Crawford v. Washington

Handling Confrontation Clause Objections to the Admission of Out-of-Court Hearsay Statements

A Guide for Municipal Judges

October 2009

Ted Wood
Assistant General Counsel
Office of Court Administration
State of Texas
E-mail: ted.wood@courts.state.tx.us
(512) 936-1183
FAX: (512) 463-1648

"[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."
- Pointer v. Texas, 380 U.S. 400, 405 (1965)

I. The Confrontation Clause

The Sixth Amendment to the United States Constitution contains a prominent guarantee known as the Confrontation Clause which reads as follows:

> In all criminal prosecutions,[1] the accused shall enjoy the right . . . to be confronted with the witnesses against him.

One may typically visualize a witness against a defendant as a person who mounts the witness stand and testifies at trial. Undoubtedly, the Confrontation Clause gives defendants the right to confront such witnesses through cross-examination.[2]

II. Out-of-Court Statements

However, a witness against a defendant can also be a person who does not physically testify at trial, but who instead has made a statement outside of court. The use of these out-of-court statements at trial is actually the chief problem at which the framers of the Constitution aimed the Confrontation Clause.[3]

Please note that the Confrontation Clause is not concerned with the admission of out-of-court statements if the person who made the statement (*i.e.*, the "declarant") appears at trial and is subject to cross-examination.[4] In such instances, the defendant is clearly able to confront his or her accuser and thus the admission of the out-of-court statement does not violate the Confrontation Clause.[5]

Please note also that the Confrontation Clause is not concerned with out-of-court statements that are offered into evidence for purposes other than establishing the truth of the matter asserted.[6] In other words, the protections of the Confrontation Clause are only triggered by out-of-court statements that qualify as hearsay statements.[7]

The focus of this paper is on the admissibility of out-of-court hearsay statements made by a witness who does not testify at trial. These are the only out-of-court statements that will trigger the protections of the Confrontation Clause.

III. *Ohio v. Roberts*[8] – The Law as it Used to Be

A literal reading of the Confrontation Clause would bar the admission of any out-of-court hearsay statement made by a declarant who is not present at trial."[9] This is

because the criminal defendant would obviously have no opportunity to confront the declarant at trial through cross-examination.[10]

But throughout its history, the United States Supreme Court has allowed the literal language of the Confrontation Clause to give way to competing interests, and has thus permitted the admission of out-of-court hearsay statements in the absence of confrontation of the declarant at trial.[11] In the 1980 case of *Ohio v. Roberts*, the Court synthesized its prior decisions to arrive at a formulation for determining when such out-of-court statements would be admissible. The Court set out two requirements for admissibility.

First, the declarant had to be unavailable to testify at trial.

Second, the statement had to bear adequate indicia of reliability. Adequate reliability was to be judicially inferred if the statement: (1) fell within a firmly rooted hearsay exception; or (2) otherwise demonstrated particularized guarantees of trustworthiness.[12]

Lower courts used this formulation for the next quarter century. If the witness was unavailable and the court found the statement to be adequately reliable, then the statement could be admitted even though there was no actual confrontation of the witness through cross-examination. But in 2004, the Sixth Amendment Confrontation Clause landscape changed abruptly.

IV. *Crawford v. Washington*[13] – A Fundamental Shift

In 2004, the Supreme Court issued the landmark decision of *Crawford v. Washington*. Writing for the Court,[14] Justice Scalia first detailed the historical roots of the Confrontation Clause and then instituted a more literal approach to determining the admissibility of out-of-court hearsay statements under the Sixth Amendment.

The framers of the Constitution aimed the Confrontation Clause at an unfair practice in the English courts of the 16th and 17th centuries. Specifically, justices of the peace[15] would question witnesses privately before trial. Then the statements of the witnesses against the defendant would be admitted into evidence at trial in lieu of live testimony. The defendant had no opportunity to confront the witnesses and subject them to cross-examination.[16]

The most notorious example of this practice was the trial of Sir Walter Raleigh for treason.[17] The main witness against Raleigh – his alleged accomplice Lord Cobham – never testified at trial. Instead, Cobham's prior testimony given to government officials (in which he implicated Raleigh) was read to the jury. Raleigh demanded that Cobham be called to appear – "let Cobham be here, let him speak it. Call my accuser before my face . . . ."[18] But the judges refused, despite Raleigh's protestations that he was being

tried "by the Spanish Inquisition."[19] The jury convicted Raleigh and he was sentenced to death for conspiring to overthrow the King of England.

The Supreme Court explained that the trial practices on display in cases like Raleigh's (*i.e.*, the use of *ex parte* examinations against the accused) were "the principal evil at which the Confrontation Clause was directed."[20] The problem in *Raleigh's Case*, "was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.[21] In order to quell the possibility that this controversial practice might resurface under a new government, the framers of the Constitution instituted the Confrontation Clause to require that evidence be tested by means of cross-examination.[22]

The test that had been set out in *Ohio v. Roberts* for admitting out-of-court hearsay statements, the Court explained, was a departure from the original meaning of the Confrontation Clause.[23] Justice Scalia described the problems with the *Roberts* test as follows:

> 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 evidence be assessed in a particular manner: by testing in the crucible of cross-examination.
>
> . . .
>
> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.
>
> . . .
>
> The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.
>
> . . .
>
> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.[24]

As noted by a leading Texas commentator, "under *Crawford*, the [Confrontation] Clause means what it says – it requires an opportunity for confrontation by cross-examination, irrespective of the reliability of the hearsay statement."[25] Even if a particular out-of-court statement were unquestionably reliable, confrontation through cross-examination would be required. In his *Crawford* opinion, Justice Scalia wittily observed that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[26]

Crawford v. Washington overruled *Ohio v. Roberts.*[27] The two-pronged *Roberts* test for determining the admissibility of out-of-court statements was replaced with a new two-part test:

First, the declarant must be unavailable to testify at trial.[28]

Second, the defendant must have had a prior opportunity to cross-examine the declarant.[29]

V. *Crawford's* Limitation of the Confrontation Clause to "Testimonial" Evidence

In *Crawford v. Washington*, the Supreme Court not only jettisoned the *Roberts* reliability test in favor of a return to Sixth Amendment bedrock (the right to cross-examination),[30] but also narrowed the application of the Confrontation Clause. Prior to *Crawford*, all out-of-court hearsay statements were subject to the two-part *Roberts* test.[31] *Crawford*, however, limited the scope of the Confrontation Clause to "testimonial" statements.[32]

The Court reached this conclusion by employing the following logic. The text of the Confrontation Clause gives a criminal defendant the right to confront "witnesses."[33] Witnesses are those persons who "bear testimony."[34] "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[35] The Sixth Amendment's primary concern in regard to out-of-court hearsay statements is with those statements in which a person bears testimony (*i.e.*, "testimonial" statements).[36] "Nontestimonial" statements, on the other hand, are exempt from Confrontation Clause scrutiny altogether.[37]

VI. Testimonial Evidence versus Nontestimonial Evidence

As explained above, the *Crawford* Court divided out-of-court hearsay statements into two categories: testimonial and nontestimonial. Unfortunately, the Court did not devise a test that lower courts could use to distinguish between the two categories. In fact, the Court explicitly acknowledged that it was "leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial.'"[38] The Court set out three different formulations of a "core class of 'testimonial' statements," but adopted none of them.[39]

But this is not to say that *Crawford* provides no schooling at all. The opinion teaches that the following statements, at least, are testimonial:

(1) affidavits;
(2) depositions;
(3) confessions;
(4) testimony at a preliminary hearing;

(5) testimony before a grand jury;
(6) testimony at a former trial;
(7) co-conspirator's guilty plea showing the existence of a conspiracy;
(8) accomplice statements implicating the accused; and
(9) statements made during a police interrogation.[40]

Additionally, *Crawford* suggested that statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" were testimonial.[41]

Lower courts seized upon this language . . .

The subsequent Supreme Court opinions of *Davis v. Washington*[42] and *Melendez-Diaz v. Massachusetts*[43] have supplied further direction.

Davis v. Washington was actually two cases – *Davis v. Washington* and *Hammon v. Indiana* – decided in one opinion. *Davis* involved a statement made to a 911 operator.[44] *Hammon* concerned an affidavit given to police who responded to a domestic disturbance call.[45] Both cases required a determination as to whether the out-of-court statements were testimonial.[46]

The Court acknowledged that in *Crawford,* it had listed statements made during a police interrogation as being testimonial. The two cases at issue in Davis, however, required the Court to "determine more precisely which police interrogations produce testimony" (*i.e.*, which statements to police are testimonial).[47]

Writing for the eight-member majority of the Court,[48] Justice Scalia penned the following holding:

> 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.[49]

Based on this newly-enunciated standard, the Supreme Court found that the 911 call in the *Davis* case was nontestimonial because "its primary purpose was to enable police assistance to meet an ongoing emergency."[50] The result in the *Hammon* case was different. The Court found Hammon's statement to police to be testimonial because "there was no emergency in progress" and "the interrogation was part of an investigation into possibly criminal past conduct."[51]

In the very recent case of *Melendez-Diaz*, the statements at issue were affidavits reporting the results of forensic analysis which showed that material connected to the defendant was cocaine.[52] At trial, the prosecution introduced the affidavits. The analysts did not testify at the trial. The defendant objected to the introduction of the affidavits on the basis of the Confrontation Clause and asserted that *Crawford v. Washington* required the analysts to testify in person.[53]

The Supreme Court dealt primarily with the issue of whether the affidavits were testimonial and had little trouble concluding that they were, indeed, testimonial.[54] In the first place, the statements were affidavits – one of the types of documents specifically mentioned in *Crawford* as being testimonial.[55] Moreover, hearkening back to the Court's language in *Crawford*, the majority[56] declared that the affidavits were "made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial."[57]

The Court's reaffirmance of its language from the *Crawford* case is significant. Lower courts now know with certainty that if a statement does not fall into one of the explicitly-listed categories of testimonial statements set out in *Crawford*,[58] then the key inquiry is whether the affidavits were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial.

Also noteworthy in a Texas discussion of whether statements are testimonial is the fact that Texas courts have distinguished between (1) official records that set out a sterile and routine recitation of an official finding or unambiguous factual matter such as a judgment of conviction or a barebones disciplinary finding and (2) a factual description of specific observations or events that is akin to testimony.[59] Records in the first category are nontestimonial while records in the second category are testimonial.

VII. The Flowchart: An Aid in Analysis

Analyzing the admissibililty of out-of-court statements can be complex. The accompanying flowchart attempts to simplify the process of analysis by listing a step-by-step chronological procedure that can be used when considering objections to out-of-court statements. Additionally, a commentary accompanies the flowchart that provides citations of authority for the step-by-step procedure.

Good luck as you rule on objections to out-of-court statements in your role as a judge.

---

[1] The Confrontation Clause is a criminal law concept. Texas law has generally limited application of the Confrontation Clause to full criminal trials. The clause is not applicable in proceedings that are not recognized as a particular stage of a criminal prosecution. *See e.g.*, *Shedden v. State*, 268 S.W.3d 717, 736-37 (Tex. App.—Corpus Christi 2008, pet. ref'd)(pretrial hearing to establish probable cause to support a warrant); *In re S.M.*, 207 S.W.3d 421, 425 (Tex. App.—Fort Worth 2006, pet. ref'd)(juvenile

transfer hearing – from Texas Youth Commission to Texas Department of Criminal Justice – "transfer hearing is not a trial [as] juvenile is neither being adjudicated nor sentenced"); *In re Commitment of Polk*, 187 S.W.3d 550, 555-56 (Tex. App.—Beaumont 2006, no pet.)(civil commitment as a sexually violent predator); *Diaz v. State*, 172 S.W.3d 668, 671-73 (Tex. App.—San Antonio 2005, no pet.)(community supervision revocation hearing); *Vanmeter v. State*, 165 S.W.3d 68, 74-75 (Tex. App.—Dallas 2005, pet. ref'd)(pretrial suppression hearing – "constitutional right of confrontation is a trial right, not a pretrial right"); *Smart v. State*, 153 S.W.3d 118, 121 (Tex. App.—Beaumont 2004, pet. ref'd)(community supervision revocation proceeding is not a stage of a criminal prosecution). *But see Curry v. State*, 228 S.W.3d 292, 296-98 (Tex. App.—Waco 2007, pet. ref'd)(protections of Confrontation Clause apply to pre-trial suppression hearings).

[2] *Delaware v. Fensterer*, 474 U.S. 15, 18-20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985); *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

[3] *Crawford v. Washington*, 541 U.S. 36, 50, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[4] *Id.* at 59.

[5] *Id.* (Confrontation Clause doses not bar admission of out-of-court statement if declarant is present at trial to defend or explain the statement).

[6] *Id.* Such purposes include rebuttal and impeachment. *See Tennessee v. Street*, 471 U.S. 409, 413-14, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) (rebuttal); *Hernandez v. State*, 273 S.W.3d 685, 689 (Tex.Crim.App. 2008)(impeachment).

[7] *See* Tex. R. Evid. 801(d)("Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

[8] 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[9] *Id.* at 62.

[10] *See* Jeffrey A. Zick, *Rethinking Confrontation: A Look at Crawford v. Washington*, 43 AZ Attorney 28 (2006)("Read literally, one would assume that [the] right [of Confrontation] guarantees that anyone having evidence against the defendant would be required to stand face-to-face before the defendant, the jury and testify.").

[11] *Id.* at 64.

[12] *Id.* at 66.

[13] 541 U.S 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[14] Justices Stevens, Kennedy, Souter, Thomas, Ginsburg and Breyer joined Justice Scalia's opinion. Chief Justice Rehnquist filed a concurring opinion in which Justice O'Connor joined.

[15] At the time, justices of the peace were not judges and magistrates as is the case today. Instead, they served an investigative and prosecutorial function. *Crawford*, 541 U.S. at 53.

[16] *Crawford*, 541 U.S. at 43-44.

[17] *See Raleigh's Case*, 2 How. St. Tr. 1, 15-16, 24 (1603).

[18] *Id.* at 15-16.

[19] *Id.*

[20] *Crawford*, 541 U.S. at 50.

[21] *Id.* at 62.

[22] *Id.* at 61-62.

[23] *Id.* at 60. The Court noted that use of the *Roberts* test by the lower courts in the *Crawford* case "reveal[ed] a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 67.

[24] *Id.* at 61-62, 67-69.

[25] W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After Crawford v. Washington; Smaller Mouth, Bigger Teeth*, 57 Baylor L. Rev. 1, 3 (2005). "*Crawford* revives the main and essential purpose of the [Confrontation] Clause by requiring that the accused have an opportunity to cross-examine the declarant as to hearsay statements to which the Clause applies." *Id.* at 2.

[26] *Crawford*, 541 U.S. at 62.

[27] *Whorton v. Bockting*, 549 U.S. 406, 413, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007)(". . . we issued our opinion in *Crawford* in which we overruled *Roberts*"); *Davis v. Washington*, 547 U.S. 813, 825, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)("We overruled *Roberts* in *Crawford* . . . .").

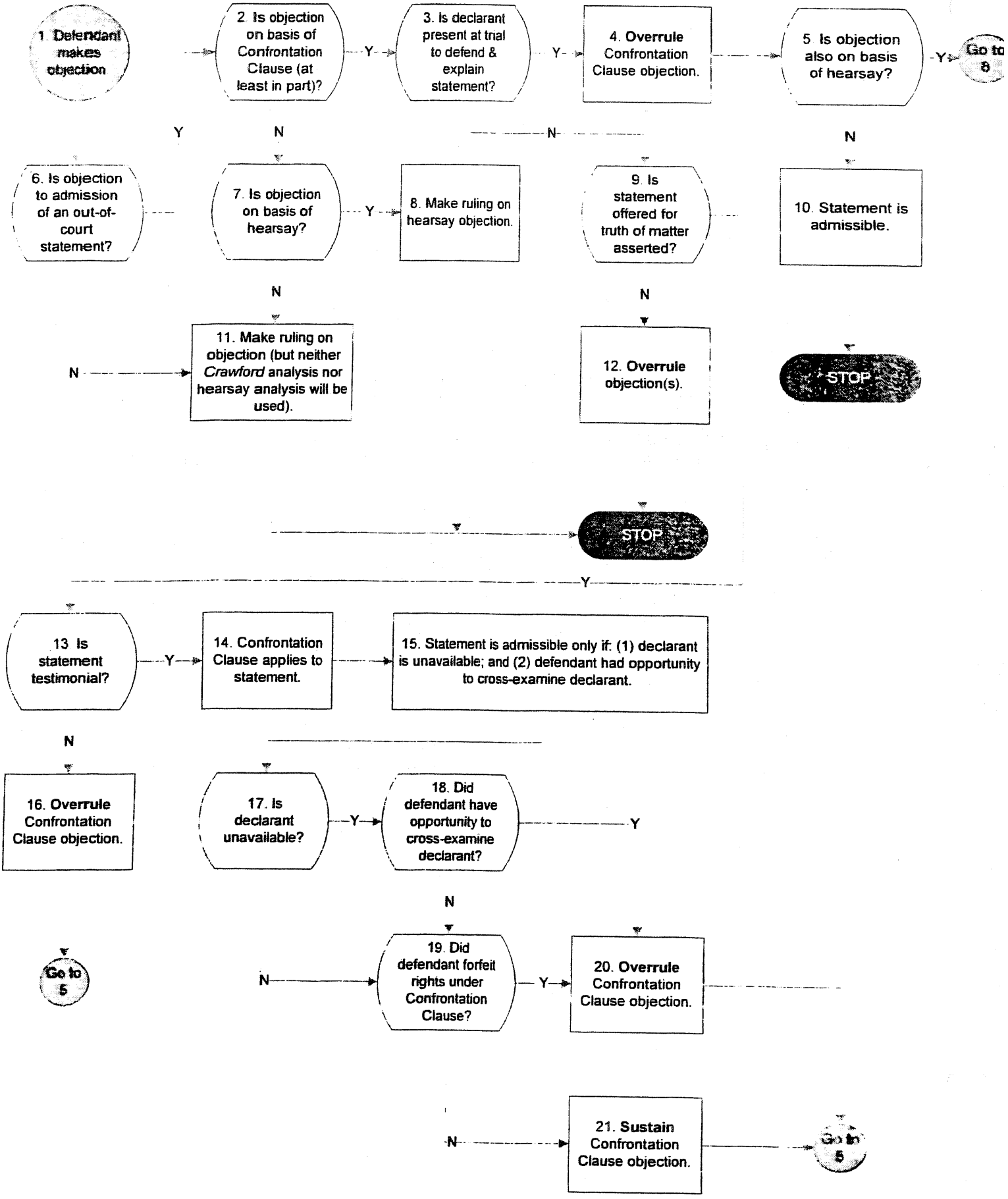
[28] This is the same initial requirement as under the *Roberts* formulation.

[29] *Crawford*, 541 U.S. at 68.

[30] See Ann Hetherwick Pumphrey, *Admissibility of Hearsay Statements to Police: Davis v. Washington and Hammon v.Indiana*, 50 B.B.J. 17 (2006).
[31] *Crawford*, 541 U.S. at 60.
[32] *Id.* at 51-53.
[33] *Id.* at 51.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 53.
[37] *Id.* at 68.
[38] *Id.*
[39] *Id.* at 51.
[40] *Id.* at 51-52, 63-64, 68.
[41] *Id.* at 52.
[42] 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).
[43] ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).
[44] *Davis v. Washington*, 547 U.S. at 817-19.
[45] *Id.* at 819-21.
[46] *Id.* at 821.
[47] *Id.* at 822. The Supreme Court noted that "[i]f 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers." *Id.* at 823.
[48] Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, Breyer and Alito joined Justice Scalia's opinion. Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part.
[49] *Davis*, 547 U.S. at 822.
[50] *Id.* at 828. The Court noted, however, that a conversation (such as one that occurs during a 911 call) which begins as an interrogation to determine the need for emergency assistance can evolve into a testimonial statement once the purpose of determining the need for emergency assistance has been achieved. *Id.* "[C]ourts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial." *Id.* at 829.
[51] *Id.*at 829.
[52] *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2530, 174 L.Ed.3d 314 (2009).
[53] *Id.* at 2531.
[54] *Id.* at 2532 ("little doubt" that the affidavits are testimonial).
[55] *Id.*
[56] *Melendez-Diaz* was a 5-4 decision. Justice Scalia wrote the majority opinion and was joined by Justices Stevens, Souter, Thomas and Ginsburg. Justice Kennedy filed a dissenting opinion that was joine by Chief Justice Roberts and Justices Breyer and Alito. Justice Thomas also filed a concurring opinion.
[57] *Melendez-Diaz v. Massachusetts*, 129 S.Ct. at 2532.
[58] See text accompanying footnote 40.
[59] *Smith v. State*, 2009 Tex. Crim. App. LEXIS 527 (Tex. Crim. App. 2009).

Crawford v. Washington
Handling Confrontation Clause Objections to the Admission of Out-of-Court Statements

Ted Wood
Assistant General Couns



Step-By-Step Commentary Accompanying *Crawford* Flowchart

ɔx 1. Defendant makes objection.

The defendant must object in order for there to be any need for possible analysis under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed2d 177 (2004).

"The defendant *always* has the burden of raising his Confrontation Clause objection . . . ." *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2541, 174 L.Ed.2d 314 (2009).

"The right to confrontation may, of course, be waived, including by failure to object to the offending evidence." *Id.* at 2534 n.3.

Go to Box 6.

Box 2. Is objection on basis of Confrontation Clause (at least in part)?

If yes, then you will need to make a ruling on the objection using the *Crawford* analysis. **Go to Box 3.**

If no, you will still need to make a ruling on the objection. **Go to Box 7.**

An objection may have more than one basis. For example, an objection may be made on the ɜsis of: (1) hearsay; and (2) the Confrontation Clause. *See e.g.*, *Ruth v. State*, 167 S.W.3d 560, 567 (Tex.App.—Houston [14th Dist.] 2005, no pet.)("Appellant objected to admission of the 911 tape on multiple grounds, including hearsay and violation of his right to confront witnesses under the state and federal constitutions."). Such an objection would be one that is based on the Confrontation Clause in part.

Please note that an objection solely on the basis of hearsay objection is not sufficient to raise a Confrontation Clause issue. *See e.g.*, *Wright v. State*, 28 S.W.3d 526, 536 (Tex. Crim. App. 2000)(at trial defendant objected to admission of evidence only on hearsay grounds thereby waiving any argument as to a Confrontation Clause violation on appeal); *Dewberry v. State*, 4 S.W.3d 735, 752 & n.16 (Tex. Crim. App. 2000)(same); *Saldivar v. State*, 980 S.W.2d 475 (Tex. Crim. App. 1998)(same); *Ruth v. State*, 167 S.W.3d 560, 567 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd)("well established that a hearsay objection does not preserve a Confrontation Clause argument for appeal" and "Confrontation and hearsay are distinct objections).

"Even constitutional errors may be waived by failing to object at trial." *Serrano v. State*, 936 S.W.2d 387, 390 (Tex.App.—Houston [14th Dist. 1996, pet. ref'd).

An objection on the basis of the Confrontation Clause may be successfully stated in different ways. *See e.g.*, *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2531, 174 L.Ed.2d 314 (2009)(admission of certificate of analysis improper because *Crawford v. Washington* required analyst to testify in person); *Davis v. Washington*, 547 U.S. 813, 819-20, 126 S.Ct. 2266, 165 L.Ed.2d 24 (2006)(objection based on the Confrontation Clause of the Sixth Amendment and, in *Hammon v. Indiana* portion of the case, objection to admission of out-of-court statement because "that doesn't give us the opportunity to cross-examine" the declarant); *Crawford v. Washington*, 541 U.S. 36, 40,

124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)(admitting the evidence would violate his federal constitutional right to be confronted with the witnesses against him); *Woodall v. State*, 2009 Tex. App. LEXIS 7112 (Tex.App.—El Paso 2009, no pet. h.)(defendant would not be able to cross-examine witness, thus violating defendant's right of confrontation); *Grant v. State*, 218 S.W.3d 225, 229 (Tex.App.—Houston [14th Dist.] 2007, pet. ref'd)("I think you got *Crawford* issues there. Because he doesn't have his right to confront that witness.").

Box 3. Is declarant present at trial to defend and explain statement?

If yes, then advance to Box 4.

If no, then go to Box 9.

This is not the same question as whether the witness is unavailable. The question of whether the witness is present at trial to defend and explain his or her statement is asked at the beginning of the analysis to determine if *Crawford* is even applicable.

If the declarant is present at trial to defend and explain the statement at issue, then *Crawford* does not apply and the Confrontation Clause objection must be overruled. *See* Box 4 of this commentary.

Obviously, if a declarant is present at trial and able to defend his or her statement then he or she is not "unavailable." If a declarant is not unavailable, then a Confrontation Clause objection must be sustained. *See* Box 17 of this commentary. But the question as to whether a declarant is unavailable is only asked of the declarant is not present at the trial to defend and explain his or her statement. If the declarant is present at trial to defend and explain the out-of-court statement, then analysis of the admissibility question under *Crawford* is at an end.

Stated somewhat differently, if a declarant is present at trial to defend and explain his or her statement, then the question of unavailability of the declarant is never reached.

Please note that not all declarants who are physically present at trial are able to defend and explain their out-of-court statements. For example, in the recent case of *Woodall v. State*, 2009 Tex. App. LEXIS 7112 at *11-12 (Tex. App.—El Paso 2009, no pet, h.), one of the out-of-court statements in question was the declarant's grand jury testimony. The defendant objected to admission of the grand jury testimony on the basis of the Confrontation Clause. The State countered that the Confrontation Clause was not even implicated because the declarant was present at trail. The court of appeals disagreed with the State and determined that the Confrontation Clause was implicated because the declarant testified to a complete memory loss concerning her grand jury testimony as she had been in a serious automobile accident a year earlier.

Box 4. Overrule Confrontation Clause objection.

In *Crawford*, the Supreme Court stated that "[t]he [Confrontation] Clause does not bar admission of a statement so long as the defendant is present at trial to defend or explain it." *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In *Romero v. State*, 2006 Tex. App. LEXIS 10723 (Tex.App.—Austin 2006, pet. ref'd), the court of appeals followed this line of reasoning in determining that no *Crawford* analysis was necessary in

considering a contention that admission of an alleged domestic violence victim's prior out-of-court statements to police contravened the Sixth Amendment. The Court reasoned as follows:

> Christina [the victim] was called to testify on behalf of Ismael [the accused] and stated that her previous statements to police [accusing Ismael of assaulting her] were false. Accordingly, because Ismael was provided with the opportunity to question Christina regarding her prior statements to the police and her testimony at prior hearings, there was no Confrontation Clause violation.

In accord with the foregoing authorities, an objection to the admission of an out-of-court statement should be overruled if the person who made the statement is present at trial and can be cross-examined. *See also Saldana v. State*, 287 S.W.3d 43, 60 (Tex.App.—Corpus Christi 2008, pet. ref'd).

Go to Box 5.

Box 5. Is objection also on the basis of hearsay?

If yes, then go to Box 8. If no, then go to Box 10.

Despite the fact that the admission of evidence does not violate the Confrontation Clause, the evidence may not be admissible under the rules of hearsay. Consequently, analysis of the admissibility of the statement may not yet be complete. Justice Scalia made the following observation in *Crawford*:

> [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.

Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In other words, an out-of-court statement may be perfectly admissible under the Confrontation Clause, but at the same time may be inadmissible under the rules of hearsay. The converse is also true; a statement may be admissible under the rules of hearsay, but barred from admission by the Confrontation Clause. *See Hernandez v. State*, 273 S.W.3d 685, 687 (Tex. Crim. App. 2008)(hearsay may be admissible under evidentiary rules, but must additionally overcome the Confrontation Clause in order to be admissible).

Baylor Law School Professor W. Jeremy Counseller and his co-author Shannon Rickett have offered this helpful explanation:

> Limiting the application of the Confrontation Clause to testimonial out-of-court statements has the effect of divorcing the Confrontation Clause analysis from the hearsay analysis. As Justice Scalia points out, an "off-hand, overheard remark" may be unreliable evidence, and, therefore, a "good candidate for exclusion under hearsay rules," but it is not the type of statement to which the Confrontation Clause applies. On the other hand, Scalia says, ex parte examinations might be admissible under the hearsay rule, but "the Framers certainly would not have condoned them." For many this divorce is long overdue. Post-Crawford, the Hearsay Rules and the Confrontation Clause provide separate analyses to answer separate questions. The blurring of the line between Hearsay and the Confrontation Clause was a result of the fact that both had been aimed at ensuring the reliability of hearsay statements. Post-Crawford, the clean break between the two analyses is a function of the fact that the Confrontation Clause is no longer directly concerned with the reliability of hearsay statements, but with whether or not the accused had the right to confront the declarant.

W. Jeremy Counseller, *The Confrontation Clause After Crawford v. Washington: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 19 (2005)(footnotes omitted).

The bottom line is that if both a Confrontation Clause objection and a hearsay objection are raised to a particular statement, a determination that the Confrontation Clause does not bar admission of the statement does not end the analysis. A determination must still be made as to whether hearsay rules bar admission of the statement.

Box 6. Is objection to admission of an out-of-court statement?

If yes, then go to Box 2.

If no, then go to Box 11.

The prosecution can attempt to introduce an out-of-court statement in two ways.

First, the prosecution may attempt to introduce the statement itself.

For example, the prosecution may attempt to place a written document into evidence. *See e.g., Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2541, 174 L.Ed.2d 314 (2009)("certificate of analysis" – essentially an affidavit – reporting the results of forensic analysis which showed that material connected to the defendant was cocaine); *Davis v. Washington*, 547 U.S. 813, 820, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)("battery affidavit" in which domestic violence victim briefly described the violence); *Tennessee v. Street*, 471 U.S. 409, 411-12, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)(accomplice's written confession); *Ohio v. Roberts*, 448 U.S. 56, 58-60, 100 S.Ct.

2531, 65 L.Ed.2d 597 (1980)(transcript of preliminary hearing testimony); State *v. Webb*, 2 N.C. 103 (1794) (written deposition); *De La Paz v. State*, 273 S.W.3d 671, 675 (Tex. Crim. App. 2008)(handwritten notes by medical center employees); *Russeau v. State*, 171 S.W.3d 871, 880 (Tex. Crim. App. 2005)(written county jail incident reports).

The prosecution may also attempt to introduce a statement that is an audio or video tape-recording. *See e.g., Crawford v. Washington*, 541 U.S. 36, 38-40, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)(tape-recorded statement by defendant's wife given in the course of police interrogation after being given *Miranda* rights); *Davis v. Washington*, 547 U.S. 813, 819, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)(recording of 911 telephone call); *Rubio v. State*, 241 S.W.3d 1, 2 (Tex. Crim. App. 2007)(alleged accomplice's oral statement recorded on videotape); *Ruth v. State*, 167 S.W.3d 560, 567-68 (Tex.App.—Houston [14th Dist.] 2005, no pet.)(911 tape).

Second, the prosecution may attempt to elicit testimony from a live witness at trial concerning a statement made by another person. *See e.g., Whorton v. Bockting*, 549 U.S. 406, 410-11, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007)(police detective's testimony at trial recounting child sexual assault victim's statements about the assault); *Walter v. State*, 267 S.W.3d 883, 885 (Tex. Crim. App. 2008)(witness testified at trial concerning statements made by defendant's co-defendant during conversation with witness); *Wright v. State*, 28 S.W.3d 526, 535 (Tex. Crim. App. 2000)(detective's trial testimony detailing conversation with defendant's accomplice who did not testify); *Ruth v. State*, 167 S.W.3d 560, 567-68 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd)(witness testified at trial concerning statements made by defendant's wife to defendant's wife's mother).

On the other hand, an out-of-court statement is not at issue when a witness testifies at trial as to things other than statements made by others. This is not to say that Confrontation Clause issues would not arise in such a situation.

For example, assume that A testifies at trial that she saw the defendant fleeing the scene of a bank robbery. When the defendant's attorney stands up and attempts to cross-examine the witness, the court refuses to allow the cross-examination. This is clearly a violation of the Confrontation Clause. *See* W. Jeremy Counseller and Shannon Rickett, *The Confrontation Clause after Crawford v. Washington: Smaller Mouth, Bigger Teeth,* 57 Baylor L. Rev. 1, 5 (2005). However, this is not the type of Confrontation Clause violation that deals with the admissibility of out-of-court statements and that serves to invoke an analysis of issues under *Crawford v. Washington. See also Delaware v. Fensterer*, 474 U.S. 15, 16, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)(FBI agent expert witness testified that hair had been forcibly removed from victim's head but could not recall specific method by which he made that determination; defendant objected that inability of witness to recall specific method of forcible hair removal precluded adequate and effective cross-examination).

Of course, a witness can testify to his or her observations. Such observations do not involve any statements at all. *See e.g., United States v. Potwin*, 136 Fed. Appx. 609, 611-12 (5th Cir. 2005)(officer's testimony that he observed tension between two individuals was based on the officer's personal observation and was not an out-of-court statement).

Similarly, baggies containing controlled substances are not statements. *Camacho v. State*, 2009 Tex. App. LEXIS 5975 (Tex.App.—Fort Worth 2009, no pet. h.) at *8. The court of appeals explained this seemingly obvious fact as follows:

> . . . *Crawford* applies only to "statements." A "statement" is defined by Texas Rules of Evidence 801(a) as "(1) an oral or

> written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression." Similarly, Federal Rule of Evidence 801(a) defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion." Baggies of controlled substances are not oral or written verbal expressions, they are not oral or written assertions, and they are not nonverbal conduct; therefore, they are not statements. Accordingly, the trial court's admission of the exhibits did not implicate appellant's confrontation rights.

The same court reached a consistent conclusion in *Martin v. State*, 2009 Tex. App. LEXIS 6141 (Tex.App.—Fort Worth 2009, no pet. h.) at *21:

> We conclude that Dr. Springfield's testimony about the chain of custody of the vials of Martin's blood and the testing procedures utilized on Martin's blood samples is not governed by *Crawford* because no out-of-court statement was admitted through her testimony. Rather, Dr. Springfield's in-court testimony was admitted based upon her own personal knowledge acquired from having trained and worked at the Tarrant County Medical Examiner's laboratory. The Sixth Amendment concerns about out-of-court-statements at issue in *Crawford*, therefore, do not apply to Dr. Springfield's in-court testimony.

Box 7. Is objection on basis of hearsay?

If yes, go to Box 8.

If no, go to Box 11.

This box is reached only if the objection is not on the basis of a violation of the Confrontation Clause.

Box 8. Make ruling on hearsay objection.

Determinations of the admissibility of an out-of-court statement under the hearsay rules is beyond the scope of this paper. However, please note that if a hearsay objection is made, a ruling on the hearsay objection should follow.

Stop. End of analysis.

Box 9. Is statement offered for truth of the matter asserted?

If yes, then go to Box 13.

If no, then go to Box 12.

As noted by the Supreme Court in *Crawford*, 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, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Of course, a statement that is not offered to prove the truth of the matter asserted does not constitute hearsay. Tex. R. Evid. 801(d) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

Statements that are offered for impeachment, for example, are not offered for the truth of the matter asserted. In *Hernandez v. State*, 273 S.W.3d 685, 689 (Tex. Crim. App. 2008), the Texas Court of Criminal Appeals issued the following holding:

> "[W]e hold that Leffew's statement to Damiani was properly offered and admitted, not to prove the truth of the matter – that the appellant committed the crime – but rather for the purpose of impeaching Leffew's credibility. The statement, as nonhearsay, did not implicate the appellant's confrontation rights and was therefore admissible under *Crawford*.

See also Tennessee v. Street, 471 U.S. 409, 413-14, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)("The nonhearsay aspect of Peele's confession – not to prove what happened at the murder scene but to prove what happened when respondent confessed – raises no Confrontation Clause concerns.").

The bottom line is that if an out-of-court statement does not constitute hearsay, the Confrontation Clause is not implicated.

Box 10. Statement is admissible.

Having overruled a Confrontation Clause objection and having no hearsay objection to consider, the statement should be admitted into evidence.

Stop. End of analysis.

Box 11. Make ruling on objection (but neither Crawford analysis nor hearsay analysis will be used).

Any objection requires a ruling. But if the objection does not concern an out-of-court statement, then there will be no occasion to employ *Crawford* analysis or hearsay analysis is making the ruling. This is not to say that the Confrontation Clause is not in play in some other way. *See* Box 6 of this commentary.

Once a ruling is made, **the analysis is at an end. Stop.**

Box 12. Overrule objection(s).

Having determined that the statement is not offered for the truth of the matter asserted, there cannot be any violation of either the Confrontation Clause or the hearsay rules. Accordingly, the objection(s) must be overruled.

Stop. End of analysis.

Box 13. Is statement testimonial?

If the statement is testimonial, then go to Box 14. The Confrontation Clause applies to the statement.

If the statement is nontestimonial, then go to Box 16. The Confrontation Clause does not apply to the statement.

Some Texas appellate courts have stated that "the threshold question in any Confrontation Clause analysis is whether the statements at issue are testimonial or nontestimonial in nature." *Campos v. State*, 256 S.W.3d 757, 761 (Tex.App.—Houston [14th Dist.] 2008, pet. ref'd); *see also Woodall v.* State, 2009 Tex. App. LEXIS 7112 at *9 (Tex. App.—El Paso 2008, no pet. h.); Wells *v. State*, 241 S.W.3d 172, 175 (Tex.App.—Eastland 2007, pet. ref'd); *Spencer v. State*, 162 S.W.3d 877, 879 (Tex.App.—Houston [14th Dist.] 2005, pet. ref'd). A threshold question might normally mean a question that should be answered first.

There is no doubt that the testimonial/nontestimonial question must be answered before one can know whether the Confrontation Clause applies to the statement at issue. In that sense, the question is indeed a threshold question. But this does not mean that this question is the first one that should be considered.

The question of whether a statement is testimonial or nontestimonial is probably the most difficult question in a *Crawford* analysis. Accordingly, a judge would be well-served to first answer any other questions that may result in a determination that the Confrontation Clause does not apply to the statement in question.

For example, if an objection is made to evidence that does not constitute an out-of-court statement at all (*see* Box 6 of this commentary), then there is no need for any further *Crawford* analysis. Similarly, if there is no objection on the basis of the Confrontation Clause (*see* Box 2 of the commentary) or if the declarant is present at trial to defend and explain the out-of-court statement (*see* Box 3 of this commentary), then the Confrontation Clause is not implicated. Finally, if the statement is not offered for to prove the truth of the matter asserted (*see* Box 9 of this commentary), then there is no need for any further analysis under the Confrontation Clause.

The hope is that a judge would not expend a lot of thought as to whether a certain statement is testimonial if, for example, the declarant is present at trial to defend and explain the statement. Thus, there is indeed a rhyme and a reason to the order in which the questions are asked on the flowchart.

If, however, a trip through the various boxes of the flowchart brings you to Box 13 (*i.e.*, if there is an objection to an out-of-court statement on the basis of the Confrontation Clause, the declarant is not present at trial to defend and explain the statement, and the statement is offered for the truth of the matter asserted), then you must make a determination as to whether the statement is testimonial.

As an **initial step** in determining whether an out-of-court statement is testimonial, see if the statement falls into one of the following categories:

(1) affidavits;
(2) depositions:
(3) confessions;
(4) testimony at a preliminary hearing;
(5) testimony before a grand jury;
(6) testimony at a former trial;
(7) co-conspirator's guilty plea showing the existence of a conspiracy; and
(8) accomplice statements implicating the accused.

If the statement falls into one of the foregoing categories, the statement should almost always (if not always) be found to be testimonial. *Crawford v. State*, 541 U.S. 36, 51-52, 63-64, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The question as to whether the statement is testimonial has been answered. (Note: Step One should not result in a determination that the statement is nontestimonial.)

If, however, the statement does not fall into one of the foregoing categories, then the inquiry as to whether the statement is testimonial must continue. As a **second step**, see if the statement can be characterized as a statement made to police (often referred to in appellate court cases as a "police interrogation"). Please note that statements made to a 911 operator are considered to be statements made to police. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

If the statement is made to police (*i.e.*, a statement made during the course of police terrogation), then the following language from the Supreme Court must be utilized to arrive at a determination as to whether the statement is testimonial:

> 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.

Davis v. Washington, 547 U.S. at 822 (emphasis added). As can be seen from the quotation above, a determination must be made as to the primary purpose of the police interrogation. Please note that a police interrogation may be partly for the purpose of meeting an ongoing emergency and partly for the purpose of proving past events. *Id.* at 828. Thus, a statement can be testimonial in part and nontestimonial in part. The Supreme Court put great faith in America's trial court judges to make such a determination, stating that "[c]ourts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogatories become testimonial." *Id.* at 829. In a case involving a statement that is both testimonial and nontestimonial, only the testimonial portions of the statement will be subject to admissibility analysis under the *Crawford v. Washington* standard.

Again, if the statement can be characterized as a police interrogation, the reliance upon the Supreme Court's language in *Davis* will yield an answer as to whether the statement is testimonial,

nontestimonial, or a hybrid. The question as to whether the statement is testimonial has been answered.

If, however, the statement is not one made to police, then the inquiry as to whether the statement is testimonial continues by moving to a **third step**. This step requires analysis if the statement is one that could be considered an official record of some kind.

Texas courts have distinguished between (1) official records that set out a sterile and routine recitation of an official finding or unambiguous factual matter such as a judgment of conviction or a barebones disciplinary finding and (2) a factual description of specific observations or events that is akin to testimony. *Smith v. State*, 2009 Tex. Crim. App. LEXIS 527 (Tex. Crim. App. 2009).

Records in the first category are nontestimonial while records in the second category are testimonial.

If the statement is an official record, then a determination can be made as to whether the statement is testimonial has been answered.

If the statement is not an official record, then the inquiry as to whether the statement is testimonial continues by moving to a **fourth and final step**. This step involves answering the question of whether the statement was:

> made under circumstances which would lead an objective witness to believe that the statement would be available for use at later trial.

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009)(quoting from *Crawford v. Washington*, 541 U.S. at 52). If an objective witness would believe that the statement would be used at a later trial, then the statement is testimonial. If an objective witness does not so believe, then the statement is not testimonial.

The analysis as to whether the out-of-court statement is testimonial should, at this point, be at an end.

There are literally hundreds (and perhaps thousands) of reported cases dealing with the question of whether an out-of-court statement is testimonial. A judge need not be intimately acquainted with these cases in order to make appropriate rulings as to whether an out-of-court statement is testimonial. The foregoing guidelines will generally provide a judge with enough guidance to make an a proper determination. In fact, reading too many such cases may be more confusing than helpful – especially because lower-court cases decided prior to U.S. Supreme Court pronouncements may be based on a now-discarded understanding of the law. In any event, a few representative cases are listed below to provide a flavor of the testimonial/nontestimonial issue.

Step One Cases

(1) *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2530-32, 174 L.Ed.2d 314 (2009)("certificate of anlaysis" showing results of a forensic analysis that found substance to contain cocaine was simply an affidavit and therefore **testimonial**).

(2) *Woodall v. State*, 2009 Tex. App. LEXIS 7112 at *11 (Tex. App.—El Paso 2009, no

pet. h.)(grand jury testimony is "indisputably testimonial").

Step Two Cases

, *Davis v. Washington*, 547 U.S. 813, 828-29, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (Case 1: **nontestimonial** because primary purpose of 911 call was to meet an ongoing emergency)(Case 2: **testimonial** because interrogation was part of an investigation into possibly criminal past conduct).

(2) *Vinson v. State*, 252 S.W.3d 336, 339-42 (Tex. Crim. App. 2008)(first part of victim's statement to police officer identifying her attacker were **nontestimonial** because there was an ongoing emergency in that the defendant was still at large; second part of statement which described the assault in detail was **testimonial** because the defendant had been removed from the scene of the alleged crime and the scene had been secured).

Step Three Cases

(1) *Smith v. State*, 2009 Tex. Crim. App. LEXIS 527 (Tex. Crim. App. 2009)(prison system –TDCJ – disciplinary reports were **testimonial** where they went beyond a sterile description of an official finding and contained detailed descriptions of the defendant's disciplinary offenses).

(2) *Segundo v. State*, 270 S.W.3d 79, 106-07 (Tex. Crim. App. 2008) (pre-printed boilerplate language in form entitled "Board of Pardons and Paroles Proclamation of Revocation and Warrant of Arrest" was **nontestimonial** as it had none of the features of a subjective incident report made by a law enforcement officer or other person conducting a specific factual investigation for use in a criminal proceeding).

(3) *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005) (jail reports containing statements written by corrections officers and graphically detailing defendant's disciplinary offenses was **testimonial**).

(4) *Campos v. State*, 256 S.W.3d 757, 761-62 (Tex.App.—Houston [14th Dist.] 2008, pet. ref'd)(autopsy report was **nontestimonial** because the report contained a "sterile recitation of facts" even though the facts may have been "detailed and graphic").

(5) *Grant v. State*, 218 S.W.3d 225, 229-32 (Tex.App.—Houston [14th Dist.] 2007, pet. ref'd)(portions of defendant's high school disciplinary records which contained detailed descriptions of defendant's conduct – including specific profane language used and sequences of events resulting in punishment – were **testimonial**; portions of same records simply listing the alleged disciplinary infraction, the punishment received, the dates of the offenses or punishments, and the names of the school authorities involved were **nontestimonial**)(excellent discussion and analysis with citations to and distinctions between -many other cases).

(6) *Ford v. State*, 179 S.W.3d 203 (Tex.App.—Houston [14th Dist.] 2005, pet. ref'd) (inmate disciplinary records containing only a sterile recitation of offenses and the

punishments received were **nontestimonial**).

Step Four Cases

(1) *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009)(**testimonial** because certificates of analysis were made under circumstances which would lead an objective witness to believe the statement would be available for use at a later trial where sole purpose of certificates was to provide prima facie evidence of the composition, quality, and net weight of the analyzed substance).

(2) *Wells v. State*, 241 S.W.3d 172, 174-76 (Tex.App.—Eastland 2007, pet. ref'd) (statements in a 15-year-old CPS record were **testimonial** because the declarant Described criminal behavior that had already occurred and there was no therapeutic or healing motive for making the statement) (the court did not have the benefit of the *Melendez-Diaz* opinion and, because the statement was made to police, had no established test to apply, but the *Melendez-Diaz* test would appear to yield similar results for similar reasons).

Box 14. Confrontation Clause applies to statement.

The Supreme Court has clearly stated that testimonial statements implicate the Confrontation Clause. In *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Supreme Court made the following statement which, when read in its entirety, makes this perfectly clear:

> The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), we held that this provision bars "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." A critical portion of this holding, and the portion central to the resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. See *id.* at 51, 124 S.Ct. 1354, 158 L.Ed.2d 177. 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.

Having determined that the statement in question is testimonial and thereby advancing to Box 14, the Confrontation Clause has been definitely determined to apply

to the statement. Accordingly, the time has come to see whether the statement can be admitted under the Confrontation Clause.

Please **advance to Box 15** to begin this analysis.

Box 15. Statement is admissible only if: (1) declarant is unavailable; and (2) defendant had opportunity to cross-examine the defendant.

Go to Box 17.

This statement describes the new test for the admissibility of testimonial, out-of-court hearsay statements under *Crawford.* As noted in *Crawford:*

> Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354. 158 L.Ed.2d 177 (2004).

Box 16. Overrule Confrontation Clause objection.

Having arrived at Box 16, a determination has been made that the statement in question is nontestimonial. Accordingly, the Confrontation Clause does not apply. There is no need to apply the two-part test for the admissibility of out-of-court statements under *Crawford.* Nor, significantly, is there any need to apply the old two-part *Ohio v. Roberts* analysis to the statement. The only further admissibility analysis that must be undertaken is to evaluate whether the statement is for some reason inadmissible under the hearsay rules. And this analysis need not be undertaken unless there is a separate and independent objection to the statement's admissibility on the basis of hearsay. For this reason, please **go to Box 5** where the analysis continues.

In the wake of *Crawford*, there was a good bit of debate as to whether the *Ohio v. Roberts* test had survived for purposes of analyzing the admissibility of nontestimonial, out-of-court hearsay statements. Some observers and courts believed that nontestimonial statements were barred from admission into evidence by the Sixth Amendment if the statement could not meet the *Ohio v. Roberts* test of: (1) unavailability of the declarant to testify; and (2) adequate indicia of reliability. *See e.g.*, *Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir. 2005).

But *Summers v. Dretke* predated the Supreme Court's opinion in *Davis v. Washington* which served to clarify that the *Roberts* test had not survived. The United States Court of Appeals for the Second Circuit described the situation this way:

> In the wake of *Crawford* this Court assumed, and several of our sister circuits held, that the *Roberts* reliability analysis continued to govern the admissibility of nontestimonial statements. *See Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir. 2005); *United States v. Hinton*, 423 F.3d 355, 358 n.1 (3d Cir. 2005); *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005); *United States v. Franklin*, 415 F.3d 537, 546 (6th Cir. 2005); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004); [*United States v.*] *Saget*, 377 F.3d [223,] 227 [(2d Cir. 2004)]; *see also Mungo v. Duncan*, 393 F.3d 327, 336 n.7 (2d Cir. 2004) (suggesting that "under

> *Roberts*, nontestimonial hearsay deemed unreliable is barred by the Confrontation Clause"). The Supreme Court, however, in *Davis* made clear that [HN4] the right to confrontation only extends to testimonial statements, or, put differently, the Confrontation Clause simply has no application to nontestimonial statements. *See Davis v. Washington*, [547 U.S. 813, 237-38,] 126 S.Ct. 2266, 2274, 165 L.Ed.2d 224 (2006) (holding that the limitation with respect to testimonial hearsay is "so clearly reflected in the text" of the Confrontation Clause that it "must . . . mark out not merely its 'core,' but its perimeter").
>
> . . .
>
> Now, after *Crawford* and *Davis*, indicia of reliability play no role in the Confrontation Clause analysis. Rather, the inquiry under the Confrontation Clause is whether the statement at issue is testimonial. If so, the Confrontation Clause requirements of unavailability and prior cross-examination apply. If not, the Confrontation Clause poses no bar to the statement's admission.

United States v. Feliz, 467 F.3d 227, 231-32 (2d Cir. 2006).

Although not reproduced in the *United States v. Feliz* opinion, the following statement in *Davis v. Washington* is illuminating:

> A critical portion of [the *Crawford*] holding, and the portion central to the resolution of the two cases now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. 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, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

A 2007 Supreme Court opinion – *Whorton v. Bockting*, 549 U.S. 406, 419, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) – states even more clearly that *Ohio v. Roberts* has been completely abandoned. In the course of analyzing whether *Crawford* is a watershed rule requiring retroactive application (it's not), Justice Alito, writing for a unanimous Court, stated:

> Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.

Box 17. Is declarant unavailable?

If yes, then advance to Box 18 to see if the statement meets the second requirement cessary for admission into evidence.

If no, then advance to Box 19.

"A witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (quoting from *Barber v. Page*, 390 U.S. 719, 724-25, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). In *Roberts*, the Supreme Court found a witness to be unavailable where the declarant (who had made a statement at a preliminary hearing) had left home more than a year before trial, had most recently called home seven or eight months prior to the trial and did not disclose her whereabouts other than to say she was traveling outside of Ohio, and her parents had no way to reach her even in an emergency. Prosecutors had attempted to subpoena the declarant by issuing subpoenas on five separate occasions and directing then to the declarant at her parents' home.

In *Barber v. Page*, 390 U.S. at 720-25, the Supreme Court held that a witness was not unavailable for a state court trial in Oklahoma because he was at the time incarcerated in a federal prison 225 miles away in Texas. The prosecution had not made a good-faith effort (in fact the prosecution had made no effort at all) to obtain the presence or the witness.

There are other reasons that a declarant may be unavailable to testify that have nothing to do with the quality of the efforts made by prosecutors. For example, a declarant may claim a Fifth Amendment right against self-incrimination and choose not to testify. *E.g.*, *Hernandez v. State*, 273 S.W.2d 685, 687 (Tex. Crim. App. 2008); *Camacho v. State*, 241 S.W.3d 1, 2 (Tex. Crim. App. 2007); *Russeau v. State*, 171 S.W.3d 871, 877 (Tex. Crim. App. 2005). A serious illness may render a witness legally unavailable. *See Galvan v. State*, 461 S.W.2d 396, 397 (Tex. Crim. App. 1970)(testimony of witness at prior trial was admissible where witness was hospitalized with a mild stroke on the first day of trial and would have been unable to testify for at least a month or six weeks). And obviously, a witness is unavailable if he or she is dead. *See generally Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).

No attempt is made here to detail the various circumstances in which a declarant may be found to be unavailable. But judges must be prepared to entertain arguments concerning the unavailability of a declarant if the question of the admissibility of a statement reaches this stage of analysis.

Box 18. Did defendant have opportunity to cross-examine declarant?

If yes, then proceed to Box 20.

If no, then go to Box 19.

This should be a fairly straightforward factual inquiry. Remember, the inquiry is not whether there actually was prior cross-examination, but whether there was a prior opportunity for cross-xamination.

Box 19. Did defendant forfeit his rights under the Confrontation

Clause?

If yes, then go to Box 20.

If no, then go to Box 21.

In *Davis v.* Washington, 547 U.S. 813, 832-34, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Supreme Court recognized that in domestic violence cases the defendant often exercises intimidation or coercion against the victim and witnesses in an attempt to ensure that the victim does not testify at trial. As the Court noted, "[w]hen this occurs, the Confrontation Clause gives the criminal a windfall." The Court's proposed remedy for this situation was set out by Justice Scalia as follows:

> [W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*; that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds. 541 U.S. at 62, 124 S.Ct. at 1354, 158 L.Ed.2d 177 (citing *Reynolds*, 98 U.S., at 158-59, 25 L.Ed. 244). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to protection. . . . *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.

The Supreme Court took no position on the standards necessary to demonstrate such a forfeiture. *Davis v. Washington*, 547 U.S. at 833. However, the Court did point out that federal courts generally require the Government to prove forfeiture by a preponderance of the evidence standard. *Id.*

Significantly, the Court concluded the case by stating that

> absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude [the declarant's] affidavit. The Indiana courts [this direction dealt with the *Hammon v. Indiana* portion of the case] may (if they are asked) determine on remand whether such a claims of forfeiture is properly raised and, if so, whether it is meritorious.

Id. at 834.

The significance of these statements is that if you, as a trial judge, are presented with an argument by the State that the defendant has forfeited his or her rights under the Confrontation Clause by wrongdoing, then you will need to make an appropriate ruling.

This paper will not go into the doctrine of forfeiture by wrongdoing in depth. Much more about the doctrine can be gleaned from reading a 2008 Supreme Court case that delves into the issue in great depth – *Giles v. California*, ___ U.S. ___, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). Additionally,

a recent edition of the Hamline Law Review contains an in-depth student article on the doctrine. *See* Amanda L. Stubson, Comment, *Giving Victims a Voice: The Doctrine of Forfeiture by Wrongdoing as a Remedy to the Silencing Effect of Crawford*, 32 Hamline L. Rev. 265 (2009).

Box 20. Overrule Confrontation Clause objection.

If this box is reached, then either: (1) the prosecution has necessarily met its burden to show that the witness was unavailable and the defendant had had a prior opportunity to cross-examine the witness; or (2) the defendant has forfeited his or her rights under the Confrontation Clause. Either way, thhe Confrontation Clause does not bar admission of the out-of-court statement.

The analysis, however, is not yet complete. There may still be a need to determine the admissibility of the statement under hearsay rules. **Go to Box 5.**

Box 21. Sustain Confrontation Clause objection.

If this box is reached, then the Confrontation Clause has been implicated by the out-of-court hearsay statement in question and the statement has not met the two-part *Crawford* test for admission. Accordingly, the Confrontation Clause objection should be sustained and the statement should not be admitted into evidence.

The Confrontation Clause analysis is now complete. The analysis, however, is not yet complete. There may still be a need to determine the admissibility of the statement under hearsay rules. This would be done in the name of completeness in an attempt to rule on all objections. **Go to Box 5.**

Note, however, that some judges may choose to **end the analysis at this point**. This is because pursuant to the Confrontation Clause analysis, a decision has already been made that the statement is inadmissible. No matter what the result of a hearsay analysis, the statement will not be admitted. Thus, an analysis of the admissibility of the out-of-court statement may to some judges seem to be pointless.

Office of Court Adminstration
October 2009

Crawford v. Washington
Handling Confrontation Clause Objections to the Admission of Out-of-Court Statements

Ted Wood
Assistant General Counsel