

CRAWFORD v. WASHINGTON: THE CONFRONTATION CLAUSE REBORN

By Jonathan Grossman

A. THE CONFRONTATION CLAUSE

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” (U.S. Const., 6th Amend.) The Confrontation Clause applies in state court proceedings through the due process clause of the Fourteenth Amendment. (*Pointer v. Texas* (1965) 380 U.S. 400, 406.)

B. THE OLD STANDARD

“In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicia of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.” (*Ohio v. Roberts* (1980) 448 U.S. 56, 63.)

C. THE NEW STANDARD

“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law - as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” (*Crawford v. Washington* (2004) 541 U.S. __ [124 S.Ct. 1354, 1374].)

Testimonial at least includes statements under oath in court, in affidavits, and in depositions. It also includes statements to the police during interrogations. (*Id.*, at p. __ [124 S.Ct. at p. 1364].) “Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not sworn testimony, but the absence of oath was not dispositive.” (*Ibid.*) In this case, the defendant’s wife made damaging statements during a police interrogation. She refused to testify under the state’s spousal privilege rule. The prosecution admitted the wife’s statements to the police, despite the defendant’s confrontation objection.

D. THE POLICY

The original intent of the confrontation clause was to permit the criminal defendant to face his accusers in an adversarial proceeding and question them. “English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examinations in private by judicial officers.” (*Id.*, at p. ___ [124 S.Ct. at p. 1359].) Without the Sixth Amendment, “ “[w]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition*.’ ” (*Id.*, at p. ___ [124 S.Ct. at p. 1362].)

“Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’ ” (*Id.*, at p. ___ [124 S.Ct. at p. 1370].) “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” (*Id.*, at p. ___ [124 S.Ct. at p. 1374].)

E. TEN POINTS ABOUT THE CONFRONTATION CLAUSE

1. Must object on federal confrontation grounds. (Evid. Code, § 353; *People v. Brown* (2003) 31 Cal.4th 518, 542; *People v. Gordon* (1990) 50 Cal.3d 1223, 1254, fn. 6; see *Davis v. Woodford* (9th Cir. 2003) 333 F.3d 982, 1006-1007.)

2. Standard of review: “A trial court’s determination regarding whether a hearsay statement has the required indicia of reliability is subject to independent review on appeal. (*Lilly v. Virginia* (1999) 527 U.S. 116, 136; *People v. Eccleston* (2001) 89 Cal.App.4th 435, 445-446.) A trial court’s finding of historical fact must be upheld if supported by substantial evidence. A trial court’s determinations of state law issues are also reviewed for an abuse of discretion. (*Lilly v. Virginia, supra*, 527 U.S. at p. 136.)” (*People v. Tatum* (2003) 108 Cal.App.4th 288, 296.)

3. Must show prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Arsdall* (1986) 475 U.S. 673, 684.)

4. The confrontation clause applies only to a criminal trial. (*People v. Miranda* (2000) 23 Cal.4th 340, 352-353; see *Kentucky v. Spencer* (1987) 482 U.S. 730, 740; *United States v. Matlock* (1974) 415 U.S. 164, 172-173.) The right to confront and cross-examine a witness can be a due process right when there is a liberty interest at stake. (See, e.g., *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786; *Specht v. Patterson* (1967) 386 U.S. 605, 610; see also *In re Melinda S.* (1990) 51 Cal.3d 368, 383, fn. 16.)

5. There is usually no confrontation clause violation if the declarant testifies. (*California v. Green* (1970) 399 U.S. 149, 162; *United States v. Owens* (1988) 484 U.S. 554,

559 [witness could not remember his prior identification]; *Nelson v. O'Neil* (1971) 402 U.S. 622, 629-630 [witness denied making prior statements].) “Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U.S. 149, 162” (*Crawford v. Washington* (2004) 541 U.S. ___, fn. 9 [124 S.Ct. 1354, 1369, fn. 9].)

6. The confrontation clause does not apply if the extrajudicial statement is not hearsay. “The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street* [(1985)] 471 U.S. 409, 414” (*Crawford v. Washington* (2004) 541 U.S. ___, fn. 9 [124 S.Ct. 1354, 1369, fn. 9].) In *Street*, the defendant claimed his confession was coerced when the police read to him the codefendant’s confession and told him to say the same thing. In rebuttal, the prosecution presented a police officer who testified as to the circumstances of Street’s interrogation and pointed to differences in Street’s confession with the codefendant’s confession. There was no confrontation problem because statements from the codefendant’s confession were admitted not for the truth of the matter asserted but for describing the circumstances of Street’s interrogation.

7. The confrontation clause might apply only to “testimonial” hearsay. “An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.” (*Crawford v. Washington* (2004) 541 U.S. ___, [124 S.Ct. 1354, 1364].) “[Legal scholars] offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements . . . [¶] In *White*, we considered the first proposal and rejected it. 502 U.S., at 352-353 Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today” (*Id.*, at p. ___ [124 S.Ct. at p. 1367].)

8. Previous holdings by the Supreme Court are still good law. “Our cases have thus remained faithful to the Framers’ understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” (*Crawford v. Washington* (2004) 541 U.S. ___ [124 S.Ct. 1354, 1369].) “[T]he results of our decisions have generally been faithful to the original meaning of the Confrontation Clause” (*Ibid.*)

9. The confrontation clause includes the right to physically see the witness. (Compare *Maryland v. Craig* (1990) 497 U.S. 836 with *Coy v. Iowa* (1988) 487 U.S. 1012; *People v. Murphy* (2003) 107 Cal.App.4th 1150.)

10. The confrontation clause includes the opportunity for cross-examination on all matters of substantial probative value. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691.) “[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which the jurors . . . could appropriately draw inferences relating to the reliability of the witness.’ [Citation.]” (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) A court has discretion in properly limiting evidence that is admitted; there is not Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced “a significantly different impression of [the witness’s] credibility” (*Ibid.*)

F. APPLICATION OF THE CONFRONTATION CLAUSE TO SPECIFIC STATE HEARSAY EXCEPTIONS

“‘Hearsay evidence’ is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) A statement is an “oral or written verbal expression or . . . nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression.” (Evid. Code, § 225.)

Not hearsay

Legally operative language to show consent, agreement, agency, solicitation, etc. (See *People v. Fields* (1998) 61 Cal.App.4th 1063, 1068-1069.)

Circumstantial evidence of state of mind to show belief or knowledge. (See *People v. Cox* (2003) 30 Cal.4th 916, 957-959.)

Effect on hearer to show notice, motive, due care, etc. (*People v. Boyette* (2002) 29 Cal.4th 381, 429; *People v. Duran* (1976) 16 Cal.3d 282, 295.)

Present memory refreshed (Evid. Code, § 771)

Fresh complaint is admissible to show the circumstances of the complaint to bolster the credibility of the complaining witness, not for the truth of the matter asserted. (*People v. Brown* (1994) 8 Cal.4th 764.) Because it is not actually hearsay, there should be no confrontation problem when it is properly admitted. Also, a statement to a civilian appears not to be “testimonial.” (*Crawford v. Washington* (2004) 541 U.S. __ [124 S.Ct. 1354, 1364].)

Evid. Code § 1202 Impeaching the credibility of the declarant with other hearsay might be admissible under Evidence Code but pose new Confrontation problems. For example, although prior inconsistent statements are admissible, *infra*, testimonial prior inconsistent statements of a declarant who never testifies might fit within the context of *Crawford*.

§ 1220 Admission by the defendant is normally not a confrontation problem. (See

Lilly v. Virginia (1999) 527 U.S. 116, 127.)

§ 1221 Adoptive admission (see *People v. Riel* (2000) 22 Cal.4th 1153, 1189) could pose a problem with the confrontation clause or the right to remain silent. In *People v. Castille* (2003) 108 Cal.App.4th 469, 479-480, the court of appeal upheld the decision to admit an adoptive admission. In that case, the police interrogated three codefendants at the same time. One of the codefendants blabbed. The defendant sometimes confirmed the codefendant's statements, sometimes he denied them or said he did not remember. The United States Supreme Court granted certiorari, vacated the judgment, and transferred it back to the state court for reconsideration in light of *Crawford v. Washington* (2004) 541 U.S. ___ [124 S.Ct. 1354]. (*Shields v. California* (Mar. 22, 2004, No. 03-7276) ___ U.S. ___.)

§ 1223 Admission in furtherance of a conspiracy does not pose a confrontation problem. (*Crawford v. Washington* (2004) 541 U.S. ___ [124 S.Ct. 1354, 1367]; *Bourjaily v. United States* (1987) 483 U.S. 171, 182-184; *United States v. Inadi* (1985) 475 U.S. 387, 395; cf. *Dutton v. Evans* (1970) 400 U.S. 74, 87-89 [admission of a statement by a coconspirator not in furtherance of a conspiracy made to another prisoner did not violate the confrontation clause].)

§ 1228 Statement by minor under 12 who was a victim of sex crime (1985) appears to pose a confrontation problem. It permits the admission of statements by a minor under the age of 12 who was a victim of molestation if the statements were documented in a police report or social worker report, the statements were made before a confession by the defendant, the minor is unavailable to testify, and the statements are reliable. The minor's statements to the police clearly are testimonial; the statements to the social worker arguably are. Whether the statements are reliable no longer make them admissible under the Confrontation Clause. If the defendant is deprived of an opportunity to cross-examine the minor, this creates a *Crawford* type confrontation problem. Because there must be a confession from the defendant, any error might be harmless. (See *Creutz v. Superior Court* (1996) 49 Cal.App.4th 822, 828-831.)

§ 1230 Declaration against interest (see *People v. Leach* (1975) 15 Cal.3d 419, 441 & fn. 17). "In criminal trials, statements against penal interest are offered into evidence in three principal situations: (1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant." (*Lilly v. Virginia* (1999) 527 U.S. 116, 127 (plur. opn.)) The first category is simply an admission by the defendant, but it can lead to an *Aranda-Bruton* problem in a joint jury trial. (*Ibid.*) The second category does not pose a confrontation problem because it is being offered by the defendant. (*Id.*, at pp. 129-130.) The third category does pose a confrontation problem. (*Id.*, at p. at pp. 131-134; *Lee v.*

Illinois (1986) 476 U.S. 530, 545.) Declarations to civilians pose less of a confrontation problem because the statement might not be testimonial. (See *Crawford v. Washington* (2004) 541 U.S. __ [124 S.Ct. 1354, 1364] [“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.”]; *Dutton v. Evans* (1970) 400 U.S. 74, 87-89 [statement by a coconspirator to a civilian did not violate the confrontation clause].) Statements admitted for the limited purpose of showing guilt of a codefendant in a joint jury trial creates a confrontation problem. (*Bruton v. United States* (1968) 391 U.S. 123, 126-129; *Richardson v. Marsh* (1987) 481 U.S. 200, 208, 211; *People v. Fletcher* (1996) 13 Cal.4th 451, 456-465; see *People v. Aranda* (1965) 63 Cal.2d 518, 530.)

§ 1231 Decedent’s sworn statement regarding gang crimes (1997) appears to pose a confrontation problem because it requires the declarant to make a sworn statement in anticipation of litigation which fits the definition of testimonial. It might be admissible as a dying declaration.

§ 1235 Prior inconsistent statement of a witness poses no confrontation problem. (*California v. Green* (1970) 399 U.S. 149, 158.)

§ 1236 Prior consistent statement of a witness probably does not pose a confrontation problem. (See *People v. Cannady* (1972) 8 Cal.3d 379, 386, relying on *California v. Green* (1970) 399 U.S. 149, 158, 161.)

§ 1237 Past recollection recorded probably does not pose a confrontation problem because the declarant must testify to authenticate the prior recording. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1292.)

§ 1238 Prior identification appears to pose no confrontation problem because the declarant must testify. (*United States v. Owens* (1988) 484 U.S. 554, 559.)

§§ 1240, 1241 Spontaneous and contemporaneous declaration might pose a confrontation problem. It appears not to pose a confrontation problem to the extent the statement is truly spontaneous or contemporaneous to the event (*Idaho v. Wright* (1990) 497 U.S. 805, 820) or if it is made to another civilian or otherwise is not testimonial (see *People v. Moscat* (N.Y. City Crim. Ct. Mar. 25, 2004, 2003BX044511) __ NYS __ [2004 N.Y. Misc. LEXIS 231] [911 call not testimonial]). A confrontation problem might arise because California statutes define the hearsay exceptions broadly, and it does not really require a spontaneous statement to be spontaneous. (*People v. Brown* (2003) 31 Cal.4th 518, 541 [lapse in time not dispositive, issue is mental state of declarant]; *People v. Raley* (1992) 2 Cal.4th 870, 893-894 [18 hours after the event was spontaneous]; *People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234-1235 [two days later].) California permits “spontaneous”

statements to be in response to questioning (*People v. Farmer* (1989) 47 Cal.3d 888, 903-904; *People v. Poggi* (1988) 45 Cal.3d 306, 319) and to describe not just events but also impressions and opinions (*Farmer, supra*, at p. 903). In *White v. Illinois* (1992) 502 U.S. 346, the state tried to admit the statements of a child sex victim to doctors as a spontaneous statement. The United States Supreme Court held the state did not have to establish the minor was unavailable. (*Id.*, at pp. 353-357.) But now “[i]t is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made ‘immediately upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.’ [Citation.]” (*Crawford v. Washington* (2004) 541 U.S. ___, fn. 8 [124 S.Ct. 1354, 1368, fn. 8].)

§ 1242 Dying declaration appears not to pose a confrontation problem, but it might. “The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, e.g., *Mattox v. United States*, 156 U.S. 237, 243-244 Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. [Citations.] We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis.” (*Crawford v. Washington* (2004) 541 U.S. ___, fn. 6 [124 S.Ct. 1354, 1367, fn. 6]; see also *Kirby v. United States* (1899) 174 U.S. 47, 61.)

§§ 1250-1253 Statement for medical diagnosis (see *People v. Brodit* (1998) 64 Cal.App.4th 1312) might pose a confrontation problem. (Compare *White v. Illinois* (1992) 502 U.S. 346, 353-357 with *Idaho v. Wright* (1990) 497 U.S. 805, 817-818.) In *Crawford v. Washington* (2004) 541 U.S. ___, fn. 8 [124 S.Ct. 1354, 1368, fn. 8], the Court said the only issue in *White* was whether the declarant needed to be unavailable, not whether the statements were admissible. “It is questionable whether testimonial statements would even have been admissible on that ground in 1791.” (*Ibid.*) Note that identifying the abuser might be admissible as a prior identification and other statements might be admissible as prior inconsistent statements, prior consistent statements, or a fresh complaint.

§ 1270 Business records usually do not pose a confrontation problem. (*Crawford v. Washington* (2004) 541 U.S. __ [124 S.Ct. 1354, 1367]; see *People v. Beeler* (1995) 9 Cal.4th 953, 978-980.) If the records are from a business that is not part of the government or an agent of the government, it probably is not testimonial. There might be an issue if the business record is produced as a requirement of the government for prosecuting crimes (e.g., mandatory reporting of child abuse) because the report is an accusation, and the Sixth Amendment requires the defendant to face his accusers. “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.” (*Crawford v. Washington* (2004) 541 U.S. ___, [124 S.Ct. 1354, 1364].)

§ 1280 Government records usually is not a confrontation problem. (See *People v. Beeler* (1995) 9 Cal.4th 953, 978-980; *United States v. Contreras* (9th Cir. 1995) 63 F.3d 852, 857.) It can be a confrontation problem when the main evidence against the defendant is information contained in a government document and the defendant does not have an opportunity to cross-examine the declarant. (*Kirby v. United States* (1899) 174 U.S. 47, 55-61 [in prosecution of possession of stolen property, proof that the property was stolen was established by records of the convictions of the thieves].)

§ 1290 Former testimony does not pose a confrontation problem so long as the declarant was subject to cross-examination and is unavailable. (*Crawford v. Washington* (2004) 541 U.S. __ [124 S.Ct. 1354, 1367-1368]; *Ohio v. Roberts* (1980) 448 U.S. 56, 63-64; *Mancusi v. Stubbs* (1972) 408 U.S. 204, 213-216; *California v. Green* (1970) 399 U.S. 149, 169-170; *Roberts v. Russell* (1968) 392 U.S. 293, 294-295 (per curiam); *Barber v. Page* (1968) 390 U.S. 719, 722-725; *Pointer v. Texas* (1965) 380 U.S. 400, 406; *Mattox v. United States* (1895) 156 U.S. 237, 244.)

§ 1293 Former testimony at a preliminary hearing of a minor admissible in a dependency case (1990) Because dependency cases are not criminal, at best the parent has a due process right to confront the declarant. (See *In re Melinda S.* (1990) 51 Cal.3d 368, 383, fn. 13.)

§ 1294 Former testimony of a prior inconsistent statement if done correctly is not a confrontation problem as long as the defendant had an opportunity to cross-examine the declarant when the former testimony was made or at trial. (*California v. Green* (1970) 399 U.S. 149, 169-170.)

§ 1350 Statement by witness of serious felony made unavailable under defendant’s direction (1985) poses a confrontation problem, and it is probably not a firmly rooted exception. There is an argument that if the defendant causes a witness to be unavailable, he forfeits the confrontation right as to that witness. (See *Motes v. United States* (1900) 178 U.S. 458, 471-472.)

§ 1360 Child abuse victim (1995) poses a confrontation problem; it is not even a firmly rooted exception. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1374; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445.)

§ 1370 Victim of (threatened) physical abuse (1996) (see *Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 937-938 [the Nicole Brown diaries exception]) poses a confrontation problem and it does not appear to be a firmly rooted exception. (*People v. Kops* (2003) 108 Cal.App.4th 514, 522-523; but see *People v. Hernandez* (1999) 71 Cal.App.4th 417, 424 [it is akin to a spontaneous statement].)

§ 1380 Victim of elder abuse (1999) would be a confrontation problem. (See *People v. Tatum* (2003) 108 Cal.App.4th 288, 296 [holding it complies with the confrontation clause because it is required to be trustworthy].)

Welf. & Inst. Code § 355 Child dependency exception. Because it is not a criminal matter, only the due process clause presents a constitutional obstacle to the evidence. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1242-1250.)