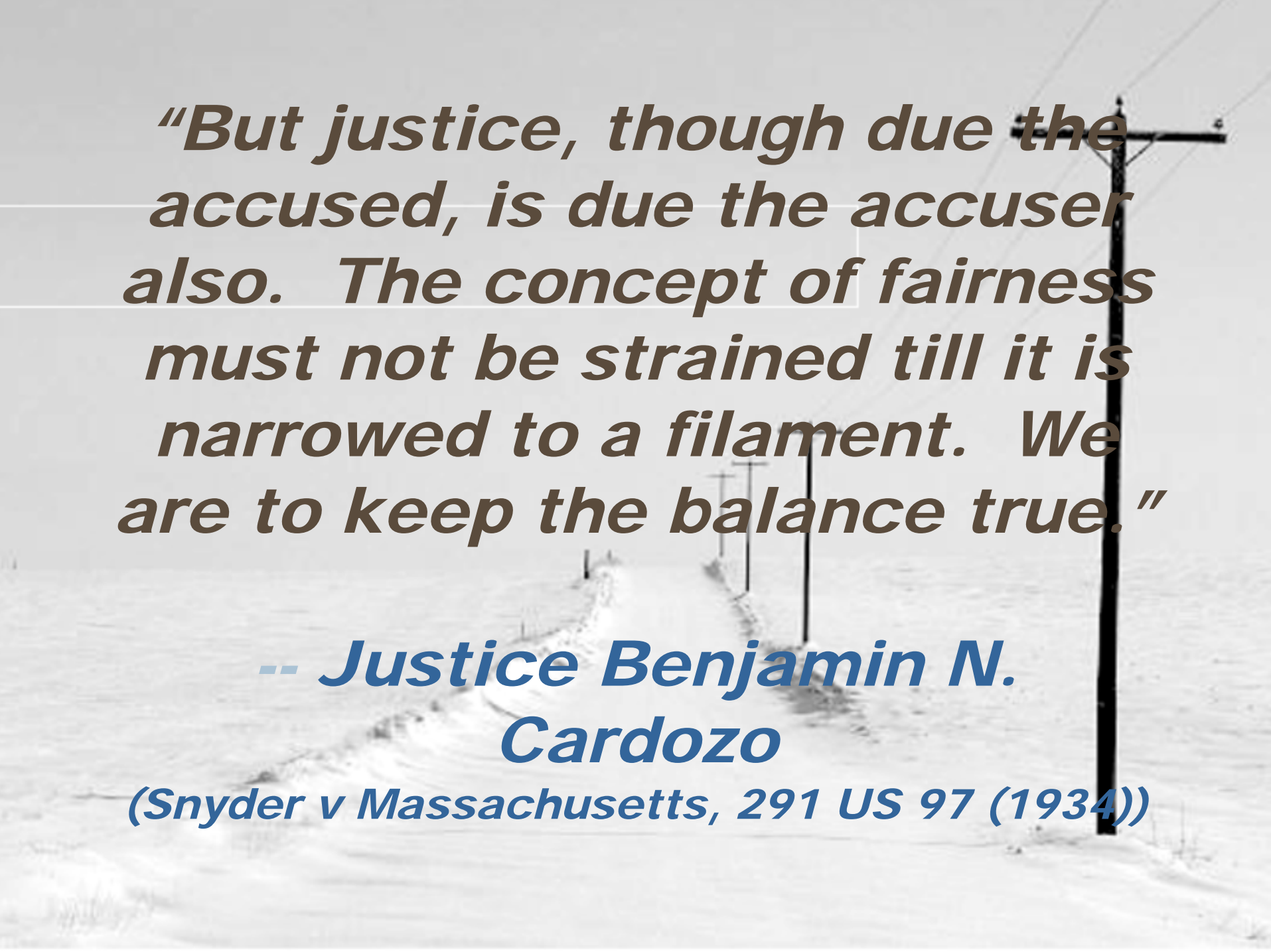


# Crawford v. Washington

When Bad Appeals Make Bad Law

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*"But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."*

*-- Justice Benjamin N.  
Cardozo*

*(Snyder v Massachusetts, 291 US 97 (1934))*

# 6<sup>th</sup> Amendment

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



# Before the Storm

- Ohio v. Roberts, 448 U.S. 56 (1980).
  - Factually, involved the prelim testimony of a witness who had testified previously.
  - Where witness becomes unavailable, proponent must show that the HSY statement falls into a firmly rooted exception, or that it has ‘indicia of credibility’.



# Before the Storm

- Idaho v. Wright 497 U.S. 805 (1990)
  - Two child victims, one who testified and one who was too young.
  - Court relies on *Roberts* and rules that the the child's HSY statements are admissible as long as the statement is deemed reliable under the totality of the circumstances surrounding the statement (not looking to corroborative evidence).
  - Allows for the use of video-taped forensic interviews in lieu of children testifying.



# Before the Storm

- Illinois v. White 502 U.S. 346 (1992).
- Statements at issue were made by child victim as excited utterances and statements made to medical personnel.
- Only question is whether Conf Clause requires unavailability for use.
- Court rules that unavailability is NOT required if the statement falls under a 'firmly rooted' exception.



# As the Clouds Gather...

- A 'new wave' of prosecution is seen.
- Efforts to shield child victims/witnesses from testifying and further trauma.
- Successful DV prosecution even when the victim is uncooperative or unavailable due to threats or coercion.
- Elder abuse cases can be prosecuted even when victims are not able to testify.



# The Skies Open

- Michael and Sylvia Crawford hit the courts.
- Sylvia's statement is used in her absence over objection.
  - Trial court finds it reliable under *Roberts* and allows it.
  - App level court disagrees- not reliable.
  - State Sup Ct re-instates- IS reliable.



# Scalia Strikes

- March 8, 2004.
- Justice Scalia sees Crawford factually as the exact reason that the Confrontation Clause was offended by *Roberts* reasoning!
- Trial says it's reliable, app ct disagrees, sup ct. disagrees with them.
- Enough, says the U.S. Sup. Ct.- we will not add another layer of guess work to this process!
- The confrontation clause is satisfied by **cross examination**, not amorphous/subjective judicial analysis.



# *Crawford* in a Nutshell

- Overrules *Roberts* and undermines *Wright* and *White*.
- Statements that are ‘testimonial’ are no longer admissible unless the witness takes the stand and is subject to cross examination.
  - Testimonial is not clearly defined.
  - Government agent and objective reasonable person standard is used.
- May impact firmly rooted HSY exceptions.
- Retroactive for pending cases.



*“Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”*

*-- Justice Scalia*



***“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.”***

***“The Confrontation Clause commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”***

***-- Justice Scalia***





# What is 'testimonial'

- At a minimum, it applies to statements
  - Made at a preliminary hearing.
  - Before a Grand Jury.
  - Former Trial.
  - To police interrogations.
- If an out-of-court statement is taken by a government agent, the statement is testimonial if the person giving it reasonably could expect that the statement would be used at trial.



# More on 'testimonial'

- Testimony is a “solemn declaration made for the purpose of establishing or proving some fact”. NOT casual remarks.
- Most statements made to police officers in the course of an investigation.
- Anything taken at a judicial proceeding.



# The Bottom Line

- ALL HSY statements must now be analyzed differently.
- The old rule- 'read the statement, go to the exceptions and see if it fits' **no longer applies.**
  - Formerly, these exceptions were said to satisfy the C.C. because they were so reliable that confrontation would be futile.
- No more! **The new rule-** judge whether the statement is testimonial, then analyze under traditional evidence rules.



# The bottom line

***“We decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”***

***-- Justice Scalia***



# When Will They Come For My Hearsay Exceptions?

- Firmly rooted exceptions are not now deemed to be automatically reliable the way they were pre-*Crawford*.
- However, many firmly rooted exceptions can be seen by their nature as being non-testimonial.
  - Excited utterance, present sense impression, statement made to medical personnel for treatment, etc.
- **But there is no longer a guarantee.**
- Scalia's message is that we've been looking at HSY backwards.



# Not impacted by Crawford yet

- **FRE 801(d)(2)(a) Statement by Party-Opponent**
- **FRE 801(d)(2)(e) Co-conspirators statements made in furtherance**
- **FRE 803(1) Present Sense Impression**
- **FRE 803(2) Excited Utterances**
  - 911 tapes
- **FRE 803(3) State of mind exception**
- **FRE 803(4) Medical Treatment/Diagnosis exception**
- **FRE 803(6) Business Records exception**
- **FRE 804(b)(1) Former testimony exception**
- **FRE 804(b)(3) Statements against penal interests**

# Crawford Analysis

- Two principal methods:
  - By examining the statement.
  - By examining the availability of the witness.



# Examination of the Statement

- Is the statement testimonial?
  - If NO, then no *Crawford* analysis is necessary.
  - If YES, then:
    - Witness must testify.
    - If witness cannot testify, must show unavailability and that the witness was subject to cross examination at a prior time.
  - NOTE: Reliability or trustworthiness of the statement are not issues under *Crawford*. Reliability is a factor under the rules of evidence.



# Examination of the Witness' Availability

- Is my witness available?
- If YES, then no *Crawford* analysis is necessary.
- If NO, then:
  - Ask if the statement is testimonial.
    - If NO, then no *Crawford* analysis is necessary. Standard reliability and Rules of Evidence tests apply.
    - If YES, then these must occur:
      1. Can demonstrate that witness is unavailable AND
      2. Was subject to cross-examination at a prior hearing.



# Out of the Weather: When *Crawford* is not-applicable

- Any case where the witness testifies.
- Civil child neglect proceedings (or any civil proceedings).
- Hearsay statements that are non-testimonial.
  - This involves some firmly rooted hearsay exceptions.
  - Co-conspirator statements per 801(d)(2)(E).
- Hearsay statements offered by the Defendant (waives 6<sup>th</sup> Amendment).
- Dying declarations and business records.



# Breaking Sunshine

- Forfeiture of the confrontation right.
  - *Crawford* cites *Reynolds* in allowing for the possibility that the defendant can forfeit the confrontation right through wrongdoing.
- If Defendant induces unavailability
  - By threats, bribery, gifts, intimidation, through 3P's, etc.
- In child abuse cases: Telling a child not to tell.



# Digging Out: Child Abuse After *Crawford*

- What about forensic interviews?
  - Consider the two factors that are involved in determining whether FI is testimonial:
    1. Is a government agent conducting the interview?
    2. Does the declarant reasonably believe that the statement may/will be used at trial?
  - Will have to concede the first, but not the second, particularly with younger children!



# Child Statements: Relevant Arguments

- The reasonable person standard is not clearly defined by *Crawford*.
  - Argue that a reasonable five year-old is different from a reasonable adult, etc.
- A child incompetent to testify cannot be seen as competent to comprehend the use of a F.I.!
- Keep the 'Child First' doctrine in mind- what is the true purpose of the F.I.?



# Forensic Interviews: Suggested Modifications


- **Truth/lie questions** in a forensic interview relate to an oath for the purposes of testifying in court and should be discouraged from use during an interview!
- **Tender Years exceptions** may apply in a non-testimonial manner, depending on the nature of the disclosure (accidental, unexpected v. forensic interview).



# Final Thoughts

- Remember, no *Crawford* analysis for closed-circuit testimony.
- For 911 tapes, testimonial nature is unclear. Other excited utterances still okay.
- Preparing children to testify should always be a priority when possible and appropriate.
  - Good strategically.
  - Arguably empowering for the child.
- **Keep victims/witnesses safe, comfortable, informed and empowered to prevent recant or unavailability.**





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