Litigating Confrontation Issues—Ten Years of *Crawford*

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I. The Basics

A. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI.

B. "In all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face." Art. I, sec. 7, Wis. Const.

C. "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

II. What is "Testimonial?"

A. The term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. 36, 68 (2004).

B. Justice Scalia declined to further define the term: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. 36, 68 (2004).

C. Three proposed definitions of testimonial statements noted in *Crawford*:

a. "'[*E]x parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'" *Crawford*, 541 U.S. 36, 51 (2004) citing Brief for Petitioner in *Crawford* at 23.

b. "'[E]xtrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or

confessions.'" *Crawford*, 124 S. Ct. at 1364, citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment).

c. "'[S]tatements 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.'" *Crawford*, 541 U.S. 36, 52 (2004), citing Brief for NACDL as amici curiae at 3.

D. *Crawford* emphasized that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S. at 51.

III. Categories of out-of-court statements not changed by Crawford

A. Several categories of out-of-court statements may be admitted without violating the Confrontation Clause:

1. Out-of-court statements not offered for the truth of the matter asserted. Crawford, 541 U.S. at 59.

2. Out-of-court statement made by declarants who do testify. *Id*.

3. Out-of-court statements made by unavailable declarants when the defendant had an adequate opportunity to cross-examine at a prior hearing. *Id*. at 55.

4. Out-of-court statements introduced into evidence by the defense (since the Confrontation Clause only protects the defendant). *See Giles* n.7. 554 U.S. 353, 375 (2008).

5. Out-of-court statements made by the defendant (since the confrontation Clause has never protected a defendant from his own testimony).

6. Statements in furtherance of a conspiracy, *Crawford*, 541 U.S. at 55.

IV. United States Supreme Court Cases After *Crawford*.

A. 911 calls and other reports to police

***Davis v. Washington/Hammon v. Indiana,* 547 U.S. 813 (2006)**

1. "Statements are nontestimonial 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." *Davis*, 547 U.S. at 822.

2. 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 a criminal prosecution."

3. In *Hammon*, that meant that statements by an alleged victim to police describing a completed domestic assault were testimonial.

4. In *Davis*, that meant that statements to 911 operator about events as they were actually happening were nontestimonial.

5. If the purpose of a report to police is to seek immediate aid, such as a 911 call reporting an ongoing crime, the statement is nontestimonial.

6. **Important**: Single conversation or report to police may contain both testimonial and nontestimonial statements. *E.g.,* 911 call that begins as reporting ongoing emergency and evolves into questioning to establish past events. *Davis*, 547 at 829.

***Michigan v. Bryant*,131 S.Ct. 1143 (2011)**

1. Court holds that statement given to police by a wounded victim who later died identifying the person who shot him was not testimonial and therefore was admissible.

2. Statement deemed to have been made during interrogation designed for primary purpose of enabling police to respond to ongoing emergency rather than to prove past events.

3. The ongoing emergency was not the threat to the shooting victim, but to the responding police and the public at large.

4. The relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose the reasonable participants would have had as determined by the individuals' statements and actions and the surrounding circumstances.

5. Justice Scalia's dissent—"Today's tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution."

B. Lab Reports

1. ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009) – State court admitted certificates reporting results of forensic analysis identifying substance as cocaine. Court holds that this forensic lab report was testimonial.

2. ***Bullcoming v. New Mexico***, 131 S.Ct. 2705 (2011)–State court admitted forensic lab report certifying defendant's BAC through analyst who neither participated in nor observed the testing. Court holds that when prosecution wishes to introduce a forensic report, a surrogate/supervisor may not stand in for the author of the report.

3. ***Williams v. Illinois***, 132 S.Ct. 2221 (2012)

   a. Complicated 4-1-4 decision that has created significant confusion regarding whether an expert's test results that are relied upon by another expert, but "not admitted for their truth," are testimonial. *See United States v. James*, 712 F.3d 79 (2d Cir. 2013). Five justices concluded that despite state's claim, test results were admitted for their truth. But Justice Thomas found that the test results were not testimonial because the lab's statements were not sufficiently formal to be considered testimonial.

   b. Justice Kagan's dissent in *Williams* highlights the reason the case has generated confusion: "In the pages that follow, I call Justice Alito's opinion 'the plurality,' because that is the

conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication." 132 S.Ct. at 2265.

C. Forfeiture by Wrongdoing—*Giles v. California*, 554 U.S. 353 (2008)

1. Court holds that it's not enough for the prosecution to prove that defendant caused the witness's absence from trial. Rather, it must be shown that defendant caused the defendant's absence with the intent to prevent the witness from testifying at trial.

2. Standard of proof theoretically an open question (not in Wisconsin), as majority opinion did not address it (or disapprove of California court's use of preponderance standard). *See also Davis*, 547 U.S. at 833 (noting widespread use of preponderance standard in forfeiture).

3. States are free to adopt a less demanding standard for forfeiture by wrongdoing as applied to the admission of nontestimonial hearsay.

D. Retroactivity—*Crawford* not retroactive. *Whorton v. Bockting*, 549 U.S. 406 (2007)

E. Dying Declarations—May qualify as exception to *Crawford* rule, but not yet determined. *See Crawford*, 541 U.S. at 56 n. 6.

F. Unavailability

1. "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Melendez-Diaz*, 557 U.S. at 324.

2. *Hardy v. Cross*, 132 S.Ct. 490 (2011)—Reaffirming that the lengths to which the prosecution must go to produce a witness is a question of reasonableness.

V. Significant Wisconsin Cases

A. Statements to Police Following Crime

1. *State v. Searcy*, 2006 WI App 8, 288 Wis. 2d 804 - Statements volunteered to police at traumatic scene that were not prompted by law enforcement or generated with intent to acquire evidence against particular suspect deemed not testimonial. Pre-*Davis* case.

2. *State v. Rodriguez*, 2006 WI App 163, 295 Wis. 2d 801 – Where police were focused on ensuring safety, rather than on building case against defendant, statements of victim and her daughter nontestimonial (Decision is completely wrong)

B. Lab Reports

1. *State v. Deadwiller*, 2013 WI 75, 350 Wis. 2d 138

   a. Court finds that *Deadwiller* and *Williams v. Illinois* basically identical fact patterns, so result of *Williams* controls

   b. And if not, it was harmless error

2. *State v. Griep*, 2014 WI App 25, 353 Wis. 2d 252, **petition for review granted**

   a. Holds that admission of surrogate expert testimony (interpreting data produced by another expert) about state lab's analysis of defendant's blood sample did not violate 6th A.

   b. Decision acknowledges that Seventh Circuit reached opposite conclusion in (*United States v. Turner*, 709 F.3d 1187, 1191-94 (7th Cir. 2013)

C. Dying Declarations

State v. Beauchamp, 2011 WI 27—Court holds that the admission of dying declaration statement does not violate state or federal constitution.

D. Forfeiture by Wrongdoing

Jensen I, 2007 WI 26, 299 Wis. 2d 267

Jensen II, 2011 WI App 3, 331 Wis. 2d 440

State v. Baldwin, 2010 WI App 162, 330 Wis. 2d 500

E. Right to Confrontation at Preliminary Hearing—None. *State v. O'Brien*, 2014 WI 54.

F. State and Federal Confrontation Rights Generally Coextensive

1. While recognizing that the state constitution provides a "more direct guarantee" to meet their accusers face to face, the Wisconsin Supreme Court holds that generally the state and federal rights are coextensive. *State v. Vogelsberg*, 2006 WI App 228, 297 Wis. 2d 519 (affirming trial court's decision to allow witness to testify from behind a barrier upon a particularized showing of necessity).

G. Opportunity for Cross-Examination

1. *State v. Hale*, 2005 WI 7, 277 Wis. 2d 593—Prior testimony admissible against confrontation challenge, but only if defendant himself had a prior opportunity to cross-examine the witness giving that testimony (codefendant's opportunity to cross not sufficient).

2. *State v. Stuart*, 2005 WI 47 – Opportunity to cross-examine at a preliminary hearing was not sufficient to admit that testimony because of restrictions on scope of cross at hearing.

I. Unavailability

1. *State v. King*, 2005 WI App 224, 287 Wis. 2d 756—Court finds that state's failure to serve assault victim with a subpoena when that was possible and when that step was a foreseeable potential condition to her presence at trial was not reasonable.

J. Statements to friends, etc.

1. *State v. Jensen*, (*Jensen I*), 2007 WI 26

2. *State v. Jensen (Jensen II*), 2011 WI App 3

3. *State v. Savanh*, 2005 WI App 245, 287 Wis. 2d 876 – Casual remark on the phone to an acquaintance not testimonial, even if overheard by

government informant. Statements in furtherance of conspiracy are not hearsay.

K. Harmless Error

Jensen II, 2011 WI App 3
Jensen v. Schwochert, 2013 WL 6708767

L. Certified Bank Records

1. *States v. Doss*, 312 Wis.2d 570, 754 N.W.2d 150–Neither records nor certificate are testimonial.

M. Limits on Cross

State v. Rhodes, 336 Wis.2d 64, 799 N.W.2d 850

Sussman v. Jenkins, 636 F.3d 329 (7th Cir. 2011)

VI. Pending Cases

A. *Ohio v. Clark*

1. Cert. Granted on two questions

   a. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?

   b. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

2. State is seeking reversal of Ohio Supreme Court decision holding that child's statements reporting physical abuse in response to a teacher's questions were testimonial, finding that "[w]hen teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator," under the mandatory-reporting law, "any statements obtained are testimonial for purposes of the Confrontation Clause."

B. ***State v. Griep***

VII. Other Significant Confrontation Clause Issues/Conflicts

A. **Autopsy Reports**—While autopsy reports would seem to clearly be testimonial, the courts remain split on the issue. *Compare United States v. James*, 712 F.3d 79,99 (2d Cir. 2013) (particular autopsy report "not testimonial because it was not prepared primarily to create a record for use at a criminal trial"); *United States v. Ignasiak*, 667 F.3d 1217, 1231 (11th Cir. 2012) (testimonial).

B. **Statements to Social Workers**

C. **Statements of Interpreters** – Are an interpreter's statements translating what a defendant or other witness said testimonial? Most courts say "no," asserting that the interpreter is merely a "language conduit," *see United States v. Shibin*, 722 F.3d 233 (4th Cir. 2013), but the Eleventh Circuit disagrees. *See United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013).

D. **Does statement need to have been made with intent to accuse defendant?** No. *United States v. Duron-Caldera*, (5th Cir. 2013); *See also Williams* (Justice Thomas and four dissenters reject plurality view that a testimonial statement should have "the primary purpose of accusing a targeted individual of engaging in criminal conduct").

E. **Due Process Right that Evidence be Reliable?**—*See* Lynn McLain "I'm Going to Dinner with Frank": *Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker—and the Role of the Due Process Clause as to Nontestimonial Hearsay,* 32 Cardozo L. Rev. 373 (2010).

VIII. Considerations in Litigating Confrontation Clause Issues

A. **Preserve Issues**

1. Raise hearsay and confrontation objections

2. Must raise constitutional claim to keep open possible habeas review

3. Renew objections to admission of evidence at trial. For example, two federal circuits have held that a severance motion did not preserve a *Bruton* challenge to the admission of a non-testifying defendant's statements where no contemporaneous objection made to testimony. *See United States v. Jobe*, 101 F.3d 1046, 1068 (5th Cir. 1996); *United States v. Turner*, 474 F.3d 1265, 1276 (11th Cir. 2007); *but see United States v. Nash*, 482 F.3d 1209, 1218 n. 7 (10th Cir. 2007) (motion for severance preserved *Bruton* issue).

B. Break statement down—When a narrative statement containing multiple assertions is at issue, consider asking for a ruling on each separate assertion on hearsay and confrontation grounds. *Davis* recognizes that same statement may contain testimonial and nontestimonial components.

C. Challenge Adequacy of State's Effort to Procure Witness's Attendance

D. Take Advantage of Forfeiture Hearings

1. Opportunity to examine important witness's before trial

2. Not like a preliminary hearing—to determine whether state has proven forfeiture by a preponderance of the evidence requires court to make credibility determination (like a civil case)

3. Be aware that state may seek to preserve testimony of reluctant witnesses at forfeiture hearing– complain about any restrictions on cross

E. Forfeiture is a two-way street

1. *United States v. Yida*, 498 F.3d 945 (9th Cir. 2008) (because government permitted deportation of witness between first trial and retrial, government prohibited from using testimony at first trial although subject to cross-examination).

2. While not a confrontation issue, if helpful witness is unavailable because of state's actions, seek to admit hearsay statements of witness on grounds that state caused absence

F. Fight Harmless Error

1. Courts are eager to avoid reversal by finding harmless error

2. Make contemporaneous record of how the lack of confrontation damages the defense

G. Pan for Gold

1. If have important confrontation issue, reread significant cases

2. Confrontation cases are not models of clarity

3. Close scrutiny is likely to reveal some helpful nuggets for your case

4. Great deal of conflict among jurisdictions on confrontation issues – look outside Wisconsin for helpful cases

H. Statements to Civilian Witnesse

1. Argue that a statement is testimonial even if not made to police if the statement is accusatory or the declarant would have reasonably expected that her statements may be used in the investigation or prosecution of a crime. *See Bullcoming*, 131 S. Ct. at 2714 n. 6 (indicating that Confrontation Clause applies to statements made to establish or prove past events potentially relevant to later criminal prosecution).

2. For professional witnesses who are not government agents (*e.g.,* SANE, social workers, doctors, teachers, and others with duty to report) be prepared to establish that their job is to acquire evidence for possible prosecution. Remember that part of statement may be testimonial (who caused injury) while other part is not (nature of injury to be treated).

I. Testimony at Pretrial Hearing—If witness testifies at pretrial hearing, make record of restrictions on cross examination that deprived you of opportunity to cross

J. Challenge Claims offered of "not for the truth"

1. Experts

2. To explain police officer's investigation – *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004)