

MARTINE LAW TRAINING UPDATE

Crawford v. Washington and the Hearsay Testimonial Rule

Protecting the Defendant's 6th Amendment Right to Confrontation



Why This Issue Matters: One of the most frequent trial errors occurs when attorneys assume that a statement admissible under a hearsay exception is automatically admissible under the Sixth Amendment. *Crawford v. Washington* makes clear that testimonial statements are constitutionally barred regardless of hearsay exceptions, and misunderstanding that distinction can result in reversible error, lost cases, or missed objections in routine prosecutions.

-INTRODUCTION TO CONFRONTATION CLAUSE ISSUES-

The hearsay rule allows into evidence many types of out-of-court statements in which the declarants will not be present for cross-examination and have never been subjected to an opportunity to be cross-examined. As held in the seminal case of *Crawford v. Washington*, 541 U.S. 36 (2004), if such statements are deemed “testimonial”, the admission of such statements can raise serious confrontation clause issues that judges must resolve before allowing the statement into evidence.

Crawford recognizes a distinction between non-testimonial hearsay (e.g., hearsay statements that do not raise a 6th Amendment right to confrontation issue) and testimonial hearsay (e.g., statements that DO raise a 6th Amendment right to confrontation issue). If a hearsay statement is found to be testimonial, and the declarant is NOT available to testify, and there was NO prior opportunity to cross-examine the declarant about the statement, then under the 6th amendment right to confrontation, the testimonial statement cannot be admitted into evidence.

After *Crawford*, the principal focus has been on determining what is and is not “Testimonial.”

Testimonial Statement Analysis, Flowchart, and Checklist

The following four-step analysis, flowchart, and checklist should be applied to determine the admissibility of any out-of-court statement under the “Testimonial Rule” established in *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Washington*, 547 U.S. 813 (2006) and *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007).

1. State the Constitutional Standard:

The Confrontation Clause of the 6th Amendment to the U.S. Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” U.S. Const. amend. VI and Minn. Const. art. I, § 6.

2. State the Basic “Crawford” Rule of Admissibility:

When a witness is unavailable, testimonial statements made by the witness are inadmissible at the defendant's trial unless the defendant had an opportunity to cross-examine the witness. This rule applies to any witness against the accused and supersedes all state rules or exceptions to the contrary.

3. Definition of a Testimonial Statement and the Primary Purpose Test:

- Under *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Washington*, 547 U.S. 813 (2006), and the Minnesota Supreme Court's interpretation in *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007), a **testimonial statement** is a statement made by a declarant under circumstances that would lead an objective person to reasonably believe that the statement would later be used at trial. These are typically formal or structured statements made to law enforcement or government agents during interrogations or investigations.
- Courts apply the **Primary Purpose Test** to determine whether a statement is testimonial. This test asks: *Was the primary purpose of the questioning or statement to create an out-of-court substitute for trial testimony?* If the answer is yes, the statement is testimonial, and the Sixth Amendment's Confrontation Clause is triggered, meaning the declarant must be available for cross-examination unless an exception applies.
- The focus is not on the declarant's or the questioner's subjective intent, but on *what a reasonable person would understand to be the primary purpose* of the exchange, considering all surrounding circumstances.

4. Apply This Flowchart & Checklist to Analyze if the Statement is Testimonial:

✓ **STEP 1: Is the out-of-court statement admissible under a statutory or hearsay exception?**
(e.g., M.S. 595.02; (child hearsay statute); Minn. R. Evid. 801(d); 803 or 804)

- Yes – Proceed to Step 2
- No – Confrontation Clause does not apply

✓ STEP 2: Is the declarant available to testify?

- Yes – If declarant testifies, Confrontation Clause does not apply
- No – If the declarant is unavailable to testify, move to Step 3.

✓ STEP 3: Did the defendant have a prior opportunity to cross-examine the declarant?

- Yes – Statement may be admissible
- No – Proceed to testimonial analysis (Step 4)

✓ STEP 4: Primary Purpose Test (From *Davis*)

Ask: Was the primary purpose of the interview to gather evidence for trial?

Factors	Yes	No
❖ Statement made to law enforcement or their agent (e.g., deputy, sheriff)?	<input type="checkbox"/>	<input type="checkbox"/>
❖ Interview conducted at a law enforcement facility (e.g., sheriff's dept)?	<input type="checkbox"/>	<input type="checkbox"/>
❖ Is the interview focused on past events (not immediate danger)?	<input type="checkbox"/>	<input type="checkbox"/>
❖ Was the interview conducted in a structured or formal setting?	<input type="checkbox"/>	<input type="checkbox"/>
❖ Was the interview recorded or preserved for use in court?	<input type="checkbox"/>	<input type="checkbox"/>
❖ Interviewer asked specific, evidence-gathering questions?	<input type="checkbox"/>	<input type="checkbox"/>
❖ Interviewer was a deputy or worked closely with law enforcement?	<input type="checkbox"/>	<input type="checkbox"/>
❖ Would an objective observer view this as a criminal investigation?	<input type="checkbox"/>	<input type="checkbox"/>

If most boxes are checked “Yes”, the statement is likely testimonial.

✓ 5. Minnesota-Specific Considerations (From *Krasky*)

- An interview conducted by a government agent is **presumed testimonial**.
- A child's belief about the interviewer's role is **not relevant**.
- Dual purposes (protective + investigative) still trigger *Crawford* if **evidence-gathering is a primary purpose**.
- The setting, structure, and interviewer's role are key.

6. Defense Strategy if Statement Is Testimonial: Prepare a pretrial motion-in-limine: “Motion to Exclude Testimonial Hearsay Statement Under the Confrontation Clause”

- Argue: The out-of-court statement is testimonial; the declarant (adult or child) is not testifying, and there was no prior opportunity for cross-examination. Admitting the statement would violate the defendant’s Sixth Amendment rights.

CAUTION: Forfeiture by Wrongdoing – Waiver of Confrontation Clause Rights

Rule: A defendant forfeits their Sixth Amendment right to confront a witness if the defendant, through wrongful conduct, intentionally causes that witness to be unavailable for trial, typically by intimidation, threats, coercion, or other forms of witness tampering. *Giles v. California*, 554 U.S. 353 (2008); *State v. Cox*, 779 N.W.2d 844, 851–52 (Minn. 2010) (State has burden of proof – preponderance of the evidence); *Minn. R. Evid.* 804(b)(6).

Explanation: This doctrine, known as **forfeiture by wrongdoing**, applies when the prosecution can show that the defendant acted with the purpose of preventing the witness from testifying. If proven, the court may admit the witness's prior statements despite the lack of cross-examination, because the defendant waived confrontation rights by their misconduct.

This rule is particularly important in domestic violence, gang, or child abuse cases where witness tampering or threats may be present.

SHORT SUMMARIES OF THREE (3) KEY CASES YOU NEED TO KNOW

1. Crawford v. Washington, 541 U.S. 36 (2004)

Summary of Facts and Issue: Michael Crawford stabbed a man he claimed had tried to rape his wife. During police questioning, Crawford’s wife gave a recorded statement that undermined his self-defense claim. She did not testify at trial due to spousal privilege. The issue was whether admitting her out-of-court statement, made during a police interrogation and not subject to cross-examination, violated the Sixth Amendment.

Legal Analysis: The U.S. Supreme Court overruled the reliability-based standard from *Ohio v. Roberts*, holding that testimonial hearsay is inadmissible unless:

- (1) The declarant is unavailable, and
- (2) The defendant had a prior opportunity to cross-examine.

The wife's statement was made during a formal police interrogation about a past crime, for the purpose of preserving evidence, and was played at trial in place of live testimony, making it plainly testimonial.

Holding: The wife's statement was testimonial. Because there was no opportunity for cross-examination, its admission violated the Confrontation Clause.

2. Davis v. Washington/Hammon, 547 U.S. 813 (2006)

Summary of Facts and Issue: This case combined two domestic violence cases. In *Davis*, the victim called 911 during an active assault. In *Hammon*, police arrived after the incident and questioned the victim, who later provided a written affidavit. Neither victim testified at trial. The issue was whether these out-of-court statements were "testimonial" and thus barred under *Crawford*.

Legal Analysis: The Court adopted the **Primary Purpose Test**: Statements are non-testimonial when made to help resolve an ongoing emergency. They are testimonial if intended to establish past facts for later prosecution. In *Davis*, the 911 call sought emergency help—non-testimonial. In *Hammon*, police questioning was after-the-fact and focused on evidence-gathering—testimonial. The Court emphasized an objective view of the statement's primary purpose.

Holding: The 911 call in *Davis* was non-testimonial and admissible. The statements in *Hammon* were testimonial and inadmissible without cross-examination.

3. State v. Krasky, 736 N.W.2d 636 (Minn. 2007)

Summary of Facts & Issue: A child disclosed past sexual abuse during a formal interview conducted by a child protection worker at law enforcement's request. The child did not testify at trial, raising the issue whether the statements were testimonial and inadmissible under *Crawford* absent cross-examination.

Legal Analysis: Applying the Primary Purpose Test, the Minnesota Supreme Court concluded the statements were testimonial. The interview occurred years after the alleged abuse, involved no ongoing safety or medical concerns, was arranged by police, conducted in a formal setting, and focused exclusively on investigating past criminal conduct.

In contrast, in ***State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006)***, a three-year-old child was interviewed by a child protection worker days after the abuse, in response to urgent concerns for the child's welfare.

The interview, though conducted at a police station, was primarily aimed at assessing imminent risk, not preserving testimony for trial. The Court found that protective intervention, not evidence-gathering, was the primary purpose, thus the statements were non-testimonial.

Holding: Because the child's interview in *Krasky* was conducted as part of a retrospective criminal investigation without a protective or medical purpose, the statements were testimonial and inadmissible without prior cross-examination.

Trial Objection Script (Crawford / Testimonial Hearsay)

Primary objection (when the prosecutor asks the officer to repeat the victim's statement):

"Objection, Your Honor—hearsay and Confrontation Clause. The state is eliciting an out-of-court statement from the alleged victim, who is not testifying. Even if the state claims an exception like excited utterance, this statement was made to law enforcement during an investigation after the scene was secure and its primary purpose was to establish past events for prosecution. It is testimonial under Crawford and Davis/Hammon, and it is inadmissible absent prior cross-examination. I ask that it be excluded."

Short follow-up (if the court asks, "but isn't it an excited utterance?" or seems focused on the hearsay issue):

"Your Honor, excited utterance (or any other exception) addresses hearsay, not confrontation. The constitutional question is whether the statement is testimonial. Here, the officer's question—'what happened'—was aimed at investigating a past event, not resolving an ongoing emergency. Under Hammon (the domestic-assault companion case to Davis), those statements to police after the scene is secure are testimonial and must be excluded unless the declarant testifies or there was a prior opportunity to cross."

RESOURCES: *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington / Hammon v. Indiana*, 547 U.S. 813 (2006); *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007)

Alan F. Pendleton, Of Counsel, Martine Law Firm; Director of Mentorship and Education;
Former District Court Judge, 763-498-1508; alan@xmartinelaw.com; Minnesota Judicial Training & Education Website