EXAMINERS' ANALYSIS OF QUESTION NO. 3

1. Anita's statement to Chelsea is not testimonial hearsay. In *Crawford v Washington*, 541 US 36 (2004), the United States Supreme Court held, among other things, that the accused's Sixth Amendment right to confrontation applied only to "testimonial" statements. While the Court did not supply a complete definition for "testimonial" statements or present an exclusive list of examples, it did provide a general measuring rod for determining whether a given statement would be classified as "testimonial."

As *Crawford* stated, the Confrontation Clause applies to "witnesses" who "bear testimony." *Crawford*, 541 US at 51. "Testimony in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* (internal quotations and citation omitted). Significantly, *Crawford* observed, "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." *Id.* Stated slightly differently, "In determining whether statements are testimonial, we ask whether the declarant 'intend[ed] to bear testimony against the accused . . .[such that] a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.'" *US v Johnson*, 581 F3d 320, 325 (CA 6, 2009), quoting *US v Cromer*, 389 F3d 662, 675 (CA 6, 2004).

Under *Crawford* and its progeny, Anita's statement would not be considered testimonial. It does not fit as a statement of a witness bearing testimony against the accused. It was not intended for use at trial; indeed Anita told Chelsea <u>not</u> to tell anyone about what she said she saw. Additionally, it was made at lunch, to a friend, and not to a police officer or governmental official.

2. The Sixth Amendment gives a criminally accused the right to confront the witnesses against him. This right to confrontation includes the right to cross-examination of the witness. If hearsay testimony is sought to be introduced, that testimony must be characterized as "testimonial" for the confrontation right to apply. *Crawford, supra*. The introduction of testimonial hearsay violates an accused's right

to confrontation if the declarant is unavailable and the accused had no prior opportunity for confrontation.

Harris did not forfeit his rights under the Confrontation Clause by his wrongdoing. It is true enough that an accused can forfeit his right to confrontation through wrongdoing causing the witness's unavailability. *Giles v California*, 554 US 353 (2008). The forfeiture by wrongdoing doctrine "has its roots in the common law maxim that 'no one should be permitted to take advantage of his wrong'." *People v Burns*, 494 Mich 104, 111 (2013) quoting *Giles*, 554 US at 359, 366.

The forfeiture by wrongdoing doctrine, however, requires more than just a wrongful act producing the witness's absence. Rather, "For a defendant to forfeit his confrontation right, the defendant must have had 'in mind the particular purpose of making the witness unavailable'." *Burns*, 494 Mich at 112, quoting *Giles*, 554 US at 367. This is tantamount to a specific intent to cause the witness to be unavailable by the act of wrongdoing.

Applying the foregoing principles to the facts provided in the question yields the conclusion that the prosecutor's argument for inclusion of Anita's statement is unpersuasive. Clearly the Sixth Amendment confrontation right is applicable because both prosecution and defense agree Anita's statement to police is testimonial. Second, it is clear that Harris's killing of Anita caused her to be absent and unavailable for trial. (Indeed, Harris maintains self-defense, implicitly conceding he killed her.)

But where the prosecutor's argument fails is on the question of intent. The limited facts do not come close to the demanding requirements of *Giles* that, for the forfeiture by wrongdoing doctrine to apply, the defendant must have had "in mind the particular purpose of making the witness unavailable." *Giles*, 554 US at 367. The prosecutor's argument cannot be squared with *Giles* and should be rejected.