ble to "inconsistent application," and "inherently . . . unpredictable." If that is true, how can the Court continue to apply that standard to any type of hearsay?

As footnotes 6 and 8 in the *Crawford* opinion indicate, in a given case the defense might be able to persuade the trial judge that the business or official record in question was prepared with a view to prosecution and, hence, is "testimonial." However, in other cases there will be no governmental involvement in the production of the statement, and the facts may dictate the conclusion that the report was generated for a legitimate, non-litigation reason. Yet, as several commentators have pointed out, such expert reports can nevertheless be so untrustworthy[20] and rely on such subjective interpretive standards[21] that it makes sense to apply the Confrontation Clause and pressure the prosecution to produce the expert as a trial witness subject to cross-examination. In that light, exempting all "nontestimonial" hearsay from Confrontation Clause scrutiny would be a step in the wrong direction.

An Unmitigated Blessing for the Defense?

Crawford is an important development in Confrontation Clause jurisprudence. In *Crawford*, the Court takes its strongest stance yet against the invocation of the declaration against interest exception to permit the sort of prosecutorial practices which prompted the Founding Fathers to adopt the Confrontation Clause. However, it is premature to conclude that *Crawford* will be an unmitigated blessing for the defense. While capitalizing on the *Crawford* majority's strictures on the use of "testimonial" hearsay, the defense must be vigilant against prosecutorial attempts to completely dismantle the Confrontation Clause restrictions on nontestimonial hearsay under *Roberts*.

Notes

1. 1 McCormick, EVIDENCE § 317 (5th Ed. 1999).
2. *Id.* at § 317, at 321 n. 6, citing Donnelly v. United States, 228 U.S. 243 (1913).
3. 410 U.S. 284.
4. *See* Edward J. Imwinkelried & Norman M. Garland, EXCULPATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE § 14-7 (2d ed. 1996).
5. Fed.R.Evid. 804(b)(3), 28 U.S.C.A.
6. 1 Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Fredric I. Iederer, COURTROOM CRIMINAL EVIDENCE § 1313 (3d ed. 1998).
7. Fed.R.Evid., 801(d)(2)(E), 28 U.S.C.A.
8. Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 HARV.L.REV.1, 62 (1944).
9. 476 U.S. 530 (1986).
10. 512 U.S. 594 (1994).
11. 527 U.S. 116 (1999).
12. Saltzburg, *Declarations Against Interest and the Confrontation Clause*, 16 CRIM. JUST. 51 (Wint. 2002).
13. Kirst, Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia, 53 SYRACUSE L.REV. 87, 105 (2003).
14. 448 U.S. 56 (1980).
15. 514 U.S. 54, 124 S.Ct. 1354, 2004 U.S. LEXIS 1838, 2004 WL 413302 (U.S., Mar. 8, 2004).
16. *See* Fed.R.Evid. 804(b)(2), 28 U.S.C.A.
17. *Id.* at Fed.R.Evid. 803(2).
18. *Id.* at Fed.R.Evid. 803(6).
19. *Id.* at Fed.R.Evid. 803(1).
20. *Giannelli, The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST.L.J. 671 (1988).
21. Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 HASTINGS L.J. 621.(1979)
22. People v. Compan, 2004 Colo. App.

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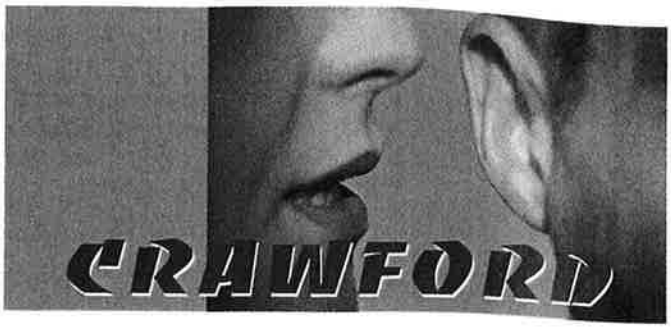

THE IMPACT OF CRAWFORD V. WASHINGTON ON TERRORISM PROSECUTIONS

BY JOSHUA L. DRATEL

The Supreme Court's recent opinion in *Crawford v. Washington*,[1] promises to be a watershed decision in many respects, including the prosecution of terrorism cases and, in particular, so-called "enemy combatants" tried by military commissions. In fact, the impact of *Crawford* on the latter proceedings might be the most profound of all, since there is a general absence of procedural protections available to detainee-defendants in those cases.

Crawford's potential application in the terrorism context is most significant in four respects : (1) it can dramatically restrict the type of evidence that the government can introduce against a defendant-detainee; (2) it can preclude the use of secret, *ex parte* evidence and proceedings; (3) it can, for detainees subject to military commissions, provide an independent, normative doctrinal foundation for the application of Confrontation Clause principles regardless whether the United States Constitution applies to a particular proceeding; and (4) it can provide a rationale for obtaining exculpatory information from persons in U.S. custody (but who are not available as witnesses), without also risking admission of inculpatory statements from those persons.

Precluding Hearsay Statements Obtained Via Custodial Interrogation

The military commission process that presently exists for persons detained at the U.S. Naval Base, Guantanamo Bay, does not employ either the Federal Rules of Evidence, or the Military Rules of Evidence (which mirror the Federal Rules). Consistent with that dangerous relaxation of evidentiary standards, the military authorities have already announced an intention to introduce against detainees statements made by other detainees to interrogators during their captivity. The military authorities intend to use such evidence regardless of whether or not the detainees who made the statements are

available. It is also possible that the statements would be from detainees who have subsequently been released by U.S. authorities, have been returned to their home countries, and are therefore beyond the reach of any process should the defendant-detainee wish to summon them as live witnesses (or even interview or depose them in advance).

Obviously, *Crawford* would preclude use of such statements absent a full and fair opportunity for cross-examination. Indeed, *Crawford* could force the government into a "Hobson's Choice" with respect to its prosecution of "enemy combatants," since it would have to choose between making those detainees witnesses, and subject to cross-examination, or forgoing use of their statements. The former course would jeopardize the secrecy of the intelligence gleaned from those witnesses (the preservation of which the government has consistently asserted as the rationale for their extended incommunicado detention), while the latter would, for all practical purposes, render impossible the prosecution of many, if not all, of the detainees, since the prosecutions are to a substantial extent grounded if not exclusively on the statements of other detainees.

Eliminating the Use of Secret and/or *Ex Parte* Evidence and Proceedings

Crawford should also sound the death knell for proceedings that utilize "secret" evidence, *i.e.*, evidence submitted *ex parte*, or "secret" proceedings, *i.e.*, at which the defendant and/or counsel are not permitted to appear and/or participate. While previously proceedings under the Classified Information Procedures Act (CIPA) have denied terrorism defendants the right to see classified information, and immigration proceedings have, in the terrorism context, involved "secret" evidence and proceedings, and the military commissions contemplate both secret evidence *and* proceedings (at which only detailed military counsel would be entitled to appear and participate), any principled application of *Crawford* would conclude that any testimony that was not "assessed . . . by testing in the crucible of cross-examination[]"[2] could not be introduced against a defendant.

In addition, since the Sixth Amendment's right to confrontation is a *personal* right enjoyed by the *defendant*,[3] *Crawford* should be employed to challenge both the defendant's lack of access to classified information, and/or his exclusion from classified proceedings. The argument would, of course, be particularly compelling if a defendant were acting *pro se*. Thus, *Crawford* represents a powerful weapon available to attack the propriety of "secret" evidence and *ex parte* or "secret" proceedings.

Principles Underlying *Crawford* Transcend the U.S. Constitution

Another important aspect of *Crawford* is not simply its reliance on the Sixth Amendment's Confrontation Clause in the abstract, but its tracing of the historical roots of the right to confrontation: "[W]e must therefore turn to the historical background of the [Confrontation] Clause to understand its meaning."[4] In finding the genesis of the right in the common law and the fundamental values of the judicial process, the Court in *Crawford* provides a basis for relief even for detainees tried before military commissions, since those defendants may not be afforded the protections of the U.S. Constitution in criminal cases.

Crawford makes it clear that cross-examination is indispensable to accurate

and reliable fact-finding, and that depriving a defendant of the opportunity to cross-examine is wholly and materially inconsistent with any traditional, historical, normative jurisprudential standard. In the terrorism context, the existence of the principles underlying *Crawford* outside the parameters of the U.S. Constitution also dispenses with problems defendants often face in challenging the admission of statements obtained by foreign law enforcement personnel, often as a result of coercion or torture, to which Fourth, Fifth, and Sixth Amendment protections do not apply. Since *Crawford* applies to *all* "testimonial" statements, the circumstances under which they were obtained (and by which sovereign) is immaterial to any analysis of admissibility. As a result, categorically, statements of others in response to law enforcement interrogation simply cannot be introduced without an opportunity for cross-examination.

Crawford Can Be Used to Gain Maximum Advantage From Exculpatory Evidence

In its most recent opinion in *United States v. Moussaoui*,[5] involving the only person charged thus far with complicity in the events of September 11, 2001, the Fourth Circuit held that Moussaoui had both a Sixth Amendment (compulsory process) and Fifth Amendment (Due Process) right to the exculpatory information provided by detainees held by the government overseas.[6] Nevertheless, since the Court also held that the Executive Branch could refuse to produce the detainees for depositions and/or trial testimony, the solution was to require the district court to devise substitutions for the detainees' testimony that would adequately encompass the exculpatory information they have provided to the government.[7]

However, relying in large part on *Crawford* (which had been decided after oral argument and six weeks prior to the *Moussaoui* decision), the Court in *Moussaoui* did not apply the same standard to *in*culpatory information.[8] Instead, the Court refused to allow the substitutions to include any inculpatory information provided by the detainees.[9] This asymmetrical approach offers a defendant a significant advantage in terrorism cases in which there are potential sources of exculpatory information — in the form of witnesses, documents, and/or other intelligence — that the government, for reasons of "national security," chooses not to produce publicly as witnesses or evidence. *Crawford* thereby offers the defendant the opportunity to enjoy the fruits of the exculpatory evidence while denying the government the use of any inculpatory information emanating from the same source. Consequently, defense counsel in such cases should aggressively pursue exculpatory information from other detainees whom the government believes are too sensitive to use as witnesses.

Thus, *Crawford* portends significant potential advantages for defendants in terrorism cases, and can be used to preclude some of the more difficult evidence to address in such cases, including those tried before military commissions.

Notes

1. 541 U.S. ___, 124 S. Ct. at 1354 (2004).
2. 541 U.S. ___, 124 S. Ct. at 1370.
3. *See, e.g.,* Faretta v. California, 422 U.S. 806, 819 (1975) ("[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor'").
4. 541 U.S. at ___, 124 S. Ct. at 1359. *See also* 124 S. Ct. at 1359-67.
5. 365 F.3d 292 (4th Cir. 2004).
6. 365 F.3d at 299-300, 304-09. *See also* 365 F.3d at 318 (Williams, J., concurring in part and dissenting in part); 365 F.3d at 318 (Gregory, J., concurring in part and dissenting in part).
7. 365 F.3d at 313-15.
8. 365 F.3d at 316.
9. *Id.*

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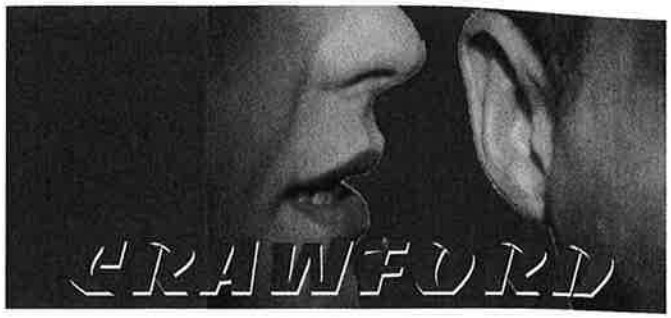

THE POTENTIAL IMPACT OF CRAWFORD V. WASHINGTON ON CHILD ABUSE, ELDERLY ABUSE AND DOMESTIC VIOLENCE LITIGATION

BY SHERRIE BOURG CARTER AND BRUCE M. LYONS

Criminal litigation involving child abuse, elderly abuse, and domestic violence allegations share several commonalities. One is that oftentimes, the only witnesses in these cases are the alleged victims and the professionals who interview and/or treat them after the alleged crime. Secondly, these cases often involve witnesses who initially may actively pursue the charges and want to see the defendant punished, yet later may change their minds and recant the allegations either on their own or due to external pressures. The specific reasons behind recantation can be many, but some motivations include fear, pressure from another person to change his/her story, not wanting to see a family member or friend get in trouble, or because the allegations are false.

Finally, these cases share the fact that witness unavailability is a frequently encountered issue. Unavailability can be caused by several different reasons, including witness incompetency (more common in child and elderly cases), emotional unavailability (more common in child cases), death (more common in elderly cases), disappearance (more common in domestic cases), or reliance on marital privilege (in domestic cases). For these reasons, the issue of hearsay often plays a central role in the litigation of these cases and one that can dramatically alter the direction and outcome of a case.