

COPING WITH CRAWFORD

THE SEQUEL

***not Joan; the Case**

VI. AMENDMENT

“In all criminal prosecutions the accused shall enjoy the right... to be confronted with the witnesses against him...”

ORDER OF ASSESSMENT

1. State Statute
2. State Constitution
3. Federal Constitution

THREE-PRONG RELEVANCE ANALYSIS

1. Is Fact For Which Evidence Proffered “Of Consequence” to Determination of Action?
2. Does Proffered Evidence Tend to Alter Probability of Fact?
(Make More or Less Probable)
3. Probative v. Prejudicial

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SUGGESTED INQUIRIES
FOR EXCITED UTTERANCE

1. Nature of Event
2. Appearance, Demeanor, and Condition of Declarant
3. Questions Asked of Declarant by Witness
4. Age of Declarant
5. Time of Statement in Relation to Event
6. Location of Statement in Relation to Location of Event

EXCITED UTTERANCES

1. Relevant
2. Startling Event; Condition
3. Statement Relates to Startling Event;
Condition
4. Declarant Still Under Stress of Event;
Condition
5. Declarant:
 - a) available, or
 - b) unavailability established
6. Indica of Reliability

**SUGGESTED INQUIRIES FOR PURPOSES OF
MEDICAL DIAGNOSIS AND TREATMENT**

1. Context in Which Statement Made
 - a) place

- b)in response to medical history inquiry
- c)in response to diagnostic inquiry
- d)in response to treatment inquiry or referral

2.Elements Relevant to Diagnosis or treatment

- a)identification of offender
- b)weapons used; if any
- c)nature of victim complaint
- d)location of assault
- e)any facts about offender known to complainant and pertinent to diagnosis or treatment

3.Diagnosis Made or Treatment Recommended

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MEDICAL DIAGNOSIS OR TREATMENT

1.Relevant

2.Statement Purpose: Medical Diagnosis or Treatment

3.Statement Relevant to Medical Diagnosis Or Treatment

4.Statement Describes:

- a)history
- b)past; present; symptoms, pain, sensations
- c)start of; character of cause or source of symptoms, pain or sensations

5.Declarant

- a)available or

- b)unavailability established
- 6.Indicia of Reliability

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PRESENT SENSE IMPRESSION

- 1.Relevant
- 2.Describe or Explain: Event or Condition
- 3.While or Immediately After
- 4.Declarant:
 - a)Available, or
 - b)Unavailability established
- 5.Indica of Reliability

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SUGGESTED INQUIRIES FOR FORMER TESTIMONY

1. Proof of Declarant's Unavailability
 - a)efforts to secure attendance
 - b)results of those efforts
2. Nature of Former Proceeding – Similar Motive
And Opportunity to Develop on:

- a) direct
 - b) cross
 - c) redirect
3. Parties to that Proceeding

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FORMER TESTIMONY

1. Relevant
2. Under Oath at Hearing, Deposition
 - a) same or different
 - b) by or against party
3. Party at Hearing; Deposition Had:
 - a) opportunity to develop: direct; cross; redirect
 - b) similar motive; interest to develop direct; cross, redirect with party against whom testimony offered
4. Unavailability Required
5. Reliability
6. Necessity

**SUGGESTED INQUIRIES TO ESTABLISH
UNAVAILABILITY (GOOD FAITH EFFORTS)**

1. Personal Service
 - a) when
 - b) how many times
2. Direct Contact
 - a) when
 - b) how many times
 - c) content of conversation
3. Unable to Locate
4. Efforts to Locate
 - a) contact with family; friends
 - b) use of law enforcement
 - c) use of computer and other searches
5. Request for Continuance
6. Request for Material Witness Warrant

EXAMPLES OF UNAVAILABILITY

1. Death
2. Incompetence
3. Recantation
4. 5th Amendment Assertion
5. Refusal to Testify Despite Contempt
6. Privileges

NOT EXAMPLES OF UNAVAILABILITY

1. Not called

2. No memory; Inadequate Memory
3. Denial

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INDICIA OF RELIABILITY

1. Firmly Rooted Exception
2. Opposed or Corroborated by Other Evidence
3. Bias, Interests, or Motives of Declarant
4. Had Declarant Ever Recanted
5. Declarant's Relationship With Either or Both Sides

NB – Not as a substitute for confrontation but foundational for hearsay exceptions

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CRAWFORD - A SUGGESTED APPROACH

1. Is it relevant? (FRE 401)

2. Is it hearsay? (FRE 801)
 - a. Out-of-court statement offered to prove the truth of the matter asserted
3. If hearsay, does an exception apply?
4. Has the foundation for the exception been laid?
 - a. Reliability
5. Is it Atestimonial@ or Anon-testimonial@ hearsay?
 - a. Was the purpose of the statement to prove or disprove a fact?
 - b. Was the statement made with the reasonable expectation of its use at trial?
 - c. Was statement product of formal interrogation?
 - d. Was statement to report ongoing emergency or past crime (primary purpose)?
6. If Atestimonial@ hearsay, is the declarant unavailable?
Good faith efforts to secure appearance
7. If Atestimonial@ hearsay, has there been an opportunity to cross-examine?

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Foundation for Testimonial Excited Utterances

- A. Primary Purpose of Declarant
 1. Relate events of prior criminal conduct.
 2. Relate events of non-emergency nature.
 3. Relate events for purposes of investigation and/or trial.
 4. Declarant in place of safety.

- B. Primary Purpose of Questioner
 1. To investigate prior criminal conduct.
 2. To preserve evidence of purposes of trial.

Note: Try coequal or current purpose argument
in 911 cases

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**Foundation for Testimonial Statements for
Purposes of Medical Diagnosis or Treatment**

A. Context

1. Who sponsors and/or funds program?
2. Who is employed by program?
3. Does program act as clearinghouse for information: to law enforcement, family services, etc.?
4. Location of program?
5. Services provided by program?

B. Primary or Coequal Purpose

1. Investigation of past criminal conduct.
2. Preservation of evidence for use in court.
3. Concurrent or coequal purpose may be diagnosis or treatment.

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U.S. SUPREME COURT CRAWFORD CASES

Crawford v. Washington

541 US 36, 124 S Ct 1354 (2004)

(Government uses wife's statement against penal interest to avoid spousal privilege exclusion and rebut husband-defendant's self

defense claim; although wife “unavailable,” without opportunity to cross-examine, statement violates Confrontation)

Davis v. Washington (Hammon)

547 US 813, 126 S Ct 2266 (2006)

(Davis: allowed use of 911 call statements as non-testimonial; primary purpose of 911 questions and answers was to meet ongoing emergency; Hammon: disallowed use of victim’s statements in police affidavit; testimonial because used to investigate past crime)

Whorton v. Bockting

549 US 1138, 127 S Ct 1173 (2007)

(discusses retroactivity of Crawford rule: did not announce “watershed rule,” therefore not retroactive)

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Giles v. California

554 US 353, 128 S Ct 2678 (2008)

(the rule of “forfeiture by wrongdoing” does not constitute an exception to Confrontation unless defendant engaged in wrongdoing with intent cause unavailability)

Melendez-Diaz v. Massachusetts

___ US ___, 129 S Ct 2527 (2009)

(under Crawford, forensic analyses by certified report violate Confrontation; violation not cured by ability to subpoena analyst)

Michigan v. Bryant

___ US ___, 131 S Ct 1143 (2011)

(victim’s statements to police were non-testimonial under the “primary purpose” rule; the questioning by police was necessary to meet an ongoing emergency; remanded to assess admissibility under State hearsay rules)

Bullcoming v. New Mexico

___ US ___, S Ct ___ (decided 6/23/11)

(New Mexico Supreme Court affirmed the admission of a blood alcohol result lab report via an analyst who had neither tested nor observed the testing of the sample; the trial court admitted the report as a business record; the state Supreme Court found the report to be testimonial but not a violation of Confrontation because the missing analyst was a mere “scrivener”;

Reversed: Confrontation was violated by the admission without proof that the testing analyst was unavailable and there had been a prior opportunity to cross examine; analyst not mere scrivener: blood must be received intact with unbroken seal; under proper report number; that test was performed under proper protocols and with no conditions that would affect validity of result)