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Sixth Amendment: Keeping it Confrontational

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.

6th Amendment
United States Constitution

Crawford v. Washington

The Confrontation Clause came to the forefront with *Crawford v. Washington*, 541 U.S. 36 (2004), where the Court held that any “testimonial” out-of-court statement is inadmissible under the Confrontation Clause, unless the declarant is unavailable to testify in court, *and* the defendant has had a prior opportunity to cross-examine the witness. In *Crawford*, the defendant claimed self-defense on the charge of assault and attempted murder of his wife. His wife was questioned by police about the alleged offense in a recorded interview at the police station. Under Washington’s marital privilege law the wife did not testify at trial, so the state offered her recorded police interview to rebut Crawford’s self-defense claim. The trial court found that the statement had “particularized

guarantees of trustworthiness,” which is a “firmly rooted” hearsay exception. The United States Supreme Court reversed, holding that where “testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.” *Crawford* did not define the parameters of a testimonial statement, however, because the Court said that statements taken by a police officer in the course of an interrogation qualify as testimonial under any definition of the word.

Davis v. Washington

The good times after *Crawford* did not last long. Two years later, in *Davis v. Washington*, 547 U.S. 813 (2006), the Court reined in the Clause by tightening the definition of “testimonial.” *Davis* involved a 911 call by a woman complaining that she was assaulted by her boyfriend, Davis. The 911 call is described as follows:

911 Operator: Hello.

Complainant: Hello.

911 Operator: What's going on?

Complainant: He's here jumpin' on me again.

911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?

Complainant: I'm in a house.

911 Operator: Are there any weapons?

Complainant: No. He's usin' his fists.

911 Operator: Okay. Has he been drinking?

Complainant: No.

911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?

Complainant: I'm on the line.

911 Operator: Listen to me carefully. Do you know his last name?

Complainant: It's Davis.

911 Operator: Davis? Okay, what's his first name?

Complainant: Adrian

911 Operator: What is it?

Complainant: Adrian.

911 Operator: Adrian?

Complainant: Yeah.

911 Operator: Okay. What's his middle initial?

Complainant: Martell. He's runnin' now.

As the conversation continued, the operator learned that Davis had “just r[un] out the door” after hitting [the victim], and that he was leaving in a car with someone else. [The victim] started talking, but the operator cut her off, saying, “Stop talking and answer my questions.” She then

gathered more information about Davis (including his birthday), and learned that Davis had told [the victim] that his purpose in coming to the house was “to get his stuff,” since [the victim] was moving. [The victim] described the context of the assault, after which the operator told her that the police were on their way. “They're gonna check the area for him first,” the operator said, “and then they're gonna come talk to you.”

The girlfriend did not testify at trial. The 911 recording was played over the defendant's objection. The Court ruled that the call to 911 was non-testimonial because the caller did not intend her statement to be used in a future criminal prosecution. According to the Court, she provided the statement intending to help the police resolve an "ongoing emergency," not to testify to a past crime. The *Davis* Court provided the following definition of “testimonial” and “non-testimonial” statements:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis provided the following four reasons for reining in the definition of “testimonial”:

1. When we said in *Crawford*... that “interrogations by law enforcement officers fall squarely within [the] class” of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.”

2. In *Davis*, [the victim] was speaking about events *as they were actually happening*, rather than “describ[ing] past events.

3. The nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past.

4. The difference in the level of formality between the two interviews is striking. The witness in *Crawford* was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; [the *Davis* victim’s] frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

Whorton v. Bockting

Crawford did not announce a “watershed” rule of criminal procedure that merited retroactive application to cases on collateral review. *Whorton v. Bockting*, 549 U.S. 406 (2007)

Melendez-Diaz

After *Davis*, the Confrontation Clause fell off the radar for a few years, then popped back up with *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), where the Court held that the admission of an affidavit by the person who determined that the substance found on the defendant was cocaine, without that person's testimony, violated the right of confrontation.

Melendez-Diaz was a drug case. At trial, the state offered the affidavit of the chemist who tested the drugs. The affidavit spelled out the chemist's qualifications and his opinion that the substance contained cocaine. The chemist never testified. The Court found that the affidavit fell within the "core class of testimonial statements" covered by the Confrontation Clause. The statements were made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Indeed, their *sole purpose* was to provide prima facie evidence of the substance's composition, quality, and net weight. In one of the better moments of the opinion, the court explains that even though forensic evidence often gets presented as objective, it is not immune to manipulation, so it is critical that the defendant be given the opportunity to test the analyst's "honesty, proficiency, and methodology."

“Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.”

Bullcoming v. New Mexico

A few months later the Court decided *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), which held that the Confrontation Clause does not permit the prosecution to introduce the results of a lab test through the testimony of a scientist who did not perform or observe the test. In *Bullcoming*, a lab analyst tested the defendant’s blood with a gas chromatograph machine. The analyst issued a report that stated that he received the sample intact with an unbroken seal, that he followed the appropriate procedures for testing, and that the blood sample contained .21 grams of alcohol per hundred milliliters.

Just before trial the prosecution announced that it did not plan to call the analyst who performed the test because that analyst was on unpaid leave. Instead, the prosecution presented the test result as a “business record” through the testimony of a different analyst at the lab. *Bullcoming’s* objection was overruled, he was convicted, and his appeal reached the New Mexico Supreme Court. The New Mexico Court found that the surrogate testimony of an analyst who did not perform or observe the test process satisfied the Confrontation Clause because the actual analyst “simply

transcribed the result generated by the gas chromatograph machine.” The Court also found that the analyst who testified at trial “qualified as an expert witness with respect to the gas chromatograph machine and the [] laboratory procedures.”

The United States Supreme Court reversed, finding that the surrogate testimony did not satisfy the Confrontation Clause. The Court found that operation of a gas chromatograph machine requires specialized knowledge and training, the testing process requires several steps, and human error can occur at each step. The Court reasoned that the surrogate testimony of a different analyst could not convey what the actual analyst “knew or observed” about the events surrounding the testing conducted on the sample. Equally, the surrogate testimony could not expose any lapses or lies on the part of the actual analyst. “[T]he Clause does not tolerate dispensing with confrontation simply because [the government] believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.”

Williams v. Illinois

Now pending before the Supreme Court is *Williams v. Illinois*. In *Williams*, an expert tested some samples and generated DNA profiles based on those samples. A different expert, one who did not participate in

generating the DNA profiles, provided statistical testimony about the various profiles and an explanation about what the statistics prove. The Illinois Supreme Court held that in this circumstance the profiles were not offered to prove the truth of the matter asserted, rather the profiles were used only to explain the testifying expert's opinion about the results.

Summary Checklist

Is the evidence testimonial?

Statements are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Is the declarant unavailable?

The fact that the drug analyst was on unpaid leave did not make him unavailable for confrontation purposes in *Bullcoming*.

The fact that the witness is on vacation at the time of the trial does not make the witness unavailable for confrontation purposes. *Earhart v. Konteh*, 589 F.3d 337 (6th Cir.2009).

Watch out for “forfeiture by wrongdoing.” See *Giles v. California*, 554 U.S. 353 (2008)(If the defendant caused the witness to be absent from trial with the intent to prevent the witness from testifying, the defendant has forfeited his right of confrontation. The mere fact that the defendant caused the witness's absence, however, without proof that he did so for the purpose of preventing the witness's testimony, is not enough to establish forfeiture by wrong doing.).

Did the defendant have the opportunity to cross examine the witness?

Does not come up too much in a federal case, except where there is a preliminary examination or retrial.

Make your objection.

Do not risk forfeiture by too broad of an objection. To preserve the confrontation issue, the best objection is to specifically state the right of confrontation under the 6th Amendment.

Confrontation Clause Resources

<http://madisonattorney.com/cjablog/?p=542>

This is a link to Confrontation Clause information on my blog, including a 163 page summary of Confrontation Clause cases since *Crawford*.

<http://confrontationright.blogspot.com/>

This blog describes itself as devoted to reporting and commenting on developments related to *Crawford v. Washington*.