

## **Sixth Amendment (1791)**

**“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”**

***Crawford* applies to “testimonial” statements. No comprehensive definition given (left for another day).**

**“Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. 541 U.S. at 68.**

## **Examples of “Testimonial” and Non-“Testimonial” Statements**

**Not “Testimonial”:** “An off-hand, overhear remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to civil-law abuses the Confrontation Clause targeted.” 541 U.S. at 51.

**“Testimonial”:** “An accuser who makes a formal statement to government officers bears testimony in a sense that . . .”

**Not “Testimonial”:** “. . . a person who makes a casual remark to an acquaintance does not.” 541 U.S. at 51.

**Not “Testimonial”:** Most hearsay exceptions covered statements that “by their nature” were not “testimonial,” e.g., business records or statements in furtherance of a conspiracy. 541 U.S. at 56.

**Not “Testimonial”:** “[S]tatements made unwittingly to an FBI informant.” 541 U.S. at 58 (citing *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987)).

## Suggested Possible Definitions

**Petitioner's Definition:** “*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.” 541 U.S. at 51-52 (quoting Brief for Petitioner at 23).

**Justice Thomas' Definition:** “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” 541 U.S. at 52 (quoting *White v. Illinois*, 502 U.S. at 365 (Thomas, J., concurring)).

**Amicus' Definition:** “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” 541 U.S. at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* at 3).

## **Crawford Exceptions**

**1. The confrontation right is satisfied in the current trial where the person who made the prior statement appears, testifies, and is subject to cross-examination as required by the confrontation right. 541 U.S. at 59 n.9. (*California v. Green & United States v. Owens* are the most important cases)**

**2. The right is satisfied where the declarant has been previously confronted regarding the statement and he or she cannot be confronted currently because of unavailability. 541 U.S. at 57-58. (This was the pattern in numerous cases, *see, e.g, Ohio v. Roberts*)**

**3. The defendant forfeits his or her right to require confrontation through if found through his or her own actions to have made the declarant unavailable rendering confrontation of the declarant impossible. 541 U.S. at 62 (see *Reynolds v. United States*)**

**4. The Confrontation Clause does not bar the use of statements even if testimonial if they are used for a purpose other than “establishing the truth of the matter asserted.” 541 U.S. at 59 n.9. (*see Tennessee v. Street*)**

**5. The historic recognition of dying declarations as an exception to the confrontation right at the time of the framing may mean that the Confrontation Clause is inapplicable to such statements even if testimonial. 541 U.S. at 56 n.6.**

**6. The Confrontation Clause surely does not exclude testimonial statements that are admissions by the defendant. Not stated as a general exception in the opinion but absolutely clear as matter of theory, at to personal admissions by the defendant. (cf. statements “in furtherance of a conspiracy” are noted as not testimonial. 541 U.S. at 56.)**

## **POLICE INTERROGATION CONTINUUM**

**UNCLEAR**

**CLEAR**

**911 Calls or  
Volunteered Statements**

**Field Investigations**

**Station House**

**No Questioning**

**Some questioning**

**“Interrogation”  
Structured  
Questioning**

**Important Factors: (1) Was the “witness”/declarant talking to a government investigative agent and did the “witness”/declarant know that fact?**

**(2) Was the statement formally taken down and did the “witness”/declarant know that fact?**

**(3) Had a Suspect been arrested and did the “witness”/declarant know that fact?**