



## : ANOKA COUNTY JUDICIAL TRAINING UPDATE :



### DETERMINING ADMISSIBILITY OF HEARSAY

#### *Crawford v. Washington*

**PROBLEM:** The Morning Of Trial, While Addressing Motions-In-Limine, You Are Asked To Rule On The Admissibility Of A Hearsay Statement For Use In The State's Case In Chief. The Following Is A Six Step Analysis The Court Should Apply In Determining Admissibility Of Any Hearsay Statement Under *Crawford V. Washington, 541 U.S. 36 (2004)*; see *State v. Cox, A08-145 March 18, 2010*.

- 1) **State the Constitutional Standard:** The Confrontation Clause of the Sixth Amendment to the U.S. constitution provides that "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." *U.S. Const. amend. VI. See Minn. Const. art. I. sec 6.*
- 2) **State the Basic 'Crawford' Rule of Admissibility:** When a witness is unavailable, *testimonial* statements made by the witness are inadmissible at the defendant's trial unless the defendant had an opportunity to cross-examine the witness. The rule applies to any witness against the accused.
- 3) **Does the Hearsay Statement Fall Within a Recognized Exception to the Hearsay Rule Exclusion?**
  - a) See Rules of Evidence 803 & 804 for a list of Recognized Hearsay Exceptions;
  - b) If there is no hearsay exception, your analysis is over; the statement is not admissible in the States case in chief for substantive purposes. If a hearsay exception does apply, then continue:
  - c) The determination of whether a hearsay statement violates the Confrontation Clause is dependent upon whether that statement is *testimonial*: (e.g. a solemn declaration or affirmation made for the purpose of establishing or proving some fact)

Note: Some out of court statements may be deemed non-hearsay and admissible by special statute or under Rule 801. However, if such non-hearsay statements are deemed testimonial then the below analysis still applies.

#### 4) You Determine if the Statement is 'Testimonial' by Applying the Following 8 Factor Test:

- (1) What was the officer's purpose in speaking with the declarant?
  - (a) *To secure the scene, to protect someone, to collect evidence, to sort out a confusing situation? The more it is to set up a prosecution, the more likely to be testimonial; and*
  - (b) *As a general rule statements taken by police officers in the course of interrogations are.....testimonial under even a narrow standard. Crawford at 52.*
- (2) What was the declarant's purpose in speaking with the officer?
  - (a) *Statements to obtain help/protection/safety/assistance are less likely to be testimonial.*

- (3) Was the declarant a victim or an observer/witness?
  - (a) *Victims are less likely to make "testimonial" statements.*
- (4) Was it the police or the declarant who initiated the conversation?
  - (a) *Declarant initiated = less testimonial*
- (5) Where was the statement made?
  - (a) *Declarant's home (less testimonial), squad car or police station (more testimonial)*
- (6) What was the declarant's emotional state?
  - (a) *Emotionally distraught = less testimonial*
- (7) How formal/structured was the conversation?
  - (a) *The less structure = less testimonial*
- (8) If and how the statements were recorded.
  - (a) *Formal taping = more testimonial.*
  - (b) *Officer's memory (or notepad) = less testimonial*

**Basic Rule of Thumb:** the first two factors listed above are the most important; the statement is likely testimonial if: either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial. The other six factors are probative of those two. *State vs Wright, 701 N.W.2d 802 (Minn. 2005); State v Scacchetti, 711 N.W.2d 508 (Minn. 2006).*

#### **5) If Statement is Testimonial, Did Defendant Have a prior Opportunity to Examine the Witness?**

- a) Answer to this question is almost always no; however, testimony from a witness at the defendant's prior trial did not violate the defendant's right of confrontation where the witness was unavailable, the defendant had an opportunity to cross-examine at the first trial, and the state's theory of the case had not substantially changed. *State v. Hannon, 703 N.W.2d 498, 507 (Minn. 2005).*
- b) If statement is testimonial and defendant did not have an opportunity to examine witness then the statement is NOT ADMISSIBLE – UNLESS:

#### **6) There Is One Exception To The Crawford Rule: Forfeiture By Wrongdoing:**

- a) This exception is aimed at defendants who intentionally interfere with the judicial process by procuring or coercing silence from witnesses and victims. *State v. Cox, A08-145 March 18, 2010.*
- b) This exception requires the state to prove by a preponderance of the evidence:
  - i) That the declarant-witness is unavailable;
    - (1) A witness is not unavailable for Confrontation Clause purposes 'unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial. Standard for State is 'reasonableness'.
  - ii) That the defendant engaged in wrongful conduct;
  - iii) That the wrongful conduct procured the unavailability of the witness; and
  - iv) That the defendant intended to procure the unavailability of the witness.