

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

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National Impact: *Crawford v. Washington*

September 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 PAC interns, Susan Treadaway and Frank Pennington. 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: Admissibility of letter written by co-defendant to an intimate acquaintance. The court reviewed for plain error the court's refusal to give a limiting charge.

2nd Circuit – Court of Appeals

United States v. Morgan, 2004 U.S. App. LEXIS 20778 (2nd Cir. N.Y. Sept. 28, 2004).

Letter written by defendant to her boyfriend was admitted into evidence. For the first time, on appeal, one defendant argued that it was improperly admitted hearsay against her co-defendant and that the jury should therefore have been instructed not to consider it with respect to the charges against her. Because the ground that the co-defendant urges here is different from the ground that was argued on her behalf to the district court, this court reviewed for plain error. The court noted that the letter was not written in response to police questioning and thus not in a coercive atmosphere. The letter was written by a co-defendant to an intimate acquaintance in the privacy of her hotel room. The co-defendant had no reason to expect that it would ever find its way into the hands of the police. Thus, the Court held that the letter was non-testimonial hearsay and was trustworthy.

Issue: Prosecutor's connection of defendant to unnamed individual in redacted coconspirator confession found to be harmless error where ample evidence provided connection.

United States v. Damti, 2004 U.S. App. LEXIS 19139 (2nd Cir. N.Y. Sept. 13, 2004).

Redacted confession of co-conspirator was admitted into evidence through the testimony of a federal agent. During this testimony, the agent replaced defendant's name with vague references to an unnamed individual who owned the moving business. During closing argument, the prosecutor made it clear that the individual was the defendant. The Court approved of the use of the redacted confession under *Crawford*, and found the prosecutor's link of the defendant to it was harmless error because by the time the link occurred there was ample evidence before the jury that the defendant was the owner of the allegedly fraudulent moving business.

Issue: Co-conspirator statements

3rd Circuit – Court of Appeals

Williams v. Superintendent SCI-Huntingdon, 2004 U.S. Dist. LEXIS 20056 (E.D. Pa. Sept. 30, 2004).

Defendant contended his confrontation rights were violated when a co-conspirator made an out-of-court statement to a bystander. The Court held that an "off-hand, overheard remark" from a co-conspirator to an acquaintance is outside the scope of *Crawford* and thus does not violate the Confrontation Clause.

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Issue: *Crawford* and sentencing hearings.

5th Circuit – Court of Appeals

United States v. Holder, 2004 U.S. App. LEXIS 19534 (5th Cir. Tex. Sept. 20, 2004).

Defendant contended his confrontation right was violated during his sentencing hearing. Noting that nothing in *Crawford* indicated it applied to sentencing hearings, the court, quoting *United States v. Navarro*, 169 F.3d 228, 236 (5th Cir. 1999), found “there is no Confrontation Clause right at sentencing.”

Issue: Photo array not introduced into evidence.

7th Circuit – Court of Appeals

United States v. Wheaton, 2004 U.S. App. LEXIS 18800 (7th Cir. Ind. Sept. 1, 2004).

During trial, a detective testified that an informant, who also testified, identified the defendant from a photo array including six photos. Defendant argued that, because the photo array was not introduced into evidence, he was denied the opportunity to show the lineup was unreliable and thus his right to confrontation was violated. The court called this argument “frivolous” noting that the lineup had no bearing on the defendant’s guilt as both men identified him at trial and further stated the defendant had an opportunity to cross-examine both the officer and informant regarding the array.

Issue: Effect of admission of non-testifying co-defendant’s statement which did not expressly or impliedly incriminate the defendant

8th Circuit – Court of Appeals

United States v. Rashid, 2004 U.S. App. LEXIS 19063 (8th Cir. Mo. Sept. 10, 2004).

Two statements of a non-testifying defendant were admitted into evidence at the joint trial of her and the appellant. One statement mentioned the appellant expressly, but did not refer to any of the charged crimes or to any wrong doing. The other statement did not mention him at all, either expressly or by implication. The court found these statements to be testimonial as they were made during an FBI interrogation and the defendant had no prior opportunity for cross-examination. However, the court found no error in their admission under *Crawford* or *Bruton* as the statements did not expressly or impliedly incriminate the defendant, and the other evidence of guilt was overwhelming.

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Issue: Business Records Exception.

9th Circuit – Court of Appeals

United States v. Travers, 2004 U.S. App. LEXIS 20493 (9th Cir. Cal. Sept. 27, 2004).

Defendant argued the trial court erred by overruling his confrontation clause objections to customer complaint letters received by his employer which were introduced against him by the government. The court found the letters, admitted under the business records exception to the hearsay rule, did not offend the Confrontation Clause because they were not testimonial statements as articulated by the Supreme Court in *Crawford*.

Issue: Statements made to police after victim called them to her home.

Leavitt v. AraveI, 2004 U.S. App. LEXIS 18833 (9th Cir. Idaho Sept. 7, 2004).

Defendant argued that his confrontation rights were violated by the admission of hearsay statements made by the victim to police officers and dispatchers the night before the murders. On that occasion, the victim called the police to her home, indicated that someone had attempted to break into her home, and said that she believed it was the defendant. In a footnote, the court declined to address the retroactivity of *Crawford* because it believed the statements were not testimonial. “[She], not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home.” Thus, the statements did not fit into the compass of the examples given by the Supreme Court of such statements, namely “prior testimony at a preliminary hearing, at a grand jury, or at a former trial; and...police interrogations.”

Issue: Dying declaration.

California Courts of Appeal

People v. Jiles, 2004 Cal. App. LEXIS 1555 (Cal. App. 4th Dist. Sept. 16, 2004).

Defendant claimed that his confrontation right was violated by admission of victim statements implicating the defendant at trial. The statements, admitted pursuant to the exception to the hearsay rule for dying declarations, presented no confrontation clause problems. In *Crawford*, the Supreme Court indicated that the existence of the exception as a general rule of criminal hearsay law cannot be disputed, that there is authority for admitting even dying declarations which are clearly testimonial, and that the rule of forfeiture by wrongdoing extinguishes confrontation claims with regard to these statements on equitable grounds.



Issue: Statements made during a 911 call and repeated to police responding which were admitted as excited utterances.

People v. Corella, 122 Cal. App. 4th 461(2004).

Defendant argued the admission of his wife's statements made during a 911 telephone call and repeated to police who responded to the call violated his confrontation rights when they were admitted as spontaneous statements after she refused to testify. The court stated that *Crawford's* analogy of police interrogation to official pretrial examinations by justices of the peace before England had a professional police force indicates a police interrogation requires a relatively formal investigation where a trial is contemplated. Agreeing with New York's decision in *People v. Moscat*, 777 N.Y.S.2d 875, 879 (2004), the court found the 911 tape was not testimonial. Such calls are initiated by citizens, not police, for assistance and bear no indicia common to the official and formal quality of statements deemed testimonial in *Crawford*. Likewise, the court found that unstructured interaction between officer and witness shortly after a crime occurs does not become an interrogation simply because it involves an officer who is obtaining information, and found those statements nontestimonial citing *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004).

Issue: Crawford not offended by admission of statements not elicited at preliminary hearing of which the defendant was aware.

People v. Ochoa, 121 Cal. App. 4th 1551 (Cal. App. 4th Dist. 2004)

Defendant argued his confrontation rights were violated by the admission of the victim's statements to police officers and the district attorney investigator. Although defendant had the opportunity to cross-examine the victim at the preliminary hearing, he argued that the violation occurred by the admission of statements that were not elicited at that hearing. The court found that, because the defendant was aware of the existence of the detailed statements given by the victim, any failure of defense counsel to cross-examine regarding the "additional" statements would not give rise to a constitutional violation. Further, any error in their admission would have been harmless.

Issue: Whether a certificate of prior conviction is testimonial.

Colorado Court of Appeals

People v. Shreck, 2004 Colo. App. LEXIS 1712 (Colo. Ct. App. Sept. 23, 2004).

Defendant argued that admission of the documentary evidence showing his prior conviction was admitted in violation of *Crawford*. The court found that the documents, admissible as business records, are not testimonial.

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Issue: Dying declaration.

Georgia Supreme Court

Walton v. State, S04A1326 (09/27/04), 04 FCDR 3150, 2004 Ga. LEXIS 804.

Defendant claimed that his right to confrontation was violated, under *Crawford*, when the court permitted introduction of a deceased witness's statement as a dying declaration. The court noted that, in *Crawford*, the Supreme Court declined to extend its holding to dying declarations by acknowledging that admission of a dying declaration was an exception to the general rule that a prior opportunity to cross-examine was a necessary condition for admissibility of testimonial statements. The court went on to hold that defendant waived any objection to the statement's admission because no objection was made to the statement at defendant's trial.

Issue: Statements by defendant's deceased girlfriend.

Ross v. State, S04A1258 (09/27/04), 04 FCDR 3152, 2004 Ga. LEXIS 815

Defendant contended the trial court erred by admitting a statement made by defendant's deceased girlfriend, who witnessed the crime, under the necessity exception because the surrounding circumstances did not support a finding of reliability or trustworthiness and because admission of the evidence violated his right to confrontation. The court found that defendant's assertion regarding the reliability and trustworthiness of the statement is irrelevant under *Crawford*, but that admission of the statement was error because defendant did not have an opportunity to cross-examine the witness about her statement. The court found that this error was harmless, however, because the statement was merely cumulative of other admissible evidence and there is no reasonable possibility that the statement contributed to the verdict.

Issue: Unavailable eyewitness testimony.

Brawner v. State, S04A0898 (09/13/04), 04 FCDR 2986, 2004 Ga. LEXIS 614.

Defendant was convicted of malice murder and possession of firearm by a convicted felon. At trial, defense counsel objected to the admission under the necessity exception of an unavailable witness' statements on the ground that he was not able to cross-examine the alleged eyewitness. The Court held the statements were testimonial hearsay made in response to police questioning and were erroneously admitted in violation of the defendant's right to confrontation. Further, the Court held that its admission was not harmless error, as it was the only unimpeached statement identifying the defendant as the killer, and it cannot be said that this statement did not contribute to the jury's verdict.

Issue: Georgia Child Hearsay Statute is valid as it requires the child witness to be available at trial for statements to be admissible.

Georgia Court of Appeals



Starr v. State, A04A1454 (09/03/04), 04 FCDR 3030, 2004 Ga. App. LEXIS 1191.

Defendant was convicted of child molestation. On appeal, he argued that his confrontation rights were violated under *Crawford* by the erroneous admission of the videotaped interview with the victim pursuant to the Child Hearsay Statute of O.C.G.A. § 24-3-16. The Court, assuming without deciding the statement was testimonial, found no basis for reversal because, although she did not testify, the prosecutor stated the child victim was in the courthouse and available if necessary. As stated explicitly in *Crawford*, the confrontation clause places no constraints on the use of a declarant's prior testimonial statements when she is available for cross-examination at trial.

Issue: Victim's statements made to police on the scene shortly after attack, admitted as an excited utterance, were not testimonial.

Indiana Court of Appeals

Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004).

Defendant claimed his confrontation rights were violated by the admission of the victim's statements identifying defendant and describing the attack. After determining the statements were properly admitted as excited utterances, the court followed *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), holding "that when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial.'" Further, the court doubted that excited utterances could ever be testimonial. "An unrehearsed statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial."

Issue: Victims' statements immediately following crime introduced by the tape of a 911 call, its transcript, and officer's testimony relating the statements are not testimonial.

Minnesota Court of Appeals

State v. Wright, 686 N.W.2d 295 (Minn. App. 2004).

Defendant argued his confrontation rights were violated by the admission of the victims' statements contained in a tape and transcript of their 911 call as well as by testimony relating those statements from responding police officers. Both the 911 tape and the officer's testimony were allowed based on the excited utterance exception to the hearsay rule. Noting it was following the majority of courts who have addressed the issue, the court found the 911 statements were not testimonial as they were made moments after the offense during a time in which the victim was seeking protection from an immediate danger. Although the court did not think it was necessary to address the police officers testimony because it was cumulative of the 911 call and therefore

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harmless, the court specifically stated that it was not suggesting such statements would be testimonial in this case. These statements, made while the victims were in distress and concerned with their safety, are fundamentally different from any of the formulations and examples of testimonial statements in *Crawford*. They lack the formalized nature of deposition, affidavit, interrogation, and grand jury testimony, are highly unlikely to be calculated for effect in future legal actions, and are neither solemn declarations nor accounts of a crime made with an eye toward trial.

Issue: Lab tests forming basis of expert opinion are not testimonial.

North Carolina Court of Appeals

State v. Jones, 2004 N.C. App. LEXIS 1655 (N.C. Ct. App. 2004).

Defendant argued his confrontation rights were violated when he was not afforded the opportunity to cross-examine the person who conducted lab tests on which an expert's opinion was based. An agent in the case, after being accepted by the court as an expert in controlled substances analysis, thoroughly reviewed the methodology used by another agent and relied on the lab analysis in forming her opinion that the white powdery substance was cocaine. The court declined to extend *Crawford* here because it is well accepted that an expert may rely on tests performed by others in the field to form her opinion and the defense was given an opportunity to cross the agent regarding the basis of that opinion.

Issue: Statement by non-testifying co-defendant that does not implicate defendant.

Ohio Court of Appeals

State v. Sailor, 2004 Ohio App. LEXIS 4766 (Ohio Ct. App., Cuyahoga County Sept. 30, 2004)

Defendant claimed his confrontation rights were violated by the admission of a statement by a co-defendant who did not testify at trial. The court said that the statement was admissible because the co-defendant did not name the defendant nor was the defendant implicated in the statement. The defendant's confrontation right was not violated because the co-defendant was not a witness against the defendant and did not implicate her in the crime.

Issue: Statements admissible as excited utterances are not testimonial.

Pennsylvania

Commonwealth v. Eichele, 66 Pa. D. & C.4th 460 (2004).

Defendant claimed his confrontation rights were violated by the admission as excited utterances



of statements made by witnesses who discovered the victim. Although the court determined his claim was time barred, it addressed the *Crawford* claim for the sake of completeness. The court held that the statements, testified to by a witness who was not a government official, were both a classic example of an excited utterance and clearly nontestimonial. “An excited utterance is at the opposite end of the hearsay spectrum from testimonial hearsay. [Defendant’s] statements, as reported by [the victim], do not exhibit any of the hallmarks of a testimonial statement: one which is solemn, deliberate and anticipated to be used formally.”

Issue: Admissibility of identification if the declarant does not testify at trial.

Tennessee Supreme Court

State v. Robinson, 2004 Tenn. LEXIS 843 (Tenn. Sept. 28, 2004)

Defendant argued that it was error to admit statements by a police officer that identified the defendant as the perpetrator of the crime. However, the Court held that the defendant cannot appeal an error in this case because the defense elicited the testimony. A litigant will not be permitted to take advantage of errors which he himself committed, or invited, or induced the trial court to commit, or which were the natural consequence of his own neglect or misconduct.

Issue: Failure to object at trial on confrontation clause grounds waives issue on appeal.

Texas Court of Appeals

Hughes v. State, 2004 Tex. App. LEXIS 8470 (Tex. App. Houston 14th Dist. Sept. 23, 2004).

Defendant claimed his confrontation rights were violated by the admission of a codefendant’s statement implicating him in the shooting. Although the statement, given after the declarant had become a suspect was clearly testimonial, defendant did not object to it on confrontation clause grounds at trial resulting in waiver of that issue on appeal. Further, the court held that objection on hearsay grounds was insufficient to preserve the constitutional error for appeal.

Issue: Statement of non-testifying co-defendant at roadside stop after defendant had been arrested are testimonial.

Lee v. State, 2004 Tex. App. LEXIS 8120 (Tex. App. Dallas Sept. 3, 2004).

Defendant argued his confrontation rights were violated by admission of co-defendant’s statement through police officer relating that money found in the defendant’s car was from the sale of ecstasy. The court declined to call the statement non-testimonial, as the state argued, because the declarant was not in custody, at the jailhouse, or sitting down to give a statement after being

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Notes

advised of Miranda warnings. The court found that interrogation in its colloquial sense includes questioning by the officer at the roadside after defendant was arrested asking if the money was from the sale of illegal drugs.

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