SPECIAL DIRECTIVE 04-03

5

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: CURT LIVESAY, Chief Deputy District Attorney

SUBJECT: *Crawford v. Washington*

DATE: April 22, 2004

On March 8, 2004, the United States Supreme Court issued an opinion greatly expanding a defendant's right to cross examination under the Confrontation Clause of the Sixth Amendment to the United States Constitution. (*Crawford v. Washington* (March 8, 2004, No. 02-9410) ___ U.S. ___ [2004 WL 413301, 72 USLW 4229, 2004 DAR 2949].) [1] As a result, many of the hearsay exceptions contained in the California Evidence Code may no longer be constitutional in the face of a Sixth Amendment objection by criminal defendants. The impact of *Crawford* on this Office is, therefore, immediate.

Subject to experience and further guidance from the courts, this Special Directive sets forth office policy on a defendant's right to cross examination under the confrontation clause.

Crawford involved a prosecution by authorities in Washington state for attempted murder. After commission of the crime, the defendant's wife made several statements during an interview with the police that incriminated both her and her husband. Because Washington's marital privilege statute prevented the state from calling her as a witness, prosecutors offered into evidence tape-recorded statements of her interview. The trial court admitted the recording under the state's declaration-against-interest exception to the hearsay rule. In so doing, it found sufficient "indicia of reliability" under the test announced in *Ohio v. Roberts* (1980) 448 U.S. 56, so as to preclude a violation of the Confrontation Clause. Under the *Roberts* test, the Supreme Court had previously held that admission of a hearsay statement made by an unavailable witness in a criminal trial did not violate a defendant's rights under the Confrontation Clause so long as the state could show that the statement bore "adequate indicia of reliability." Such reliability existed if the statement:

(1) fell within a "firmly rooted hearsay exception," or
(2) bore "particularized guarantees of trustworthiness."

---

[1] A copy of the slip opinion may be downloaded from the following site: www.supremecourtus.gov/opinions/03slipopinion.html.

(*Ohio v. Roberts*, *supra*, 448 U.S. at p. 66.) After the trial court made this finding, the jury convicted the defendant and the state supreme court upheld the conviction.

The United States Supreme Court reversed, overruled *Roberts* and established a new test which expands the reach of Confrontation Clause, thus limiting the types of hearsay statements that are now admissible against the defendant in a criminal trial. The new test consists of the following two components:

1) The Confrontation Clause Applies To All *Testimonial Statements* Offered By The Prosecution At A Criminal Trial.

The Court did not offer a comprehensive definition of the term "testimonial statement." Instead it defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." (Slip Opn. at p. 15.) This rule thus applies, "at a minimum" to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (Slip Opn. at p.33.) The Court hinted that it may in the future apply a broader definition, such as: "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (Slip Opn. at p. 16.) Also, the Court acknowledged that the lack of a comprehensive definition of "testimonial" will result in "interim uncertainty." (Slip Opn. at p. 33, fn. 10.)

Examples of non-testimonial statements which do not trigger Confrontation Clause violations include business records and statements made in furtherance of a conspiracy. (Slip Opn. at p. 20.) The Court also left the door open to the admission of dying declarations but expressly refused to rule on the issue, at least for now. (Slip Opn. at p. 20, fn. 6.) Such evidence will not be precluded by the Sixth Amendment if a proper foundation is laid under an applicable hearsay exception in the Evidence Code.

2) In A Criminal Trial, Admission Against The Defendant Of Testimonial Statements Made Out Of Court Requires A Showing That (a) The Declarant Is *Unavailable*, And (b) The Defendant Had An *Opportunity For Cross-Examination*.

The Court in *Crawford* left intact prior holdings governing the determination of witness "unavailability" for purposes of the Confrontation Clause, such as the degree of diligence the state must exert in order to locate an absent witness. It also left intact cases discussing what constitutes an opportunity for cross-examination. The Court did, however, transform the importance of these factors. Put simply, pre-*Crawford* case law made unavailability and a prior opportunity for cross-examination *sufficient* conditions for satisfying the Confrontation Clause. Until last week, testimony from an unavailable witness that a trial court deemed to be inherently "trustworthy" would also have satisfied the Confrontation Clause, even in the absence of prior cross-examination. After *Crawford*, however, unavailability and prior cross-examination are now *necessary* conditions for admission of testimonial statements made out of court.

The conclusions that can be made about *Crawford* at this time are as follows:

1) The Legislature's recently enacted hearsay exceptions allowing for admission of witness statements made during police interviews or other forums, without cross-examination, are now essentially inoperative for use against the defendant in criminal trials. These include Evidence Code section **1231** (statements by witnesses in gang-related cases where witness subsequently dies); section **1253** (statements of victims under age 12 made for purposes of medical diagnosis), section **1360** (statements of victims under the age of 12 in child abuse prosecutions), section **1370** (statements narrating infliction or threat of physical violence) and section **1380** (videotaped statements of elder abuse victims).

2) The applicability of some of the more venerable hearsay exceptions in criminal trials is also in grave doubt, at least where the proffered statements are made in the context of a police interview or interrogation. The exception for declarations against interest, (Evid. Code § 1230), is a prime example. Washington state's version of this exception was at issue in *Crawford.*

3) Under standard appellate rules, cases in which appeals are not yet final are subject to *Crawford.* (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328.) Collateral attacks of convictions (i.e. habeas corpus petitions) can also be expected soon. Any deputies who receive habeas corpus petitions alleging *Crawford* error should notify HABLIT D.I.C. Brentford Ferreira immediately at (213) 974-5908.

The Confrontation Clause protects the "accused" in "criminal prosecutions." With these parameters in mind, our Office should resist application of *Crawford* in the following instances:

1) Civil Proceedings, such as:

- Consumer Protection Cases Arising Under Bus. & Prof. Code § § 17200 and 17500
- Civil Forfeitures
  (*Austin v. United States* (1993) 509 U.S. 602, 608, fn 4 [Confrontation Clause inapplicable].)
- Commitment Proceedings Involving Sexually Violent Predators
  (*People v. Otto* (2001) 26 Cal.4th 200, 214 [respondents in civil commitment proceedings must look to Due Process Clause rather than Confrontation Clause regarding cross-examination of witnesses].)

2) Probable Cause Proceedings, such as:

- Preliminary Hearings
  (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1078, ["it is doubtful that the federal confrontation clause operates to bar hearsay evidence offered at a preliminary hearing"].)
- Bail Hearings
  (*United States v. Winsor* (9th Cir. 1986) 785 F.2d 755, 756 [hearsay admissible at bail hearings].)

3) Criminal Trials In Which An Out-Of-Court Testimonial Statement Is Offered:

- When The Declarant Appears For Cross-Examination At Trial.
  (Slip Opn. at p. 24, fn. 9.)
- For A Non-Hearsay Purpose (e.g., state of mind).
  (Slip Opn. at p. 24, fn. 9 ["the Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"].)

4) Cases in Which Defendants Have "Opened The Door" And Thus Waived Their Rights Under The Confrontation Clause

The Confrontation Clause is a "one-way" street. In other words, a defendant may continue to rely upon state hearsay exceptions that would constitute a violation of the Clause if utilized by the prosecution.

Should the defendant offer a portion of a hearsay statement containing exculpatory evidence, and that same statement also includes *inculpatory* evidence, deputies should continue to utilize Evidence Code section 356 in order to present the complete statement to the trier of fact. Even after *Crawford*, the admission of such evidence by the People will not create any Confrontation Clause violations. (*United States v. Nobles* (1975) 422 U.S. 225, [because "one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth," trial court had discretion "to assure that the jury would hear the full testimony of the [defense] investigator rather than a truncated portion favorable to [defendant]"]; see also *State v. Johnson* (Kan. 1995) 905 P.2d 94, 100; *Worthington v. State* (Md. App. 1978) 381 A.2d 712, 715-716.)

5) Cases Where Defendants Have Forfeited Their Right To Cross-Examination By Intimidating Or Murdering Witnesses

The Court suggested that defendants could forfeit their rights under the Confrontation Clause if the state can show that they and/or groups with which they are associated intimidated or murdered witnesses. (Slip Opn. p. 12; *Reynolds* v. *United States* (1878) 98 U.S. 145, 159; *United States* v.

Mastrangelo (2d Cir. 1982) 693 F.2d 269 [grand jury testimony of witness murdered while on his way to courthouse held admissible]; *United States* v. *Carlson* (8th Cir. 1976) 547 F.2d 1346 [grand jury testimony of witness who refused to testify at trial held admissible due to threats by defendant]; *United States* v. *Thevis* (5th Cir. 1982) 665 F.2d 616, 630.) Deputies who intend to utilize this exception should also be cognizant of state law restrictions imposed by Evidence Code section 1350.

6) Certain Statements Under Evidence Code Section 1360

As mentioned earlier, many of the statements that would have been admissible under Evidence Code section 1360 and *Ohio v. Roberts* will no longer be under *Crawford.* Evidence Code section 1360 may still be viable, however, in some instances.

For example, the statute does not require unavailability of the child/witness. Thus, if the child is available for cross-examination at trial, the admission of his or her prior, out-of-court statements would not violate the Confrontation Clause. (Slip Opn. at p. 24, fn. 9).

Additionally, the scope of Evidence Code section 1360 is not restricted to statements made to law enforcement officials. Statements made to non-law enforcement officials that qualify under Evidence Code section 1360 might also qualify as "non-testimonial" and thus might be admissible over a Confrontation Clause objection.

7) Statements Under Evidence Code Section 1370 Which Are Not "Testimonial"

Evidence Code section 1370 specifically requires unavailability of a witness, thus implicating *Crawford.*

The statute, however, also requires the trial court consider, *inter alia*, "whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested." (Evid. Code § 1370, subd. (b)(1).) A trial court's finding that a statement was not made in anticipation of legal proceedings might provide a trial deputy with ammunition to argue that the statement is not "testimonial" and thus not precluded by *Crawford.* An example would be Nicole Brown's diary. Her written statements in the diary detailing physical abuse at the hands of O.J. Simpson were arguably not made in anticipation of a future trial. Thus, such statements might be admissible not only under Evidence Code section 1370, but also in spite of a Confrontation Clause objection.

dtg