonial” by the United States Supreme Court. Some of these supreme courts, for example, have held that statements elicited during the course of government investigations of crimes pursuant to a possible subsequent prosecution are “testimonial”. Statements made in the course of reporting a crime to the police when there is no evidence that the primary purpose of the statement was to resolve an on-going emergency situation were also held to be “testimonial”. Recently state supreme courts have found that DNA profiles, certification by a state official of factual findings in an autopsy report, and notice of a suspended driver’s license are “testimonial”. A document created by the state after the alleged crime event to be used to prove an element of the crime is “testimonial”. A state supreme court has even held that a prior written accusatory statement penned by a person who eventually became a homicide victim at the hand of the person she accused in the note, was testimonial, despite the fact that the note was not authored at the behest of or specifically directed to the government.


40 Derr v. State, 29A.3d 533,549(Mryl., 2011)(DNA profile and expert claim that the defendant’s profile is a match to DNA find at the crime scene); Com. v. Parenteau, 948 N.E.2d 883, 886(Mass., 2011)

41 Com. v. Parenteau, 948 N.E.2d 883, 888 and 890(Mass., 2011)

42 State v. Sanchez, 177 P.3d 444, 451-452(Mont., 2008)
Finally, a state supreme court recently held that when Crawford protection applies, it cannot be satisfied by the conducting of a pre-trial discovery opportunity because there is no reasonable opportunity to meaningfully cross-examine the deposed person.43

State supreme courts have almost uniformly chosen to honor the limitations to Crawford protection in the form of exceptions to that protection expressly or by implication recognized by the U.S. Supreme Court in crafting confrontation protection.44 There are also significant examples of state supreme courts narrowly interpreting the protection of the right of confrontation provided by Crawford and its progeny. At least two of the narrow interpretations are now hopefully and appropriately fairly characterized as historical in light of recent U.S. Supreme Court decisions rejecting these interpretations.

First, several state supreme courts, in reviewing homicide convictions, held that confrontation protection was forfeited by any defendant found to have killed the declarant, even if there was no pending litigation at the time of the homicide, and therefore no intent on the part of the accused to prevent the deceased from testifying.45 In 2008, the Supreme Court rejected this limit on the right to confrontation.46 Other state supreme courts held that confrontation only required that the declarant be available to call as a witness by the defense.47 In 2011, the Supreme Court rejected this limit on the right to confrontation.48

43 Corona v. State, 64 So.3d 1232, 1241(Fla., 2011)

44 See supra notes 16-19 and accompanying text. See e.g, Com. v. Hanible, 30 A.3d 426(Pa., 2011)(prior inconstant statement of “turncoat” prosecution witness admissible to prove guilt).

45 People v. Giles, 152 P.3d 433(Calif., 2007); Vasquez v. People, 173 P.3d 1099(Col., 2007); State v. Meeks, 88 P.3d 789(Kan., 2004); State v. Moua Her, 750 N.W.2d 258(Minn., 2008); State v. Sanchez, 177 P.3d 444, 456(Mont., 2008)

Other true exceptions suggested or sanctioned by state supreme courts are sometimes more complex, and are still in play, in 2012. For example, the California Supreme Court sanctioned a bizarre exception that reflects the following set of principles. The prosecution may admit at trial a prior inconsistent testimonial statement to impeach a testifying declarant’s trial statement, and the preliminary hearing testimony of an unavailable declarant to prove guilt, but it may not introduce into its case-in-chief to prove guilt the same unavailable declarant’s testimonial statement to impeach the preliminary hearing testimony of that declarant.

Another such exception focused on testimony by an expert who relied heavily upon a statement by another declarant-expert who did not testify. A state supreme court has held that if the testifying expert plausibly claims that his opinion is an independent judgment and when some of the contents of the report is otherwise admissible under a hearsay exception, excuses the need to call the preparer of the report. The Massachusetts Supreme Court apparently reached this decision without eliminating the possibility that the testifying expert was relying upon the accuracy of the findings of the report’s preparer. Finally, the court further complicated its holding by acknowledging and then finding significant as partial or total waiver of Crawford protection, the failure of the defense attorney to object to the admission of some of the content of the report during the direct examination of the testifying expert.

47 In the Matter of T.J.B., 233 P.3d 341, 346(Montana, 2010); MacGruder v. Com., 657 S.E.2d 113(Virg., 2008); Rodriguez v. State, 245 P.3d 818, 822 and 824(Wyo., 2010)


49 P. v. Blacksher, 259 P.3d 370, (Cal. 2011)

50 Id.


52 Id.
Such an exception if sanctioned by the United States Supreme Court would significantly limit the scope of the protection provided by Crawford and its progeny. A limitation especially troubling, if as appears to be the case in the facts of the Massachusetts’ decision, the prosecutor appeared to have called the examiner who testified rather than the examiner who conducted the autopsy, because the former’s opinion was more favorable to the prosecution’s theory of the case. 53 Subsequently, in 2011, the U.S. Supreme Court cast significant doubt on whether it would sanction this exception.54 Subsequent to that decision, the Maryland Special Court of Appeals rejected the rationale of the Massachusetts’ Supreme Court, and the attempt to craft a “surrogate” expert exception. 55 The Michigan Supreme Court and the Kentucky Court of Appeals also recently rejected attempts by their lower courts to sanction a very similar expert exception to Crawford. 56

State supreme courts recognized that the United States Supreme Court by the end of its 2011 term had put to rest the idea that established exceptions to the hearsay rule such as the business records exception, could independently trump Crawford protection. 57

53 Id. At 445. Testifying examiner’s opinion of proximity of gun to the victim more consistent with the prosecution’s theory of the case.

54 Bullcoming v. New Mexico, __ US __, 2-11 WL 2472799(Sotomayor) (2011)(statements made by analyst who was the expert who certified the blood alcohol report were testimonial and accused was entitled to confront that declarant rather than another witness who was an expert who reviewed, relied upon, and reported the findings of the initial declarant)

55 Derr v. State, 29A.3d 533, 548-549(Mryl., 2011)

56 Whittle v. Com., 352 S.W.3d 898, 903(Ky., 2011); People v. Fackleman, 802 N.W.2D 552, 554(Mich., 2011)

57 Whittle v. Com., 352 S.W.3d 898, 902(Ky., 2011); Derr v. State, 29A.3d 533, 548-549(Mryl., 2011)
One of the Courts expressly recognized the consistent rebuffing by the United States Supreme Court of attempts by state courts to authorize such exceptions.\(^{58}\) The same state supreme court, The Maryland Court of Special Appeals, also held that Crawford protection provides an independent shield to that created by the Bruton doctrine with respect to statements of co-defendants when they are tried jointly with the accused.\(^{59}\) Hence a testimonial statement of a jointly tried co-defendant even if the declarant refuses to testify and even if the statement does not clearly implicate the accused must be excluded when there was no prior opportunity to cross-examine that co-defendant.\(^{60}\)

The Mississippi Supreme Court also rejected an attempt to extend the prior inconsistent statement exception to a situation where the declarant took the stand and, because of physical injury, could not make an inculpatory or exculpatory statement.\(^{61}\) The government sought and the trial court then sanctioned admission of a pre-trial statement the declarant allegedly made to police incriminating the accused.\(^{62}\) The Mississippi Supreme Court held Crawford was not simply satisfied by the mere fact the declarant is sworn in as a witness, but required at least that the defense would have the chance to have the declarant remember the statement or the underlying event to the degree that he could acknowledge, explain, or defend it.\(^{63}\)

But even this holding, failed to properly restate the dimension of the protection provided by Crawford in this situation. Since no plausible claim of use of the pre-trial statement to impeach the declarant's trial testimony can be made, the statement's only relevance would require the prior statement to be true, and if true to

\(^{58}\) Derr v. State, 29A.3d 533, 550(n. 12)

\(^{59}\) Morris v. State, 13 A.3d 1206(Md., 2011)

\(^{60}\) Id.

\(^{61}\) Goforth v. State, 70 So.3d 174, 186-187(Miss., 2011)

\(^{62}\) Id. At 180

\(^{63}\) Id. At 186-187.
assist the prosecution’s efforts to prove guilt. But since the prior statement was not made under circumstances that afforded the current accused the opportunity to cross-examine the declarant when the statement was made, the statement’s admission would per se violate the national constitution’s confrontation clause. Hence the fact that the declarant on the stand admits remembering making the statement would not suffice as a basis to satisfy Crawford.

State supreme courts have also recognized that failure of defense counsel to appropriately invoke Crawford protections to exclude damaging prosecution admission of declarant statements can satisfy the first prong of the national constitution’s sixth amendment’s right to effective assistance of counsel – a performance below minimal standards of lawyer competence. On the other hand, there is a flagrant example of ineffective assistance with respect to a defense attorney ignoring a Crawford violations, that were noted but also ignored by the state supreme court.

For a constitutional violation of the confrontation clause to be excused because it is found harmless, it must be harmless beyond reasonable doubt. State Supreme Courts have recently held that the Crawford violations they found, were not harmless. On the other


64 Ardis v. State, 718 S.E. 2d 526, 530(Ga., 2011)
65 State v. Smith, 960 A.2d 993, 1007(Con., 2008)(police wired a cellmate of a co-conspirator of the accused. Defense attorney conceded that said solicited statements were not testimonial. State supreme court made no attempt to note that error)
66 Ardis v. State, 718 S.E. 2d 526, 530(Ga., 2011); State v. Beadle, 265 P.3d 863(Wash., 2011)
67 Corbin v. State, 74 So.3d 333, 339(Miss., 2011)(Crawford violation was not harmless as to convictions for murder and aggravated assault, but was harmless as to the conviction for felony fleeing); Goforth v. State, 70 So.3d 174, 187(Miss., 2011)
hand, several state supreme courts have excused Crawford violations by finding the violations as harmless beyond reasonable doubt.\textsuperscript{68}

IV. CRAWFORD IN THE TEXAS COURT OF CRIMINAL APPEALS

The Texas Court of Criminal Appeals has recognized that Crawford, when applicable, trumps its evidence rules hearsay exceptions, and therefore an otherwise admissible statement as a hearsay exception, such as an excited utterance, present sense impression, or even a co-conspirator admission must be excluded if it is “testimonial”, and the Crawford conditions for admission are not satisfied. \textsuperscript{69} Hence “informal” hearsay statements given to an

\begin{itemize}
\item \textsuperscript{68} Ardis v. State, 718 S.E. 2d 526, 530(Ga., 2011)(The Ardis holding demonstrates the overlap between harmless error analysis and assessment of whether a lawyer’s incompetence in failing to invoke confrontation protection was prejudicial and therefore a violation of the separate sixth amendment right to effective assistance of counsel. In Ardis, the Georgia Supreme Court treated the two standards as identical when applied to the facts in the record of that case; id. at 530-531; State v. Bennington, 264 P.3d 440,455-456(Kan., 2011)
\item \textsuperscript{69} Fratta v. State, 2011 WL 4582498(Tex. Crim. App., 2011)(co-conspirator statements could qualify as testimonial, but court holds that they were made to a non-government agent, and one of them was about declarant expectation and not to a past event); Fischer v. State, 252 S.W.3d 375(Tex. Crim. App. (2008) (DWI prosecution. Officer’s record of his field observations of accused alleged by state to constitute present sense impression, although court held statements in his investigation report did not qualify as present sense impressions); Wall v. State, 184 S.W. 3d 730(Tex. Crim. App. (2006) (excited utterance trial recital by non-declarant was admissible under evidence rules, but was nevertheless testimonial and therefore a Crawford violation. Constitutional violation, however, subject to harmless error analysis and harmless error found with respect to trial stage)]
\end{itemize}
investigating government agent are appropriately cast as “testimonial” because ruling that the Crawford requirements must be satisfied thwarts the government tactic of seeking informal statements from witnesses who thereafter would be excused from testifying and subjecting themselves to cross-examination. 70 On the other hand, the Court recently undercut the conceptual clarity of this holding, by holding statements by a co-conspirator were non-testimonial because solicited by a non-government agent, who was just interviewed by the police, on the specious justification that the questioner was seeking to establish her own innocence. 71 The motive of the questioner is irrelevant to a sound “testimonial” evaluation. The appropriate inquiry as the Texas Court of Criminal Appeals had acknowledged in earlier decisions was if there was a reasonable possibility that the statement when obtained would eventually be used in a criminal prosecution. 72

72 See infra note ___65, and accompanying text.
The Texas Court of Criminal Appeals has also held that testimonial statements, even if they might qualify under the evidence rules as “business” or “public” records in police reports, prison “packets”, or school records are nevertheless “testimonial” when they detail specific allegations of misconduct by the defendant.73 The Court has held therefore that such written hearsay is inadmissible over a confrontation clause objection when the declarant fails to testify at the guilt-innocence stage of trial.74 Statements made by an informant, even if used to secure a search warrant, have also been held to be “testimonial” by the Texas Court of Criminal Appeals.75 The Court so held because it found that the primary purpose of the informant’s statement was to prosecute those who were identified as involved with the sale of drugs.76

The Court of Criminal Appeals has further broadened the definition of “testimonial” by holding that the statement need not be the product of government interrogation or even made to a government agent, if there was a reasonable possibility that the statement when obtained would eventually be used in a criminal prosecution/in the criminal


74 Id. In contrast see Martinez v. State, 327 S.W.3d 727)(Tex. Crim. App.(2010)(Capital Murder prosecution. Declarant testifies at the penalty phase of the trial, and the accused is sentenced to death. Thereafter, on unrelated grounds, a new trial is ordered. The declarant is unavailable at the second sentencing phase, and his first trial sentencing testimony is read into the record. Admission upheld because there was an opportunity to cross-examine at the first sentencing hearing, and the Court assumes that the defense theory at the first proceeding gave it a similar motive to cross)

75 Id.

76 Id.
prosecution of the specific accused. Hence statements made by a declarant to hospital personnel, after the defendant became a suspect, were held by the court to be “testimonial”. The Court also held that handwritten notes of the hospital personnel, which purported to identify the source of injuries sustained as a result of an assault/sexual assault, which were routinely reported to government agents responsible for initiating criminal prosecutions, were also “testimonial”.  

The Texas Court of Criminal Appeals has sanctioned two of its own exceptions to the confrontation protections provided by Crawford and its progeny. First the Court has held that some statements are fairly characterized as “Boilerplate”, and therefore not really testimonial. Hence the Court has embarked upon creating its own exception to the national constitutional protection provided by Crawford and its progeny – a “De Minimis” exception. De Minimis statements are admissible to convict or punish the accused and include statements which are pre-printed findings which recite a criminal conviction, basis for parole revocation, or disciplinary sanction. The Court apparently relied on

---

77 De La Paz v. State, 273 S.W. 3d 671(Tex. Crim. App. (2008) (two counts of aggravated sexual assault of a child) (neither the injured child nor the hospital personnel testified on behalf of the state at trial - and the double hearsay and hearsay were admitted. Defense attorney apparently did not seek writ of attachment to bring hospital personnel to court)]

78 Id.

79 Id.


the theory that once you summarize the factual basis for sanction in a conclusion, it insulates going behind the conclusion during cross-examination. This policy basis is plausible when a “conviction” is the basis for the conclusion, but not for conclusions summarizing one or more allegations of wrongdoing in other government documents because they are subject to contest and hence cross-examination is a meaningful protection.

Second, the Court of Criminal Appeals has held that Crawford protection is unavailable at sentencing when the judge does the sentencing and the hearsay is found in the pre-sentence investigative report ordered by the judge, as statutorily mandated, when community supervision is an option following a non-capital felony conviction. 82 The Court relied on precedent from federal circuits, including the fifth circuit, and the 1949 Williams v. N.Y. U.S. Supreme Court decision as support of its decision to hold Crawford protection unavailable under these circumstances. 83 The court declined to rule whether Crawford protection was available when the jury, under similar circumstances, was the sentencing authority. 84 The Court, on the other hand, has held that the Crawford protection does apply with respect to the sentencing phase of a Capital Murder prosecution, and by implication more generally when the jury is the sentencing authority. 85


83 Id.

84 Id.
In September of 2011, the Court of Criminal Appeals rejected the Texas legislature's attempt to authorize an exception to the protection provided by Crawford and its progeny. The statute authorized minors to forego testifying at the trial, if the theory of prosecution was that the minor as declarant was sexually assaulted or abused, and a “forensic interview and videotape were made of the youth’s statements and played in lieu of the live testimony. The Court held that there was no sound policy basis that justified such an exception to the right to cross-examine an alleged victim before the trier of fact.

The Texas Court of Appeals has also applied the United States Supreme Court’s non-testimonial category of emergency resolution statements to a domestic assault case. In that case, the Court held that statements made to identify the accused, who was present in the area/room, as the source of the injuries, were sought to terminate the on-going emergency by providing a basis to seize the accused. However, once the accused was seized and fully restrained, subsequent statements made by the alleged victim detailing the alleged assault were testimonial.

---

Smith v. State, 297 S.W. 3d 260(Tex. Crim. App. (2009); Wall v. State, 184 S.W. 3d 730(Tex. Crim. App. (2006) (case remanded to determine if the admission of testimonial statements which were inflammatory had prejudicial/non-harmful effect at the sentencing stage)

Coronado v. State __ S.W.3rd __, WL 4436474(2011)

Id.

Coronado v. State __ S.W.3rd __, WL 4436474(2011)


A “testimonial” statement is nevertheless, not subject to exclusion under Crawford, if it is not hearsay, because it is relevant even if false. This is because the right to confrontation is in fact provided by the opportunity to cross-examine the witness on the stand who allegedly heard the statement. 92 Hence statements relevant to impeach the declarant’s testimonial statements are admissible over a Crawford objection. 93 Background information provided by a declarant’s statements may also not be hearsay, if introduced at trial to provide the jury context for information that is more offense specific, but not if the witness repeating the statements makes reference to incriminating offense details.94

The Texas Court has held that once a timely defense objection is made based on the national constitution’s confrontation clause—Crawford objection, the burden of proof is on the state to prove that the out of court statement is admissible under Crawford. 95 The Court also held, however, several times, that a violation of national constitution’s confrontation protections is trumped by waiver and harmless error analysis. 96 Only on a rare occasion has the Court of Criminal Appeals


(impeachment of declarant statements by introduction of conflicting subsequent statements Not Hearsay because relevant even if false. See also TX. Rules of Evidence, 806, and identical or similar federal and states’ rules)

(background context information in declarant’s statements not hearsay)


found a Crawford Confrontation Clause violation harmful. In that case, the court was faced with a situation when an accomplice interlocking corroborating confession was referred to several times by the prosecutor in his closing. The Court held that the accomplice's statement when admitted as evidence at trial was a violation of Crawford's requirement that the prior testimonial statement must have been taken under circumstances that provide accused with an opportunity to cross-examine. The Court found that given the doubt with respect to the independent validity of the accused confession, reliance on the accomplice's statement to bolster the reliability of that statement was harmful because it served as a significant element of the prosecution's ability to prove guilt.

---


98 Id.

99 Id.

100 Id.
Part 4 - Summary, Policy, Perspectives, and Recommendations

The holding of Crawford was deceptively simple – At a criminal trial, with two historical exceptions, the prosecution must prove guilt, when relying on testimonial statements made prior to trial, by bringing the declarant to give live trial testimony, unless the declarant was unavailable and the accused had a prior opportunity to subject the statement to the equivalent of cross-examination. After seven years, there is evidence to support the conclusion that Crawford and its progeny’s signal a paradigm shift in the protection provided by the national constitution’s confrontation clause. 101 This article, for example, found that there were over 700 state supreme court decisions which not only cited Crawford, but included, as at least a part of their holding, an interpretation and application of this new dimension of confrontation clause protection. 102 The proliferation of U.S. Supreme Court progeny coupled with this state supreme courts count raises the issue of whether Crawford is or is on the way to becoming a watershed supreme court decision. 103 The decision also has the added dimension of policy and constitutional history significance because the majority opinion, which significantly broadened protection to criminal defendants, was written by Justice Scalia - a justice viewed as highly pro-government in criminal cases. 104 Justice Scalia’s opinion rested on

101 See supra note 3, and accompanying text.

102 See supra note 23, and accompanying text.

103 In previous studies, I have sought to measure the significance of other supreme court decisions, by tracking their aftermath: Gates and The States the first Three years, ; United States v. Fordice: The Mississippi Aftermath; Hibbel v. Sixth Judicial Court of Montana,. Other commentators have also sought to provide benchmarks for evaluating if a U.S. Supreme Court decision is seminal or watershed.

104
his fidelity to his apparently reconsidered view the original intent of the drafters of the constitution. 105

The focus of this article’s assessment of the significance of Crawford, is its impact on the thinking and behavior of both legal academics and both sides of the criminal practice bar. To achieve a manageable assessment of the significance of Crawford on the practicing bar, the article surveyed state supreme court decisions across the nation, and then examined almost all of the significant Crawford decisions by one state supreme court, The Texas Court of Criminal Appeals.

Prosecutors must consider the decision in every case when they begin to plan the witnesses they must call to prove guilt beyond reasonable doubt. Defense Counsel must consider the decision in each case from the time they begin evaluation of what witnesses the prosecutor must call to prove guilt beyond reasonable doubt. Conceptually defense counsel should first evaluate whether prosecution reliance on hearsay is subject to exclusion under the evidence rules; bearing in mind at all times that Crawford provides a basis for exclusion beyond that resulting from appropriate hearsay objection. 106

Crawford has mandated that evidence law professors teach the conceptual framework of the confrontation clause. To do this effectively academics must determine how to integrate the constitutional right with the teaching of the hearsay doctrine. Crawford for example, in the specific context of hearsay exclusion analysis, converts all the exceptions which do not require unavailability of the declarant to ‘804’ exceptions when testimonial statements are offered by the prosecution.

105 See supra note 10, and accompanying text.

106 Of course such statements could be subject to exclusion for other constitutional and statutory reasons such as Miranda, the Texas Confession statute, and fruits of an illegal seizure.
The decisions of the state supreme courts illustrate attempts to craft bases for avoiding Crawford protection.\(^ {107} \) One such avoidance strategy suggested by the decisions is to have the government take a statement from a declarant and thereafter have the statement repeated by the declarant to non-government witness. The latter statements by the declarant are arguably not “testimonial, and therefore lay the predicate to admit the statements made to the police investigators, and cleanse the erroneous admission by successfully invoking the harmless error doctrine. \(^ {108} \) In the alternative the government could argue that the statements made to the non-government witnesses proceeded those to the government, and are therefore non-testimonial, and therefore the admission of any statements made by the declarant to the government is harmless. \(^ {109} \)

In evaluating the significance of Crawford, it is important to be mindful that this is still the relatively early stages of “Crawford in Texas-The Texas Court of Criminal Appeals”, and the other state supreme courts. For example, we have not seen evaluation of full blown defense arguments that the confrontation clause found in the Texas and other state constitutions provides greater protection than that provided under the national constitution by Crawford and its progeny. \(^ {110} \) Traditionally, state supreme courts have declined to interpret state constitutional protections of criminal defendants to provide greater protection than that provided by identically or similarly worded protections found in the national constitution. \(^ {111} \) This

\(^ {107} \) See Infra ___ - ___ and accompanying text.


\(^ {110} \) We have identified, however, instances when state supreme courts have deliberately chosen to base their confrontation clause analysis and resulting protection on the state rather than the national constitution. See infra note 107 and accompanying text.

\(^ {111} \) Katharine Goodloe, A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Protections, 35 N.Y.U. Rev. L. &
declination has also taken place in the opinions of these courts with respect to Crawford and its progeny.\textsuperscript{112} In the second half of 2011, however, the Mississippi Supreme Court expressly rested its rejection of an attempt to create an exception to Crawford protection on its state constitution.\textsuperscript{113}

**Recommendations**

While the number of state supreme court decisions, and the scope and depth of academic discussion and analysis clearly signal its significance, academics and both sides of the criminal bar need clarification of the protection and policy premise of Crawford. More specifically in 2012, it is clear that the threshold concept of “testimonial” needs conceptual and policy revisiting. The Bryant decision invites litigation to further refine the definition of “testimonial”.\textsuperscript{114} Such an invitation is most unwelcome in light of the hundreds of decisions by state supreme courts in the seven years since Crawford. Justice Scalia’s dissent in Bryant noted this fundamental defect in the majority opinion, even if he did not provide a coherent way forward.\textsuperscript{115} The way forward requires fidelity to the current

\textsuperscript{112} State v. Smith, 960 A.2d 993, 1006(Con., 2008)(state supreme court requires defendants to provide an independent analysis of the comparable state constitutional provision in order to claim that the provision provides greater protection than that provided by the national constitution); State v. Marquis, 257 P. 3d 775, 779-780(Mont., 2011)

\textsuperscript{113} Goforth v. State, 70 So.3d 174, 183(Miss., 2011)

\textsuperscript{114} Michigan v. Bryant, 562 US ___, 131 S.Ct. 1143, 1161-62

\textsuperscript{115} Id., at 1170
understanding of the original purpose and therefore the protection of the national confrontation clause.

One way forward is to remove the issue of whether the statement is “testimonial” from the front end of the analysis. The Court has already expressly held that the fact that a declarant is available to the defense does not satisfy the national constitution. The way forward may be best achieved by beginning by presumptively imposing the reciprocal principle – if the declarant is available the government must call him or her, if the declarant’s testimony is arguably necessary to prove guilt. Of course, the current complimentary principle would remain in tact - that when the declarant is unavailable and there was a reasonable prior opportunity to cross-examine the declarant concerning the offered testimony, the prior statement can be offered to prove guilt.

An available declarant would then only be excused from testifying to prove guilt, if the government can prove that the statement was not testimonial. Statements sought, located, or created at the behest of the government for the purpose of proving guilt are testimonial. This would presumptively mean that when the declarant is a victim or otherwise a witness to the crimes prosecuted, or the accused, or an alleged co-perpetrator any post-crime event statement is testimonial. A constitutional and otherwise valid confession of the accused would remain admissible to prove guilt because another constitutional protection scheme regulates such statements, and the accused is arguably available to testify to explain or refute the confession, and that was true at the time the confrontation clause was adopted.

The purpose of the clause is to require convictions be based on live testimony at trial which is subject to defense cross-examination. Therefore testimonial hearsay should not be the basis for a conviction, unless there is clear and convincing proof that the accused conscious objective was to eliminate or reduce the likelihood that the declarant would testify against him in a pending case. The forfeiture exception,
however, should not be extended to include double or multiple hearsay by the deceased declarant. 116

116 Profitt v. State, 191 P.3d 963, 967(Wyo., 2011)(accused prosecuted for conspiracy to murder the declarant, allegedly to prevent him from testifying against the accused in a child sexual abuse case. Court held that forfeiture exception applied not only to admitting deceased declarant’s statement to police in the sexual abuse case, but also in the conspiracy to murder case. Hence expanding the scope of the forfeiture exception. Court’s glaring error, however, was that the alleged deceased declarant’s statements were not incriminating, but only his reference to alleged statements by the accused purporting to threaten accused if he testified in the sexual abuse case))