

## **Washington v. Crawford: Must Crime Victims Testify Against the Defendant?**

On March 8, 2004, the United States Supreme Court issued a decision in the case *Washington v. Crawford* that may significantly affect whether an accuser, usually the victim of the crime, must take the stand and testify against the accused criminal defendant.

The Confrontation Clause of the 6<sup>th</sup> Amendment to the United States Constitution requires that the accused criminal defendant “shall have the right ... to be confronted with the witnesses against him.” The purpose of the Confrontation Clause is to ensure that an accused has the opportunity to test the reliability of the accusation against him by cross-examining the accuser. In other words, the Confrontation Clause of the US Constitution mandates that any witness giving testimony against a criminal defendant must be subjected to cross-examination.

Before *Crawford*, the United States Supreme Court had allowed a narrow class of exceptions to this mandatory confrontation. In an earlier case, *Ohio v. Roberts*, the Supreme Court ruled that certain witness statements could be allowed into evidence without cross-examining that witness if a judge found that the statements were sufficiently reliable so as to be trustworthy. The *Crawford* case overruled *Ohio v. Roberts*, doing away with this “reliability” exception to requiring confrontation and cross-examination of accusations against criminal defendants.

To comprehend the importance of the *Crawford* decision, it is necessary to understand the interplay between the Confrontation Clause and the general rule against hearsay (which is itself an extremely difficult subject!). “Hearsay” is an out-of-court statement offered as evidence to prove the truth of the content of the statement. It is generally inadmissible because courts want that content to come from live witness testimony, which is considered more reliable evidence because the court (judge and jury) can observe the demeanor of the witness while testifying and because the witness can be cross-examined to test the truthfulness of her testimony.

Basically, both the rule against hearsay and the Confrontation Clause are aimed at the same goal: getting live witness testimony. However, there are many, many exceptions to the rule against hearsay (e.g., excited utterances, recorded recollections, business records, etc.) and only one exception to the Confrontation Clause. The *Crawford* case takes away the “reliability” exception and replaces it with an even more rigorous standard. Unless the prior witness statement fits within the narrow exception *Crawford* sets forth, that prior statement will be excluded and the only way its contents can come in is through the witness taking the stand and testifying.

### Analysis of the Holding in *Crawford*

*Crawford* holds that testimonial statements made by witnesses who are absent from the trial may be admissible in court only when 1) that witness is unavailable (not merely unwilling) to testify, and 2) the defendant had a prior opportunity to cross-examine that witness. This holding requires three independent steps to assess whether *Crawford* applies and whether the witness statement can be used as a substitute for the witness’s live testimony.

#### 1. What is “Testimonial”?

By its own language, the *Crawford* decision applies only to “testimonial” statements given by a witness who is later unavailable to testify at trial. The Court declined to define what “testimonial”

means, but did state that it definitely includes “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”

*Crawford* does not then apply to statements that are not testimonial in nature. In other words, if at the time the statement was made, the person making that statement did not intend or could not reasonably expect that it later would be used at a trial, it is unlikely that the statement will be deemed testimonial and excluded under the *Crawford* decision.

However, it remains to be seen how courts will define “testimonial” and apply it to cases. There are certain statements we can reasonably presume to be not testimonial in nature and thus outside the scope of the *Crawford* ruling. For example,

- statements that qualify as an excited utterance hearsay exception that were not made to police officers; these are statements made in the excitement of the event (such as “Oh my god he’s got a gun!”), typically made at the time of or immediately following the event;
- statements that qualify as a present sense impression, i.e., statements made while observing what is happening, describing what the witness sees immediately as she sees it (e.g., “Hold on, someone’s at my door”); immediacy is key, while excitement is the essence of the excited utterance;
- statements made to medical providers for the purpose of treatment (but be mindful of the issue of doctor/patient confidentiality);
- statements made in a 911 call, because the purpose of the statement is not to give testimony but to give enough information about an emergency so that law enforcement or other emergency personnel can be dispatched.

The harder kinds of statements are those given to the police at the scene. Arguably, such statements are given not in response to interrogation, nor are they given for the purpose of testimony. Usually the purpose is to provide information to the police so that they can determine whether to make an arrest, pursue the suspect, call for medical care, be alert to an imminent danger, etc. How such statements will be treated under *Crawford* remains to be seen, and BWLAP urges anyone with knowledge of such a ruling to call us.

## 2. Unavailable to Testify

“Unavailable” is a legal term of art with a very particular definition. According to the Federal Rules of Evidence, which are in substance identical to the Minnesota State Rules of Evidence:

“Unavailability as a witness” includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege [such as marital privilege or attorney-client privilege] from testifying concerning the subject matter of the declarant’s statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant’s statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness of infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under

subdivision (b)(2), (3), or (4), the declarant's attendance by testimony) by process or other reasonable means [such as through a deposition].

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying."

In cases of sexual and/or domestic violence, frequently the crime victim does not want to take the stand at all, refusing to testify or to show up in court whatsoever. However, subdivision (2) above envisions that the witness takes the stand but refuses to testify, then the judge orders her to do so under threat of contempt but she still refuses, thereafter deeming her unavailable. If the witness simply does not come to court, the prosecutor can subpoena her, and can have her arrested and taken by squad to the courtroom (assuming the police can find her; a warrant for her arrest may be issued). It is the trial judge who determines whether a witness's testimony is unavailable at trial; because discretion lies with the judge, this determination depends on who is making it.

If the witness is not found "unavailable" by the court, then she must testify or any prior statements given by her will be excluded.

### 3. Prior Opportunity to Cross-Examine

There are few situations in which a criminal defendant has an opportunity to cross-examine prior to trial. The clearest example would be deposition testimony. [A deposition is a form of pre-trial discovery through which testimony is given under oath, recorded, and transcribed by a court reporter. Most depositions are oral—in person—although the Rules of Civil Procedure also provide for written depositions in civil cases; the Rules of Criminal Procedure require depositions to be oral.] For example, if the accusing witness is deposed prior to the trial, the defendant has a right to be present and to question the deponent about her testimony. If that witness/deponent is later deemed unavailable to testify at the trial, her testimony from the deposition could be admitted and used instead of her live trial testimony.

### Conclusion

It is unquestionable that the *Crawford* case makes prosecutors' jobs more difficult. *Crawford* also puts immense pressure on crime victims to take the stand and testify against their perpetrators, something that many victims are too afraid and/or traumatized to do. Advocates for battered women have long fought for evidence-based prosecution rather than relying on victim testimony to prosecute the perpetrator. Now, under *Crawford*, evidence that involves the victim's prior statements may be excluded unless they are found not testimonial in nature, or unless the victim is officially unavailable and the defendant had a prior opportunity to cross-examine her.

### Impact on Advocacy for Battered Women

Many battered women are afraid to testify because they fear the consequences their abuser will inflict. Others are afraid of the process of testifying in court. If testifying will not jeopardize the victim's safety, then this latter fear can be overcome with help from advocates. *Assuming the battered woman's safety will not be further jeopardized by testifying*, the role of the advocate should be to prepare her for court by explaining to her what is involved so that the unknown is less so. Usually, the more one is prepared, the less anxious she will feel. Explain to her what the process is—being sworn in, direct examination, cross-examination, what objections are, what to do when an attorney objects, etc. It may be helpful to bring a victim to a court proceeding so that she can experience for herself

what the process is like, or to an empty courtroom so that she can get comfortable with its layout. If sexual violence is involved, know the parameters of the rape shield law that prohibit the defendant from asking invasive questions about the victim's sexual history. Do whatever you can to facilitate a trusting relationship with the prosecutor who will ultimately be handling the trial.

The Minnesota State Bar Association has prepared a pamphlet called "So You're Going to Be a Witness," which gives practical advice and information on the process of testifying in court. BWLAP has this pamphlet available to distribute upon request.

Advocates may also encourage prosecutors to take the deposition of the witness in case she is unavailable for trial. Depositions are usually much less stressful than trial testimony, as they are less formal, the victim may have her own attorney present, and she can take breaks as often as needed.

If the victim cannot or does not want to testify, talk with the prosecutor to ensure that the prosecutor will not have her arrested for violating a subpoena.

Absent victim testimony, bolstering the non-testimonial evidence in the case is imperative. Advocates should think creatively about what forms of evidence are available and useful, then try to get police policy and protocol changed or established so that law enforcement gathers that evidence.

If you want further information, or wish to discuss any aspect of *Crawford* and its impact, please call Nicole at 612-343-9844.