

**Circuitous Thinking**

**by**

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This is the first of what is certain to be a sporadic series of columns addressing, principally, recent Second Circuit criminal law. I say “principally” because I undoubtedly will veer off-topic frequently, as different emerging issues pique my interest and overcome my intention, honorable as it is, to focus on the Circuit; witness this inaugural column.

Unless you’ve spent the last few months living in a rock shelter in Sri Lanka, you by now are well aware of the Supreme Court’s March 8<sup>th</sup> decision in Crawford v. Washington, 124 S.Ct. 1354. In Crawford, the Court, per Justice Scalia, takes a categorical approach to the Confrontation Clause and excludes “testimonial hearsay” by non-testifying persons unless the defendant had a previous opportunity to cross-examine the witness. In so holding, Crawford overrules Ohio v. Roberts, 448 U.S. 56, which broadly held that hearsay is admissible if it either falls within a

firmly rooted hearsay exception or bears independent indicia of reliability. “Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’ ” Crawford, 124 S.Ct. at 1370.

The Crawford Court has left to another day a full explication of the category of hearsay deemed “testimonial,” but the decision nonetheless suggests (or outright holds) it includes, at least, post-arrest confessions, preliminary hearing testimony, grand jury testimony, plea allocutions; and testimony at a previous trial. On the other hand (and not to rain on the parade), the Court’s categorical approach likely means that Confrontation Clause arguments may no longer be available (not that they were worth much, anyway) where the objected-to hearsay is not “testimonial” in character.

In holding as it did, Crawford overrules long-standing Second Circuit law, which routinely upheld the admission of all sorts of “reliable” hearsay, including – perhaps most notoriously – plea allocutions, which were routinely admitted to prove the existence of the charged conspiracy (though not the defendant’s membership therein). The Crawford Court specifically cited with disapproval United States v. Gallego, 191 F.3d 156 (2d Cir.

1999), admitting such evidence: "That inculpatory statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands." 124 S.Ct. at 1372.

Crawford, of course, is not the first time long-standing Second Circuit law has been upended by the Supreme Court. Other notable examples include United States v. Gaudin, 115 S.Ct. 2310 (1995) (materiality in false statements case must be decided by the jury); Bailey v. United States, 516 U.S. 137 (1995) (crime of "using" a firearm in relation to a drug trafficking charge under 18 U.S.C. § 924(c)(1) requires proof that defendant actually employed the gun in relation to the drug offense); and Apprendi v. New Jersey, 520 U.S. 466 (2000) (facts that increase the statutory maximum (other than the fact of a prior conviction) must be presented to the grand jury and proved to the fact finder beyond a reasonable doubt). To this extent,

Crawford reaffirms that we should continue to challenge unjust rules, even though they appear to be written in stone.

The three decisions cited above did not have the bombshell effect on previous convictions many thought they would, as procedural hurdles, narrow construction and harmless error analysis often got in the way. Nor have they substantially impacted the landscape going forward: materiality is rarely a serious issue in a false statements case; where the facts do not establish a defendant “used” the firearm the charge of “possession” may generally be substituted; and presenting to the grand jury and proving at trial facts used to increase the maximum sentence otherwise applicable is at most a minor nuisance to a prosecutor. Crawford might be different, as it disallows the use of numerous traditional forms of hearsay that often have devastating consequences. For example, plea allocutions of non-testifying witnesses are popular arrows in the prosecutorial quiver, and often hit their mark with lethal accuracy. Limiting instructions notwithstanding the jury gets the

message that the defendant and hearsay declarant were in cahoots.

In the future, counsel of course will be ready to object, under Crawford, to the admission of any testimonial hearsay uttered by someone not subject to cross-examination. But what relief is available to defendants who were tried and convicted before Crawford? Given the devastating impact of testimonial hearsay, many defendants will be able to show that Crawford error was not harmless. But the harmless error hurdle is often the least of the problems confronting a defendant seeking to apply new law to an old case. Unquestionably the rule announced in Crawford will apply to all cases, both state and federal, on direct appeal. Griffith v. Kentucky, 479 U.S. 314 (1987). But what if the issue was not preserved for review? Or if all direct appeals have been denied and the client's only hope is a first or successive habeas petition? The issues raised by these questions, and others, will eventually be sorted out. But here are some general principles and their likely application:

**Need for Objection.** If trial counsel in a federal case did not object to the introduction of testimonial hearsay (whether in the form of a plea allocution or otherwise) the Second Circuit will apply plain error analysis and require the defendant to show: (1) there was error; (2) the error was plain; and (3) the error affected the defendant's substantial rights, i.e. was prejudicial and affected the outcome of the proceedings. If these three criteria are satisfied the court considers whether the error seriously affects the fairness, integrity or public reputation of judicial proceedings. No question a court's admission of, say, the plea allocution of a non-testifying witnesses is error in light of Crawford and the error is "plain" because contrary to the law applicable at the time of the appeal. Furthermore, when the basis for the finding of error is an intervening decision that alters settled law, the Second Circuit will apply "modified plain error analysis" in which the government bears the burden of persuasion as to whether substantial rights have been affected. United States v. McLean, 287 F.3d 127 (2d Cir. March 28, 2002) (Cabranes). If these hurdles are met then the fourth factor, should not prove insurmountable. After all, the asserted violation resulted in the admission of (presumably) prejudicial hearsay in violation of bedrock Constitutional protections.

In state court appeals, the failure to preserve the issue will require counsel to invoke the Appellate Division's interests of justice jurisdiction under CPL § 470.15 subds. 3(c) and 6 and demonstrate that the error deprived the defendant of a fair trial.

**Collateral Proceedings.** Where a defendant has already lost his direct appeal(s) his recourse is a collateral attack, generally through a habeas corpus petition under 28 U.S.C. § 2254 for state defendants and § 2255 for federal defendants. Assuming the issue has been exhausted the principle issue is the retroactive application of Crawford. This issue plays out differently for state and federal defendants. A court considering the habeas petition of a federal defendant will apply the general principle that new rules of constitutional procedure are not (with two exceptions noted below) retroactive, but new rules of criminal substantive law are retroactive. Teague v. Lane, 489 US. 288 (1989). The difference between procedural and substantive rules is not always easily discerned, witness the Second Circuit's decision in Coleman v. United States, 329 F.3d 77 (2d Cir. 2003), where Chief Judge Walker and Judge Sack held that the Apprendi Court "clearly indicated that it was announcing

a procedural rule” and Judge Parker, in an opinion denominated a concurrence, flatly said “the Supreme Court's decision in [Apprendi] caused a substantive change in the law...” The Teague dichotomy is neatly demonstrated in Bilzerian v. United States, 127 F.3d 237 (2d Cir. 1997), where the holding of United States v. Gaudin, that materiality is a jury question in a false statements case was found to be a new rule of constitutional procedure and therefore not to be applied retroactively, but the holding of United States v. Ali, 68 F.3d 1468 (2d Cir. 1995), that materiality was as much an element of an offense under 18 U.S.C. § 1001(a)(2) as under § 1001(a)(1), was found to be a substantive rather than procedural rule, to be retroactively applied.

What about Crawford, which declares a new (or re-newed) interpretation of the Confrontation Clause? The Crawford rule will likely be viewed as a new rule of procedure, rather than a rule of substantive law and the presumption therefore would be against retroactivity. See Crawford 124 S.Ct. at 1359 (describing the right of confrontation as a “bedrock procedural guarantee”). A finding that Crawford states a new rule of procedural law is not,

however, necessarily fatal to a retroactivity argument for the usual rule of non-retroactivity will not apply to decisions placing conduct beyond criminal sanction or decisions that announce so-called “watershed rules” of criminal procedures. A powerful argument can be made that Crawford is, indeed, a “watershed rule” – rare as they are – that should be applied retroactively.

The Second Circuit in Coleman explained:

In order to be “watershed” under *Teague* 's second exception, a rule must not only “improv[e] the accuracy” of criminal proceedings, *Sawyer*, 497 U.S. at 242, 110 S.Ct. 2822, but also “alter our understanding of the bedrock procedural elements essential to the fairness” of those proceedings, *id.* at 241, 110 S.Ct. 2822; *accord Mandanici*, 205 F.3d at 528. “In short, it must be a ‘groundbreaking occurrence.’ ” *Mandanici*, 205 F.3d at 528 (quoting *Caspari v. Bohlen*, 510 U.S. 383, 396, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994)).

329 F.3d at 88.

A strong argument can be made that Crawford meets the watershed test. Justice Scalia, writing for the Crawford majority, repeatedly emphasized that the right of confrontation is a “bedrock procedural guarantee” that was intended to assure fairness and reliability: “Where testimonial statements are at

issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. 124 S.Ct. at .1374.

Thus a federal prisoner encumbered by a conviction obtained through the use of testimonial hearsay has a colorable habeas argument. But what about state defendants? Their road to habeas relief is substantially imperiled by the AEDPA., 28 U.S.C. § 2254(d)(1) sharply restricts the availability of habeas relief to those claims the adjudication of which

resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Courts have interpreted the quoted language to refer to the federal law that existed at the time of the initial state court decision on direct appeal, and therefore would not even permit the retroactive application of a subsequent decision where the state defendant's conviction is final. See, e.g., Daniels v. Lee, 316 F.3d 477, 491 n.12 (4th Cir. 2003). In other words, a state court decision relying on Ohio v. Roberts would not be considered "contrary to... clearly established Federal law" notwithstanding that Roberts was thereafter overruled by Crawford. This harsh result reflects the substantial respect accorded to final state court rulings, and the policy decision to permit states to avoid the endless and expensive litigation which would occur were this not the rule.

There is, however, a small ray of hope for state defendants. Although § 2254(d)(1) seems to foreclose Crawford's retroactive application, § 2244(b)(2) arguably (but not definitively) permits a successive § 2254 petition by a state prisoner to be brought where, inter alia, "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme court that was previously unavailable." To be sure there appears to be tension between § 2254(d)(2) and § 2244(b)(2); it hardly makes sense to

permit the retroactive application of a new decision in a successive habeas petition but not in a first habeas petition. The analysis is further complicated by the Supreme Court's decision in Horn v. Banks, 536 U.S. 266 (2002), which requires courts considering s§ 2254 petitions to first subject the petition to Teague analysis. The interplay between sections 2244 and 2254 has not been definitively resolved, however, and the hope provided by § 2244(b)(2) may, in any event, prove ephemeral, as the Supreme Court has yet to hold one of its decisions to be retroactive under § 2244.

For now, counsel's obligation to old clients is to examine whether a Crawford issue exists and then determine whether some relief might be available. A certain creativity is encouraged here: If an arguably meritorious Crawford issue was not preserved, is there an ineffectiveness claim available? Are you still within time to file a petition for rehearing in the Appellate Division or the Second Circuit? Is the client still within time to file a cert petition on authority of Crawford? Can you move in the Second Circuit to recall the mandate in reliance on Crawford? Should a state defendant first re-litigate the confrontation issue under CPL Article 440, arguing that the state court should apply Crawford retroactively? If a previously filed habeas petition is still pending, can you move to amend the petition with your Crawford argument? Can you get around lack of state court preservation by arguing cause and prejudice in the federal court based on the previous non-assailable authority of Ohio v. Roberts?

Crawford has obvious and profound implications but its full import will not become clear for years, as cases further define "testimonial hearsay" and courts consider how, if at all, its holding is to be applied retroactively.