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Domestic Violence Hearsay Exceptions in the Wake of *Crawford vs. Washington: A View from the Bench*

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Case Overview

On August 5, 1991, Michael D. Crawford violently stabbed a man he accused of trying to rape his wife, Sylvia. Both Michael and Sylvia were immediately arrested and taken to the police station for separate interrogation. After receiving Miranda warnings and while still in police custody, both provided tape-recorded statements.

The key issue at Michael's trial was whether he acted in self-defense. Michael testified that after asking the victim, Richard Rubin Kenneth Lee, whether he had tried to rape Sylvia, Lee rushed at Michael at the same time reaching for a weapon.

Sylvia did not testify at trial because both the prosecution and Michael stipulated that Washington's marital privilege statute rendered her unavailable to do so. The marital privilege statute provided that Sylvia could not be forced to testify against Michael without his consent, which he did not provide in this case. The prosecution, however, sought to introduce Sylvia's pre-recorded statement and accompanying transcript as evidence that the victim did not reach for a weapon until after Michael stabbed him. Michael objected, arguing that the admission of Sylvia's tape-recorded statement violated his Sixth Amendment right to confront witnesses against him.

The Washington Supreme Court held that Sylvia's statement was admissible, despite Sixth Amendment and hearsay obstacles. To be sure, the Court found that Michael did not waive his Sixth Amendment right to confront the witness against him, given the fact that he asserted the

marital privilege to prevent his wife from testifying. And because that made Sylvia unavailable to testify, her statement became hearsay, and did not meet any of the generally accepted (i.e., “firmly rooted”) hearsay exceptions. However, because the Washington Court found that her confession was “virtually identical” to Michael’s confession, the two confessions therefore “interlocked.” The fact that the two statements “interlocked” made Sylvia’s statement reliable – that is, it contained sufficient guarantees of trustworthiness despite Michael’s inability to cross examine her.¹

The case was heard by the U.S. Supreme Court (hereinafter Court), which reevaluated the Confrontation Clause framework it had established in *Ohio v. Roberts*.² The problem with hearsay statements, of course, is that unless the person who made the statement is available for cross-examination, there is no way to determine how reliable the statement is. However, in some circumstances, other factors contribute to the reliability of a statement made out of court and sought to be introduced as hearsay evidence. *Roberts* established the mechanism of measuring whether a hearsay statement meets the reliability test sufficiently to satisfy the requirements of the Confrontation Clause in the Constitution. In this case, the Court found that Sylvia’s statement did not satisfy the test and was inadmissible, explaining that because “testimonial statements are at issue, (statements made in police interrogation or at trial, rather than spontaneously in a help-seeking context) the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”³

Crawford v. Washington now establishes that the introduction of a statement made during a police interrogation, where the witness is unavailable at trial and has never been subjected to cross-examination, violates the Confrontation Clause.⁴ This article will examine the impact, if any, *Crawford’s* application of the Confrontation Clause has on the typical prosecution relying on firmly rooted hearsay exceptions in domestic violence cases.

The Domestic Violence Hearsay Enigma

In the unique context of domestic violence cases, prosecutors frequently are faced with victims who recant their testimony or fail to show up for trial. Because domestic violence victims are often not available to testify, out-of-court statements that meet hearsay exceptions constitute a significant form of proof prosecutors seek to use in admitting evidence that a crime was committed. The goal is to conduct evidence-based prosecutions.

Some examples of what states are doing to ensure evidence-based prosecutions include: enacting mandatory arrest laws, instituting mandatory prosecutions laws, and increasing the enforcement of protective orders against abusers where the victim may have initiated contact.⁵ These trends are helping to lower the dismissal rates in domestic violence cases. However, the problem with obtaining convictions still remains with the victim’s reluctance or inability to testify. Two other trends that are helping prosecutors with the difficult task of obtaining convictions in domestic violence cases are the enactment of domestic violence statutes allowing evidence to be admitted under the exceptions to the hearsay rule, and expansive readings of other evidentiary rules.⁶

Crawford's Effect on Domestic Violence Hearsay Statements

In the context of domestic violence cases, most hearsay statements sought to be introduced in domestic violence courts arguable fall outside the scope of *Crawford*. These include 9-1-1 calls for help made by victims or others, statements made by domestic violence victims to treating doctors, and spontaneous statements made by domestic violence victims to police officers first arriving at the scene. Without question, prior to *Crawford*, 9-1-1 calls for help routinely were admitted by courts as excited utterances and were not violations of the Confrontation Clause. A 9-1-1 call is generally initiated by the victim or witness of a crime seeking immediate help, not by the government seeking evidence for prosecution. For purposes of *Crawford*, these types of statements are a far cry from the recorded statement given by Sylvia Crawford in response to the structured questioning at the police station.

By contrast, statements made by victims to police officers who arrive on the scene of a domestic violence incident and respond to a simple “What happened?” or “Is there a problem?” do not fall within the definition of interrogation, and therefore an excited utterance which may follow is not subject to *Crawford's* confrontation requirement. These statements are often initiated and freely given by the victim; have no indicia of police compulsion; and are not made in contemplation of future prosecution, but rather are an attempt to reach out for help.

However, if the statement is not blurted out upon the officer's arrival, or is the product of more intensive questioning with an eye towards gathering evidence for prosecution, then it might be considered “interrogation.” Statements resulting from interrogation of any kind are likely to require *Crawford's* confrontation and should not be admissible unless there is an opportunity for cross-examination. The trial court should test the statement prior to trial at a hearing designed to determine whether the statement is an excited utterance, the product of interrogation, or made by the victim in clear contemplation of criminal prosecution.

The *Crawford* case will have some effect on domestic violence cases. However, because many domestic violence cases will arguably involve admissible hearsay statements, *Crawford* should have little effect on the day-to-day trials seen in domestic violence courts in others states around the nation.

Practical Approaches to Determine Admissibility

As Chief Judge Rehnquist notes in his concurring opinion in *Crawford*, the legal community needs answers to the hearsay problem now.⁷ In that respect, below are some considerations for judges and practitioners to keep in mind.

Courts confronted with a *Crawford* issue should first determine whether the hearsay statement sought to be introduced is testimonial or non-testimonial. For example, the trial court might be presented with statements made to a police officer on the scene or the statements might be the contents of a 9-1-1 call. The trial court can hold a hearing to determine if the statements were necessary for the officer to determine probable cause or to make an arrest. If a finding is made that the statements were only necessary to the probable cause determination, and were not evidence gathered for prosecution or the product of interrogation, then the evidence should fall

within an admissible hearsay exception. Additionally, a court or magistrate could also devise a fast track procedure for ensuring cross-examination of statements. The procedure might include giving the defense, perhaps at first appearance, a time/date in the future to attend the taking of the statement, and allowing the opportunity for cross-examination. The victim of course, would also need to be advised of the date and time when the statement would be given, which could be done at the time of arrest, or through other means.

Final Thoughts

From the decision in *Crawford*, it appears that the Court is attempting to achieve a workable balance between the defendant's right to confrontation and the right to introduce reliable evidence to aid the truth-finding process. This balance should not impede the tremendous advancements accomplished in the past few years in the area of domestic violence. Because many statements sought to be introduced in domestic violence courts are arguably admissible hearsay, the traditional *Roberts* framework will apply and the statements will continue to be admissible under existing hearsay exceptions.

Domestic violence remains a serious problem in our communities. Unquestionably, hearsay exceptions are critical to the goal of evidence-based prosecutions in our domestic violence course. Although *Crawford* has "made waves" in the traditional approach to analyzing confrontation clause hearsay issues, domestic violence hearsay exceptions should definitely "remain afloat" in the wake of *Crawford*.

¹ *State v. Crawford*, 54 P.3d 656 (Wash. 2002).

² *Ohio v. Roberts*, 448 U.S. 56 (1980), overruled in part by *Crawford*, 124 S. Ct. 1354 (2004). In order to demonstrate sufficient reliability to satisfy the Confrontation Clause, admissible hearsay has to meet one of two prongs: manifest particularized content-based or circumstance-based "guarantees of trustworthiness," or fall with a "firmly rooted hearsay exception." *Roberts*, 448 U.S. at 66.

³ *Crawford*, 124 S. Ct. at 1374. The Court provided that "[w]hatever else [testimonial] covers, it applies at a minimum to priori testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with the closest kinship to the abuses at which the Confrontation Clause was directed."

⁴ U.S. Const. amend. VI.

⁵ See Michael Morley, *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 210-20 (2003).

⁶ See e.g., Or. Rev. Stat. § 40.460 (2003) and Cal. Evid. Code § 1370 (West 2000). For a discussion of the varying state approaches to the prosecution problem and the use of hearsay in domestic violence cases, see Neal A. Hudders, *The Problem of Using Hearsay In Domestic Violence Cases: Is A New Exception The Answer?*, 49 Duke L.J. 1041 (2000). See also Morley, supra note 6 at 215-216.

⁷ *Crawford*, 124 S. Ct. at 1378.