2015

Confrontation after Ohio v. Clark

Anne R. Traum
University of Nevada, Las Vegas -- William S. Boyd School of Law


SHUTTERSTOCK

CONFRONTATION AFTER OHIO V. CLARK

BY PROF. ANNE R. TRAUM

The Supreme Court's decision in *Ohio v. Clark,*[1] provides an occasion to take stock of the Sixth Amendment Right to Confrontation since the court's landmark 2004 decision in *Crawford v. Washington*.[2] *Crawford* strengthened a defendant's right to confront his accusers face-to-face, underscoring that cross-examination is the constitutionally preferred method for testing the reliability of accusatory statements. *Clark* could eliminate that right in a wide range of cases where, although the reliability of a declarant's out-of-court statements is critically important, a defendant has no right to confrontation.

Confrontation Requires Cross-examination

Crawford established that cross-examination is a touchstone of the Sixth Amendment Confrontation Clause. Before *Crawford*, the court permitted judges to admit statements without face-to-face confrontation upon a finding that the statements bore sufficient indicia of reliability. *Crawford* abandoned that approach and instead divided accusatory statements into two camps: those that are testimonial and those that are not. Testimonial statements, the court said, were only admissible at trial if the declarant was unavailable and the defendant had a prior opportunity for cross-examination.[3] And though the court in *Crawford* did not fully define testimonial, it stated that "at a minimum," the definition would include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[4]

The statements in *Crawford* easily fit this definition. In *Crawford*, the defendant, who was accused of assault, claimed he acted in self-defense. His wife made statements during police interrogation that undermined his defense, but was unavailable to testify at trial. Because her statements to police were testimonial, admitting them without an opportunity for cross-examination violated the defendant's right to confrontation.[5]

Confrontation Hinges on What's "Testimonial"

Since *Crawford,* the Supreme Court has honed its definition of testimonial. A statement qualifies as testimonial if, in light of all the circumstances, the primary purpose of the conversation was to "creat[e] an out-of-court substitute for trial testimony."[6] Under this primary purpose test, statements to police that prove past events

continued on page 19

continued from page 17

CONFRONTATION AFTER OHIO V. CLARK

relevant to a criminal prosecution are testimonial, such as a sworn statement to police following a domestic violence incident, and a certified drug report from a forensic laboratory.[7]

Statements to police during an ongoing emergency, however, are not testimonial if their primary purpose is to seek or render aid. Such non-testimonial statements include a victim's call for help to a 911 emergency operator and a dying victim's description of his assailant.[8] The court acknowledged in *Michigan v. Bryant* that crime victims and police interrogators may act with mixed motives, prompted by a blend of safety, accusatory and investigatory concerns. But the court nonetheless concluded that the primary purpose of the interrogation in *Michigan v. Bryant* was "to enable police assistance to meet an ongoing emergency."[9]

Justice Scalia, who authored *Crawford* and dissented *Michigan v. Bryant,* criticized the court for embracing such a "malleable approach," which affords judges broad discretion in deciding what is testimonial and thus when the Confrontation Clause applies.[10]

Clark Limits Confrontation

Clark addressed the recurring challenge of confronting child victims of abuse. Child witnesses have long been controversial based on concerns about their reliability, truthfulness, suggestibility and memory.[11] Evidentiary laws aim to shield child victims of abuse from the further trauma of confronting their abusers in court.[12]

Clark concerned statements made by a three-year-old boy to his pre-school teachers, who questioned him about injuries on his face and arms. The pre-school teachers, who were required by law to report suspected child abuse, asked the child, L.P., "[W]hat happened?" and "Who did this?"[13] L.P. was "bewildered" and gave inconsistent answers: he initially said nothing, then claimed that he fell, and, finally, incriminated the defendant (Clark).[14] Because the child's statements were the only direct evidence against Clark, his counsel would have been keenly interested in probing those inconsistencies and testing the child's credibility.

But L.P. was deemed incompetent to testify at trial due to his young age, so Clark never got to cross-examine him.[15] Instead, the child's statements were deemed reliable and admitted through other witnesses. Clark claimed that his inability to confront the child violated *Crawford*. Although the Ohio Supreme Court agreed, the United States Supreme Court unanimously held that the boy's statements were not testimonial, meaning Clark had no right to confront him.

The court's analysis in *Clark* turned on three key facts: the statements were made to a teacher (not law enforcement), during an "ongoing emergency" and by a three-year-old child. Statements "made to preschool teachers, not the police," the court explained "are much less likely to be testimonial than statements made to law enforcement officers."[16] The teachers' status as mandatory reporters, did not convert them into law enforcement officers.[17] Further, the boy's teacher elicited his statement during "an ongoing emergency," because the pre-school "needed to know whether it was safe to release L.P. to his guardian at the end of the day."[18] So, as in *Michigan v. Bryant,* learning the suspect's identity, though obviously investigatory, was considered necessary to quell a safety concern.

The Upshot

Clark will constrict defendants' ability to confront child accusers. This is because in *Clark*, the Supreme Court broadly suggested that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause," because it is "extremely unlikely that a three-year old child in L.P.'s position would intend his statements to be a substitute

continued on page 20

SHUTTERSTOCK

continued from page 19

CONFRONTATION AFTER *OHIO V. CLARK*

for trial testimony."[19]

Clark may not reshape existing cases in Nevada, but it will narrow and simplify confrontation analysis. In Nevada, child statements about abuse are testimonial when made during interviews with law enforcement or child protective services.[20] Nevada cases have treated statements to nurses or doctors as testimonial,[21] but they may not be considered so under *Clark,* especially if the victim is very young, or if safety concerns predominate. Further, *Clark* may raise questions about when a child is considered very young, or not old enough to understand that her statements will be shared with police, or that the person asking questions is part of law enforcement or functionally equivalent. Courts will grapple with these questions. But whereas *Crawford* was a thumb on the scale favoring confrontation, *Clark* appears to be the opposite.

Clark breaks new ground by suggesting several new default rules, namely that statements to non-police, statements by young children and statements elicited based on safety concerns are not testimonial under *Crawford*. Overall, *Clark* limits a defendant's right to confront his accusers.

Crawford courts have focused, somewhat myopically, on whether out-of-court statements are testimonial, as the sole determinant of whether the defendant has the right to confrontation. What has fallen out of view is the value of cross-examination; whether it would assist the factfinder in assessing the credibility of a declarant whose accusations are critical to guilt or whose reliability is already at issue. *Crawford* railed against the courts usurping the factfinder's role in assessing the reliability of accusatory statements. *Clark* shows that the court's narrow definition of "testimonial" may lead to even less confrontation, cross-examination and adversarial testing than before *Crawford*. NL

1. 135 S.Ct. 2173 (2015).
2. 541 U.S. 36 (2004).
3. *Id.* at 54.
4. *Id.* at 68.
5. *Id.* at 68-69.
6. *Michigan v. Bryant*, 562 U.S. 344, 369 (2011).
7. *Davis v. Washington*, 547 U.S. 813, 822-23 (2006) (domestic battery affidavit in *Hammon v. Indiana* was testimonial); *Melendez-Diaz v. Massachusetts*, 577 U.S. 305, 310-311 (2009) (certified drug report was "functionally identical to live, in-court testimony").
8. *Davis v. Washington,* 547 U.S. 813, 827 (2006), *Michigan v. Bryant,* 562 U.S. 344, 376-77.
9. *Id.* at 377.
10. *Id.* at 383 (Scalia, J., dissenting).
11. *See, e.g., Clark*, 135 S.Ct. at 2182; Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation,* 82 Ind. L.J. 1009 (2007).
12. Raeder, 82 Ind. L.J. 1016-17.
13. *Clark*, 135 S. Ct. at 2178.
14. *Id.*
15. *Id.*
16. *Id.* at 2182.
17. *Id.* at 2183.
18. *Id.* at 2181.
19. *Id.* at 2182.
20. *Flores v. State*, 120 P.3d 1170 (Nev. 2005) (statements to law enforcement and child protective services are testimonial).
21. *State v. Vega*, 236 P.3d 632 (Nev. 2010) (statements to nurse at child advocacy center are testimonial); *Medina v. State,* 143 P.3d 471 (Nev. 2006) (statements to a sexual assault nurse examiner are testimonial, even if police are not yet involved).

Anne R. Traum is a professor of law at the UNLV William S. Boyd School of Law, where she teaches federal courts, criminal procedure, and criminal law, and directs the Appellate Clinic. During the 2015-2016 academic year, Traum is on leave from UNLV, while serving as a special attorney at the Department of Justice, Access to Justice Initiative, in Washington, D.C.