

**OFFICE OF THE PROSECUTING ATTORNEY  
COUNTY OF WAYNE**

**A PROSECUTOR'S INITIAL LOOK AT  
CRAWFORD V WASHINGTON:**

**EVERYONE OUT OF THE POOLE?**

**Criminal Law Section  
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## HEARSAY AND CONFRONTATION

**Cardinal Principle:** *the Confrontation Clause is implicated 1)when an out-of-court statement of an unavailable declarant is admitted as substantive evidence, AND 2)that statement is “testimonial” (not that it is used testimonially at trial, but that it was “testimonial” in nature when made).*

### **I. Generally: Historical Development**

- A. **Wigmore:** Wigmore points out that the confrontation clause is related to the rules concerning hearsay, and that the history of the hearsay rule began only in the 1500's. Up to that time, though jury trial had come into being, it was a common practice for the jury to obtain information from informed persons not called into court. Testimony in open court was a rare event. Testimony in open court began to develop during the 1500's and 1600's, reversing the earlier order, with testimony becoming common, and consultation by the jury with informed persons not called into court becoming rare. The question began to arise whether hearsay was competent evidence in the presentation of evidence in court.

5 Wigmore, *Evidence* § 1364

- B. **The Trial of Sir Walter Raleigh:** the infamous trial of Sir Walter Raleigh in 1603 for treason is often thought of as the father of the constitutional confrontation clause. Raleigh had no assistance from counsel, and would not have been allowed to call witnesses had he wished to do so. The only defense of the accused was that the case against him had to be completely proved. If it was, there was no need of witnesses from the accused; if it was not, there was likewise no need for witnesses from the accused—a “catch-22” worthy of Joseph Heller. Raleigh insisted that the case could not be proven unless he faced his accusers. Reams of deposition testimony by Raleigh's alleged accomplice were admitted, depositions which themselves contained only innuendo and no credible assertions of substance sufficient to support a conviction. Yet Chief Justice Popham refused to produce the alleged accomplice, Cobham, to testify, stating that “where no circumstances do concur to make a matter

probable, then an accuser may be heard in court, and not merely by extrajudicial statement, but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced."

5 Wigmore § 1364, p. 16-17

See *California v Green*, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (1970) (fn 9 and 11, p.507-508)

- C. **Modern Development**: by the later 1600's and early 1700's, the rule against hearsay had come to be established, with the qualification that it could be used as corroboration, and with several exceptions to application of the rule. Thus, the common law rule of confrontation was a rule requiring confrontation, except where exceptions to the rule of hearsay existed. In other words, the right of cross-examination secured by the common law was not a right devoid of exceptions.

McCormick, *Evidence*, p. 580-581

5 Wigmore § 1397, p.158

## II. **Reliability: From Ohio v Roberts to Crawford v Washington**

- A. **Ohio v Roberts**: a prior recorded testimony case—the Court observed that the Confrontation Clause reflects a “*preference*” for face-to-face confrontation at trial, and that a primary interest it secures is that of cross-examination. But this preference may be overcome upon a showing of 1)necessity (i.e. unavailability), and 2) “sufficient indicia of reliability.” Reliability could be shown in one of two ways:

Ž the statement falls within a “firmly-rooted” hearsay exception; or

Ž “particular guarantees of trustworthiness” surrounding the making of the statement afforded the trier of fact a sufficient basis to gauge the reliability of the statement.

*Ohio v Roberts*, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531 (1980)

**B.** *Crawford v Washington*: the case involved a declaration against penal interest by a nontestifying codefendant that implicated the defendant in the crime. Though holding that the statement did not fall within a firmly-rooted hearsay exception, the state supreme court found it admissible as sufficiently reliable given the circumstances surrounding its making. After a thorough historical review, the Court, through Justice Scalia, rejected the *Roberts* principles and reached the following conclusions:

Ž The Confrontation Clause applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony" is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Included among testimonial statements are "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Though the Court declined to fully define "testimonial," one possible definition it posited was "statements that 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,"

Ž Statements taken by police officers in the course of interrogations are testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England.

Ž The Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.

- Ž The Court came close to holding—and almost certainly would hold (in my opinion)—that out-of-court statements that are not testimonial are not within the Confrontation Clause at all (the Court gave as examples business records and statements in furtherance of a conspiracy).
- Ž Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law.
- Ž A likely deviation from these principles is the dying declaration. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. But if this exception must be accepted on historical grounds, it is *sui generis*.
- Ž The Court reiterated that when the declarant *appears* for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his or her prior testimonial statements (whether affirmed, repudiated, or “not remembered”)

### III. Prosecution Use of Declarations Against Penal Interest: Everyone Out of the Poole?

- A. **The Rule.** Excluded from operation of the hearsay rule is “a statement which...so far tended to subject the declarant to..criminal liability..., that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.”

MRE 804(b)(3)

- B. Prosecution Use.** In Michigan, our Supreme Court held that where the statement of one defendant fits the foundation requirements of the rule and implicates a codefendant it is admissible against the codefendant, even if arguably the “carry-over” portion which incriminates the codefendant is not directly against the declarant’s penal interest. The foundation is rigorous, and it was difficult to meet the foundation with statements made in-custody to a police officer, though not impossible.

*People v Poole*, 444 Mich 151 (1993)

Contra *Williamson v United States*, 512 US 594, 114 S Ct 2431, 129 L Ed 2d 476 (1994)(interpreting FRE—not a constitutionally based decision)

**C. The Foundation:**

- Ž Was the statement voluntarily given.
- Ž Was it made contemporaneously with the events.
- Ž Was it custodial, or made to family, friends, colleagues, or confederates.
- Ž Was it uttered spontaneously at the initiation of the declarant.
- Ž Did it shift blame or attempt to minimize the role of the declarant
- Ž Did the declarant have a motive to falsify or curry favor.

*People v Poole*, 444 Mich 151 (1993)

**D. Lilly v Virginia: Crawford Presaged.** In *Lilly v Virginia*, 527 US 116, 144 L Ed 2d 117 (1999) the Court held that *under the circumstances* the statement was not reliable so as to satisfy confrontation clause concerns, where made in custody, and the declarant minimized role and shifted blame. Justice Scalia, concurring, expressed his view that what occurred was “a paradigmatic Confrontation Clause violation.”

*Lilly v Virginia*, 527 US 116, 144 L Ed 2d 117 (1999)

**E. After Crawford: The Poole Is Only Half Empty**

- 1) It is clear that the declaration against penal interest may not be used to admit the formal confession of a nontestifying codefendant.
- 2) But if the statement is *not* a confession to the police, but meets the *Poole* factor of having been made to family, friends, colleagues, or confederates, the statement is still admissible on application of the *Poole* factors, and because the statement is not testimonial as defined in *Crawford*, the Confrontation Clause is not implicated at all. The Michigan Supreme Court has already distinguished *Crawford* in this fashion.

*People v Deshazo*, \_\_Mich\_\_, 679 NW2d 69 (2004)

- 3) Further, even a declaration by a codefendant made to the police may not be testimonial under the *Crawford* definition. In one case the codefendant, when surrounded, blurted out “I did it, I’m the shooter.” This is a strong argument that this statement would be admissible even after *Crawford*.

*People v Washington*, 468 Mich 667 (2003)(pre-*Crawford*, held admissible)

#### IV. Future Battlegrounds

##### A. Other Statements Made to the Police by Unavailable Declarants.

The prosecution may wish to admit statements from unavailable declarants made to the police where unavailability is not a prerequisite of admissibility, as it is with the declaration against penal interest. The principal battlegrounds likely will be excited utterances made to police officers, and present sense impression statements made to police officers. *The issue only arises with an unavailable declarant. If the declarant testifies, even to repudiate or disavow the out-of-court statement, then the statement is admissible without Confrontation Clause concerns so long as it meets the foundational requirements of a hearsay exception.*

##### B. Some Early Developments:

Ž **State v. Manuel**, 685 N.W.2d 525 (Wis.App.2004). Statement of individual to his girlfriend not testimonial; government not involved at all.

Ž **People v. Sisavath**, 118 Cal.App.4th 1396, 13 Cal.Rptr.3d 753, 758 (Cal.Ct.App.2004). Statement was a videotaped interview with a trained interviewer at Fresno County's Multidisciplinary Interview Center (MDIC), a facility specially designed and staffed for interviewing children suspected of being victims of abuse. By that time, the original complaint and information had been filed and a preliminary hearing had been held. The deputy district attorney who prosecuted the case was present at the interview, along with an investigator from the district attorney's office. The interview was conducted by a forensic interview specialist. "Under these circumstances, there is no serious question but that Victim 2's statement was 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" and it was thus found testimonial and inadmissible.

Ž **State v Snowden**, 2005 WL 275752 (Md Ct App, 2-7-2005): during police investigation of claims by children of inappropriate touching, children, with detective present,

were interviewed by a sexual abuse investigator for the county Department of Health and Human Services, asked why they were being interviewed first, each responding that they knew they were being interviewed as a result of accusations they had made. They then gave statements of the event. Testimony by investigator in lieu of testimony of children held barred by *Crawford*.

Ž **People v Geno**, 261 Mich App 624 (2004). A two-year old child who appeared to have possibly been molested was interviewed by the Children’s Assessment Center. At the interview, the victim asked the interviewer to accompany her to the bathroom, and the interviewer noticed blood in the child’s pull-up and asked the child if she “had an owie?” The child answered, “yes, Dale [defendant] hurts me here,” pointing to her vaginal area. Defendant claimed that his confrontation clause rights were violated by admission of this statement under MRE 803(24), the "catch-all" exception, citing the United States Supreme Court's recent decision in *Crawford v Washington*. But the Court of Appeals held that the child's statement was not "testimonial" as described in *Crawford*--the statement was not made to a government employee, and the child’s answer to the question of whether she had an “owie” was not a statement in the nature of “*ex parte* in-court testimony or its functional equivalent.” Where "nontestimonial" statements are at issue, “it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Crawford*, 541 US at \_\_\_, 124 S Ct at 1374. With regard to the foundational requirements of the hearsay exception itself, the court held them met.

Ž **Cassidy v. State**, 149 SW3d 712 (2004). Hospital interview of stabbing victim by police officer one hour after assault held not testimonial, statement admissible as excited utterance.

Ž **People v. Conyers**, 777 N.Y.S.2d 274, 277 (N.Y.Sup.Ct.2004). 911 telephone calls to police held not

testimonial; audible on these 911 tapes were the voices of the victim and the defendant while the assault was still in progress. “It is clear to this Court, having heard the panicked and terrified screams of Ms. Conyers', that her intention in placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in a future proceeding.” Calls held admissible as excited utterances.

Ž **People v. Moscat**, 777 N.Y.S.2d 875, 878 (N.Y.City Crim.Ct.,2004): “typical” domestic violence 911 calls not testimonial—where “a woman tells the 911 operator (in New York City, a civilian police employee) that her boyfriend has just shot, stabbed or beaten her (and may be about to do so again); usually, the woman hurriedly answers a few questions from the operator and then asks the operator to send police officers and an ambulance to her aid. The present case fits that description.....The 911 call—usually, a hurried and panicked conversation between an injured victim and a police telephone operator—is simply *not* equivalent to a formal pretrial examination by a justice of the peace in Reformation England.”

Ž **State v Powers**, 99 P3d 1262 (Wash. App, 2004): victim called 911 to report that defendant had been in her home in violation of a no-contact order. Police responded and found him several blocks away. Tape of 911 call where declarant unavailable violated *Crawford*, where it was not a call for help but a report of a crime (and was not actually an excited utterance):

Ž **People v. Cortes** 4 Misc.3d 575, 781 N.Y.S.2d 401 (N.Y.Sup.,2004) Statements a witness to ongoing shooting made to operator during emergency 911 call were product of interrogation and amounted to testimonial evidence, and thus introduction of 911 tape into evidence in prosecution for attempted murder premised on shooting would violate Confrontation clause under both federal and New York constitutions, absent ability to cross-examine witness;

information was elicited from witness in a particular way and order in response to questions operator asked in accepted pattern regarding shooter's location, description, and direction of movement, and purpose of information was for investigation,

prosecution, and potential use at judicial proceeding.<sup>1</sup>

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<sup>1</sup> Operator: Police 1290. Is this emergency?  
Caller: I just saw a man running with a gun at 138th  
Operator: What borough?  
Caller: 137 and Cypress. He had a red shirt on \*578 ... bald head  
Operator: What borough, sir?  
Caller: Pardon me?  
Operator: What borough is this for?  
Caller: Oh, the Bronx, sorry.  
Operator: The Bronx.  
Caller: Yeah, 137, 138 and Cypress. He's got a red shirt on, hispanic, bald-headed  
Operator: What direction?  
Caller: Towards 138th Street and Cypress.  
Operator: 138th Street and Cypress. What was he wearing?  
Caller: A red shirt and he's bald-headed.  
Operator: A red shirt and he's bald-headed.  
Caller: Yeah.  
Operator: What about the bottom?  
Caller: Eh?  
Operator: What about the bottom? What kind of pants? Jeans?  
(Noise)  
Caller: Oh, he's shooting at him, he's shooting at him.  
Operator: OK.  
Caller: He's shooting at him.  
Operator: He's chasing the guy, right?  
Caller: Yup. (Noise) You hear it?  
Operator: I hear it. I hear it. OK.  
Caller: He's killing him, he's killing him, he's shooting him again.  
Operator: He's shooting at him or he shot him?  
Caller: He shot him and now he's running. And he shot him two or three times. Yes.  
Operator: Where's he running to?  
Caller: He's running toward 138th Street.  
Operator: Hold on, let me get a ambulance on line. Hmmm?  
(Ring.)  
Male voice: 0709.  
Operator: OK. What was that?  
Male: 0709.  
Caller: I gotta hang up because people, people are \*579 gonna think I'm out calling the cops. And they'll think it's me.

Ž **People v. Caudillo**, 19 Cal.Rptr.3d 574, 590 (Cal.App. 6 Dist.,2004)(rev. grtd): during shooting someone called 911 and reported "men with guns" at the 7-Eleven. The anonymous caller provided a license plate number and a description of the cars involved, which became corroborative evidence. The court held the call non-testimonial as “not...within the "core class of ‘testimonial statements’ which is the focus of the Confrontation Clause. ...The declarant was speaking to a dispatcher who was attempting to obtain information to assist the police in responding appropriately, by providing assistance to any victims and apprehending the gunman to prevent any further violence....The 911 call was an informal report of a recent shooting; its purpose was to advise the police of the situation so that they could take appropriate action to protect the community....This was a classic 911 call, made immediately after a crime was committed. The caller was simply requesting help from the police by describing what she saw without thinking about whether her statements would be used at a later trial.

Ž **Moreno Denoso v. State**, 2005 WL 247427, 11 (Tex.App.-Corpus Christi) (Tex.App.-Corpus Christi,2005): autopsy report not testimonial. Same, *Smith v. State*, 2004 WL 921748, 8 (Ala.Crim.App.) (Ala.Crim.App.,2004)

**Prediction:** Justice Scalia, the author of *Crawford*, joined Justice Thomas, who joined without separate opinion in *Crawford*, in *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 747 (1992), in his statement concurring there 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. It was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process.” The less “formal” the situation, the more likely the statements are nontestimonial, even though made to

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Operator: OK. All right sir, no problem. OK. Thank you. I think I got it to relay.

governmental employees (such as 911 operators).