

National
I M P A C T

The seal of the Prosecuting Attorneys' Council of Georgia is centered in the background. It is a circular emblem with the text "PROSECUTING ATTORNEYS' COUNCIL OF GEORGIA" around the top and "1776" at the bottom. The seal is rendered in a light, faded teal color.

Crawford v. Washington

Produced by the
Prosecuting Attorneys' Council of Georgia
Legal Services Division

July 2004



National Impact: *Crawford v. Washington*

July Overview

National Impact: *Crawford v. Washington* updates are published monthly, and consist of a short summary of each case that rules on a piece of evidence based on the *Crawford* standards, with particular attention being paid to the “testimonial” versus “nontestimonial” distinction. The purpose of this publication is to make the prosecution community aware of how courts around the nation are treating the evidentiary standards announced in the *Crawford* decision.

This publication is prepared by the Trial Support Division under the direction of Joseph F. Burford with assistance and research provided by the summer interns, Erin O’ Mara and Logan Butler. The overview focuses on the evidentiary issues that are subject to the *Crawford* “testimonial” distinction. Page numbers are provided for easy reference. The overall publication begins with the federal courts listed numerically by district, followed by the State courts in alphabetical order. Should you have any questions or need assistance, contact Joseph F. Burford at 404-969-4001 or by e-mail at jburford@pac.state.ga.us.

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Issue: Pre-Crawford discussion of 'testimonial' in Justice Thomas' concurrence.

SUPREME COURT

White v. Illinois, 502 U.S. 346; 112 S. Ct. 736 (1992).

The defendant was convicted of sexual assault on a four year old girl. He alleged that the girl's statements were admitted in error because the girl did not testify at trial. The Court held that the statements were properly admitted under existing hearsay exceptions and that their admission did not violate the defendant's Confrontation Clause rights. In reaching this decision, the Court rejected the United States *amicus curiae* argument that the only statements that could be excluded by the Confrontation Clause were statements in the character of *ex parte* affidavits. However, Justice Thomas' concurrence finds the United States' argument more in line with the history of the Confrontation Clause. Although he does not agree with the narrowness of the United States' argument, he does opine that **"the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."** Justice Thomas also points out the inherent difficulty in attempting to determine if a statement was made in contemplation of legal proceedings.

Issue: Statements made to a confidential informant.

2nd Circuit – Court of Appeals

United States v. Saget, 2004 U.S. App. LEXIS 15529 (2d Cir. N.Y. July 28, 2004).

The defendant was convicted of conspiracy to traffic in firearms and firearms trafficking. At trial, statements made prior to arrest by the defendant's co-conspirator to a confidential government informant were introduced against the defendant. The co-conspirator did not testify at trial. The defendant now argues that the statements made to the confidential informant were testimonial and were admitted in violation of his confrontation rights. The court held that the statements to the confidential informant were not testimonial because the co-conspirator did not know that the informant was working for the government; rather, he thought he was recruiting another conspirator. In reaching this decision, the court reasoned that **"the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial."**

Issue: Co-conspirator's plea allocutions.

United States v. McClain, 2004 U.S. App. LEXIS 15528 (2d Cir. N.Y. July 28, 2004).

The defendants were convicted of money laundering, wire fraud, interstate



transportation of stolen property, and conspiracy to commit money laundering and wire fraud. At trial, the plea allocutions of three other co-conspirators were introduced against the defendants as evidence of the conspiracy. The defendants alleged that the introduction of the allocutions violated their confrontation rights. The court agreed but held that in light of all the other evidence the admission of the allocutions was harmless error.

Issue: An expert's opinion formed by reviewing out-of-court statements.

2nd Circuit - U.S. District Court

Howard v. Walker, 2004 U.S. Dist. LEXIS 14425 (W.D.N.Y. July 28, 2004).

In his habeas petition, the defendant alleged that *Crawford* prevents any prosecution expert from testifying where that expert formed his opinion based on his review of out-of-court statements. The court declined to extend *Crawford* to prevent an expert in a criminal case from ever reviewing non-testimonial statements in forming an opinion.

Issue: Expert witness testimony.

6th Circuit – U.S. District Court.

United States v. Stone, 2004 U.S. Dist LEXIS 12873 (E.D. Tenn. July 8, 2004).

This memorandum was issued by the court to clarify its ruling during the trial regarding the extent to which the government's expert witness could testify during the upcoming tax fraud case. The defense alleged that the expert had formulated her opinion by examining testimonial statements of witnesses that were made without the defense having the opportunity to confront those witnesses. As such, the expert opinion violated the Confrontation Clause. The court ruled that the Confrontation Clause was not violated and that *Crawford* was not implicated because the testimonial statements were not being used to prove the truth of the matter asserted but were merely used by the expert to reach an opinion.

Issue: Victim's statements to government agents and acquaintances.

7th Circuit – U.S. District Courts

United States v. Mikos, 2004 U.S. Dist. LEXIS 13650 (N.D. Ill. July 15, 2004).

The government sought, in limine, the admission of statements made by the murder victim to agents from the United States Department of Health and Human Services

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and to several of her friends and family members. The court determined that the statements made to the government agents were testimonial in nature because the agents obtained the statements as part of their Medicare fraud investigation of the defendant. Under *Crawford*, these statements are not admissible. The court found that the statements made by the victim to her friends and family were not testimonial and did not implicate the rule in *Crawford*.

Issue: Co-defendant's statements to his mother.

8th Circuit – Court of Appeals

United States v. Lee, 2004 U.S. App. LEXIS 14079 (8th Cir. Ark. July 8, 2004).

Defendants Lee and Kehoe were convicted for three murders and various RICO violations. On appeal, defendant Lee argued that statements made by defendant Kehoe to his mother were testimonial because they were confessional, detailed, and made to an individual who allegedly later became an agent of the government. The court held that these statements did not fall into any of the categories of testimonial statements outlined in *Crawford* and that the nature of the statements did not implicate the core concerns of the Confrontation Clause. Therefore, the statements were not barred under *Crawford*.

Issue: Statements made by a confidential informant used to obtain a search warrant.

9th Circuit – Court of Appeals

United States v. Dunbar, 2004 U.S. App. LEXIS 14917 (9th Cir. Cal. July 19, 2004).

The defendant was convicted of possession with intent to distribute cocaine and various firearms offenses. On appeal, he argued that his right to confront witnesses against him was violated when a police officer testified that on the night of this arrest he was under surveillance so that the police could execute a valid search warrant against him. The search warrant was obtained based on information provided by a confidential informant whose identity was not disclosed. The actual statements of the confidential informant were not disclosed by the officer at trial. The court held that although the defendant did not get to confront the confidential informant, his confrontation rights were not violated because no testimonial evidence provided by the confidential informant was ever introduced into evidence.

Issue: Victim's statements to the investigating police officer.

California

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People v. Adams, 2004 Cal. App. LEXIS 1188 (Cal. App. 3d Dist. July 22, 2004).

The defendant was convicted of assault, criminal threats, and false imprisonment. The victim did not show up for trial. The only testimony about the events in question came from the medical technicians who treated the victim and the police officer who interviewed her about the events. The defendant successfully argued that the victim's statements to the police officer were testimonial and should have been excluded at trial. The court reversed the convictions.

Issue: Victim's statement to police during a "pre-investigative fact finding" interview.

People v. Cage, 2004 Cal. App. LEXIS 1121 (Cal. App. 4th Dist. July 15, 2004).

Defendant's 15 year old son received a severe laceration across his face and neck. A police officer was dispatched to the defendant's house after a 911 call reported a fight there between a mother and her son. The officer saw some broken glass on the floor and the defendant with some small cuts on her hand. The officer testified that he had no reason to believe a crime had been committed after he concluded his stop at the house. A short while later the officer went to the hospital to talk to the defendant's son who was there for medical treatment of his neck injury. The son told the officer about a fight he had with his mother and that she had purposefully cut him with a large piece of broken glass. The son was unavailable for trial.

The son's hearsay statements to the officer were admitted at trial. The court held that the statements made by the victim at the hospital were not testimonial pursuant to *Crawford*. The court reasoned that police questioning is not necessarily police interrogation. Here, there was no structured questioning. The officer just asked the victim to tell his story. Also, the officer had not yet determined if a crime had been committed, there was no suspect under arrest, and no trial was contemplated. This statement was not admitted in error. However, the victim later told his same story to the same officer during a recorded interview at the police station. The court held that this statement was testimonial and should not have been admitted at trial but its admission was harmless error. Judgment affirmed.

Issue: Prior opportunity to cross where the defendant's previous attorney was disqualified for an actual conflict of interest.

Connecticut

State v. Crocker, 83 Conn. App. 615; 2004 Conn. App. LEXIS 292 (2004).

The defendant was convicted of murder. Defendant's first attorney was disqualified after the probable cause hearing because it was discovered that he was also representing an eyewitness to the victim's murder. At the second probable cause hearing a witness refused to testify causing the State to admit his testimony from the first probable cause hearing. The defendant argues that due to his first attorney's actual conflict of

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interest he was not provided with an adequate opportunity to confront the witness during the first probable cause hearing. The court reviewed the transcript from the first probable cause hearing and made a factual determination that the defendant's first attorney conducted an adequate and thorough cross examination of the witness. The defendant's right of confrontation was not violated.

Issue: Statement made during a police interview that was overheard by the victim's mother not testimonial if related by mother at trial.

Florida

Somervell v. State, 2004 Fla. App. LEXIS 11330 (Fla. Dist. Ct. App. 5th Dist. July 30, 2004).

The defendant was convicted of attempted lewd and lascivious conduct with a minor. One of the alleged victims was a ten year old autistic child. Due to the autism, the court ruled that the child was unavailable to testify. The state introduced the child's testimony through the police officer who interviewed the child at the Child Advocacy Center. **The court stated that the admission of this testimonial statement would normally be considered error in light of *Crawford*. However, here it was not because the victim's mother overheard the child's statements to the officer and the mother testified to those statements at trial.** The court concluded that statements that a mother hears from her autistic child do not fit within any of the categories of testimonial evidence stated in *Crawford*. Furthermore, the court concluded that the admission of the officer's testimony relating to this child was merely cumulative and therefore harmless error. Judgment affirmed.

Issue: Unavailable child's statements to child protective worker and police officer.

Minnesota

State v. Courtney, 2004 Minn. App. LEXIS 768 (Minn. Ct. App. 2004).

The defendant was convicted of assault against his girlfriend. The girlfriend's six year old daughter gave a videotaped statement to a child protective worker and police officer regarding her account of the events at issue. The daughter was unavailable to testify and the state introduced the videotaped statement at trial. The court found the statements to be testimonial because the sole purpose of the interview was to develop the case against the defendant. The police officer even stopped the interview to direct the child protective worker to ask more specific questions about the guns the daughter saw. Under these circumstances, the testimonial statements of the daughter should not have been admitted. The court also found that the admission of the statements constituted harmful error which required a new trial.



Issue: Police request for a 'co-conspirator' to tape a conversation with her other 'co-conspirator'.

In re Welfare of J.K.W., 2004 Minn. App. LEXIS 783 (Minn. Ct. App. July 6, 2004).

J.K.W. was adjudicated delinquent for aiding and abetting terroristic threats by encouraging her friend to call in a bomb threat to their school. During the investigation, the caller told the police that J.K.W. had encouraged her to make the call. The police officer then suggested that the caller should record a conversation with J.K.W. in order to get her to admit her involvement with the bomb threat. The caller did not testify at J.K.W.'s trial but the taped conversation was admitted as evidence against J.K.W. On appeal, J.K.W. argues that the taped conversation was admitted in violation of her confrontation rights. **The court held that because a police officer encouraged the caller to tape the conversation in order to incriminate J.K.W., the caller's statements were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial.** Therefore, the statements are testimonial and were admitted in error. The court ruled that the error was harmful and remanded for a new trial.

Issue: Child sexual assault victim's statements to her attending physician.

Nebraska

State v. Vaught, 2004 Neb. LEXIS 122 (2004).

The defendant was convicted of sexual assault on a child. The victim told the doctor who performed her examination that her uncle DJ had touched her inappropriately. At trial, the doctor testified to the child's identification of the perpetrator. The doctor also testified that it was important to his assessment of the patient to learn who the perpetrator was to make sure that he did not release the victim back into the custody of the perpetrator and to assist him in treating the patient's mental well-being. The court held that these statements were not testimonial because they were made for the explicit purpose of obtaining medical treatment and were not made in anticipation of litigation. Judgment affirmed.

Issue: Murder victim's statements to wife and daughter while in hospital expecting to make a full recovery.

North Carolina

State v. Blackstock, 2004 N.C. App. LEXIS 1168 (N.C. Ct. App. July 6, 2004).

The defendant was convicted of robbery, murder, and felony murder. While robbing a convenience store, the defendant shot the store owner in the upper right chest.

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The owner's injury was treated at the hospital and his condition improved. However, five days after being shot he developed an infection and died. Testimony at trial indicated that the gun shot wound was the proximate cause of the victim's death. While in the hospital, the victim described the events of the robbery and shooting to his wife and daughter. At trial, his wife and daughter testified to what the victim had told them. The defendant argued that the victim's statements to his wife and daughter were admitted in error. The court conducted a *Crawford* analysis and determined the statements to be non-testimonial because they were personal in nature and were made at a time when the victim's condition was improving. The court stated that the victim could have been expecting to testify at trial himself. Therefore, they were not made in anticipation of trial. However, the court then examined the statements utilizing *Roberts*, 448 U.S. 56 (1980), and held them inadmissible.

Issue: Statements made by defendant's wife to investigating officer.

Washington

State v. Fischer, 2004 Wash. App. LEXIS 1708 (Wash. Ct. App. July 26, 2004).

The defendant was convicted of first degree murder with aggravating factors. At trial, the investigating officer testified to statements that the defendant's wife had made to him during his investigation. On appeal, the defendant argues that the admission of those hearsay statements violated his right to confrontation. The court assumed that admitting the statements violated the defendant's constitutional right to confrontation but found that any error was harmless in light of the overwhelming evidence of the defendant's guilt. Judgment affirmed.