

Understanding *Crawford v. Washington*

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*Crawford v. Washington*¹ is an important U.S. Supreme Court decision because it impacts the way prosecutors may get evidence, e.g. testimonial statements, admitted into court to assist in the prosecution of criminal defendants. *Crawford* involved a criminal defendant's constitutional right to confront his accusers. Specifically the U.S. Supreme Court addressed the issue of whether a criminal defendant's Sixth Amendment Right, under the U.S. Constitution, to confront his or her accusers, known as the "confrontation clause," was violated when the defendant was not afforded an opportunity to cross-examine the "accuser." The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."²

Prior to the *Crawford* decision, hearsay³ statements could withstand a confrontation clause challenge if the statement bore adequate "indicia of reliability," or "particularized guarantees of trustworthiness."⁴ In short, prior to *Crawford*, if a victim/witness in a criminal proceeding was not available to testify in court and the defense *did not* have a prior opportunity to cross-examine the victim/witness, their testimonial statements could and often would be admissible in court under a specific, firmly rooted exception to the hearsay rule, such as statements for the purpose of medical diagnosis and excited utterances.⁵

The Impact on Sexual Assault Criminal Cases

Generally, *Crawford* only impacts criminal cases when a victim/witness of sexual assault makes testimonial statements and then later is not available to testify in court about those testimonial statements. What constitutes a testimonial statement – given the range of statements a victim of

¹ *Crawford v. Washington*, 124 S.Ct.1354, 158 L.Ed. 2d 177, (2004).

² United States Constitution, Sixth Amendment

³ Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered as evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Hearsay evidence is testimony in court of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. (*Mutyambizi v. State*, 33 Md. App. 55, 363 aA.2d 511, 518.)

⁴ *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, (1980)

⁵ *Id.*

sexual assault may make, how it is made, and to whom, is much of where the impact of *Crawford* is focused.

Although the court declined to fully articulate what exactly constitutes a testimonial statement, they did refer to extrajudicial statements ...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions –as testimonial.⁶ Further the court said that testimonial statements include those “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”⁷

Therefore it is likely that a statement made by a victim/witness of sexual assault to a police officer, child protective services or adult protective services agent, will be considered testimonial. Furthermore, the impact may vary depending on the victim's age. For example, child victims of sexual assault who are not available to testify in court because they are too young and have been found incompetent⁸ may be more adversely impacted by the *Crawford* decision. This is because *Crawford* is about allowing the accused the opportunity to confront their accusers. Thus if the child victim is unavailable to testify and defense counsel did not have an opportunity to question the child, and the statements are not admissible under a firmly rooted exception to the hearsay rule, it may be that the child’s statements regarding the sexual abuse will not be admissible.⁹

Similarly in domestic violence criminal cases where a victim of domestic violence refuses to testify against her batterer, and defense counsel did not have an opportunity to cross-examine the victim, it is unlikely her statements made out of court about the domestic violence incident, will be admissible against the defendant/batterer. Because it is not uncommon for a victim of sexual assault or domestic violence to be the only witness to the assault, it is more difficult to prosecute these cases if the victims are not available to testify and if defense counsel did not have an opportunity to cross-examine them. This is why some people have suggested that evidence based prosecution in domestic violence cases may no longer be a viable strategy.¹⁰

⁶ See *Crawford* at 1364.

⁷ *Id.*

⁸ A witness may be unqualified - or lack the legal ability in some respect, especially to stand trial or to testify. Black's Law Dictionary, Second Pocket Edition, West Group, St. Paul, Minn., 2001.

⁹ Vieth, Victor. *Keeping the Balance True: Admitting Child Hearsay in the Wake of Crawford v. Washington*, NCPA Update Newsletter, Vol. 16, No. 12, (2004)

¹⁰ Feige, David. *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, Jurisprudence, Friday, March 12, 2004.

The impact of *Crawford* on sexual assault victims; adult and children, will continue to unfold as this case is applied to various fact patterns all over the country. Whether you view the *Crawford* decision as favorable to criminal defendants or as a wake up call for our criminal justice system, across the country, every state's prosecution of sexual assault and domestic violence cases, to varying degrees of significance, are impacted by this decision.

In summary, *Crawford* applies only when *all* the following elements occur:

- Criminal prosecution
- The case involves “testimonial” evidence made by the victim/witness
- The victim is unavailable to testify in court, and
- The defendant did not have a prior opportunity to cross-examine the victim/witness.

To learn more about how *Crawford* has impacted your state's prosecution of sexual assault cases, please contact your local prosecuting attorney's office or your local defense bar.