

6th Amendment's Confrontation Clause Evolution



Robert H. Humphrey, Esq.
Law Offices of Robert H.
Humphrey



Kimberly A. Petta, Esq.
Associate, Law Offices of
Robert H. Humphrey

Although not automatically excluded by the confrontation clause, the 6th Amendment right usually trumps the use of hearsay evidence.

The 6th Amendment guarantees the defendant's fundamental right to confront the witnesses against him or her in all criminal prosecutions. This right is applicable through the 14th Amendment Due Process Clause.¹ The defendant's opportunity to cross-examine witnesses is a cornerstone of all criminal defenses and the primary purpose of the right of confrontation. Therefore, out-of-court statements must not deny criminal defendants this right. The 6th Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.²

The rights protections of the 6th Amendment are applicable to the States through the 14th Amendment, and the Rhode Island Constitution has a comparable provision in Article I, Section 10, which states:

Rights of accused persons in criminal proceedings. – In all criminal prosecutions, accused persons shall enjoy the right... to be confronted with the witnesses against them, to have compulsory process for obtaining them in their favor, to have the assistance of counsel in their defense, and shall be at liberty to speak for themselves; nor shall they be deprived of life, liberty, or property, unless by the judgment of their peers or the law of the land.³

In certain criminal cases, a balance must be developed between the criminal defendant's right of confrontation and the use of hearsay evidence by the introduction of out-of-court statements. Although all hearsay evidence is not automatically excluded by the confrontation clause, the 6th Amendment right usually trumps the use of hearsay evidence.

In several cases, the U.S. Supreme Court has analyzed the relationship between the confrontation clause and the use of hearsay evidence. In *Ohio v. Roberts*,⁴ the Court held "[i]n 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."⁵

However, the "reliability" standard established in *Ohio v. Roberts*, was overturned by the Court in *Crawford v. Washington*⁶ where the Court held that the confrontation clause permits the admission of "testimonial statements of witnesses absent from trial... only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine."⁷

During the trial for attempted murder and assault, the defendant's wife's statements made during police interrogation were recorded and introduced at trial after a finding that the statements were trustworthy and reliable. The defendant's conviction was overturned by the U.S. Supreme Court which held that the admission of the statements were in violation of the defendant's right to confrontation and to cross-examine witnesses against him. The statements were testimonial, and their reliability could only be ascertained through confrontation. The Court concluded that the language of the confrontation clause applies to witnesses who made statements to police officers during interrogation and that those statements are testimonial. If such statements are testimonial, they are only admissible when a defendant has had a prior opportunity to cross-examine the unavailable witness regarding his/her statements. "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural, rather than a substantive, guarantee. It commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."⁸ In *Crawford*, the Court declined to fully define what statements are testimonial. Instead "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law

YOUR CONNECTICUT CONNECTION



Kelsie C. Leon, [^]

Gregory P. Massad †

Jason B. Burdick [^]†

Victoria S. Mueller *

Alan R. Messier [†]

^{*} Admitted in CT

[^] 2L, RWU Law

† Admitted in RI

21 Huntington Street
New London, CT 06320
860-443-7014



1050 Main Street, Suite 8
E. Greenwich, RI 02818
401-385-3877

AREAS OF PRACTICE:

- | | | |
|-----------------------|-----------------|---------------------|
| Personal Injury | Bankruptcy | Landlord & Tenant |
| Real Estate | Wills & Probate | DUI |
| Commercial Litigation | Family Law | Foreclosure Defense |

www.messiermassad.com

OCEAN STATE *Weather*

STEVEN R. CASCIONE
Meteorologist

109 Larchmont Road
Warwick, Rhode Island 02886
Tel: 401-439-9023

CONSULTING & EXPERT WITNESS SERVICES

required: unavailability and a prior opportunity for cross-examination. 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.”⁹

In the cases of *Davis v. Washington*,¹⁰ *Hammon v. Indiana*,¹¹ and *Michigan v. Bryant*,¹² the U.S. Supreme Court had an opportunity to interpret the definition of “testimonial” left open in its holding in *Crawford*. In *Davis* and *Hammon*, a tandem decision, the Court attempted to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are “testimonial” and thus subject to the requirements of the confrontation clause. In *Davis*, the defendant’s conviction was upheld because the Court held that “[s]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”¹³ Therefore, the 911 calls from the defendant’s girlfriend/victim were properly admitted into evidence at trial to identify the defendant as the perpetrator despite the absence of the girlfriend/victim at trial. In contrast, the affidavit prepared by the wife/victim after the police responded to a reported domestic disturbance in *Hammon’s* case was improperly admitted into evidence because the affidavit was testimonial and not part of an ongoing emergency.¹⁴

In *Michigan v. Bryant*, the police responded to a gas station after reports of a gunshot. The victim made statements to the police officers about the person who shot him. The victim died and the defendant was charged and convicted of second degree murder. The U.S. Supreme Court reinstated the defendant’s conviction because the statements to police were non-testimonial because they were made as part of an ongoing emergency. The Court attempted to clarify what it meant by “the primary purpose of the interrogation is to enable police assistance

