

Confrontation and Hearsay in the *Post-Crawford* Era

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I. Introduction

The history of the Sixth Amendment's Confrontation Clause may fairly be divided into two distinct eras: *Pre-* and *Post-Crawford*. When the Supreme Court decided *Crawford v. Washington*¹ on March 8, 2004, it announced a fundamental shift in the constitutional analysis of the accused's right "to be confronted with the witnesses against him."² The decision recast the Confrontation Clause from an evidentiary rule, concerned primarily with the reliability of out-of-court statements, to a procedural rule calculated to prevent the government from developing and using *ex parte* testimony of witnesses. *Crawford* also redefined (and arguably severed) the relationship between the Constitution and hearsay rules.³

With the advent of *Crawford*, confrontation has become one of the most active and rapidly evolving aspects of constitutional law. This paper attempts to impart to the reader a practical and current understanding of the Confrontation Clause as now interpreted and applied by the courts of the United States and Texas.⁴

II. The Pre-Crawford Era and the Reign of Roberts.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right... to confront the witnesses against him." This clause was the embodiment of a right familiar at common law at the time of its ratification.⁵ Its

¹ 541 U.S. 36, 124 S. Ct. 1354 (2004).

² U.S. Const. Amend. VI.

³ This distinction was recognized in the original Federal Rules of Evidence Advisory Committee Notes: "Under the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule. These considerations have led the Advisory Committee to conclude that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas. In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility." Federal Rules of Evidence, Article VIII, Advisory Committee Notes, 1972 Proposed Rules.

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⁵ See *Crawford v. Washington*, 541 U.S. 36, 43-50 (2004).

lineage can be traced to the infamous treason trial of Sir Walter Raleigh⁶, who was denied the opportunity to test in open court the veracity of the witnesses against him. In England, the development of the right of confrontation stood in contrast to the continental civil-law practice of allowing magistrates and prosecutors to interview witnesses *ex parte* and later offer their “testimony” against the accused by way of affidavit.

In the United States, the Supreme Court’s interpretation of the Constitution’s Confrontation Clause came to be intertwined with the evidentiary rule of hearsay and its accompanying exceptions. This view of the Clause as an evidentiary rule came to an apex with the Court’s decision in *Ohio v. Roberts*, 488 U.S. 56 (1980). In *Roberts*, Justice Blackmun wrote that reading the Confrontation Clause literally would lead to the abrogation of “virtually every hearsay exception, a result long rejected as unintended and too extreme.”⁷ *Roberts* interpreted the Clause as one concerned primarily with the reliability of out-of-court statements, and the decision framed a test calculated to address this concern. Under *Roberts*, an unavailable witness’s out-of-court statements would be admitted so long as those statements bear adequate indicia of reliability. To qualify as such, the statement would have to either (1) fall within a firmly rooted hearsay exception or (2) possess particular guarantees of trustworthiness.⁸ The reign of the *Roberts* “reliability test” continued unimpeded until the Supreme Court’s decision in *Crawford v. Washington* dethroned such evidentiary analysis of confrontation and restored the Clause as a procedural guarantee against the government’s presentation of *ex parte* testimony.

⁶ As Justice Scalia notes in the *Crawford* opinion, one of Sir Walter’s trial judges later lamented, “The justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.” 541 U.S. 36, 44.

⁷ 488 U.S. 56, 63.

⁸ 541 U.S. 36, 66.

III. *Crawford v. Washington* and the Restoration of the Right of Confrontation.

Michael Crawford was convicted of stabbing Kenneth Lee, a man who had allegedly attempted to rape Crawford's wife, Sylvia. Crawford gave a statement to police in which he said Lee may have reached for a weapon before the stabbing. Sylvia was also interviewed at the police station, however her account was arguably different with respect to Lee's reaching for the weapon. On trial for first degree assault and attempted murder, Crawford claimed self-defense. To rebut this claim, the state sought to introduce a tape recording of Sylvia's statement.⁹ Crawford's objection that admission of the statement would violate his federal right to confrontation was overruled. The trial court found that Sylvia's statements bore particularized guarantees of trustworthiness under the *Ohio v. Roberts* "reliability test."¹⁰ The Washington Court of Appeals reversed Crawford's conviction, applying a nine factor test to determine Sylvia's statement lacked the indicia of reliability required by *Ohio v. Roberts*. The Washington Supreme Court reinstated Crawford's conviction, finding the statement did indeed bear the necessary indicia of reliability.

The United States Supreme Court granted certiorari and held that Crawford's Sixth Amendment right to confront the witness against him was violated by the admission of Sylvia's tape recorded statements. In doing so, the Court overruled the broad, expansive approach to admissibility it had taken in *Ohio v. Roberts*. Justice Scalia, writing for the majority, left for another day "any effort to spell out a comprehensive definition of 'testimonial,'"¹¹ however the opinion did note "[r]egardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing," and "[s]tatements taken

⁹ Sylvia did not testify due to the state's marital privilege statute. *See* 541 U.S. 36, 40.

¹⁰ Among the "particularized guarantees of trustworthiness" the trial court found were: (1) Sylvia was not shifting blame but corroborating her husband's story, (2) she had knowledge as an eyewitness, (3) she described recent events, and (4) she was being questioned by a "neutral" law enforcement officer. *See* 541 U.S. at 40.

¹¹ 541 U.S. 36, 68.

by police officers in the course of an investigations are also testimonial even under a narrow standard.”¹²

Under *Crawford*, the Confrontation Clause serves to bar the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”¹³ Notably, this reading of the Sixth Amendment removes evaluation of reliability from the analysis, at least in the context of testimonial statements. In fact, *Crawford* effectively divorces the long standing relationship between evidentiary hearsay and the Confrontation Clause. Whereas *Ohio v. Roberts* viewed the Confrontation Clause as an evidentiary rule concerned with judicial evaluation of the reliability of out-of-court statements, *Crawford v. Washington* envisions the clause as a prophylactic procedural rule designed to dissuade and prevent the government from gathering and using *ex parte* testimony against the accused.¹⁴ Justice Scalia took considerable pain to make clear this distinction between prophylactic “procedural” and “substantive” protections:

“To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”¹⁵

Justice Scalia made clear the disconnection between the concerns of the hearsay rules and the Sixth Amendment Confrontation Clause.¹⁶ To illustrate this distinction, Scalia notes that to say

¹² 541 U.S. 36, 52. For further explication of what statements to police officers qualify as testimonial, see the recently decided *Davis v. Washington*, 126 S.Ct. 2266, (2006), and discussion *infra*.

¹³ 541 U.S. 36, 53-54 [emphasis added].

¹⁴ See W. Jeremy Counsellor, “The Confrontation Clause After *Crawford v. Washington*: Smaller Mouth, Bigger Teeth,” 57 *Baylor L. Rev.* 1 (2005).

¹⁵ 541 U.S. 36, 61.

¹⁶ “[N]ot all hearsay implicates the Sixth Amendment’s core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.” 541 U.S. 36, 51.

that evidence is so reliable as to satisfy the need for confrontation would be like saying someone is so guilty as to obviate the need for a trial.¹⁷ While both hearsay law and the Confrontation Clause govern the admission of out-of-court statements, the Court has announced in *Crawford* that the two belong to entirely separate species if not separate and distinct genera.

IV. *Davis v. Washington*: “Testimonial” Statements in Police Interrogations

In *Crawford*, Justice Scalia left for another day “any effort to spell out a comprehensive definition of ‘testimonial’.” The dawn of that day came recently when the Supreme Court handed down its decisions in two companion cases, *Davis v. Washington* and *Hammon v. Indiana*, 126 S.Ct. 2266, (2006). Although the opinion, also authored by Justice Scalia, failed to offer a “comprehensive definition” of “testimonial,” the Court did offer guidance in the context of statements made during “police interrogations¹⁸.” As it currently stands, *Davis* and *Hammon* are the only post-*Crawford* cases by the Court addressing the issue of what statements may qualify as testimonial. In sum, they hold that – applying an “objective standard” which examines the primary purpose of a police interrogation – statements recorded during an on-going emergency 911 call are nontestimonial (*Davis*), while statements made during an on-scene interrogation where the declarant is separated from her alleged assailant are testimonial (*Hammon*).

In *Davis*, the defendant’s former girlfriend made the relevant statements in the course of a 911 call reporting an ongoing domestic disturbance. The 911 operator elicited specific answers from the declarant. The operator first asked whether Davis possessed weapons or had been drinking, then began to gather identifying information including Davis’s name and birthday. Finally, the alleged victim related the context of the assault. Davis was convicted of felony

¹⁷ 541 U.S. 62.

¹⁸ In *Crawford v. Washington*, the Court clarified that it used the term *police interrogation* “in its colloquial, rather than any technical legal sense.” 541 U.S. 36, 53, n. 4.

violation of a no-contact order, after the trial court allowed the state to play a recording of the 911 call.

In *Hammon*, police arrived at the scene of a reported domestic disturbance. The police separated the defendant from his wife, the alleged victim, and proceeded to question them both independently. Police interviewed the defendant's wife and had her fill out and sign a domestic abuse affidavit which stated, "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house." During a bench trial for domestic battery, the state called the interviewing police officer to the stand to authenticate the affidavit and testify as to statements made by the alleged victim. Over the objections of defense counsel, the trial court admitted the affidavit as a present sense impression and the oral statements as excited utterances.

The Supreme Court expressly held what it had first alluded to in *Crawford*: that only testimonial statements implicate the Sixth Amendment's Confrontation Clause.¹⁹ The Court next turned to the issue of whether each of the statements qualified as testimonial. Rather than offering a generally applicable definition of the term "testimonial statement," the Court confined holding to the facts of the cases before it.

"Without attempting to produce an exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation-as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."²⁰

¹⁹ "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 126 S.Ct. 2266, 2273 (2006)

²⁰ *Id.*, [emphasis added].

Applying this standard, the Court held that the statements made during the 911 call in *Davis* were **not** testimonial. 911 calls, the Court reasoned, are not ordinarily initiated to establish or prove past facts, but to describe current circumstances and allow police to render assistance. The Court drew several distinctions between the call in *Davis* and the recorded interview in *Crawford*. First, the 911 caller was describing events as they were actually happening, while the interview in *Crawford* related events hours after the fact. Second, “any reasonable listener would recognize that [Davis’s ex-girlfriend] was facing an ongoing emergency.” Third, the questioning in *Davis* —when viewed objectively – “was such that the elicited statements were necessary to be able to *resolve* the present emergency,” rather than to simply gather past facts as in *Crawford*.²¹ Finally, the Court contrasted the level of formality in the two interviews. Where the declarant in *Crawford* responded calmly to questions in a stationhouse, the caller in *Davis* offered “frantic answers” in an environment that was neither tranquil nor safe. All of this led Justice Scalia to conclude:

“that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*. What she said was not a weaker substitute for live testimony at trial. No ‘witness’ goes into court to proclaim an emergency and seek help.”²²

However, the Court did not hold that all emergency calls to 911 would be considered entirely nontestimonial. Justice Scalia left open the possibility that a call initiated for the purposes of emergency assistance could evolve so as to elicit testimonial statements. It will be left to the trial courts, through *in limine* procedure, to redact the testimonial portions of such a call. The opinion even noted that portions of the call in *Davis* might be considered testimonial.

²¹ According to the Court, even the operator’s efforts to establish attacker’s identity were “so that dispatched officers might know whether they would be encountering a violent felon.”

²² *Davis v. Washington*, 126 S.Ct. 2266, 2277 (2006) [emphasis supplied, internal quotations marks and citations omitted].

However, any concern over this was disregarded because the jury did not hear the complete call and any testimonial portions were harmless beyond a reasonable doubt.

The Court then turned to the statements at issue in *Hammon*, easily finding them to be testimonial and their admission violative of Hammon's constitutional right to confrontation. Looking to the factual circumstances of the case, Justice Scalia found an absence of any indications of an emergency in progress.

“There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) “what is happening,” but rather “what happened.”²³

When viewed objectively, the “primary, if not the sole, purpose of the interrogation was to investigate a possible crime...” Although the interrogation in *Crawford* was more formal, the statements were similar in that both declarants were separated from any danger, both recounted past facts, and both were “an obvious substitute for live testimony.” The Court held open the possibility that initial questioning by officers at the scene may produce nontestimonial answers, but where the statements made are “neither a cry for help nor the provision of information enabling officers to end a threatening situation, the fact that they were giving at an alleged crime scene and were initial inquiries is immaterial.”²⁴

Finally, the Court took the opportunity to reiterate the validity of the rule of forfeiture by wrongdoing.²⁵ Under this rule, a defendant who obtains the absence of a witness by wrongdoing – such as “coercing or procuring silence from witnesses and victims” – forfeits the constitutional

²³ *Davis v. Washington*, 126 S.Ct. 2266, 2278 (2006)

²⁴ *Id.* at 2279 [internal quotation marks omitted].

²⁵ The Court here seems to be responding to concerns expressed in various *amici* briefs regarding the practical effects of excluding the out-of-court statements of unavailable witnesses in domestic violence cases.

right to confrontation. Although the Court did not outline the procedures and standards by which the forfeiture rule may operate, it did allude to the federal courts' use of F.R.E. 804(b)(6)²⁶.

V. Application of the Confrontation Clause in the Age of *Crawford*

Although *Crawford* represents an exciting sea change in the Court's interpretation of the Confrontation Clause, its fundamental transformation of the right to confrontation raises many questions regarding the application of the Sixth Amendment. This section will attempt to provide practitioners with guidance on several key issues surrounding the right to confrontation. Caveat: The right to confrontation is one of the most active and rapidly evolving fields of constitutional procedure, and counsel should be aware of any subsequent developments in state and federal confrontation law.

a. The Rule in *Crawford*.

The basic rule announced in *Crawford* can be stated as follows:

The Confrontation Clause of the Sixth Amendment will bar the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant was afforded a prior opportunity for cross-examination.²⁷

Thus, to determine if a witness's statements implicate the Sixth Amendment, ask:

1. Is the statement *testimonial*, and
2. Was the witness unavailable for cross-examination at trial?

If both of these questions are answered affirmatively, the Sixth Amendment is implicated.

To determine if a defendant's Sixth Amendment right to confrontation is violated, ask:

1. Is the witness *unavailable* to testify, and
2. Was the defendant afforded the opportunity to cross-examine the witness at trial or on a prior occasion?

²⁶ Federal Rule of Evidence 804(b)(6): "Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

²⁷ See *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

If either of these questions is answered negatively, the defendant's right to confront that witness is violated. Finally, on appeal, the violation is subject to a harmless error analysis.

b. Placement of Burden

The burden is on the proponent (i.e. the prosecution) to show an out-of-court statement is admissible under *Crawford*. 541 U.S. 36, 68; *see also Mason v. State*, 173 S.W.3d 105, 111 (Tex. App. – Dallas 2005, *pet. ref'd*).

c. Preservation of Error

To preserve a violation of the right to confront the witnesses against him, the defendant must object on constitutional grounds. An objection on the basis of hearsay will not preserve error on a Confrontation Clause claim. *See Neal v. State*, 186 S.W.3d 690, 691-692 (Tex. App. – Dallas 2006). “Hearsay objections and objections to violation of the constitutional right to confront witnesses are neither synonymous nor necessarily coextensive.” *Eustis v. State*, 191S.W.3d 879, 886 (Tex. App. – Houston [14th Dist] April 25, 2006, *no pet. h.*).

Moreover, a blanket objection will not preserve error if the issue is specific statements contained in a larger report; the objections must be specific to the statement. *See In re M.P.*, ___ S.W.3d ___, 2007 WL 417126 (Tex.App. – Waco, Feb. 7, 2007).

d. Testimonial and Nontestimonial Statements.

The great unanswered question of *Crawford* is, what exactly constitutes a “testimonial statement” for purposes of the Confrontation Clause? In *Crawford* the Court quoted an early American dictionary definition of the word “testimony” as meaning: “A solid declaration or oath

of affirmation made for the purpose of establishing or proving some fact”²⁸ However, the Court did not announce a comprehensive definition of *testimonial*, and it would seem the issue of what statements qualify as testimonial in various contexts will be decided case-by-case in the years to come. In the meantime, the Court’s discussion of the issue in *Crawford* and *Davis*, and the decisions by Fifth Circuit and Texas courts provide guidance to the rules application to specific types of statements.

i. Prior Testimony

“Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial...” *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

ii. Police Interrogations

Crawford held that police interrogations were among the “core class” of statements encompassed by the protections of the Confrontation Clause. 541 U.S. 36, 52-53. *Crawford* itself involved statements made by a declarant during a police interview at the stationhouse and after *Miranda* warnings. The Court declared that statements under such circumstances qualify as testimonial “under any conceivable definition” of *interrogation*. 541 U.S. 36, 53 n. 4.

In the recent companion cases of *Davis v. Washington* and *Hammon v. Indiana*, 126 S.Ct. 2266, (2006), the Court revisited the issue of testimonial statements in the context of police interrogations.²⁹ The Court set forth an objective test that looks to the circumstances of the interrogation to determine its “primary purpose.” If the primary purpose of the interrogation is to enable police to render assistance in an ongoing emergency, the statements are nontestimonial.

²⁸ *Crawford v. Washington*, 541 U.S. 36, 51, citing N. Webster, *An American Dictionary of the English Language* (1828).

²⁹ For a detailed summary and discussion of the holdings in *Davis* and *Hammon*, see IV., *supra*.

However, if the primary purpose of the interrogation is to “establish or prove past events potentially relevant to a later criminal prosecution,” the statements elicited are testimonial and implicate the Sixth Amendment. Applying this test, the Court held that statements elicited during a 911 call reporting an ongoing domestic disturbance were not testimonial (*Davis*). The Court then held that statements made during an on-scene police interview with an alleged victim of domestic abuse, after the parties were separated, were testimonial (*Hammon*).

iii. Statements by Confidential Informants

The Fifth Circuit has held that statements made by confidential informants to the co-conspirators of a crime are not testimonial, because such statements “do not resemble in any of the ‘core class’ of statements articulated by the Court in *Crawford*.” *United States v. Crespo-Hernandez*, No. 05-10461, 2006 WL 1307562 (5th Cir. 2006) (unpublished). Surprisingly, a description of the defendant provided by a confidential informant and included in a search warrant affidavit introduced at trial was held by one Texas appellate court to be nontestimonial. *Ford v. State*, 179 S.W.3d 203, 208 (Tex. App. – Houston [14th Dist.] 2005)³⁰.

iv. Casual and Informal Remarks

Casual remarks are nontestimonial under *Crawford*, and their introduction does not implicate the Confrontation Clause. *Woods v. State*, 152 S.W.3d 105, 114 (Tex. Crim. App. 2004) (casual remarks made by co-conspirator to acquaintances were nontestimonial); *see also Smith v. State*, 187 S.W.3d 186, 193 (Tex. App. – Fort Worth Feb. 14, 2006, *pet. filed*) (statements made by cohort at informal gathering of friends while drinking beer were nontestimonial); *King v. State*, 189 S.W.3d 347, 357-360 (Tex. App. – Fort Worth March 16,

³⁰ The Houston Court of Appeals reasoned that the description contained in the search warrant “was not used to link appellant to the premises because appellant was found lying on a mattress in the apartment.” 179 S.W.3d 203, 208. Thus, the statement was not used for a testimonial purpose.

2006, *no pet. h.*) (statements made by co-conspirator to friend regarding the disposal of a body were not testimonial). However, see *United States v. Acosta*, 475 F.3d 677 (5th Cir. 2007), where the court held that a “safety valve” statement to federal authorities – although obviously testimonial – was nevertheless admissible because the witness testified at trial and was subject to cross-examination, the statement was not offered for the truth of the matter asserted (but to rebut an allegation of recent fabrication) and was invited by defense counsel who alluded to the same in his attempt to impeach the witness’s credibility.

v. Statements by Co-Conspirators

Statements by co-conspirators made in furtherance of the conspiracy have been held to be nontestimonial in both Texas and federal courts nontestimonial. See *Wiggins v. State*, 152 S.W.3d 656, 659 (Tex. App. – Texarkana 2004, *pet. ref’d*); see also *United States v. Robinson* 367 F.3d 278, 292 (5th Cir. 2004). These cases seize on language in *Crawford* stating, “[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.” 541 U.S. 36, 56. However, this portion of the opinion is a refutation of Justice Rehnquist’s criticism of the majority’s historical analysis, and it is arguably dicta.

vi. Letters Accusation to Officials

In Justice Scalia’s historical analysis of the Confrontation Clause in *Crawford*, it is noted that a “letter” was introduced against Sir Walter Raleigh. By the decision’s reasoning, based Justice Scalia’s interpretation of the original meaning of the Clause, such letters are testimonial. However, under this analysis, it would appear that to person to whom such statements are being transmitted to may be as important as the form that communication takes.

vii. Disciplinary Reports by Corrections Officers

Inmate disciplinary reports have been held to be testimonial in Texas. The Texas Court of Criminal Appeals has held that the admission of “incident reports” by county jail officials and TDCJ “disciplinary reports” at the punishment phase of trial violated the defendant’s right to confrontation. *Rousseau v. State*, 171 S.W.3d 871, 880-881 (Tex. Crim. App. 2005). “[T]he statements in the reports amounted to unsworn, *ex parte* affidavits of government employees and were the very type of evidence the [Confrontation] Clause was intended to prohibit.” *Id.* at 881, *citing Crawford v. Washington*, 541 U.S. 36, 50 (2004), *Cf. Ford v. State*, 179 S.W.3d 203, 209 (Tex. App. – Houston [14th Dist.] 2005, *pet. ref’d*) (holding jail records not containing observations by correctional officers to be public records and nontestimonial).

viii. School Disciplinary Records

Portions of school disciplinary records that contain statements by teachers specifically describing a defendant’s behavior are testimonial and inadmissible unless the State shows that these teachers were unavailable to testify and at trial and the defendant had a prior opportunity for cross-examination. *Grant v. State*, 218 S.W.2d 225 (Tex. App. – Houston [14th Dist.] 2007, *pet. filed*).

ix. Chain of Custody Affidavits

Evidentiary chain of custody affidavits are “testimonial.” However, to preserve error, a timely, written objection must be filed at least 10 days before trial. *Deener v. State*, 214 S.W.3d 522 (Tex.App. – Dallas, 2006, *pet. filed*).

x. Autopsy Reports

It has been held that, under Texas caselaw, that autopsy reports are nontestimonial public records, and their admission does not implicate the Confrontation Clause. *See Mitchell v. State*, 2005 WL 3477857 at 1 (Tex. App. – San Antonio 2005, *pet. ref'd*); *Moreno Denoso v. State*, 156 S.W.3d 166, 182 (Tex. App. – Corpus Christi 2005, *pet. ref'd*). Federal cases have also held that autopsy reports do not fit with in the core class of statements that the Supreme Court would deem testimonial. *United States v. Feliz*, 467 F.3d 227 (2nd Cir., 2006)

xi. Urinalysis Test Results

One unpublished case in Texas has held that the results of urinalysis testing are not testimonial. *In re J.L.R.G.*, 2006 WL 1098944 (Tex. App. – Eastland April 27, 2006) (unpublished memorandum opinion in a juvenile probation disposition).

xii. Vehicle Registration Records

Vehicle registration records are nontestimonial in nature and admissible as public records. *See Nieschwietz v. State*, 2006 WL 1684739 (Tex. App. – San Antonio June 21, 2006, *no pet. h.*) (unpublished); *Pendley v. State*, 2006 WL 2712109 (Tex. App. 2004, *pet. ref'd*) (unpublished) (vehicle registration admissible as public record).

xiii. Other Documents

Other documents which record routine facts that would not collected for the purposes of investigation will probably not be considered testimonial. Examples:

Receipts from a private business transaction are not testimonial. *United States v. Ramirez*, 479 F.3d 1229 (10th Cir., 2007). A photocopy of an identification card is not testimonial. *See United States v. Lopez-Moreno*, 420 F.3d 420, 436 (5th Cir. 2005). Postal records, as business records, are not testimonial. *United States v. Baker*, 458 F.3d 513 (6th Cir., 2006). A cell phone

bill is not a testimonial statement. See *Miller v. State*, 208 S.W.3d 554 (Tex. App. – Austin 2006). A Certificate of Nonexistence of Record in an immigration hearing is not testimonial. See *United States v. Rueda-Rivera*, 396 F.3d 678 (5th. Cir. 2005). And, Warrants of Deportation are not testimonial. See *United States v. Valdez-Maltos*, 433 F.3d 910 (5th. Cir. 2006).

xiv. Identification in Photo Array

Identification of a defendant in a photo array is testimonial, and admitting the identifying statements through the investigating officer violated the defendant’s confrontation rights. *Walker v. State*, 180 S.W.3d 829, 833-835 (Tex. App. – Houston [14th Dist.] 2005, *no pet.*).

e. Application of the Confrontation Clause to Nontestimonial Statements.

Under *Roberts*, the Confrontation applied to nearly all forms of out-of-court statements offered against the defendant; no distinction was made between testimonial and nontestimonial statements. *Crawford* untangled the concepts of evidentiary hearsay from the procedural right of confrontation and announced a new analysis for the admission of testimonial statements under the Sixth Amendment. However, the decision left open the question of whether the confrontation clause is still implicated by nontestimonial statements. Some subsequent lower court decisions held that nontestimonial statements are still subject to the *Roberts* reliability test. The Court’s recent decision seems to put this issue to rest, stating that the Sixth Amendment is no longer implicated by the introduction of nontestimonial statements. See *Davis v. Washington*, 126 S.Ct. 2266, (2006).

f. Unavailability

In order for the government to introduce out-of-court testimonial statements, the defendant must have had a prior opportunity to cross-examine the witness *and* that witness must be unavailable at trial. *Crawford v. Washington*, 541 U.S. 36, 45 (2004).

i. General Unavailability

The law regarding the unavailability of witnesses is set forth in Texas and Federal Rules of Evidence 804. Although, framed for hearsay, these rules are derived from those developed at common law³¹, and will likely continue to apply to Confrontation Clause issues. However, it should be noted that, unlike the hearsay unavailability requirement, the requirement of unavailability under the rule in *Crawford* would apply regardless of the particular category of hearsay the statement might fall into.

ii. Article 38.071 (Recorded Statement of Child Victim)

In *Rangel v. State*, 199 S.W.3d 523 (Tex. App. – Fort Worth 2006), the trial court's determination that an six year old alleged victim of sexual assault emotionally unavailable to testify under Tex. Code Crim. Pro. Art. 38.071 § 8 was not an abuse of discretion, because the determination was within the zone of reasonable disagreement.

g. Prior Opportunity to Cross-Examine

If the defendant was represented by counsel who had an adequate opportunity to cross-examine the witness and a similar motive for doing so, the Confrontation Clause is satisfied with regard to statements given at that time. *See Mancsi v. Snubs*, 408 U.S. 204, 213-216 (1972) (adequate where statement given at former trial on same charges); *California v. Green*, 399 U.S. 149, 165-168 (1970) (adequate when statement given at preliminary hearing where defendant

³¹ See 1972 Commentary to Federal Rule of Evidence 804(a).

was represented by counsel); *Cf. Pointer v. Texas*, 380 U.S. 400, 406-408 (1965) (inadequate when statement given at preliminary hearing where defendant was not represented by counsel).

In *Rangel v. State*, 199 S.W.3d 523 (Tex. App. – Fort Worth 2006), the defendant argued that the presentation of the alleged child-victim’s testimony by an *ex parte* videotaped interview conducted by a CPS officer violated his right to confrontation. The Fort Worth Court of Appeals held that, although the child’s testimony did not fit neatly into the core-class of testimonial statements, it was testimonial. However, the court went on to hold that the defendant’s right to confrontation was not violated, because “appellant had an opportunity to effectively cross examine [the alleged victim] through written interrogatories.” Because the defendant did not avail himself of the statutory interrogatory procedure, he waived his confrontation claim on appeal.

h. Exceptions to the Right

i. Forfeiture By Wrongdoing

The rule of forfeiture is an equitable doctrine that provides that a defendant who causes the unavailability of a witness forfeits his right to object to the admission of that witness’s out-of-court statements. The rule exists to allow courts to protect the integrity of their proceedings. *See Reynolds v. United States*, 98 U.S. 145 (1879). Although the forfeiture doctrine has existed at common law since at least 1666 and was applied the right to confrontation in *Reynolds*, the rule saw major development as an exception to the hearsay evidentiary rule.³²

This doctrine applies to the Confrontation Clause as stated in *Crawford v. Washington*, 541 U.S. 36, at 62 (2004), and reiterated in *Davis v. Washington*, 126 S.Ct. 2266, (2006). In the era of *Crawford*, prosecutors will likely seek to use the rule of forfeiture more frequently than in

³² The doctrine of forfeiture in the hearsay context is now codified in Federal Rule of Evidence 804(b)(6) and the last paragraph of Texas Rule of Evidence 804.

the past. As the Court noted in *Davis*, “[t]he *Roberts* approach to the Confrontation Clause made recourse to this doctrine less necessary, because prosecutors could show the ‘reliability’ of *ex parte* statements more easily than they could show the defendant’s procurement of the witness’s absence.”

In the recent case of *Gonzales v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006), the Texas Court of Criminal Appeals held that a defendant on trial for capital murder was precluded from objecting to the introduction of dying statements made by the woman he allegedly murdered. The court reasoned that,

“The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.” *Gonzales v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006).

ii. Waiver

A defendant may waive the constitutional right to confrontation if such waiver is made intelligently, knowingly, and voluntarily. See *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). Statements contained in a pre-sentence investigation report may be asserted at sentencing where the defendant waives his right to confrontation upon entering a plea of guilty. See *Stringer v. State*, 196 S.W.3d 249 (Tex. App. – Fort Worth May 4, 2006, *pet. granted.*)

iii. Not Offered for the Truth of the Matter Asserted

The holding in *Crawford* makes clear that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.

Crawford v. Washington, 541 U.S. 36, 59 n. 9 (2004), citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985). The Fifth Circuit affirmed this reading of *Crawford* in *United States v. Acosta*, 475 F.3d 677, 683 (5th. Cir. 2007). In that case the trial court admitted a “safety valve” statement made by a co-defendant who had testified at trial. Although the statement implicated the defendant, the Fifth Circuit found that its admission did not violate the Confrontation Clause because (1) it was not offered for the truth of the matter asserted but to rebut an allegation that the witness’s testimony was a recent fabrication and (2) its admission was accompanied by a limiting instruction to this effect. 475 F.3d 677, 683. Thus, it appears this vestige of hearsay law remains a part of the Confrontation Clause analysis.

i. Other Issues

i. Sentencing

Texas courts have recognized a right to confrontation at the punishment phase of trial. See *Stringer v. State*, 196 S.W.3d 249 (Tex. App. – Fort Worth May 4, 2006, *pet. granted.*) (acknowledging the right by examining whether defendant waived it). However, the Fifth Circuit does not recognize a right to confrontation at sentencing. See *United States v. Edwards*, 133 Fed. Appx. 960, 964-965 (5th Cir. 2005) (stating that nothing in *Crawford* created a right to confrontation at sentencing); see also *United States v. Fields*, 482 F.3d 313 (2007).

ii. Community-Supervision/Probation Revocation Hearings

Texas and Federal Courts have held that the right to confrontation does not apply to community supervision and probation revocation hearings. See *Trevino v. State*, 218 S.W.3d 234, 239 (Tex. App. – Houston [14th Dist. 2007]; *Ash v. Reilly*, 431 F.3d 826, 830 (D.C.Cir.2005); *United States v. Rondeau*, 430 F.3d 44, 47-48 (1st Cir.2005); *United States v.*

Hall, 419 F.3d 980, 985-86 (9th Cir.2005); *United States v. Kirby*, 418 F.3d 621, 627-28 (6th Cir.2005); *United States v. Aspinall*, 389 F.3d 332, 342-43 (2d Cir.2004); *United States v. Kelley*, 446 F.3d 688 (7th. Cir. 2006); *United States v. Martin*, 382 F.3d 840, 844 n. 4 (8th Cir.2004); *but see U.S. v. Jarvis*, 94 Fed.Appx. 501, 502 (9th Cir.2004) (not designated for publication) (“Due process mandates that at revocation proceedings, the releasee must be afforded the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause.”).

iii. Juvenile Transfer Hearing

The right to confrontation does not apply to a hearing to transfer a juvenile from TYC to TDCJ under Tex. Fam. Code § 54.11. *See In the Matter of D.L.*, 198 S.W.3d 228 (Tex. App. – San Antonio March 8, 2006, *pet. ref’d*). “[A] transfer hearing it not a trial, because the juvenile is neither being adjudicated nor sentenced.” *Id.* at 2.

iv. Civil Commitment Proceedings

The first words of the Sixth Amendment read “In all criminal prosecutions...” The Confrontation Clause of that amendment does not apply to civil commitment proceedings in Texas. *See In re Commitment of Polk*, 187 S.W.3d 550 (Tex. App. – Beaumont March March 16, 2006, *no pet. h.*) (Note: Appellant did not assert rights (such as due process) under any other clause of the Constitution).

v. Crawford Not Retroactivity Applied in Collateral Appeals

In *Whorton v. Bockting*, 127 S.Ct. 1173 (2007), the United States Supreme Court employed the *Teague* test to hold that *Crawford* created a procedural rule that was not a watershed rule and therefore not retroactively applied in cases on collateral appeal.

vi. Confrontation and the Texas Constitution

Article I, section 10 of the Texas Constitution provides “In all criminal prosecutions the accused... shall be confronted by the witnesses against him...” Arguments made asserting a right to confrontation under the Texas Constitution similar to that of the Sixth Amendment of the United States Constitution have been “forfeited” by failure to cite authority. *See Shuffield v. State*, 189 S.W.3d 782, 788 (Tex. Crim. App. May 3, 2006); *see also Russeau v. State*, 171 S.W.3d 871, 880-881 (Tex. Crim. App. 2005). This presents a frustrating quandary, allowing courts to avoid ruling on the Texas Confrontation Clause because they have not yet ruled on the confrontation clause. In light of these decisions, Texas-law confrontation claims are better brought under Art. 1.25 of the Code of Criminal Procedure.

VI. Conclusion

The resurrection of the Right to Confrontation signaled by *Crawford* hailed a major victory for champions of civil liberties. But winning this battle opened up a new theater of warfare in the fight for constitutional rights, and, to serve their clients well, practitioners must be well versed in the dynamic issues surrounding the Confrontation Clause.³³ In many respects, confrontation law remains uncharted territory, but an effective advocate will not find frustration in these uncertainties. Rather, he or she will see a new world of opportunities to present creative arguments and effect meaningful changes in an area that seems to have been resurrected and

³³ For further analysis of the evolving Right to Confrontation, see the following articles:

- Kelly Rutlan, “Procuring the right to an unfair trial: federal rule of Evidence 804(B)(6) and the due process implications of the rule’s failure to require standards of reliability for admissible evidence.” 56 Am.U.L.Rev. 177 (2006).
- Miguel A. Mendez. *Crawford v. Washington: A Critique.*” 57 Stan.L.Rev. 569 (2004).
- Andrew King-Ries. *Crawford v. Washington: The End of Victimless Prosecution?*” 28 Seattle U.L.Rev. 301 (2005).
- Myrna S. Raeder. ““Hot Topics in Confrontation Clause Cases and Creating a More Workable Confrontation Clause Framework Without Starting Over,” 21 Q.L.R. 1013 (2003).

exhumed from and underground abode. After all, *Crawford* itself was a won by an argument that seemed to have been long foreclosed by precise, on point, precedent.