19. HEARSAY AND THE CONFRONTATION CLAUSE

A. *In general*.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court balanced the hearsay rule against the defendant's 6th Amendment right to confront witnesses, and held that "testimonial" hearsay statements made to the police may be used at trial only if the declarant has become unavailable, and the defendant has had a meaningful prior opportunity to cross-examine the accuser. The fact that a statement falls into a traditional hearsay exception does not make it admissible. The prosecutor must also prove unavailability and prior cross-examination. This requirement is in addition to laying the full foundation for a hearsay exception.

If a statement is not hearsay at all, such as one not offered for its truth or a statement of the opposing party, *Crawford* does not apply.

B. *What is testimonial?*

A testimonial statement is one that looks like the kind of testimony that would be offered at trial in aid of prosecution: it identifies the defendant, accuses him of wrongdoing, describes the circumstances of the crime, establishes elements of the offense, and is made with some degree of formality after the event is over. For example:

- Emergency 911 calls which are made to seek help are usually not testimonial. *Davis v. Washington,* 547 U.S. 813 (2006). However, parts of the call that provide accusatory information that is not necessary to getting help may be testimonial.
- Statements to police about a suspect's identity, type of vehicle, and state of mind that will assist them in resolving an "ongoing emergency" where the suspect is still at large are not testimonial. *Michigan v. Bryant*, 131 S.Ct. 1143 (2011).
- Statements by victims and witness describing the defendant's conduct, made to police after the investigation has begun, are testimonial.
- Depositions, affidavits, transcripts of prior testimony, and other formalized statements are testimonial.
- Police investigative records, such as lab reports of drug tests, are testimonial. *Melendez-Diaz v. Mass*., 557 U.S. 305 (2009). The defendant has the right to cross-examine the technician who performed the test. *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). Routine information gathered in the booking process for administrative reasons is not testimonial.
- Documents and hearsay statements admitted to lay an evidentiary foundation are not testimonial. *See Speers v. State*, 999 N.E.2d 850, 855 (Ind. 2013) (evidence establishing chain of custody).
- Reference materials such as a glossary of abbreviations used on a cell phone bill are not testimonial.

C. *Procedural rules.*

(1) A witness is unavailable only if the prosecution made a good faith effort to obtain the witness's presence at trial.

(2) An adult witness who refuses to cooperate is only unavailable if he or she refuses to answer questions after being ordered to do so, and the prosecution must first request such an order. However, if the noncooperative witness is a child, the witness's unavailability may be established by expert testimony that person will be traumatized by the act of testifying.

(3) In order to object to the lack of cross-examination, the defendant must first exhaust procedural tools for compelling the witness to appear, including issuing a subpeona and requesting that the court order the witness to cooperate and threaten her with contempt if she refuses.
(4) Taking the declarant's deposition satisfies the cross-examination rule, whether it was a discovery deposition or one taken to preserve testimony for trial.
(5) A defendant who causes a witness's unavailability by his own wrongdoing (e.g., kills the witness) forfeits the right to object to the admissibility of that person's prior statements on hearsay or confrontation clause grounds.

D. *Context matters*

The context in which an accusatory statement was made matters. In general, the *Crawford* rule applies only to statements by victims and witnesses when they were made to the police or a prosecutor as part of the investigation of a crime and preparation for trial. Statements made to other people or in other contexts are not "testimonial," but just ordinary hearsay, admissible if they fall within an exception. For example:

- Text messages saved on a cell phone were probably not intended to be used in legal proceeding and therefore are not testimonial.
- A statement by a child to a parent accusing the defendant of sexual abuse is not testimonial because not made to police to aid prosecution.
- Statements by a crime victim made to medical personnel in the course of seeking treatment are not testimonial.

E. *Crawford* Rule Does Not Apply To Non-Hearsay Statements

Crawford does not apply to out-of-court statements that are not hearsay because they are not assertions, not offered for their truth, or are attributable to the defendant. For example:

- Mechanically produced print-out from Datamaster breath analyzer was not hearsay, and machine was not a "witness," so ticket was not testimonial. However, a report prepared by a laboratory technician that includes machine-created data is testimonial. *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).
- Statements which are not offered for their truth are not hearsay, so there is no confrontation issue.
- Co-conspirator statements are considered admissions of the defendant on agency principles, so there is no confrontation issue.
- If the defendant suggests during cross-examination that a witness has fabricated or exaggerated testimony, statements made by the witness before the motive to fabricate arose which are consistent with trial testimony are not hearsay.