

A Judge's Guide to Confrontation Clause Analysis

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April 2010

The screenshot shows a Westlaw search results page for the case **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354 (2004). The page is titled "Crawford v. Washington" and includes the citation "541 U.S. 36, 124 S.Ct. 1354" and the date "March 08, 2004". Below the title, it says "Citing References (Showing 23283 documents)". Under the heading "Negative Cases (U.S.A.)", there are three categories of cases:

- Not Followed as Dicta**: Johnson v. State, 929 So.2d 4, 6+, 31 Fla. L. Weekly D125, D125+ (Fla.App. 2 Dist. Dec 30, 2005) (NO. 2D04-3460) ★★★★★ HN: 3,4,5 (S.Ct.)
- Abrogation Recognized by**: Meeks v. McKune, 2009 WL 4269701, *3+ (10th Cir.(Kan.) Dec 01, 2009) (Table, text in WESTLAW, NO. 09-3133) (Table, text in WESTLAW) ★★★★★ HN: 2,4,8 (S.Ct.)
- Called into Doubt by**: State v. Mason, 162 P.3d 396, 400+, 160 Wash.2d 910, 917+ (Wash. Jul 19, 2007) (NO. 77507-9) ★★★★★ HN: 4,5,6 (S.Ct.)

At the bottom, there is a link to "State v. Henderson, 160 P.3d 776, 782+, 284 Kan. 267, 275+ (Kan. Jun 22, 2007)". The page also includes a "Limit KeyCite Display" button and a "SELECT TO PRINT, EMAIL, ETC." link.

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Crawford v. Washington
[541 U.S. 36, 124 S.Ct. 1354](#)
 U.S.Wash.,2004.
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Negative Cases (U.S.A.)

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Session Objective

At the end of this session you will be able to:

Understand & apply the new confrontation clause rules

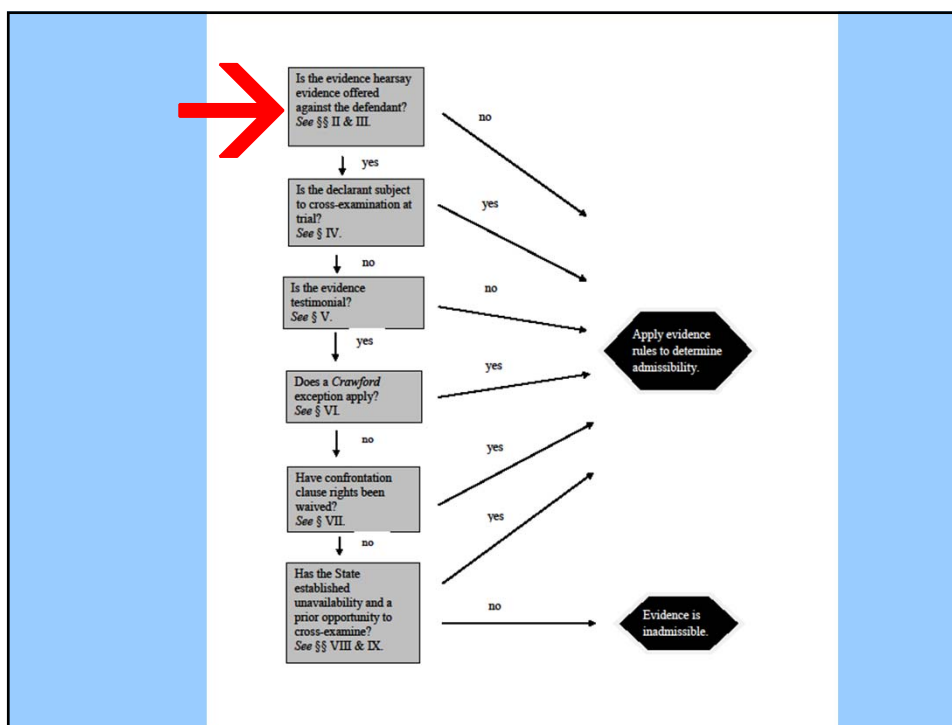
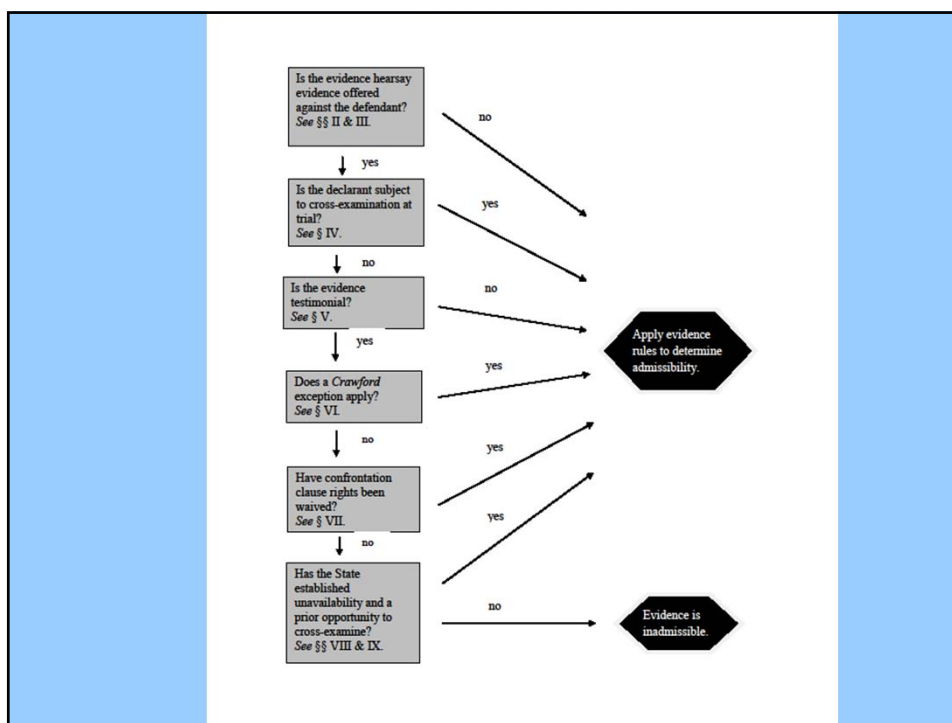
Crawford Holding:

“Testimonial” hearsay statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and there has been a prior opportunity to cross examine.

Crawford Holding:

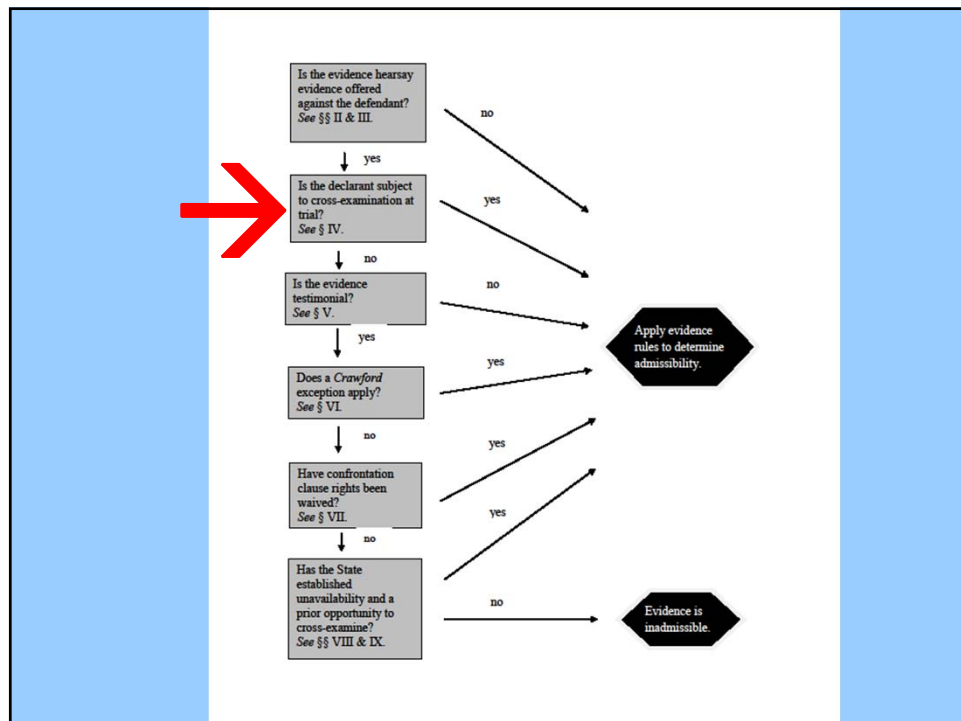
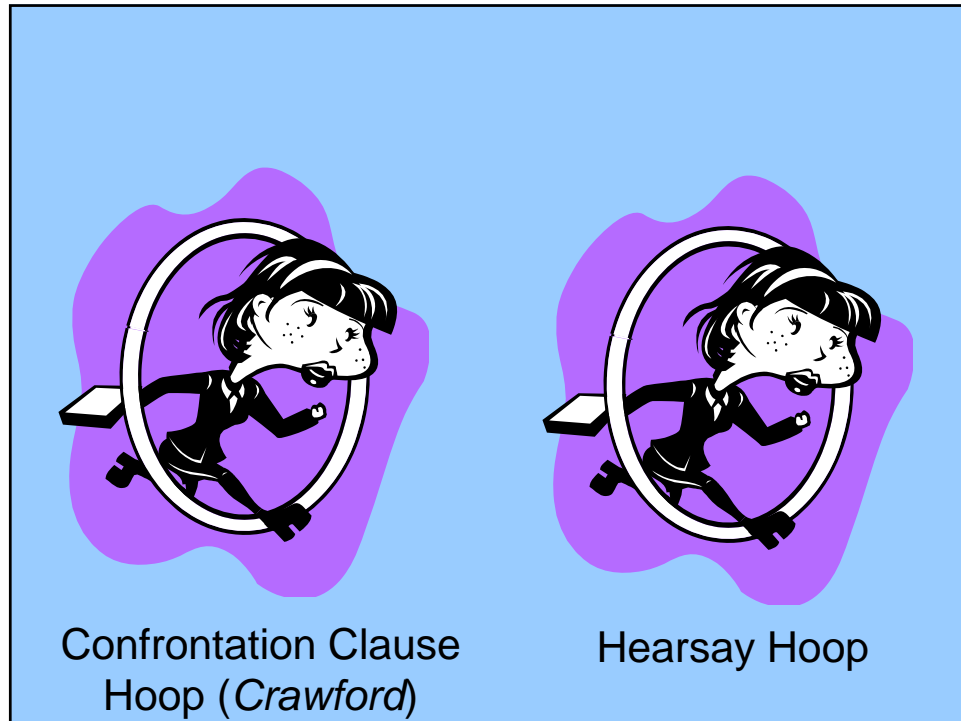
“Testimonial” hearsay statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and there has been a prior opportunity to cross examine.

- Statements of DV V to 1st responding officers/911 operator
- Statements of child sexual assault V to a family member/social worker/doctor
- Forensic report identifying substance as a controlled substance/specifying weight
- Autopsy report on cause of death
- Chemical analyst’s affidavit in a DWI case
- Record prepared by evidence custodian to establish chain of custody



- *Crawford* does not apply to D's own statements
- Nor does it apply to D's evidence

- *Crawford* analysis is separate from hearsay analysis



Crawford Holding:

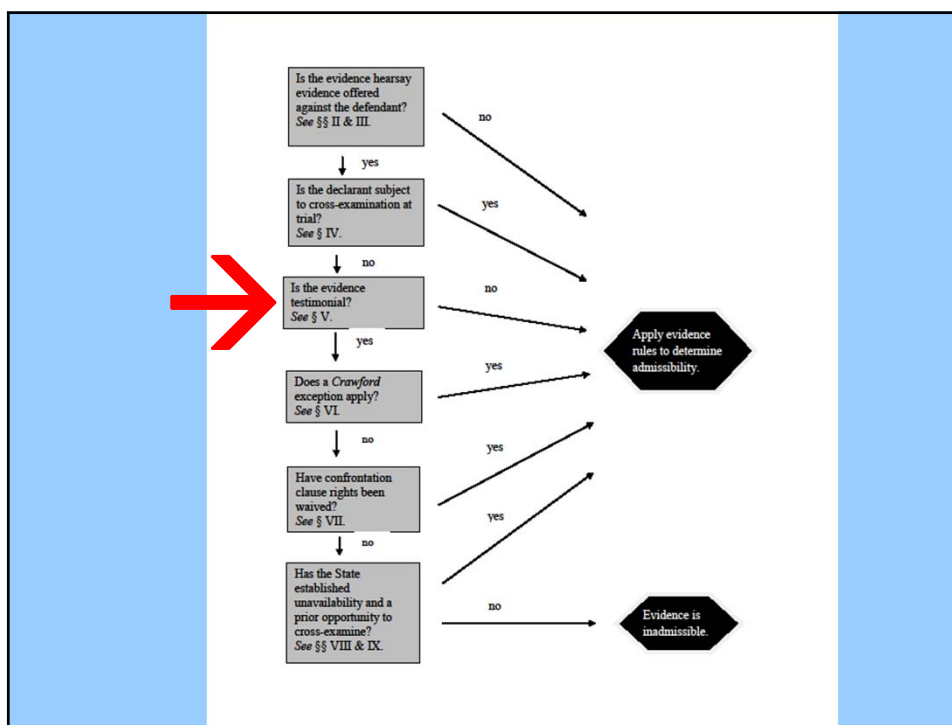
“Testimonial” hearsay statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and there has been a prior opportunity to cross examine.

What does it mean to
“be subject to cross-examination at
trial”?

Generally: Take the stand and
willingly answer questions.

What does it mean to “be subject to cross-examination at trial”?

- W who asserts privilege is not subject to cross-examination
- W who has memory lapse is



Is it testimonial?

Crawford said:

- Includes statements by those who “bear testimony” against the accused
- Testimony = a solemn declaration used to establish or prove some fact

Is it testimonial?

However, *Crawford* declined to comprehensively define the term

Is it testimonial?

- ✓ Police interrogation
 - of suspects
 - of victims

Davis/Hammon Rule:

(1) Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.*

Davis/Hammon Rule:

(2) They are *testimonial* when the circumstances objectively indicate that there is no such ongoing emergency, and that the *primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*

Davis Holdings:

(1) 911 call statements = nontestimonial

- V spoke about events as they were happening, not later
- V facing ongoing emergency
- Q&A necessary to resolve emergency (including ID of D)
- Formality lacking

Davis Holdings:

(2) V's statements to responding officers = testimonial

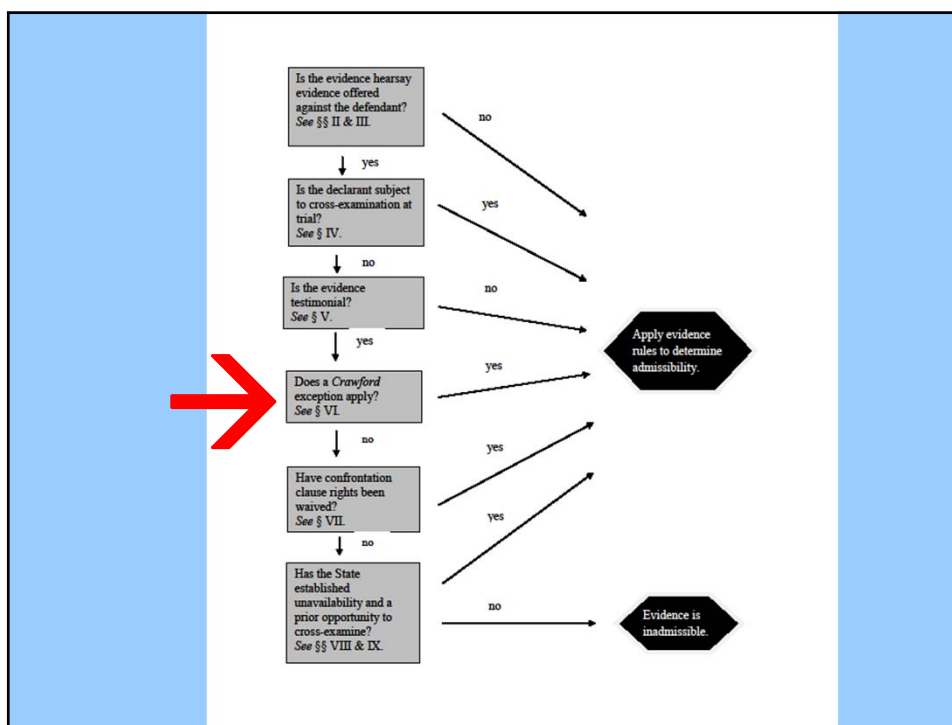
- Not much different from those in *Crawford*
- Interrogation was investigation of past conduct
- No ongoing emergency
- 2nd questioning
- Was “formal enough”

Is it testimonial?

- ✓ Police interrogation
 - of suspects
 - of victims
 - of witnesses

Is it testimonial?

- ✓ Police interrogation
- ✓ Forensic reports & affidavits
- ✓ Chain of custody evidence
- X Business records
- X Equipment maintenance records
- X Casual remark to an acquaintance



Crawford Exceptions:

1. Offered for a purpose other than the truth of the matter asserted
2. Forfeiture by wrongdoing
3. Dying declarations

Offered for
purpose other
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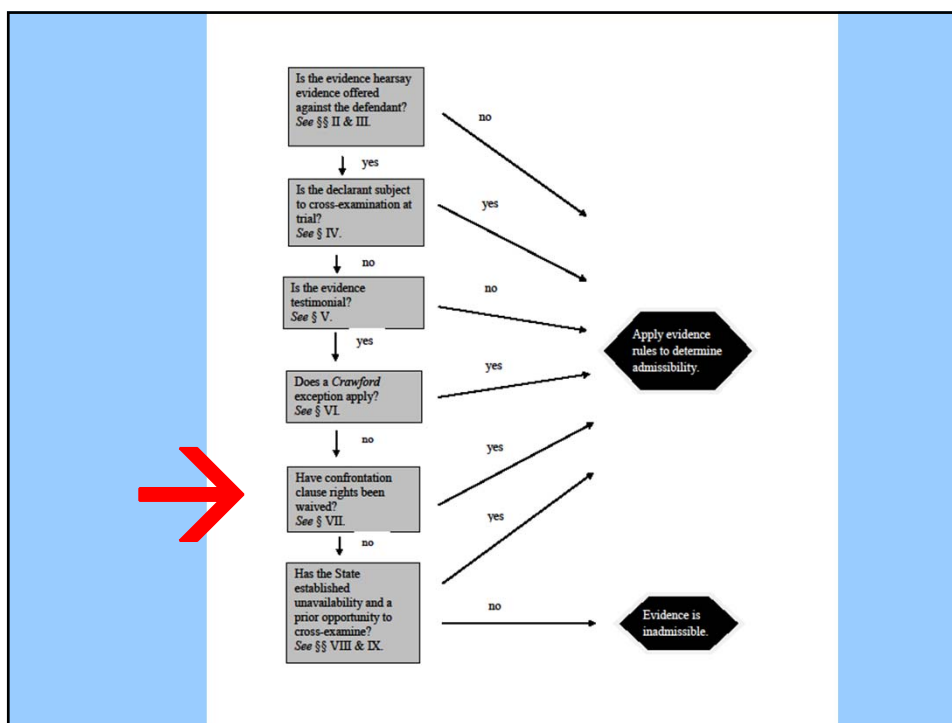
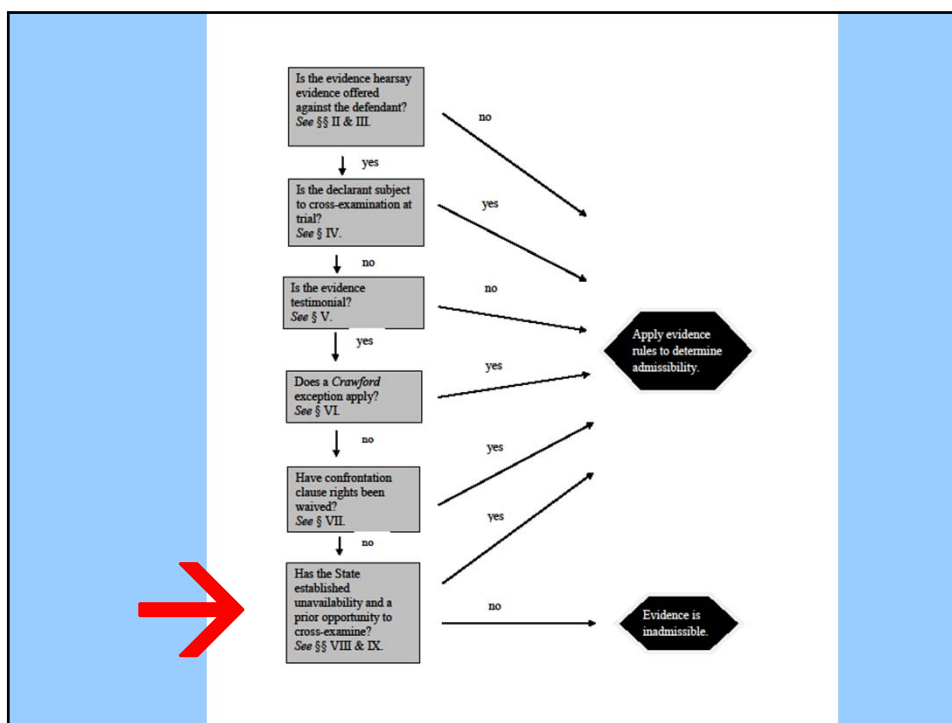


Table 1: North Carolina's Notice & Demand Statutes (for offenses committed on or after October 1, 2009)

Statute	Relevant Evidence	Proceedings	Time for State's Notice	Time for D's Objection/Demand
8-58.20(a)-(f)	Laboratory report of a written forensic analysis	Any criminal proceeding	No later than 5 business days after receipt or 30 days before the proceeding, whichever is earlier	Within 15 business days of receiving the State's notice
8-58.20(g)	Chain of custody statement for evidence subject to forensic analysis	Any criminal proceeding	At least 15 business days before the proceeding	At least 5 business days before the proceeding
20-139.1(c1)	Chemical analysis of blood or urine	Cases tried in district & superior court & adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
20-139.1(c3)	Chain of custody statement for tested blood or urine	Cases tried in district & superior court & adjudicatory hearings in juvenile court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
20-139.1(e1)-(e2)	Chemical analyst affidavit	Hearing or trial in district court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
90-95(g)	Chemical analyses in drug cases	All proceedings in district & superior court	At least 15 business days before the proceeding	At least 5 business days before the proceeding
90-95(g1)	Chain of custody statement in drug cases	All proceedings in district & superior court	At least 15 days before trial	At least 5 days before trial



Unavailability & Prior Opportunity to Cross-Examine

How does the State establish unavailability?

Need to show a good faith effort to obtain the witness's presence at trial

State needs to put on evidence.

Unavailability & Prior Opportunity to Cross-Examine

Prior Opportunity to cross-examine

- Prior trial
- Pretrial deposition?
- Probable cause hearing?

