

RECENT DEVELOPMENTS IN CRIMINAL LAW

United States Supreme Court Overrules *Ohio v. Roberts*,

Reinforces 6th Amendment Right to Confrontation

The United States Supreme Court, in *Washington v. Crawford*, 124 S.Ct. 1354 (2004), made a substantial change in the jurisprudence surrounding the 6th Amendment right to confrontation, overruling *Ohio v. Roberts*, [448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597](#) (1980). With seven Justices joining in the majority opinion, and Chief Justice Rehnquist and Justice O'Connor concurring in the Judgment, the Court ruled that out of court testimonial statements by witnesses are barred under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable.

Defendant, Michael Crawford, and his wife Sylvia, went looking for Kenneth Lee, after Lee allegedly tried to rape Sylvia. Upon finding Lee, there was a confrontation in which Lee was stabbed in the torso.

Mr. and Mrs. Crawford were interrogated twice by the police, after being given their Miranda warnings. Mr. Crawford claimed that he had stabbed Lee in self-defense. Michael and Sylvia's stories were largely consistent, except that Sylvia was not as clear on the issue of whether Lee was reaching for a weapon when Mr. Crawford stabbed him.

Mr. Crawford was charged with assault and attempted murder, and asserted self-defense at trial. Sylvia did not testify, claiming spousal privilege (see for comparison La. C.E. 504, 505). Washington's case law provides that the privilege does not extend to a spouse's out of court statements admissible under a hearsay exception (see for comparison La. C.E. 804(A)(1)), and so the State moved to admit the evidence as a statement against penal interest (see for comparison La. C.E. 804(B)(3)).

Crawford moved to have the statements ruled inadmissible, arguing that the evidence would violate his 6th Amendment right to confront the witnesses against him. The Trial Court refused to exclude the evidence, citing *Ohio v. Roberts*, which held that the 6th Amendment does not bar admission of unavailable witness statements against a defendant, provided the statements bear adequate indicia of reliability, in that it must either fall under a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." The State used Sylvia's tape-recorded confession during the trial and relied on the confession in its closing argument. Crawford was convicted of assault.

The Court of Appeals reversed, based on its own nine-factor test of particularized guarantees of trustworthiness. Washington's Supreme Court reinstated the conviction, concluding that it did bear guarantees of trustworthiness, finding it to be an "interlocking confession." The defendant sought certiorari, which was granted.

The Supreme Court engaged in a substantial historical review, describing the practice of using ex parte statements as evidence in a criminal trial as a particular civil law vice which the Confrontation Clause was designed to stop. Justice Scalia, writing for the majority, explained that the *Roberts* test did not present a problem merely because it was unpredictable, but because of “its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude”

Accordingly, the Court held that testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine.

The Court did not clearly define testimonial statements, stating

- We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations.

It is important to note that earlier in the opinion, it was stated that interrogation, as used in describing “testimonial,” is used in a “colloquial” rather than technical or legal sense, indicating a breadth to the term not usually ascribed in Supreme Court jurisprudence such as *Miranda*, et al. This definition does not include business records or official records, and does appear to allow for non-testimonial hearsay, such as casual remarks overheard by a third party. Whether those casual remarks would be testimonial if overheard by a police officer in some official setting is open to question.

Aside from the obvious problems posed in adult criminal cases, this opinion implicates similar concerns for delinquency proceedings under Title 8 of the Louisiana Children’s Code, which guarantees all Constitutional rights to defendants except for the right of Trial by Jury (see La. Ch. C. Art. 808). The evidentiary rules under La. C.E. 804(B), Hearsay Exceptions, may be in conflict with the ruling in *Washington v. Crawford*, depending on the situation. Although the decision specifically leaves intact dying declarations (La. C.E. 804(B)(2)), former testimony subject to cross but not in combination with unavailability of the witness would appear to be excluded (La. C.E. 804(B)(1)), as would statements against interest (La. C.E. 804(B)(3)) or complaints of sexually assaultive behavior (La. C.E. 804(B)(5)), provided those statements were “testimonial” within the meaning of the decision.

An additional area of concern arises in non-criminal proceedings for domestic violence and child abuse. *Folse v. Folse*, 1998-1976 (La. 6/29/99), 738 So.2d 1040, addressed whether the relaxed evidentiary standard applicable to child custody proceedings (La. C.E. 1101) applied in an action under the Post-Separation Family Violence Relief Act (La. R.S. 9:361 et seq.). The Louisiana Supreme Court, relying on *Ohio v. Roberts* and La. C.E. 804(B)(5), ruled that the statements of the minor child in accusing the parent of abuse were admissible. With the overruling of *Roberts* and the implicit conflict of the new rule with La. C.E. 804(B)(5), the validity of the *Folse* decision is called into question.

AUTHORS

Michael S. Walsh – Chair, Criminal Justice Section

Joseph K. Scott III

Lee & Walsh

628 North Boulevard

Baton Rouge, LA 70802