



PROGRAM MATERIALS

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**Litigation Series:
Crawford and Beyond: Mastering the
Modern Confrontation Clause**

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Crawford and Beyond

Mastering the Modern Confrontation
Clause

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Learning Objectives

- Understand the evolution of Confrontation Clause law.
- Review *Crawford v. Washington* and its core holdings.
- Analyze key Supreme Court Confrontation Clause cases post-Crawford.
- Apply modern Confrontation doctrine in trial settings.

Sixth Amendment Text

- “In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” **U.S. Const. Amend. VI**

Pre-Crawford Doctrine

- **Ohio v. Roberts (1980)**
- Prior rule allowed out-of-court statements if they bore “adequate indicia of reliability” — firmly rooted hearsay exception or particularized guarantees of trustworthiness.
- *Roberts* was expressly **overruled** by *Crawford*.

Crawford v. Washington (2004)

- **Core Holding:**
- The Confrontation Clause bars admission of testimonial out-of-court statements against a criminal defendant unless the witness is (1) unavailable **and** (2) the defendant had a prior opportunity for cross-examination.
- Overruled *Roberts*: Reliability alone is not enough.

What Is “Testimonial”?

- *Crawford* did not fully define “testimonial,” leading to later case clarifications.

Declarant Availability vs. Unavailability

- A declarant is **UNAVAILABLE** when the prosecution cannot produce the witness at trial despite good-faith efforts.
 - Examples of unavailability: death; valid invocation of the Fifth Amendment; witness cannot be located after diligent search; severe illness preventing testimony.
- A declarant is **AVAILABLE** when the witness testifies live at trial and is subject to cross-examination.
 - If the declarant is available and testifies, the Confrontation Clause is satisfied regardless of prior statements.

The Doctrine of Forfeiture by Wrongdoing

- **Core Principle**
- A defendant **forfeits** (loses) the right to confront a witness when the defendant **wrongfully causes the witness's unavailability with the intent to prevent testimony.**
- This doctrine prevents a defendant from **benefiting from their own misconduct.**

Supreme Court Foundation

- **Giles v. California, 554 U.S. 353 (2008)**
- Controlling Case
- Holding:
Forfeiture by wrongdoing applies only when the defendant acted with the specific intent to prevent the witness from testifying.
- Mere causation is not enough.
- “The Sixth Amendment does not permit the admission of testimonial statements of a witness absent cross-examination unless the defendant intended to prevent the witness from testifying.”

Elements the Prosecution Must Prove

- To invoke forfeiture by wrongdoing, the government must establish:
- **Wrongful conduct** by the defendant
- **Causation** — the conduct caused the witness's unavailability
- **Intent** — the defendant acted **for the purpose of preventing testimony**
- **Standard of Proof**
- **✓ Preponderance of the evidence** (not beyond a reasonable doubt)

What Counts as “Wrongful Conduct”

- Examples recognized by courts include:
 - **Threats or intimidation** (direct or indirect)
 - **Violence or murder** of the declarant
 - **Bribery** or coercion
 - **Instructing third parties** to intimidate or silence the witness
 - **Patterns of domestic violence** aimed at preventing cooperation
- Wrongful conduct **does not require a separate criminal conviction.**

Intent Requirement (Critical Limitation)

- **What Is NOT Enough**

- ✗ The witness is unavailable because of fear
- ✗ The defendant committed the underlying crime
- ✗ The defendant “should have known” the witness would be unavailable

- **What IS Required**

- ✓ Evidence the defendant **intended** to keep the witness from testifying

Intent Inferred Circumstantially

- **Intent can be inferred circumstantially,** including:
 - Timing of threats relative to court dates
 - Statements referencing court or police
 - Jail calls or third-party communications
 - Pattern of intimidation escalating as trial approaches

Interaction with *Crawford*

- When forfeiture by wrongdoing is proven:
 - **Crawford does not apply**
 - **Testimonial statements become admissible**
 - **No prior cross-examination is required**
- This is one of the **only situations** where testimonial hearsay may be admitted **despite Crawford**.

Common Trial Contexts

1. Domestic Violence Cases

- Courts often admit 911 calls or police statements when the defendant:
- Threatened the victim
- Enforced silence through fear
- Had a history of intimidation

2. Gang / Conspiracy Cases

- Forfeiture is frequently invoked where:
- Witnesses are threatened through intermediaries
- “Word on the street” intimidation is traceable to the defendant

Common Trial Contexts

3. Jail Call Evidence

- Recorded calls instructing others to:
 - “Tell her not to show up”
 - “Handle the witness”
- are classic forfeiture evidence.

Procedural Requirements

Pretrial Hearing Required

- The court must:
 - Conduct an evidentiary hearing
 - Make **explicit findings** on intent and causation

Judge Decides

- The judge — not the jury — determines forfeiture applicability.

Defense Strategies (How to Fight Forfeiture)

Defense counsel should:

- **Demand strict proof of intent**
 - Argue threats were unrelated to testimony
- **Challenge causation**
 - Show alternative reasons for unavailability
- **Object to bootstrapping**
 - The statement itself cannot prove forfeiture
- **Request limiting findings**
 - Insist on detailed factual findings for appeal

Prosecutorial Pitfalls

- Prosecutors often lose forfeiture motions by:
 - Relying on generalized fear
 - Failing to tie conduct to **testimony suppression**
 - Offering speculation rather than evidence
 - Skipping a proper evidentiary hearing

Trial Script (Defense Objection Example)

- “Your Honor, forfeiture by wrongdoing requires proof that the defendant acted **with the intent to prevent testimony**, not merely that the witness is unavailable or fearful. The State has shown neither causation nor intent. Without explicit findings supported by evidence, admission of these testimonial statements would violate the Sixth Amendment.”

Bottom Line for Trial Attorneys

- ✓ Forfeiture by wrongdoing is **narrow and intent-based**
- ✓ It is **not automatic** in violent or domestic cases
- ✓ When proven, it **overrides Crawford**
- ✓ When misapplied, it is a **reversible constitutional error**

Davis v. Washington (2006)

- **Testimonial vs. Non-Testimonial Statements**
 - Emergency 911 calls = generally **non-testimonial** (Confrontation Clause not implicated).
 - Statements during or after interrogation for prosecution = **testimonial**.
- Provides **primary purpose test** for testimonial status.

Further Clarification: Hammon v. Indiana

- Often discussed with *Davis* — statements made to police where the primary purpose is to investigate past crimes = **testimonial**.
(*Davis* + *Hammon* clarified Crawford's limits.)

The Primary Purpose Test

- Defined in *Davis v. Washington* and refined in later cases.
 - The court asks: What was the primary purpose of the statement when it was made?
 - If the primary purpose was to address an ongoing emergency → NON-TESTIMONIAL.
 - If the primary purpose was to establish past events for future prosecution → TESTIMONIAL.

Primary Purpose Test: Examples

- Non-Testimonial Example: A frantic 911 call reporting an ongoing assault and requesting immediate police assistance.
 - Reason: The objective purpose is resolving an emergency, not creating evidence.
- Testimonial Example: A recorded police interview taken after the scene is secure.
 - Reason: The purpose is to gather evidence for prosecution.

Melendez-Diaz v. Massachusetts (2009)

- Forensic laboratory certificates are **testimonial**.
- Analysts must testify in person, or defendant has right to cross-examination under *Crawford*.

(*Note*: foundational for forensic Confrontation issues.)

Williams v. Illinois (2012)

- Plurality held some expert testimony based on lab reports did not violate Clause if not offered for truth, but the case splintered.
- Later decisions (e.g., *Smith v. Arizona*) revisit this logic.

Concrete Examples: Availability Analysis

- Example 1 (Unavailable): A forensic analyst who performed drug testing has died before trial. The analyst's lab report is testimonial.
 - Result: The report is inadmissible unless the defendant previously cross-examined the analyst.
- Example 2 (Available): A 911 caller testifies at trial and is cross-examined.
 - Result: The prior 911 recording may be admitted because the declarant had been subject to cross-examination at trial.

Ohio v. Clark (2015)

- Statements of a child to teachers not made primarily to create evidence for prosecution were **non-testimonial**.
- Refined *Crawford* “primary purpose” analysis.

Whorton v. Bockting (2007)

- Crawford does **not apply retroactively** on collateral review.
- Important for post-conviction practice.

Samia v. United States (2023)

- The Confrontation Clause was not violated by admission of a redacted codefendant's confession where it was properly limited and did not directly inculcate the defendant.
(*Note*: reaffirmed contextual rule application).

Modern Confrontation Issues (2024–2025)

- **Smith v. Arizona (2024) — Key Confrontation Doctrine addressing situation where a substitute expert testifies to findings made by the actual analyst who does NOT testify at trial**
- Supreme Court held that when a testifying expert conveys statements of a non-testifying forensic analyst that support the expert's opinion *only if they are true*, then those statements come in for their truth and implicate the Confrontation Clause.
- Result: Defendant must have right to confront the analyst — not just surrogate witness.

2025 Supreme Court Orders

- In late 2025, the Supreme Court issued unsigned opinions clarifying Confrontation Clause standards in child abuse/scenario screening cases, emphasizing necessity findings before limiting face-to-face confrontation.

Application to 2026 Trial Practice

- **Critical steps for trial attorneys:**
 - ✓ Evaluate whether offered statement is *testimonial*. If testimonial, ensure witness is available with opportunity to cross-examine.
 - ✓ Against expert testimony based on another analyst's work, argue *Smith v. Arizona* applies to exclude.
 - ✓ Challenge surrogate witnesses whose testimony depends on absent analysts.

Strategic Tips

- Always obtain labs' analyst lists early.
- Demand live testimony or waivers.
- Consider primary purpose and testimonial analysis at pretrial.
- Use *Davis/Clark* to differentiate ongoing emergency vs. testimonial statements.

The Crawford Confrontation Checklist (2025)

1. Is the statement offered against the defendant?
2. Is the statement hearsay or functionally equivalent?
3. Is the declarant unavailable?
4. Is the statement *testimonial*?
5. Did the defendant have a *prior* opportunity to cross-examine?

If any answer fails, Clause may bar admission.

Hypothetical Fact Pattern

- Defendant is charged with armed robbery.
 - Victim gives a detailed recorded statement to police two hours after the crime.
 - Victim later moves overseas and refuses to return to testify.
 - Prosecution seeks to admit the recorded statement at trial.

Hypothetical Analysis – Step-by-Step

- Step 1: Offered Against Defendant – Yes.
- Step 2: Hearsay – Yes, out-of-court statement offered for truth.
- Step 3: Unavailability – Yes; witness refuses to return despite subpoena efforts.
- Step 4: Testimonial – Yes; formal police interrogation describing past events.
- Step 5: Prior Cross-Examination – No opportunity provided.

Hypothetical Conclusion

- Under Crawford and its progeny, the statement is *testimonial*.
 - Declarant is unavailable and no prior cross-examination occurred.
 - Admission would violate the Sixth Amendment Confrontation Clause.
 - Defense counsel should move to *exclude* the statement pretrial.

Federal Trial Hypotheticals

- What follows are a series of federal trial hypotheticals. These hypotheticals:
 - ✓ Reinforce **availability vs. unavailability**
 - ✓ Apply the **Primary Purpose Test**
 - ✓ Demonstrate **Crawford analysis exactly as federal judges apply it**
 - ✓ Prepare attorneys for **motions in limine, objections, and appellate preservation**

Federal Trial Example #1 — Forensic Analyst (Controlled Substances Case)

- **Scenario:**

In a federal drug-distribution prosecution, the government offers a DEA laboratory report identifying seized substances as cocaine. The chemist who performed the testing has retired and does not testify. The prosecution instead calls a supervising analyst.
- **Analysis:**
 - The lab report is a **testimonial statement** (*Melendez-Diaz*).
 - The supervising analyst relies on the absent chemist's conclusions for their truth.
 - Under **Smith v. Arizona (2024)**, this is impermissible surrogate testimony.
- **Result:**

Admission violates the Confrontation Clause unless the testing analyst testifies or the defendant previously cross-examined the analyst.

Federal Trial Example #1 — Forensic Analyst (Controlled Substances Case)

- **How to argue this in court:**
- “Your Honor, this lab report is testimonial under *Melendez-Diaz*. The government is attempting to introduce the absent chemist’s conclusions through a surrogate witness. Under *Smith v. Arizona (2024)*, the Sixth Amendment is violated when an expert conveys statements that are only probative if true and the declarant is not subject to cross-examination. The supervising analyst did not perform or observe the testing and cannot be cross-examined about errors, contamination, or methodology. The report must be excluded.”
- **Practice tip:**
Raise this **pretrial in a motion in limine**, renew at trial, and request a standing objection to preserve appellate review.

Federal Trial Example #2 — 911 Call vs. FBI Interview

- **Scenario:**
A victim calls 911 during an armed home invasion. Two hours later, FBI agents conduct a recorded interview after the scene is secure. The victim later becomes unavailable.
- **Primary Purpose Analysis:**
 - **911 Call:** Non-testimonial — purpose is resolving an ongoing emergency (*Davis*).
 - **FBI Interview:** Testimonial — purpose is establishing past events for prosecution.
- **Result:**
911 recording admissible; FBI interview excluded absent prior cross-examination.

Federal Trial Example #2 — 911 Call vs. FBI Interview

- **How to argue this in court:**
- “The Supreme Court instructs us to apply the objective primary purpose test. The 911 call was made during an ongoing emergency — the declarant was seeking immediate help, not creating evidence. By contrast, the FBI interview occurred after the scene was secure, was structured, recorded, and focused on past events. Its sole purpose was to gather evidence for prosecution. That makes it testimonial under *Davis* and *Clark*.”
- **Practice tip:**
Walk the judge through **timing, tone, and structure** — not just content.

Federal Trial Example #3 — Co-Defendant Confession (Joint Trial)

- **Scenario:**

In a federal conspiracy case, a co-defendant gives a post-arrest confession naming “another individual” as the planner. The government introduces the statement through a federal agent.
- **Analysis:**
 - Statement is testimonial (*Crawford*).
 - Even with redaction, if jurors can infer the defendant’s identity, Confrontation is violated.
 - Governed by **Samia v. United States (2023)**.
- **Result:**

Admission unconstitutional if the redaction still points directly to the defendant.

Federal Trial Example #3 — Co-Defendant Confession (Joint Trial)

- **How to argue this in court:**
- “Although the government has redacted the confession, the jury can readily infer that ‘another individual’ refers to my client, John. *Crawford* and *Samia* make clear that formal redaction is insufficient if the statement still functions as an accusation. The Confrontation Clause protects against practical, not theoretical, violations.”
- **Remedy to request:**
Exclusion, severance, or separate trials — not a limiting instruction alone.

Federal Trial Example #4 — Child Statements to Federal Task Force

- **Scenario:**
A child makes statements to a federally deputized social worker during a joint child-safety and criminal investigation.
- **Primary Purpose Inquiry:**
 - If the objective purpose is **protective or medical** → non-testimonial.
 - If the purpose is **criminal investigation** → testimonial.
- **Result:**
Courts focus on **objective circumstances**, not the government's after-the-fact characterization.

Federal Trial Example #4 — Child Statements to Federal Task Force

- **How to argue this in court:**
- “The primary purpose must be assessed objectively. Here, the interview was conducted by a federally deputized task force member, with structured questioning and no immediate emergency. Regardless of how the government labels it, the circumstances show an evidence-gathering interview designed for prosecution. That makes these statements testimonial and inadmissible absent confrontation.”
- **Practice tip:**
Focus on **who asked the questions, how, and why** — not the witness’s age alone.

Conclusion

- The Sixth Amendment's Confrontation Clause, as revitalized by *Crawford* and refined by later cases, remains a central protection for criminal defendants.
- Trial counsel must aggressively analyze testimonial issues to effectively safeguard their client's confrontation rights.