Out of Harm’s Way: 
Hearings that are Safe from the Impact of 
Crawford v. Washington (Part 2 of 2)

By Allie Phillips

This is the second article in a two-part series addressing the proceedings and hearings where Crawford v. Washington does not apply. As discussed in the first part of this article, the Crawford case announced a new rule regarding the admission of hearsay statements from non-testifying witnesses: Testimonial statements are no longer admissible in criminal prosecutions unless the witness takes the stand and is subject to cross-examination. The Supreme Court, however, did not provide a definition of what statements are considered testimonial. Part Two of this article will continue to address the hearings and proceedings where Crawford does not apply and analyze 18 months of post-Crawford case law. Please consult your state law and procedures regarding the applicability of the Sixth Amendment and Crawford to each hearing and proceeding listed below. To request an outline of the cases interpreting Crawford, please visit our Web site at www.ndaa-apri.org.

Crawford Does Not Impact Probation Revocation, Sentencing and Restitution Hearings

The new rule announced in Crawford does not apply to probation revocation proceedings or supervised release hearings, sentencing hearings, including juvenile disposition hearings and restitution hearings. These collateral criminal proceedings are civil in nature and do not possess a Sixth Amendment confrontation right. Therefore, the new rule of Crawford does not apply. However, one court held that a probation supervised release revocation hearing entitled the defendant to some due process and Sixth Amendment protections and that the defendant was entitled to confront the police officer who issued a report regarding a new crime. See, United States v. Zayas, 2005 U.S. App. LEXIS 17566 (11th Cir. Fla. 2005). Moreover, there currently exists a split of authority as to whether the Sixth Amendment and Crawford apply to parole revocation hearings. A thorough analysis of case law throughout the federal circuits was addressed in Ash v. Reilly, 354 F Supp. 2d 1 (D.C. Cir. 2004). Thus Court held that a defendant has the right of confrontation in a federal parole revocation hearing reasoned:

The federal courts are split with regard to whether Crawford v. Washington is binding precedent for parole revocation hearings. See United States v. Jarvis, 94 Fed. Appx. 501 (9th Cir. 2004) (holding that the right to confrontation and thus Crawford v. Washington, applied to parole revocation hearings); United States v. Martin, 362 F.3d 840 (8th Cir. 2004) (holding that the Sixth Amendment right to confrontation did not exist in parole revocation hearings); See also United States v. Taveras, 580 F.3d 532 (1st Cir. 2004); See also United States v. Banegas, 318 F. Supp. 2d 1031 (S.D. Cal. 2004). Most recently, the 2nd Circuit held that Crawford v. Washington does not apply to parole revocation hearings because by its text, the Sixth Amendment is limited to “criminal prosecutions.” United States v. Apisnall, 2004 U.S. App. LEXIS 23954, 2004 WL 2601081 (2nd Cir. 2004). That Court also cited to Morrissey (Morrissey v. Brewer, 408 U.S. 471, 489, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972) for the proposition that “revocation of parole is not part of a criminal prosecution.”

In relation to sentencing hearings, if the sentencing phase is conducted before a jury, one court has held that the traditional rules of hearsay, as well as the Sixth Amendment, apply. Thus, Crawford applies to these hearings. See, State v. Berry, 2005 Mo. App. LEXIS 631 (Mo. App. 2005) and United States v. Bedros, 2005 U.S. Dist. LEXIS 8747 (WD Mo. 2005) (the eligibility phase of sentencing before a jury has Sixth Amendment rights).

Crawford Does Not Impact Expert Witness Opinions

As defined in FRE 703:
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

Most post-Crawford decisions have not altered this rule and have held that an expert witness may rely on other out-of-court information when testifying to an expert opinion, including relying on information from another expert. There is no confrontation or Crawford violation when an expert witness testifies from another expert’s tests or results. In Ellis v. Phillips, 2005 U.S. Dist. LEXIS 13910 (S.D.N.Y. 2005), the court held, “The Confrontation Clause was not violated by allowing one expert to testify as to DNA test results when the expert who conducted

UPDATE is published by the American Prosecutors Research Institute’s National Center for Prosecution of Child Abuse for publication only. It may not be reprinted or quoted without the permission of the National Center for Prosecution of Child Abuse. Please provide copies to Update Contact if you have inquiries or article suggestions at 703-549-4253.
the tests was unavailable due to cancer under the business record exception to the hearsay rule." 5

However, in United States v. Buonsignore, 131 Fed.Appx. 252 (11th Cir. Ga. 2005), the court issued a contrary ruling as a result of Crawford: Although we conclude that the district court abused in discretion by admitting expert testimony regarding the value of the drugs, the error was harmless and does not warrant reversal. The district court properly admitted the agent’s testimony under Rule 702, as his training and experience qualified him to testify as an expert in drug valuation. The district court evaluated the reliability of the agent’s testimony and the methodology he employed to arrive at his testimony: The drug value information helped the jurors better understand evidence at issue. Thus, it was admissible under Rule 702. However, the drug valuation testimony violated the Confrontation Clause. Although Rule 702 allows experts to rely on otherwise inadmissible evidence in formulating their opinions and the agent’s testimony complied with our decision in Brown, it is inadmissible under the standard set forth in Crawford. The agent’s testimony was based on information obtained from an unidentified individual at the DEA in Washington, D.C. The evidence is testimonial in nature. The government has not shown that both (1) that individual is unavailable, and (2) Buonsignore had the opportunity to cross-examine that individual. Thus, it was a violation of the Confrontation Clause to admit it.

Split Decisions Regarding Crawford and Pre-trial Suppression Hearings

One area that is still unstable after Crawford involves criminal pre-trial suppression hearings. Whether a state attaches a Sixth Amendment right-to-confront to these hearings will determine the applicability of the new rule in Crawford. Only a few cases have addressed pre-trial suppression hearings after Crawford. Although some cases have held that the Sixth Amendment does not apply to these hearings, 6 one case has held that the Sixth Amendment, and Crawford, did apply. 7

Crawford and Preliminary Hearings

Of particular interest throughout the country is whether Crawford applies to preliminary hearings. With convincing arguments on both sides of the issue, the fundamental question to resolve is whether the Sixth Amendment applies at a preliminary hearing. The states have differing statutes and case law on this issue. However, the United States Supreme Court has held that the right to confrontation is basically a trial right, which includes the opportunity to cross-examine and provide an occasion for the jury to weigh demeanor of witnesses. Barber v. Page 390 U.S. 719, 20 L.Ed. 2d 255, 80 S.Ct. 1318 (1960). Moreover, confrontation and cross-examination of witnesses is not essential, as matter of constitutional principle, for judicial determination of probable cause for detention required by the Fourth Amendment with regard to persons arrested without warrant and charged by information with state offenses. Gesten v. Bogh, 420 U.S.103, 43 L.Ed. 2d 54, 95 S.Ct. 854, 19 FR. Serv. 2d 1499 (1975). One post-Crawford case has addressed the issue 8 by holding that the Sixth Amendment Confrontation Clause does not apply at preliminary hearings since the right only applies to witnesses who actually testify. Therefore, the new rule of Crawford would also be inapplicable.

Conclusion

When determining whether the new rule of Crawford applies to a hearing or proceeding based on a criminal prosecution, the first question to answer is whether your state attaches a Sixth Amendment right to be confronted with witnesses at the particular hearing. If there is no Sixth Amendment right, then the new rule announced in Crawford does not apply. The cases listed in these articles address the interpretation of Crawford throughout the country over the 18 months since the decision was issued.

1 Allie Phillips is a Senior Attorney with APRI’s National Child Protection Training Center and National Center for Prosecution of Child Abuse in Alexandria, Virginia. The author thanks the research assistance of Jennifer Lamport, intern with the National Child Protection Training Center in Winona, Minnesota.


3 In determining whether a statement is testimonial or non-testimonial, courts are consistently applying the Crawford two-pronged analysis to otherwise admissible hearsay statements: (1) Was the statement made to a governmental agent or from a governmental source? (2) Would the declarant expect her/his statement to later be used at trial? For a more complete analysis of the Crawford test, see A Flurry of Court Interpretations: Weathering the Storm after Crawford v. Washington, by Allie Phillips, in The Practice News, Volume 39, Number 4 (July-August 2003).


9 People v. Brown, 2005 N.Y.Misc. LEXIS 1535, 2005 NY Slip Op 23003 (N.Y. Sup. Cir. 2005). "The notes and records prepared by the technicans were not made for investigative or prosecutorial purposes but, rather, were made for the routine purpose of ensuring the accuracy of the testing done in the laboratory and as a foundation for formulating a DNA profile. As such, they were not ‘testimonial’ in nature, and there was no Sixth Amendment right of confrontation as to the technicans there were no constitutional grounds for reversal of the judgment.”


11 In LaPointe v. State, 2005 Tex. App. LEXIS 3153 (Texas App Austin 2005), the court held that an in camera hearing to determine whether to admit the sexual history of the victim in a sexual assault trial implicates the Sixth Amendment and requires the presence of the defendant and cross-examination.
