Crawford v. Washington, 541 U.S. 36 (2004): Flow Chart

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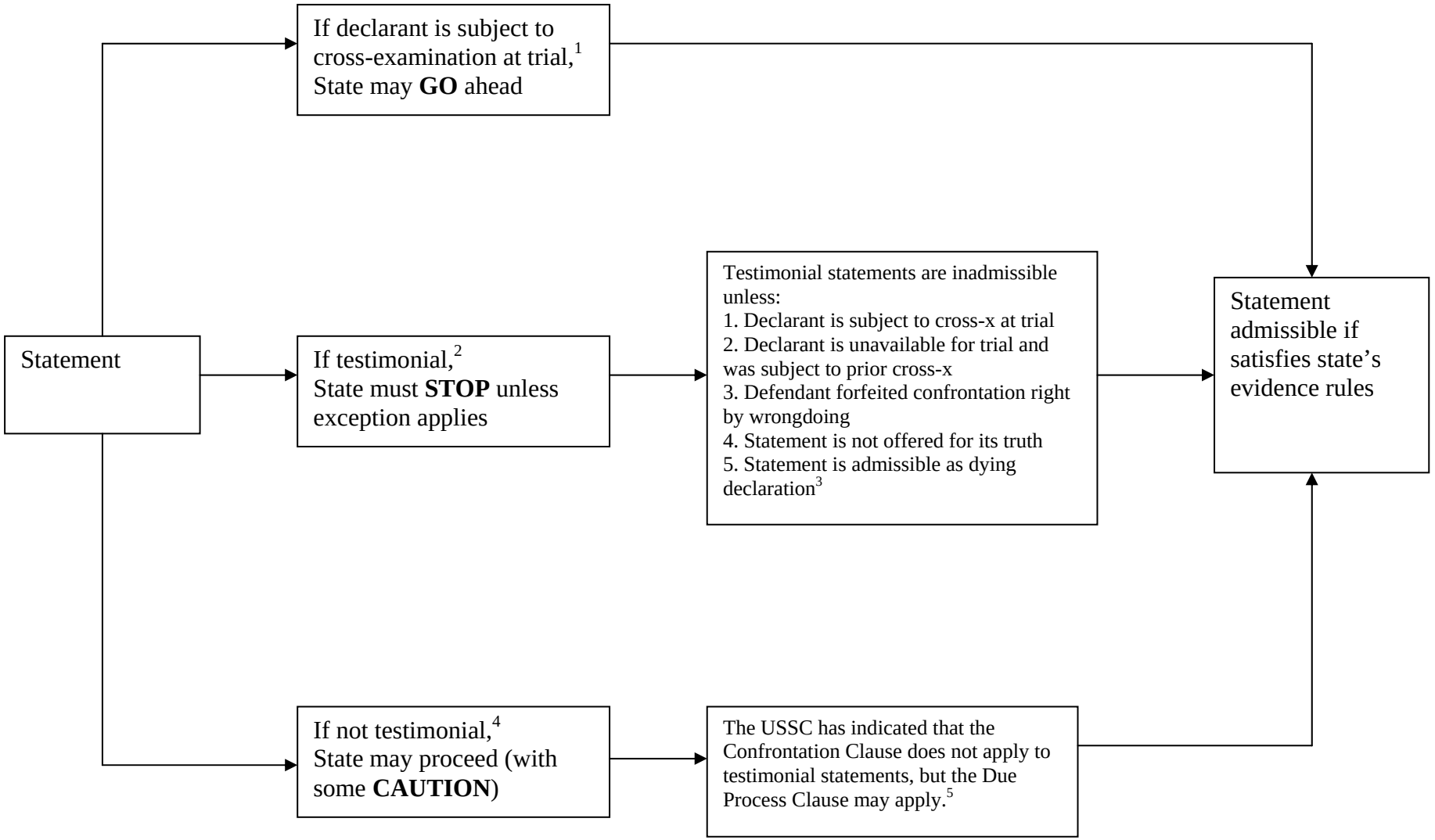

Notes to *Crawford* Flow Chart

1. If the declarant successfully invokes a privilege against testifying or the judge unduly interferes with cross-examination, then the declarant would not be subject to cross-examination and the Confrontation Clause would not be satisfied.

2. The *Crawford* court gave the following as possible definitions of testimonial statements: *ex parte* in-court testimony or its functional equivalent, extrajudicial materials contained in formalized testimonial materials, and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. The Court gave the following examples of statements that are testimonial: prior testimony at a preliminary hearing, before a grand jury, or at a former trial; affidavits and depositions; police interrogations (used in a colloquial rather than technical, legal sense); and plea allocutions. *See also Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266 (2006) (considers circumstances in which questioning by police and agents of police results in testimonial statements).

3. A testimonial statement no longer satisfies the Confrontation Clause merely because it falls within a firmly-rooted exception to the hearsay rule. If testimonial, a statement is admissible only if it satisfies one of the exceptions identified in *Crawford.* The *Crawford* court stated (without deciding the issue) that testimonial dying declarations might be admissible but found that such statements are *sui generis* and did not adopt any other hearsay exceptions as grounds for admitting testimonial statements.

4. The *Crawford* court gave the following as examples of non-testimonial statements: an off-hand, overhead remark; a casual remark to an acquaintance; business records; and statements in furtherance of a conspiracy.

5. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the U.S. Supreme Court held that the Confrontation Clause bars admission of an unavailable witness's statement if the statement does not bear "adequate indicia of reliability." To meet that test, the evidence either had to fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The *Crawford* court overruled the *Roberts* test for testimonial statements but did not resolve whether that test continued to apply to non-testimonial statements. The North Carolina Court of Appeals thereafter held that *Roberts* continued to govern the admissibility of non-testimonial statements under the Confrontation Clause. *See* State v. Blackstock, 165 N.C. App. 50 (2004). The U.S. Supreme Court has since indicated that non-testimonial statements are not subject to the Confrontation Clause. *Davis*, 126 S. Ct. at 2273. The admissibility of such evidence may still be governed by the Due Process Clause (as well as the state's own hearsay and other evidence rules).

For an in-depth analysis of developments since the issuance of *Crawford*, *see* Jessica Smith, *Crawford v. Washington: Confrontation One Year Later* (Apr. 2005), posted at http://www.iog.unc.edu/pubs/electronicversions/pdfs/crawford.pdf, and Jessica Smith, *Emerging Issues in Confrontation Litigation: A Supplement to Crawford v. Washington*: Confrontation One Year Later (Mar. 2007), posted at http://www.sog.unc.edu/pubs/electronicversions/pdfs/crawfordsuppl.pdf.