New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 237—NO. 25 TUESDAY, FEBRUARY 6, 2007 ALM

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Status of Out-of-Court Statements After 'Crawford'

In *Crawford v. Washington*,[1] the U.S. Supreme Court revisited the issue of when the admission of hearsay evidence crosses the boundaries of the Confrontation Clause of the Sixth Amendment.

Prior to this decision, under the rule set forth in *Ohio v. Roberts*, many out-of-court statements were admissible where the declarant was unavailable and the statement carried an adequate "indicia of reliability." The reliability requirement was satisfied where the statement fell under a "firmly rooted hearsay exception" or possessed "particularized guarantees of trustworthiness."[2]

Reviewing the "*Roberts* standard" in *Crawford*, the Supreme Court expressed concern that a jury would be allowed "to hear evidence untested by the adversary process, based on a mere judicial determination of reliability."[3] Accordingly, the Court determined that, where an out-of-court statement made by an unavailable witness is testimonial in nature, it is inadmissible against a criminal defendant unless the defendant has had an opportunity to cross-examine the declarant. However, the Supreme Court declined to draw a definitive line between "testimonial" and "nontestimonial" statements, deciding to "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[4] More than two and a half years later, the meaning of this term is starting to take shape.

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Guidance Offered in 'Crawford'

Perhaps the best way to begin to understand the Supreme Court's intended meaning of "testimonial" is to examine the statement at issue in *Crawford*. The government introduced statements made by the defendant's wife to police while detained, along with the defendant, for questioning regarding a stabbing that had occurred earlier that day. Her statement generally corroborated the defendant's confession to stabbing the victim, but failed to support his claim of self-defense. At trial, the defendant's wife did not testify because of the state marital privilege barring a spouse from testifying without the other's consent. The Supreme Court concluded that this statement was testimonial.[5] Accordingly, the admission of this statement against the defendant when he had no opportunity to cross-examine his wife violated the Constitution.

The Court's decision in *Crawford* did offer some guidance as to the intended meaning of "testimonial." The Court recognized the definition of testimony as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Given this definition, it said that certain statements fell within the "core class" of testimonial statements. First, this group includes "'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially….'"

Second, extrajudicial statements, such as those contained in depositions, confessions or other "formalized testimonial materials" also are included in the core class of testimonial statements. Further, the Court found that statements made under circumstances that would lead an objective witness reasonably to believe that the statement later would be used at trial also are testimonial in nature.[6] Finally, beyond these somewhat amorphous definitions, the Court was very clear that the term covers, at a minimum, ex parte testimony at a preliminary hearing, before a grand jury or statements taken by police officers in the course of interrogations. The Court stated that it was using the term "interrogation" in its colloquial, rather than technical, legal sense, thereby incorporating statements made under various forms of government questioning.[7]

After *Crawford*, district and circuit courts have struggled to refine the dimensions of the new rule but have identified certain factors relevant in determining whether a statement is testimonial.

Key Factors of a Testimonial Statement

• *Statements Made With the Reasonable Expectation That They Will Be Used in a Future Prosecution*. Examining *Crawford*, the U.S. Court of Appeals for the Second Circuit has observed that the types of statements cited by the Supreme Court as testimonial share certain characteristics: "all involve a declarant's knowing response to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect

that his or her responses might be used in future judicial proceedings."[8] In *United States v. Saget*, the defendant was tried for firearms trafficking. During the trial, the court allowed the government to admit statements incriminating Saget made by Saget's codefendant, Mr. Beckham, to a confidential informant, who Mr. Beckham believed was an individual interested in joining their conspiracy.

The Second Circuit noted that the statements made by Mr. Beckham did not fall squarely within the examples of testimonial statements offered by the Supreme Court in *Crawford*. "The question, therefore, is whether Mr. Beckham served as a 'witness' who bears testimony within the meaning of the [Confrontation] Clause, despite the fact that he was unaware that his statements were being elicited by law enforcement and would potentially be used at trial." In answering this question, the Court observed that *Crawford* suggested that the declarant's state of mind regarding whether his statements may later be used at trial was a "determinative factor" in deciding whether a statement is testimonial. Because Mr. Beckham had no knowledge of the informant's connection to the government and believed he was having a casual conversation with a friend, his statement did not satisfy this determinative factor and therefore was admissible.[9]

Furthermore, the Second Circuit found that Mr. Beckam's statement was not testimonial because the circumstances under which it was rendered were similar to those in another Supreme Court case, *Bourjaily v. United States*. *Bourjaily*, in which a codefendant's unwitting statements to an FBI informant correctly were admitted against the defendant without prior cross-examination, was cited approvingly by the Supreme Court in *Crawford* as an example of the proper admission of nontestimonial statements.[10]

• *Statements Made to Law Enforcement Officials or Other Government "Agents."* Another relevant factor is to whom the statement was made. Like the statement made by the defendant's wife in *Crawford*, statements made to law enforcement officials, such as confessions, plea allocutions, and grand jury testimony, are testimonial in that they are made with the reasonable expectation that they will be used prosecutorially. *United States v. Saner*, a case from the U.S. District Court for the Southern District of Indiana, demonstrates that the questioning need not occur in a custodial setting for the statements made to be rendered testimonial. In that case, Mr. Saner, and a codefendant, Mr. Vogel, were brought to trial for their role in an alleged antitrust conspiracy. The government sought to admit statements made by Mr. Vogel when interviewed at his home by a Department of Justice attorney and paralegal. The court held that Mr. Vogel's statements implicating both himself and Mr. Saner were testimonial and, therefore, inadmissible as against Mr. Saner because he did not have an opportunity to cross-examine Mr. Vogel.[11]

Although the Supreme Court has been reluctant to offer an exact definition of the term "testimonial," its decisions, in conjunction with those issued by lower courts, provide counsel and judges with a methodology to examine out-of-court statements and a criminal defendant's right to confront his accusers.

The New York State case of *People v. Newland*, provides an example of when statements made in response to law enforcement questioning are not testimonial. The defendant was convicted of burglary after a police officer testified that he searched a shopping cart outside the burglarized premises and obtained documents bearing the defendant's name after a brief conversation with a by-stander. The court found that the officer's interactions with the by-stander, who was not a witness to the crime, were not "structured police questioning" of the type that produces testimonial statements. Accordingly, the statements made by the by-stander properly were admitted and the defendant's conviction was affirmed.[12]

Statements made to nongovernment "agents" also are testimonial if made to individuals who are likely to be called upon to aid in a future prosecution. Such individuals include social workers, counselors and examining doctors. These situations arise most frequently in child abuse cases. For example, in *Snowden v. State*, statements made by two children to a sexual abuse investigator from the county's office of Health and Human Services were found to be testimonial. The court found that questioning by the investigator was the "functional equivalent of the formal police questioning discussed in *Crawford*" because her involvement was initiated by the police and its purpose was to support the prosecution of the defendant. Accordingly, "for Confrontation Clause analysis, [she acted as] an agent of the police department."[13]

• *Statements Reporting or Describing Criminal Activity: "Davis v. Washington."*

Issues regarding the intent of both the declarant and the individual receiving the statement are not always easy to resolve in the context of an emergency situation. In June 2006, the Supreme Court examined the meaning of "testimonial" in this context in *Davis v. Washington*.[14] The consolidated case before the Court required it to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are "testimonial" and thus subject to the requirements of the Confrontation Clause. Both cases involved statements made to police during or after domestic violence disputes.

The first case, captioned *Davis v. Washington*, involved statements made by a defendant's girlfriend in a 911 call during a fight with the defendant. The defendant's girlfriend told the 911 operator that the defendant was abusing her and provided her with identifying information about the defendant. During the call, the defendant fled the scene, after which his girlfriend remained on the phone with the operator and answered more questions about the altercation.

The second case, captioned *Hammon v. Indiana*, involved statements made by a defendant's wife shortly after police arrived at her home to investigate a reported domestic disturbance. Initially, the defendant's wife indicated that nothing was wrong. Shortly afterwards, while separated from the defendant, she told the police that he had attacked her and her daughter. In both cases, the incriminating statements were admitted into evidence. The defendants argued that the statements were testimonial and that Sixth Amendment right to confrontation had been wrongly denied because they were not afforded the opportunity to cross-examine the women.

In distinguishing between the two circumstances, the Court held that statements made in response to police questioning—or questions posed by the police's agent, as in the case of a 911 call—are nontestimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

On the other hand, statements are testimonial when the circumstances

objectively indicate that there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal proceedings. Accordingly, the statements made by the girlfriend during the 911 call were nontestimonial because they were made to enable police to assist in an ongoing emergency, although the Court added that such nontestimonial statements made to assist the police in providing emergency assistance may evolve into testimonial statements once the assistance has been rendered. The statements made by the wife in *Hammond*, however, were found to be testimonial because there was no immediate threat from her husband at the time she made them and the officers merely were trying to determine what had happened earlier.[15]

These cases demonstrate that the speaker's purpose in making the statement and the recipient's intended use of the statement both are relevant considerations in determining whether a statement is testimonial. As set forth in *Davis*, the statement need not be obtained in a custodial setting to implicate the Confrontation Clause, but is not likely to be testimonial if made in the middle of a crisis.

Non-Testimonial Statements

Where a statement is nontestimonial, the Sixth Amendment right to confrontation does not apply. In *Crawford*, the Court identified as nontestimonial statements: i) statements made in furtherance of a conspiracy; ii) "an off-hand, overheard remark" or "a casual remark to an acquaintance"; iii) statements made unknowingly to a government informant; and iv) business records.[16] Courts have followed the Supreme Court's lead in this respect. As seen in the Second Circuit's opinion in *United States v. Saget*, detailed above, statements in furtherance of a conspiracy, made by a coconspirator to an unknown government informant, have been categorized as nontestimonial.[17]

The Second Circuit had another opportunity to address the relationship between the Confrontation Clause and statements made in furtherance of a conspiracy in its review of Martha Stewart's conviction. Both Martha Stewart and her codefendant, Peter Bacanovic, argued that their Sixth Amendment rights were violated when the trial court admitted certain statements each had made to SEC attorneys and FBI agents as against the other. Specifically, they argued that statements made to the government agents were the type barred by *Crawford*—statements offered for the truth of the matter asserted as probative of the other's guilt. Because neither defendant took the stand, there was no opportunity for cross-examination.[18]

The Second Circuit rejected the defendants' argument, finding that where the object of a conspiracy is to obstruct justice by providing both truthful and false statements to government agents, the admission of the truthful statements can not be objected to on the grounds that they are testimonial. "[T]he truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice."[19]

The Second Circuit also has addressed the question whether business records are testimonial under *Crawford*. In *United States v. Feliz*, the defendant appealed his racketeering conviction, arguing that his rights under the Confrontation Clause were violated by the admission of numerous autopsy reports through the chief medical examiner who had performed none of the autopsies. The defendant asserted that despite language in *Crawford* implying that business records are nontestimonial, the autopsy reports themselves contained testimonial statements and that he had not had the opportunity to cross-examine the doctors who had written those statements.[20]

In analyzing the issue, the Second Circuit said that a business record, as defined under Federal Rule of Evidence 803(6), can never be testimonial because it is "fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence." Specifically, business records are not made in anticipation of litigation or include observations made by law enforcement personnel. For this reason, they "'bear [] little resemblance to the civil-law abuses the Confrontation Clause targeted.'"[21]

In response, the defendant argued that the Second Circuit's decision in *Saget*, stating that the determinative factor in deciding whether a statement is testimonial is "the declarant's awareness or expectation that his or her statements may later be used at a trial," rendered the autopsy reports testimonial because the medical examiners must have expected that the reports would later be used at trial. Finding that the language in *Saget* was only dicta, the Court rejected a specific formula for determining whether a statement is testimonial. Rather, it held that the autopsy reports in this case were nontestimonial and therefore admissible.

Conclusion

In addition to the nontestimonial categories specifically provided in *Crawford*, traditional hearsay exceptions, such as excited utterances, statements of then existing state of mind and statements made for the purpose of medical diagnosis, also have been held to be nontestimonial.[22] Again, relevant to all these inquiries was the reason for the statement and the context in which it was made. Although the Supreme Court has been reluctant to offer an exact definition of the term "testimonial," its decisions, in conjunction with those issued by lower courts, provide counsel and judges with a methodology to examine out-of-court statements and a criminal defendant's right to confront his accusers.

1. 541 US 36 (2004).
2. *Ohio v. Roberts*, 448 US 56 (1980).
3. *Crawford*, 541 US at 62.
4. Id. at 68.
5. Id. at 51.
6. Id. at 51-52 (citing Petitioner's Brief, Justice Thomas' concurring opinion, and the Amicus Brief of the NACDL).
7. Id. at 53, n.4.
8. *United States v. Saget*, 377 F3d 223, 228 (2d Cir. 2004).
9. Id. at 228-229.
10. *Crawford*, 541 US at 58 (citing *Bourjaily v. United States*, 483 US 171 (1987)).
11. *United States v. Saner*, 313 FSupp2d 896 (S.D. Indiana 2004).
12. *People v. Newland*, 6 AD3d 330, 775 N.Y.S.2d 308 (1st Dept. 2004).
13. *State v. Snowden*, 867 A.2d 314 (Ct. App. Md. 2005).
14. 126 S.Ct. 2266 (2006).
15. Id. at 2277-2278.
16. 541 US at 51, 56 and 58; see also *United States v. Savoca*, 335 FSupp2d 385, 391-92 (SDNY 2004) (incriminating statements made by co-defendant's brother to live-in girlfriend were deemed "idle chatter" and non-testimonial).
17. See supra n. 8; see also *Diaz v. Herbert*, 317 F. Supp.2d 462. 482-83 n. 11 (S.D.N.Y. 2004) (stating that co-conspirator's statements properly admitted against defendant because they were non-testimonial).
18. 433 F.3d 273, 290 (2d Cir. 2006).
19. Id. at 292-293.
20. 467 F.3d 227 (2d Cir. 2006).
21. Id. at 233-34.
22. See Michael S. Feldberg and Karen Lee, "The Right to Cross-Examine Government Witnesses: 'Crawford' and Beyond," Defending Federal Criminal Cases (Diana D. Parker, ed. 2006) §6.03[3][b] (setting forth cases in which statements were held not to be testimonial).