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Justices to Decide When Victims' Transcripts Can Be Used

By LINDA GREENHOUSE

The Supreme Court agreed on Monday to address a major new debate in criminal law and decide the circumstances under which prosecutors can use the transcripts of 911 calls, and similar unprompted statements by crime victims, as evidence at trial.

The debate was opened by the court itself in a decision last year that significantly limited the use that prosecutors could make of statements by witnesses who did not appear at trial or otherwise make themselves available for cross-examination.

In that decision, Crawford v. Washington, the court ruled by a vote of 9 to 0 that if such a statement was "testimonial" in nature, it could not be introduced at trial, in the absence of the witness, unless the defendant had a previous chance to cross-examine the witness, such as in a formal deposition. The problem with the Crawford decision was that the court did not say what it meant by "testimonial," instead deferring the definition for a later day.

That day has now arrived, none too soon for prosecutors and defense lawyers who have been complaining about growing uncertainty over an issue that arises in courtrooms every day. The Supreme Court's decisions, in the two cases it accepted on Monday for argument in March, will govern proceedings in state and federal courtrooms. The decisions will require the justices to interpret the Sixth Amendment's "confrontation clause," which gives defendants the right to confront their accusers.

It was this right that Justice Antonin Scalia, in his opinion for the court in the Crawford case, said was inadequately protected by the decision that the Crawford ruling overturned. The earlier decision, Ohio v. Roberts, from 1980, permitted the use of statements from absent witnesses as long as the trial judge regarded the statement as having "adequate indicia of reliability."

The Constitution's framers would not have permitted such a flexible interpretation of the confrontation guarantee, Justice Scalia said. "They were loath to leave too much discretion in judicial hands," he said.

Since the Crawford decision, in March 2004, there has been a lack of consensus among state and lower federal courts over what makes a witness's unprompted statement "testimonial" and subject to the new limitation. Some courts used a subjective test, asking whether the witness intended to incriminate someone, in which case the statement was testimonial and entitled the defendant to confrontation, or was simply calling for help, in which case the statement could be admitted at trial.

But this is a "demonstrably false dichotomy," the lawyer for the defendant in one of the cases the court accepted on Monday told the justices in his brief. The lawyer, Jeffrey L. Fisher, of Davis Wright

Tremaine in Seattle, successfully argued the Crawford case.

Now representing a man from Kent, Wash., who was convicted of violating a protective order by assaulting a woman who identified him by name to a 911 operator, Mr. Fisher said in his brief that 911 calls typically represent both a desire to get help and to assist the police. "The typical caller wants some kind of help and probably realizes she is making statements that might reasonably be used for investigative or prosecutorial purposes," the brief said, adding that the subjective test adopted by the Washington Supreme Court "invites judicial manipulation and idiosyncratic decision making, the very problems" created by the earlier precedent.

In the Washington State case, Davis v. Washington, No. 05-5224, the assault victim, Michelle McCottry, did not appear at the trial of Adrian Davis, the man she had identified to the 911 operator as her assailant. Instead, the prosecutor played the 911 tape, on which she gave precise details of the man's identity, including his middle name and date of birth. The Washington Supreme Court upheld the conviction on the ground that the identification was "nontestimonial and properly admitted."

The second case the court accepted, Hammon v. Indiana, No. 05-5705, does not involve a 911 call, but rather statements made to the police who came to a couple's home to investigate a report of a domestic disturbance. Amy Hammon told the police that her husband, Hershel, had pushed, shoved and punched her, and she signed a statement making those allegations.

She did not appear at the trial, at which the trial judge ruled her statement admissible. The Indiana Supreme Court upheld Mr. Hammon's conviction for domestic battery on the ground that "responses to initial inquiries by officers arriving at a scene are typically not testimonial."

In Mr. Hammon's Supreme Court appeal, his lawyer, Richard D. Friedman, a professor at the University of Michigan Law School, is urging the justices to rule that any accusation that a reasonable person would expect to be used to help prosecute the accused is testimonial and subject to the Crawford decision.