

The Framers' Sixth Amendment Prescriptions: Cross-Examination and Counsel of Choice

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Introduction

The Sixth Amendment does not require mere reliability or fairness, but rather that reliability and fairness be tested in a particular manner, by cross examination and counsel of choice respectively.

The 2006 term included significant Sixth Amendment cases including the first Supreme Court case on confrontation¹ since *Crawford v. Washington*² and two Court of Appeals for the Armed Forces (CAAF) cases on the business records exception after *Crawford*.³ Two confrontation cases decided early in the 2007 term also require brief mention, though a detailed analysis will wait for further developments in the law.⁴ In addition to the confrontation cases, the Supreme Court decided a case that spells out the meaning of the right to counsel.⁵

This article reviews the Confrontation Clause analysis for testimonial hearsay statements in the wake of *Crawford*, including the reasoning followed by most courts, including the CAAF, for nontestimonial hearsay statements.⁶ The article then describes the Supreme Court's reasoning regarding statements made during police interrogation in *Davis v. Washington*⁷ before covering the military courts' treatment of documentary evidence under the business records exception to the hearsay rules in *United States v. Magyari*⁸ and *United States v. Rankin (Rankin I)*.⁹ Finally, this article addresses *United States v. Gonzalez-Lopez*, where the Supreme Court further defined the meaning of the Sixth Amendment right to counsel.¹⁰

Confrontation Clause Analysis Before and After *Crawford*¹¹

Before *Crawford* was decided in 2004, confrontation clause analysis was governed by *Ohio v. Roberts*,¹² decided in 1980. *Roberts* held that a hearsay statement must possess sufficient indicia of reliability to be admitted into evidence.¹³ There were two methods available for showing indicia of reliability, either the statement fell within a firmly rooted hearsay exception, or the statement possessed particularized guarantees of trustworthiness.¹⁴ The idea was that if a statement possessed sufficient indicia of reliability, then cross examination would add nothing to the search for truth, and could therefore be dispensed with.

In order to find that a statement possessed particularized guarantees of trustworthiness, a court could consider non-exclusive factors including spontaneity and consistent repetition, mental state of the declarant, use of terminology unexpected

¹ "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

² 541 U.S. 36 (2004).

³ *United States v. Rankin (Rankin I)*, 63 M.J. 552 (N-M. Ct. Crim. App. 2006); *United States v. Magyari*, 63 M.J. 123 (2006).

⁴ *Whorton v. Bockting*, 127 S. Ct. 1173 (2007); *United States v. Rankin (Rankin II)*, 64 M.J. 348 (2007).

⁵ *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006).

⁶ *Ohio v. Roberts*, 448 U.S. 56 (1980).

⁷ *Davis v. Washington*, 126 S. Ct. 2266 (2006).

⁸ 63 M.J. 123.

⁹ *Rankin I*, 63 M.J. 552 (N-M. Ct. Crim App. 2006).

¹⁰ 126 S. Ct. 2557.

¹¹ *Crawford v. Washington*, 541 U.S. 36 (2004); see Major Robert Wm. Best, *To Be or Not To Be Testimonial? That Is the Question: 2004 Developments in the Sixth Amendment*, ARMY LAW., Apr. 2005, at 65 (providing a more detailed look at *Crawford*).

¹² 448 U.S. 56 (1980).

¹³ *Id.* at 66.

¹⁴ *Id.*

of a child of similar age, lack of motive to fabricate, use of open-ended, non-leading questions, repeated emphasis on truthfulness, and declarations against the declarant's interest.¹⁵ Importantly, a court was limited to the circumstances surrounding the making of the statement when analyzing its reliability.¹⁶ Extrinsic evidence was not permitted.¹⁷

Crawford changed the analysis by describing two distinct categories of hearsay statements, testimonial and nontestimonial.¹⁸ *Crawford* holds that testimonial hearsay cannot be admitted unless the declarant is unavailable and there has been a prior opportunity for cross examination.¹⁹ The *Crawford* Court conducted a historical analysis of confrontation and determined that the right to cross examination was intended to combat the abuses inherent in the civil law system of criminal procedure, particularly the use of ex parte affidavits against an accused.²⁰

The *Crawford* Court did not define the term "testimonial," in fact they specifically left its definition for later development.²¹ They did, however, describe three forms of core testimonial evidence: (1) ex-parte in court testimony, (2) extrajudicial statements in formalized trial materials, and (3) statements made under circumstances that would cause a reasonable witness to believe they could be used later at trial.²² The first two forms are fairly straightforward in application, however, the third form has resulted in controversy.²³

The Court also discussed various factors that would indicate that a statement was testimonial. The involvement of government agents in production of a statement, for example, tends to lead to the conclusion that the statement is testimonial.²⁴ Statements made to police officers in the course of interrogations are the most prominent example of this type of testimonial statement.²⁵ The Court acknowledged there was more than one definition of the term interrogation, and noted that under the facts in *Crawford*, statements "knowingly given in response to structured police questioning," would qualify under any definition.²⁶ Categorizing statements made in response to police interrogation was precisely the issue addressed by the Court this term in *Davis*.²⁷

On the other hand, the Court also described factors that would militate against a statement being categorized as testimonial. One example given by the Court of a statement that would not be considered testimonial was a remark made to a casual acquaintance.²⁸ Another example was a statement that would qualify for admission under the business records exception to the hearsay rules.²⁹ This became the focus of military caselaw this term in *Rankin I*³⁰ and *Magyari*.³¹

¹⁵ Idaho v. Wright, 497 U.S. 805, 821 (1990) (providing factors for use in analyzing the reliability of hearsay statements made by child witnesses in child sexual abuse cases); United States v. Ureta, 44 M.J. 290, 296 (1996) (giving examples of factors to consider when looking at the circumstances surrounding the making of a hearsay statement when the declarant is unavailable).

¹⁶ Wright, 497 U.S. at 819.

¹⁷ This was confusing to many lawyers and judges, since this limit on extrinsic evidence only applied to the Confrontation Clause analysis. Once a statement passed the Confrontation Clause hurdle, extrinsic evidence was perfectly acceptable for analysis under the hearsay rules. Another source of confusion in military caselaw is the fact that the CAAF has stretched the meaning of circumstances surrounding the making of the statement to include statements made close in time, yet before the actual making of a particular statement in at least one case. See United States v. Ureta, 44 M.J. 290 (1996).

¹⁸ Crawford v. Washington, 541 U.S. 36, 51 (2004).

¹⁹ Id. at 68.

²⁰ Id. at 50.

²¹ Id.

²² Id. at 51-52.

²³ Much post-Crawford litigation has been focused on the meaning of the third form of core testimonial statements. See Richard D. Friedman, Symposium: Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Grappling with the Meaning of "Testimonial," 71 BROOK. L. REV. 241 (Fall 2005).

²⁴ Crawford, 541 U.S. at 53.

²⁵ Id. at 52.

²⁶ Id. at 53.

²⁷ Davis v. Washington, 126 S. Ct. 2266 (2006).

²⁸ Crawford, 541 U.S. at 51.

²⁹ Id.

³⁰ Rankin I, 63 M.J. 552 (N-M. Ct. Crim. App. 2006).

³¹ United States v. Magyari, 63 M.J. 123 (2006).

*Davis v. Washington*³²

In his concurrence to the opinion in *Crawford*,³³ then Chief Justice Rehnquist described the Court's treatment of testimonial hearsay as follows:

The Court grandly declares that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” . . . But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of “testimony” the Court lists, . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.³⁴

Following the court's opinion in *Crawford*, many practitioners believed the Court would define the term testimonial in their next confrontation case, which turned out to be *Davis*.³⁵ Unfortunately the Court limited its holding in *Davis* to the situation of police interrogation, and left open almost as many questions as it answered.³⁶

Davis was actually a two-case opinion, covering both *Davis v. Washington* and *Hammon v. Indiana*.³⁷ Both cases involve statements taken during police interrogation, following domestic disputes. These statements were later admitted at trial in lieu of live witness testimony.³⁸

In *Davis v. Washington*, Michelle McCottry called 911 but hung up before speaking to anyone during an ongoing altercation with her former boyfriend, Davis.³⁹ When the 911 dispatcher reversed the call and reached McCottry, she asked a series of questions that elicited responses, including the facts that the former boyfriend was still there, that he was jumping on McCottry, and that his name was Davis.⁴⁰ The police responded, arriving a few minutes later, and observed that McCottry appeared upset and looked like she had sustained recent injuries.⁴¹ McCottry failed to appear at trial, and the accused was convicted based on the transcript of the 911 phone call⁴² and the testimony from the police officers who responded to the scene.

In *Hammon v. Indiana*, police responded to a reported domestic disturbance and found Amy Hammon standing on the porch, while her husband remained inside the house.⁴³ Police interviewed Amy in the living room, while her husband was kept physically separated from her in the kitchen.⁴⁴ Amy jotted down a brief statement alleging that her husband had hit her and broken furniture during the earlier altercation.⁴⁵ When she failed to appear at the bench trial, the judge considered both the testimony of the officer who interviewed her at the scene, and the handwritten “affidavit,” written by Amy that night.⁴⁶

³² *Davis*, 126 S. Ct. 2266.

³³ *Crawford*, 541 U.S. at 69 (Rhenquist, C.J., concurring).

³⁴ *Id.* at 75.

³⁵ *Davis*, 126 S. Ct. 2266.

³⁶ *Id.* at 2273-74.

³⁷ *Id.* at 2266.

³⁸ *Id.*

³⁹ *Id.* at 2270.

⁴⁰ *Id.* at 2271.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Hammon v. Indiana*, 126 S. Ct. 2266, 2272 (2006).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

The issue in both cases was whether statements made during the police interrogations⁴⁷ (i.e., the 911 call made in *Davis* and the officer testimony in *Hammon*) are inadmissible testimonial hearsay statements under *Crawford v. Washington*.⁴⁸ The Court held in *Davis* that:

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. 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.⁴⁹

The Court in *Davis* compared the facts of the two cases contained therein to the facts of *Crawford*.⁵⁰ *Crawford*, itself, involved the classic case of police interrogation at the station house,⁵¹ however these two cases present more difficult questions about what situations qualify as police interrogation and whether the statements derived from them are considered testimonial.⁵² The Confrontation Clause applies only to testimonial hearsay, that is, statements made by witnesses against the accused, those who bear testimony.⁵³ “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”⁵⁴ That said, not every statement made to a government official, or even every statement made during an “interrogation” should be considered testimonial.⁵⁵

In analyzing *Davis v. Washington*, the Court cited four differences between the interrogations in *Crawford* and *Davis* respectively.⁵⁶ First, McCottry was describing events as they occurred, where Sylvia Crawford was describing past events.⁵⁷ Second, McCottry was facing an ongoing emergency, her assailant was still present, while Crawford was making her statement from the police station.⁵⁸ Third, the questions asked of McCottry were necessary to resolve the emergency, rather than just to learn what had already occurred from Crawford.⁵⁹ Finally, the statement made by McCottry was completely informal, frantically answering the dispatcher on the phone, whereas Crawford was calmly answering police questions at the station house.⁶⁰ From these comparisons, the Court concluded that the circumstances surrounding the interrogation in *Davis* objectively indicate that its primary purpose was to summon police assistance in response to an ongoing emergency, rather than to gather evidence for future use at trial.⁶¹ The Court also points out that an interrogation might begin with the primary purpose of enabling a police response to an emergency and later evolve into a testimonial statement, and that courts can address these situations through motions in limine and redacting testimonial portions of statements.⁶²

The Court had an easier time with the interrogation in *Hammon v. Indiana*, noting that although the situation was less formal than that in *Crawford*, the interrogation was nonetheless conducted by a police officer after the emergency had passed, and was directed toward the investigation of past events.⁶³ The police arrived and questioned the parties while keeping them

⁴⁷ *Davis*, 126 S. Ct. at 2274 n.2. The Court reasoned that even if the 911 operator is not a member of the police, he or she is at least an agent of the police such that questioning should be considered police interrogation. *Id.*

⁴⁸ *Id.* at 2270 (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

⁴⁹ *Id.* at 2273-74.

⁵⁰ *Id.* at 2276-77.

⁵¹ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁵² *Davis*, 126 S. Ct. at 2270.

⁵³ *Id.* at 2274.

⁵⁴ *Crawford*, 541 U.S. at 51.

⁵⁵ *Davis*, 126 S. Ct. at 2274.

⁵⁶ *Id.* at 2276-80.

⁵⁷ *Id.* at 2276.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2277.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Hammon v. Indiana*, 126 S. Ct. 2266, 2278 (2006).

physically separated.⁶⁴ The statements given in *Hammon* and *Crawford* are similar to statements the government would likely elicit on direct examination at trial, and are inherently testimonial.⁶⁵ The Court explained that exigencies surrounding initial police response to an emergency might often mean that initial inquiries could produce non-testimonial statements, but in cases like *Hammon*, where the scene is secure and there is no ongoing emergency, even initial inquiries will be considered testimonial.⁶⁶

Justice Thomas concurred in the judgment in *Davis*, and dissented in *Hammon*.⁶⁷ He argued that only statements possessing some degree of formality ought to be considered testimonial, as the closest approximation in modern times to the ex parte examination evils the Confrontation Clause was designed to guard against.⁶⁸

The Supreme Court opinion in *Davis* is important to judge advocates because although the holding was limited to circumstances of police interrogation, some courts, including the CAAF, have applied the primary purpose analysis used in *Davis* to their own consideration of testimonial statements in other circumstances in other cases.⁶⁹

*United States v. Rankin (Rankin I)*⁷⁰

In *Rankin I*, the appellant began a period of unauthorized absence in 1993, and returned more than seven years later.⁷¹ He was convicted of violating Article 86, Uniform Code of Military Justice (UCMJ),⁷² and sentenced to ninety-one days confinement and a Bad Conduct Discharge (BCD).⁷³ The government's case consisted of several personnel records documenting appellant's absence, and two live witnesses who testified for the purpose of laying the foundation for admission of the documents.⁷⁴ There was no live witness testimony by anyone with first-hand knowledge of the circumstances surrounding appellant's unauthorized absence.⁷⁵

The issue in the case was whether the documentary evidence admitted against appellant at trial violated his Sixth Amendment right to confront the witnesses against him.⁷⁶ In other words, the case examined whether service records documenting appellant's absence should be considered testimonial hearsay requiring unavailability and a prior opportunity for cross-examination for admissibility.⁷⁷ The Navy-Marine Corps Court of Appeals (NMCCA) held that the service record entries documenting the appellant's period of unauthorized absence were not testimonial statements for the purposes of the Confrontation Clause.⁷⁸

In so holding, the court first reviewed the Confrontation Clause analysis after *Crawford*, observing that the first step in the analysis is whether a statement is testimonial or non-testimonial.⁷⁹ In determining the personnel documents were non-testimonial, the court looked at three factors.⁸⁰ First, the documents admitted were routine personnel accountability

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 2279.

⁶⁷ *Id.* at 2281 (Thomas, J., dissenting).

⁶⁸ *Id.* at 2282.

⁶⁹ See, e.g., *Rankin II*, 64 M.J. 348 (2007); *People v. Hrubecky*, No. 2006RI005491, 2006 N.Y. Misc. LEXIS 3859 (N.Y. Crim. Ct. Dec. 13, 2006); *N.J. v. Buda*, 912 A.2d 735 (N.J. Super. Ct. App. Div. 2006); *State v. Alvarez*, 143 P.3d 668 (Ariz. Ct. App. 2006).

⁷⁰ *Rankin I*, 63 M.J. 552 (N-M. Ct. Crim. App. 2006).

⁷¹ *Id.* at 553.

⁷² UCMJ art. 86 (2005).

⁷³ *Rankin I*, 63 M.J. at 552.

⁷⁴ *Id.*

⁷⁵ *Id.* at 553.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 554.

⁷⁹ *Id.* at 553 (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

⁸⁰ *Id.* at 554.

documents, not prepared by the prosecution or police in preparation for trial.⁸¹ Second, the primary purpose for these documents was administrative, rather than evidentiary.⁸² Third, the information contained in the documents was mainly objective in nature, i.e. times, places, and identifying data.⁸³ Any subjective or narrative data contained in the documents was redacted before admission.⁸⁴ After deciding the documents were non-testimonial, the court then followed the *Ohio v. Roberts*⁸⁵ indicia of reliability analysis and found that the documents fell within a firmly rooted hearsay exception, the business records exception.⁸⁶

The CAAF first considered admission of documentary evidence under the business records exception post-*Crawford* in *United States v. Magyari*, a case involving admission of a urinalysis lab report.⁸⁷

*United States v. Magyari*⁸⁸

The facts in *Magyari* replicate the typical urinalysis based drug case in the military today. Appellant's urine sample tested positive for methamphetamine after a random urinalysis conducted on 12 February 1998.⁸⁹ The only evidence presented at trial was the lab report, three chain of custody witnesses involved in the collection of the sample, and a civilian quality assurance officer from the lab.⁹⁰ The civilian witness from the lab testified about the procedures followed at the testing facility in general, however, he did not personally participate in testing appellant's sample.⁹¹

The issue presented was whether, in light of *Crawford*, appellant was denied his Sixth Amendment right to confront the witnesses against him where the government's case consisted solely of appellant's positive urinalysis.⁹² In other words, did the lab reports constitute testimonial hearsay statements, such that the declarants, i.e. the lab technicians that tested the sample and produced the reports, should be required to testify at court-martial.⁹³

The CAAF held that "in the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not 'testimonial' in nature."⁹⁴

The CAAF began its reasoning by reviewing the Supreme Court's analysis in *Crawford*.⁹⁵ In *Crawford*, the Supreme Court held that a testimonial statement can only be admitted against an accused if the declarant is present at trial or there has been a prior opportunity for cross-examination.⁹⁶ However, if a statement is considered nontestimonial, then admissibility is still governed by whether the statements possess sufficient indicia of reliability.⁹⁷ The Court did not provide a comprehensive definition of testimonial versus nontestimonial, but it did identify three forms of core testimonial evidence: (1) ex-parte in court testimony, (2) extrajudicial statements in formalized trial materials, and (3) statements made under

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 448 U.S. 56 (1980).

⁸⁶ *Rankin I*, 63 M.J. at 555.

⁸⁷ *Magyari*, 63 M.J. 123 (2006).

⁸⁸ *Id.*

⁸⁹ *Id.* at 124.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁹⁶ *Id.* at 68.

⁹⁷ *Magyari*, 63 M.J. at 127 (citing *Ohio v. Roberts*, 448 U.S. 56 (1980)).

circumstances that would cause a reasonable witness to believe they could be used at trial.⁹⁸ The Court also provided a few examples of testimonial hearsay, including prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and police interrogations.⁹⁹ The question in *Magyari* was whether the lab reports should be considered testimonial or nontestimonial.¹⁰⁰ Appellant argued that the reports were testimonial, falling under the third *Crawford* category as statements made in preparation for trial, since the lab technicians would have known that the reports could be used later at trial.¹⁰¹ The Government argued that the lab reports were business records and, by their nature, nontestimonial.¹⁰² The CAAF found that under the circumstances of this case, the lab reports were nontestimonial business records.¹⁰³ Importantly, however, the court refused to say that all lab reports would be considered nontestimonial.¹⁰⁴ In dicta, the court laid out some scenarios where lab reports might be considered testimonial (e.g., where an accused is already under investigation, and where testing is initiated by the prosecution to discover incriminating evidence).¹⁰⁵ The court even cited civilian cases where lab reports were considered testimonial, including where the government sought to admit DNA evidence in a rape case and an affidavit prepared by hospital personnel in a DUI case.¹⁰⁶

Magyari is important because it considers the classic military drug use case based on random urinalysis testing and finds the lab reports nontestimonial. If the court had held otherwise, then military prosecutors would be forced to call multiple witnesses from the lab to testify in an otherwise straightforward drug use court-martial. Aside from its holding, the *Magyari* opinion also sheds light on the CAAF's thinking regarding when lab reports might be considered testimonial.¹⁰⁷ Government counsel should not be lulled to sleep by the holding in *Magyari*, and defense counsel should sit up and take note, because given different facts, it seems clear that the CAAF is prepared to find a lab report testimonial in the future, even if it would otherwise qualify under the hearsay rules for admission as a business record.¹⁰⁸

Besides the confrontation cases already discussed, another aspect of the Sixth Amendment was addressed by the Supreme Court last term in *United States v. Gonzalez-Lopez*.¹⁰⁹ In *Gonzalez-Lopez*, the Court ruled that the Sixth Amendment right to counsel guarantees not just the presence of counsel, but counsel of choice, when a defendant does not require appointed counsel.¹¹⁰

*United States v. Gonzalez-Lopez*¹¹¹

In *Gonzalez-Lopez*, respondent was charged with conspiracy to distribute a hundred kilograms of marijuana.¹¹² His family hired a lawyer, John Fahle, to represent him.¹¹³ Respondent subsequently chose another attorney, Joseph Low, to represent him instead.¹¹⁴ Both lawyers represented respondent at an evidentiary hearing, where Low's provisional

⁹⁸ *Crawford*, 541 U.S. at 51-52.

⁹⁹ *Id.* at 52.

¹⁰⁰ *Magyari*, 63 M.J. at 126.

¹⁰¹ *Id.*

¹⁰² *Id.* at 127. The *Crawford* opinion contains language citing documents admitted under the business records exception to the hearsay rules as an example of statements that were by their very nature nontestimonial. *Crawford*, 541 U.S. at 56.

¹⁰³ *Magyari*, 63 M.J. at 128.

¹⁰⁴ *Id.* at 127.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing *People v. Rogers*, 8 A.D.3d 888, 891 (N.Y. App. Div. 2004), and *Las Vegas v. Walsh*, 91 P.3d 591, 595 (Nev. 2004), *modified by* 100 P.3d 658 (Nev. 2004)).

¹⁰⁷ *Id.*

¹⁰⁸ The ACCA recently found a lab report testimonial where the report identified marijuana as the substance obtained after appellant had been arrested. *United States v. Williamson*, 65 M.J. 706, 718 (Army Ct. Crim. App. 2007).

¹⁰⁹ *Gonzalez-Lopez*, 126 S. Ct. 2557 (2006).

¹¹⁰ *Id.* at 2560.

¹¹¹ *Gonzalez-Lopez*, 126 S. Ct. 2557.

¹¹² *Id.* at 2560.

¹¹³ *Id.*

¹¹⁴ *Id.*

appearance was accepted by the magistrate on condition he immediately file for admission pro hac vice.¹¹⁵ Later, during that same hearing, the magistrate revoked Low's provisional appearance on grounds that he violated a court rule against double teaming on cross by passing a note to the other lawyer.¹¹⁶ A few days later, respondent decided he only wanted Low to represent him, and Low filed an application for pro hac vice admission.¹¹⁷ This application was denied by the district court and by the Eighth circuit on appeal.¹¹⁸ Attorney Fahle, meanwhile, filed a motion to withdraw and for sanctions against Low, accusing Low of contacting his client without his consent in violation of the rules of professional conduct.¹¹⁹ Low countered with a motion to strike.¹²⁰ The district court granted Fahle's motion to withdraw and denied Low's motion to strike explaining that it had denied his motion for pro hac vice admission because Low had violated the rule against communicating with a represented party in a separate case before it.¹²¹ Respondent eventually hired a local attorney, Karl Dickhaus, to represent him.¹²² Low made another application for admission and was again denied.¹²³ Low was also not permitted contact with respondent other than the night before the last day of trial.¹²⁴ At trial, respondent was represented by Mr. Dickhaus and, found guilty.¹²⁵ After trial, the district court granted Fahle's motion for sanctions against Low for violating the rule against contacting represented parties.¹²⁶ Respondent appealed, and the Eighth circuit vacated the conviction, holding that the district court had misinterpreted the rule against contacting represented parties in both this case and in the matter it relied upon in denying Low's application for pro hac vice admission.¹²⁷ The district court's denials were therefore erroneous and violated respondent's Sixth Amendment right to paid counsel of his choosing.¹²⁸

The issue decided by the Court was whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction?¹²⁹ The Court answered in the affirmative and held that a trial court's erroneous deprivation of a criminal defendant's choice of counsel does entitle him to reversal of his conviction.¹³⁰

The Court has previously held that a defendant that does not require appointed counsel has the right to be defended by any otherwise qualified counsel who he can afford or who is willing to represent him.¹³¹ The government agreed that the respondent in this case was deprived of his right to choose his counsel, however, the government contended that the violation is not complete unless defendant can show that substitute counsel was ineffective under *Strickland v. Washington*.¹³² The argument was basically that if the trial was fair, then the respondent's rights were not violated. This government argument was similar to the state of confrontation law before *Crawford v. Washington*, where a statement could satisfy the Confrontation Clause by merely possessing indicia of reliability sufficient to find it trustworthy.¹³³ In *Crawford*, the Court, said confrontation does not just require that evidence be reliable, but that it be tested in a particular fashion, i.e. cross-examination.¹³⁴ In the same way, the right to counsel of choice does not merely guarantee a fair trial, but instead that a

¹¹⁵ *Id.* Low was a California attorney; however, the case was in the United States District Court for the Eastern District of Missouri, thus he needed to be admitted pro hac vice in order to represent Gonzalez-Lopez. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* A U.S. Marshall sat between Low and the respondent at trial to make sure there was no contact between the two. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 2561.

¹²⁸ *Id.*

¹²⁹ *Id.* at 2560.

¹³⁰ *Id.* at 2566.

¹³¹ *Id.* at 2561 (citing *Wheat v. United States*, 486 U.S. 153 (1988), and *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989)).

¹³² *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). *Strickland* requires ineffective conduct and prejudice.

¹³³ *Crawford v. Washington*, 541 U.S. 36 (2004) (citing *Ohio v. Roberts*, 448 U.S. 56 (1980)).

¹³⁴ *Id.* at 69.

particular guarantee of fairness be provided, i.e. that the accused choose who is to defend him.¹³⁵ The Court reasoned that deprivation of the right to counsel of choice is complete when the accused is prevented from being represented by the lawyer he chooses, regardless of the quality of representation he ends up with.¹³⁶

Looking Ahead: *United States v. Rankin (Rankin II)*¹³⁷ and *Whorton v. Bockting*¹³⁸

Two cases decided after the end of the 2007 term require brief mention due to their potential for immediate impact on military jurisprudence. The CAAF delivered its opinion in *Rankin II*, refining their analysis of testimonial hearsay statements after *Crawford* and *Davis*.¹³⁹ In February, the Supreme Court delivered an opinion in *Whorton* that may affect the analysis of nontestimonial hearsay statements.¹⁴⁰

The NMCCA opinion in *Rankin I*¹⁴¹ was detailed above; however, the CAAF opinion in the same case was released 31 January 2007.¹⁴² The CAAF affirmed the lower court, finding that three of the four documents introduced by the government were nontestimonial, and that although the fourth may have qualified as testimonial, the information it contained was cumulative with information in the other three.¹⁴³ In analyzing the four documents, the CAAF conducted a three factor analysis, looking first at prosecution involvement in the making of the statement.¹⁴⁴ Second, the court asked whether the reports merely catalogued unambiguous factual matters.¹⁴⁵ And third, the court used a primary purpose analysis derived from *Davis v. Washington*.¹⁴⁶ After using the three factors to find that three of the four documents were nontestimonial, the court went on to conduct the confrontation analysis from *Ohio v. Roberts*¹⁴⁷ to conclude that the documents were properly admitted under the business records exception to the hearsay rules.¹⁴⁸

This case is important because it describes an analysis for determining whether documents are testimonial, and uses a primary purpose test derived from *Davis* as part of that analysis. Interestingly, although *Davis* itself was limited to the circumstances of police interrogation, the CAAF in *Rankin II* used the primary purpose test outside the context of police interrogation in determining whether a statement was testimonial.¹⁴⁹

Also of significance in the CAAF opinion in *Rankin II* is the fact that the court conducted the *Roberts* Confrontation Clause analysis after finding three of four statements to be nontestimonial.¹⁵⁰ This is consistent with the CAAF's previous

¹³⁵ *Gonzalez-Lopez*, 126 S. Ct. at 2562.

¹³⁶ *Id.* at 2563.

¹³⁷ *Rankin II*, 64 M.J. 348 (2007).

¹³⁸ *Whorton*, 127 S. Ct. 1173 (2007).

¹³⁹ *Rankin II*, 64 M.J. at 352.

¹⁴⁰ *Whorton*, 127 S. Ct. 1173.

¹⁴¹ *Rankin I*, 63 M.J. 552 (N-M. Ct. Crim. App. 2006).

¹⁴² *Rankin II*, 64 M.J. 348.

¹⁴³ *Id.* at 352. The three nontestimonial documents were: PE5, a letter from the command to the appellant's mother, notifying her that he was an unauthorized absentee; PE 6, a computer generated document known as a "page 6," that showed the date the unauthorized absence began; and PE 10, a copy of a naval message informing recipients that appellant had been apprehended. The testimonial document, PE 11, was a copy of a notice for civilian law enforcement to the effect that appellant was a deserter and asking for assistance in apprehending him. *Id.* at 350.

¹⁴⁴ *Id.* at 352.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Ohio v. Roberts*, 448 U.S. 56 (1980).

¹⁴⁸ *Rankin II*, 64 M.J. at 353.

¹⁴⁹ *Id.* at 352.

¹⁵⁰ *Id.* at 353 (citing *Roberts*, 448 U.S. 56).

jurisprudence in confrontation after *Crawford*;¹⁵¹ however, the continued vitality of the *Roberts* analysis is in question following the Supreme Court's reasoning in *Whorton*.¹⁵²

Whorton v. Bockting is a case about the retroactive effect of *Crawford* on cases final after direct review, but considered in a collateral proceeding.¹⁵³ While an important issue because of the possible impact of having to relook a multitude of cases, a more fundamental issue is apparently resolved at the end of the opinion. *Crawford* clearly overruled *Roberts* where it applied to testimonial statements, although the opinion left open its effect on nontestimonial statements.¹⁵⁴ The opinion in *Whorton* contains language that indicates nontestimonial statements no longer require Confrontation Clause analysis.¹⁵⁵

The holding in *Davis* described when a statement made during police interrogation would qualify as testimonial.¹⁵⁶ The court found that the statement in *Davis v. Washington* was nontestimonial¹⁵⁷ while the statement in *Hammon v. Indiana* was testimonial.¹⁵⁸ For *Hammon*, that was the end of the line, however for *Davis*, presumably the confrontation analysis in *Roberts* was still required. Yet the Court did not analyze the statement under *Roberts* at all, but simply affirmed the judgment of the Washington state Supreme Court.¹⁵⁹ There currently appears to be a split in state and federal courts on whether Confrontation Clause analysis is required at all for nontestimonial statements after *Crawford*.¹⁶⁰ The CAAF, however, has held that nontestimonial statements still require confrontation analysis under *Roberts*.¹⁶¹ The controversy appears to have been resolved by the Court in *Whorton*.¹⁶²

In its analysis of whether the procedural rule announced in *Crawford* is a watershed rule requiring retroactive application,¹⁶³ the Court in *Whorton* stated:

Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.¹⁶⁴

The holding in *Whorton* is that *Crawford* is not retroactive to cases already final on direct review, however, part of the basis for that holding is that *Crawford's* impact on criminal procedure is equivocal.¹⁶⁵ *Crawford* results in the admission of fewer testimonial statements, while exempting nontestimonial statements from confrontation analysis entirely.¹⁶⁶ Thus, it is not clear that in the absence of *Crawford* the likelihood of an accurate conviction was seriously diminished under the *Roberts*

¹⁵¹ *Crawford v. Washington*, 541 U.S. 36 (2004); *United States v. Scheurer*, 62 M.J. 100 (2005); *United States v. Magyari*, 63 M.J. 123 (2006); see Major Michael R. Holley, "It Was Impossible to Get a Conversation Going, Everybody Was Talking Too Much": Synthesizing New Developments in the Sixth Amendment's Confrontation Clause, *ARMY LAW.*, June 2006, 1, 15.

¹⁵² *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

¹⁵³ *Id.*

¹⁵⁴ *Crawford*, 541 U.S. at 68.

¹⁵⁵ *Whorton*, 127 S. Ct. 1173.

¹⁵⁶ *Davis v. Washington*, 126 S. Ct. 2266 (2006).

¹⁵⁷ *Id.* at 2277.

¹⁵⁸ *Id.* at 2280.

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., *United States v. Tolliver*, 454 F.3d 660 (7th Cir. 2006) (finding that *Davis* holds that nontestimonial hearsay is not subject to the Confrontation Clause); but see *Harkins v. State*, 143 P.3d 706 (Nev. 2006) (finding that nontestimonial statements are subject to analysis under *Roberts*).

¹⁶¹ *Ohio v. Roberts*, 448 U.S. 56 (1980). See *Rankin II*, 64 M.J. 348 (2007); *United States v. Magyari*, 63 M.J. 123 (2006); *United States v. Scheurer*, 62 M.J. 100 (2005).

¹⁶² *Whorton*, 127 S. Ct. 1173.

¹⁶³ The general rule on retroactivity of new rules comes from *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* says a new rule applies retroactively in a collateral proceeding only if the rule is substantive or is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of a criminal proceeding. *Id.* In order to qualify as watershed, a new rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction, and must alter the understanding of the bedrock elements essential to the fairness of a proceeding. *Id.*

¹⁶⁴ *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

analysis.¹⁶⁷ Since the Crawford rule did not significantly alter the fundamental fairness of criminal proceedings, it is not considered a watershed rule requiring retroactive effect on cases already final on direct review.¹⁶⁸

It seems unlikely that CAAF will continue to require the *Roberts* analysis for nontestimonial hearsay statements after *Whorton*, although for the time being that is still the law in courts-martial.¹⁶⁹ More detailed analysis is almost certain in next year's symposium, undoubtedly with military confrontation cases decided after *Whorton*.

Conclusion

Last term was an important one for Sixth Amendment jurisprudence, particularly in the Confrontation Clause arena. The Supreme Court, in *Davis*, gave us a little more guidance on how to determine whether a statement is testimonial,¹⁷⁰ as did the CAAF in the military context in *Rankin I*.¹⁷¹ The Court also precisely defined the meaning of the right to counsel in *Gonzalez-Lopez*.¹⁷² The CAAF decided two cases prior to *Davis*¹⁷³ and one after,¹⁷⁴ which further developed its confrontation analysis after *Crawford*. Perhaps most importantly, though decided after the 2006 term, the Court made it clear in *Whorton* that confrontation clause analysis is no longer required at all for nontestimonial statements.¹⁷⁵

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See *Rankin II*, 64 M.J. 348 (2007); *United States v. Magyari*, 63 M.J. 123 (2006); *United States v. Scheurer*, 62 M.J. 100 (2005).

¹⁷⁰ *Davis v. Washington*, 126 S. Ct. 2266 (2006).

¹⁷¹ *Rankin I*, 63 M.J. 552 (N-M. Ct. Crim. App. 2006); *Magyari*, 63 M.J. 123.

¹⁷² *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006).

¹⁷³ *Rankin I*, 63 M.J. 552; *Magyari*, 63 M.J. 123.

¹⁷⁴ *Rankin II*, 64 M.J. 348.

¹⁷⁵ *Whorton v. Bockting*, 127 S. Ct. 1173, 1178 (2007).