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## **Ruling on Hearsay Evidence Guts Cases**

By Robin Franzen

***Summary: Prosecuting abuse and domestic violence will be harder after the Supreme Court's affirmation of the right to face an accuser***

One of the most defense-friendly U.S. Supreme Court decisions in years, underscoring the right to cross-examine witnesses, could severely thwart the ability of prosecutors to try certain sensitive cases of domestic abuse and child abuse.

Legal authorities were scrambling to decide the extent of Monday's ruling but said Wednesday that it could gut prosecution of cases in which victims often refuse to testify at trial – domestic violence being a prime example – and limit the use of co-defendants' statements in the prosecution of other cases.

The 9-0 opinion potentially disallows hearsay evidence that courts had increasingly allowed as exceptions during the past 25 years and boldly reinforces a defendant's right to confront witnesses under the Sixth Amendment of the U.S. Constitution.

"This decision will have a significant impact on criminal prosecution, no doubt," said Kevin Neely, spokesman for the Oregon attorney general's office, which convened a meeting Wednesday to discuss the ruling's effect.

Dana Forman, a criminal defense lawyer, considers the decision in Crawford v. Washington to be the most important ruling from the Supreme Court since the 1966 Miranda decision in terms of preserving constitutional rights for criminal defendants.

"I was blown away by the scope of the thing," she said.

The decision overturned an assault conviction against Michael Crawford of Olympia, who stabbed a man he thought had tried to rape his wife. Crawford claimed self-defense, arguing the victim was going for a weapon when he was stabbed.

His wife, Sylvia, who was present at the time of the incident, did not testify at her husband's trial, invoking marital privilege. However, a judge said the prosecution could use her taped statement to police indicating that there was no weapon.

The Supreme Court ruled that the wife's statement to police was not admissible because the defense did not have an opportunity to cross-examine her.

In overturning the Washington Supreme Court on the Crawford case, the U.S. Supreme Court also abandoned its own 1980 ruling, *Ohio v. Roberts*, that allowed a hearsay witness statement if a judge found it trustworthy.

Inadequate under Sixth Amendment Justice Antonin Scalia, who wrote Monday's opinion, said that wouldn't have been enough for the framers of the Constitution.

"Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty," Scalia wrote. "This is not what the Sixth Amendment prescribes."

Previously, Oregon prosecutors handling domestic violence and child abuse cases did not have an absolute obligation to produce a witness at trial, Neely said. Instead, they could rely on statements those witnesses made to police officers if they were found to be reliable. Typically, in domestic violence cases, those statements had to be made within 24 hours of the incident.

"Now, in those instances, (prosecutors) will not be able to rely on the officer," he said. "They'll be required to produce a witness."

It was unclear Wednesday whether the Supreme Court's ruling would be retroactive. Prosecutors certainly hope not. But they are concerned.

"We had a situation where the law was pretty settled that this was admissible," said Norm Frink, chief deputy district attorney for Multnomah County. "Now, I'm sure every sex abuser in the penitentiary is probably thinking they are going to get out."

Oregon case already affected Already, the Supreme Court ruling has caused an Oregon criminal case to be dismissed.

When a domestic assault trial began Monday morning without the victim's cooperation, a Multnomah County judge ruled that hearsay statements against the defendant were admissible. But that afternoon, after the high court's ruling, Forman, who works for Multnomah Defenders Inc., successfully asked the judge to exclude the statement. The case was dismissed.

The only way it can be reinstated, Forman said, is if the district attorney compels the victim to testify by issuing an arrest warrant.

Although John Bradley, special counsel for the Multnomah County district attorney's office, agreed the decision will make prosecutors' jobs harder, he cautioned that it might not be as broad as it appears on first reading.

Bradley said the opinion doesn't affect many types of evidence typically admitted at trial, including medical reports or business records. He also said he expected it would take years of litigation to sort out exactly what type of evidence falls under Monday's ruling.

Defense lawyer Larry Matasar said he thought the ruling would, perhaps most importantly, prevent innocent people from being convicted.

"If you believe in the judicial system and the right of confrontation, it's one of the bedrock principles," he said.

Although the ruling was unanimous, Chief Justice William Rehnquist dissented from overturning the court's 1980 decision that allowed some hearsay evidence. He said it was crucial to deal with the unresolved questions raised by the new ruling quickly.

"Thousands of federal prosecutors and the tens of thousands of state prosecutors need answers," he wrote. "They need them now, not months or years from now. . . . The parties should not be left in the dark in this manner."

News researcher Kathleen Blythe contributed to this report. Reporter Robin Franzen: 503-221-8133; robinfranzen@news.oregonian.com

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