February 2015

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

STATE v. DANIEL

STATE v. DANIEL

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

LYNCH and MAURER

Attorneys at Law

Avery Park, Columbia

MEMORANDUM

TO: Applicant

FROM: Mary Lynch

RE: State v. Daniel

DATE: February 26, 2015

We represent Christopher Daniel, who has been charged with the murder of Peter Daniel and the attempted murder of Gloria Daniel. Christopher is their son. Unfortunately, Gloria Daniel has recently died and I expect the indictment to be amended to charge Christopher with her murder as well.

I have filed a notice of a motion seeking to suppress evidence. We have ten days after filing this notice to file the supporting memorandum of points and authorities. Please prepare a draft of a persuasive memorandum of points and authorities that argues that the motion should be granted in full or at least in part. You may assume that, at the evidentiary hearing, witnesses will testify consistent with the material contained in the file. The transcript contained in the file is a certified copy of the recording. As such, you may assume that, if any parts of the recording are admitted into evidence, the transcript of that portion will also be admitted.

Arguments on motions to suppress require a detailed showing of how the facts in the case relate to specific factors identified by the courts in suppression cases. Therefore, your memorandum should relate specific facts to those specific factors and conclude how your analysis would establish that the evidence should be suppressed. Take care to anticipate arguments the prosecution is likely to make and explain why they are not persuasive. Your memorandum should, of course, contain appropriate

argument headings, but should dispense with a statement of facts. I will draft the statement of facts later.

STATE OF COLUMBIA
WARREN COUNTY SUPERIOR COURT

STATE OF COLUMBIA v. CHRISTOPHER DANIEL	Criminal Division CASE NO. 2014-2341

NOTICE OF MOTION TO SUPPRESS EVIDENCE

PLEASE TAKE NOTICE that, upon the attached affidavit of Dr. Nancy Donahue, and upon all the previous papers and proceedings in this matter, the undersigned will move this Court at the Courthouse located at 1435 Elm Street, Avery Park, Columbia, on March 5, 2015 at 9:00 a.m., or as soon thereafter as counsel can be heard, for an order:

1. Suppressing evidence of all or part of all testimony of nonverbal statements allegedly made by Gloria Daniel to the police during an interview conducted on August 12-13, 2014, as inadmissible hearsay, or in the alternative, a violation of defendant's constitutional right to confront witnesses, and
2. Suppressing evidence of all or part of all transcripts or testimony recording concerning the 911 call allegedly made by Peter Daniel on August 12-13, 2014, as inadmissible hearsay and a violation of defendant's constitutional right to confront witnesses, and
3. For such other and further relief as the Court may deem just and proper.

DATED: February 25, 2015

___*/s/ Mary Lynch*_____

Mary Lynch
Attorney for Defendant

STATE OF COLUMBIA

WARREN COUNTY SUPERIOR COURT

STATE OF COLUMBIA v. CHRISTOPHER DANIEL	Criminal Division CASE NO. 2014-2341

AFFIDAVIT OF DR. NANCY DONAHUE
IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

I, Dr. Nancy Donahue, being duly sworn, state:

1. I am a medical doctor and board certified neurologist licensed to practice in the state of Columbia.
2. I have expertise in neurology and rehabilitation of people with brain injuries.
3. I am one of Gloria Daniel's treating physicians.
4. I am Department Chair of Neurology at Avery Park Health Systems.
5. I started treating Mrs. Daniel in October 2014.
6. I have reviewed the statements of police and first responders who assisted Mrs. Daniel on August 13, 2014, as well as her entire medical record.
7. Many people with brain injuries have erratic movements of their arms and legs.
8. In order to know if someone who moved her head up and down or side to side was actually answering a question, I would have to know much more about her mental status than is contained in medical records or witness accounts to determine if the movement was actually in response to the question, and/or if it was accurate.
9. There are brain injury patients who may nod their heads up and down, but do not really intend the "yes" response.
10. In order to assess such a person's movements and responses, I would first have to ask a series of questions in order to establish if the person was oriented to person, place, or time. Next, to determine if the individual was competent to answer

questions, I would ask simple and unambiguous questions to which the answer was immediately apparent, e.g., "Are you a woman?"

11. Even if a brain-injured person was oriented and able to follow commands, those facts did not mean the person had any memory of the event that caused the brain injury.
12. When police come to my facility to question someone with a brain injury, I first assess the person to determine if he or she can provide any useful information.
13. If the person is not oriented, even if he or she can follow simple commands, no useful information can be provided.
14. Even if Mrs. Daniel was oriented and could generally answer questions, it was very unlikely that she would have any memory of the event that caused the injury.
15. With such a serious brain injury, it was extremely unlikely, if not impossible, that Mrs. Daniel could have remembered the event that caused the injury.

___*/s/ Nancy Donahue*_____

Nancy Donahue, M.D.

Subscribed and sworn to before me on February 25, 2015 [Signature and Title]

TRANSCRIPT

PRELIMINARY HEARING TESTIMONY OF TYLER JAMES

BY: MELISSA BREGER, Deputy District Attorney

* * * * *

BREGER: I have a few questions.

JAMES: Fine.

BREGER: Officer James, can you tell us where you were on the evening of August 12-13, 2014?

JAMES: I was on patrol in the Newtown section of the city.

BREGER: That is here in Avery Park?

JAMES: Yes.

BREGER: Did you respond to a call?

JAMES: Yes.

BREGER: What was the nature of the call?

JAMES: The 911 operator said that there was an assault taking place at 365 Delmar Street and I immediately went there.

BREGER: Approximately what time was this?

JAMES: About 12:30 a.m.; so I guess it was the 13th.

BREGER: When you got there, who did you see when you first went into the residence?

JAMES: When I first went into the room, there was one person in the front room. He was a man later identified as Peter Daniel. And then there was a woman lying in front of the refrigerator in the kitchen who was identified as Gloria Daniel.

BREGER: All right. When you first went in there, in what kind of condition was Mr. Daniel?

JAMES: He was dead. He had a wound to the head that we later learned was caused by a baseball bat. He was lying in blood. It looked like he fell over when he died. In fact, he had a telephone in his hand. He apparently pulled the phone cord out of the wall when he fell.

BREGER: And did you approach Mr. Daniel?

JAMES: Yes, I did, but it was clear he was dead.

BREGER: What did you do then?

JAMES: I went into the kitchen, and saw Mrs. Daniel.

BREGER: What condition was she in?

JAMES: She also appeared to have a head wound. She was also severely beaten around her face.

BREGER: What did you do?

JAMES: I got on my handheld radio and made sure the emergency medical team was on its way. After that, I went back to Mrs. Daniel.

BREGER: Did you speak to her?

JAMES: Yes, I reassured her that help was on the way and asked her if there was anyone else in the house.

BREGER: Did she say anything?

JAMES: No, it was pretty clear she had suffered some kind of head injury and she was unable to speak.

BREGER: What happened then?

JAMES: I went to search the house to make sure the assailant was not still present.

BREGER: Was there anyone else in the house?

JAMES: Just Mr. Daniel.

BREGER: Then what happened?

JAMES: I went back to Mrs. Daniel.

BREGER: From the time you went to clear the house and the time you returned to Mrs. Daniel, how long was that?

JAMES: It was probably 10 minutes. It was a big house. Sometime during the search I heard that the ambulance had arrived, so I knew she was being attended to.

BREGER: When you went back to Mrs. Daniel, what happened?

JAMES: She was already on the gurney to be taken to the hospital, but I stopped them and I asked if I could have a few moments with her. So, the paramedics stopped.

BREGER: Then what happened?

JAMES: I asked her if she knew who had done this to her and her husband. She tried to speak, but again, couldn't.

BREGER: Then what happened?

JAMES: Based on what the 911 operator told me, I asked her whether a member of her family did this and she nodded yes. Then I asked whether her son Jonathan did this. She shook her head no. Then I asked whether her son Christopher had done this. She nodded yes.

BREGER: Then what did you do?

JAMES: I repeated the question about Christopher two more times and she nodded, yes, both times. Then the paramedics put her in the ambulance.

* * * * *

STATEMENT OF KEVIN ROBERT

I am a paramedic employed by the Avery Park Fire Department. I was a first responder to the scene of the Daniel murder and assault, 365 Delmar Street, on August 12-13, 2014. When my partner, Leonard Ickes, and I arrived at the Daniel residence we found Peter Daniel dead in the living room and Gloria Daniel on the kitchen floor. She had profound injuries.

Mrs. Daniel was obviously in extreme distress. She was agitated and frustrated that she was unable to speak and her legs were moving erratically back and forth. I attempted to give Mrs. Daniel oxygen and assess her injuries. I realized she would need to be intubated, so I radioed for medical permission to give her a sedative necessary for the intubation. I inserted an IV line to administer the sedative. I administered the sedative. She responded to the sedative and calmed down.

As I was moving her to the ambulance, Officer Tyler James stopped Leonard and me and asked to speak to Mrs. Daniel. I explained that she was unable to speak, but Officer James asked her if her son Christopher had done this to her. She nodded yes. He asked her the same question a second time and she again nodded yes.

___*/s/ Kevin Robert*_____

Kevin Robert

LYNCH and MAURER

Attorneys at Law

Avery Park, Columbia

MEMORANDUM

TO: State v. Daniel File

FROM: Mary Lynch

RE: Summary of Interview of Gloria Daniel

DATE: February 11, 2015

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1. She is the mother of the defendant in the above-entitled action.
2. I spoke with her at the Avery Park Hospital.
3. She remains in serious condition and the prognosis for her recovering is not good.
4. At approximately 12:10 a.m. on August 13, 2014, she was attacked by an unknown assailant in her house on Delmar Street, Avery Park, Columbia.
5. I informed her that Officer Tyler James allegedly attempted to question her in her home on August 13, 2014.
6. I explained that Officer James allegedly asked her if she recognized the assailant who attacked her and killed her husband, Peter Daniel.
7. She indicated that at the time of the questioning by Officer James she was in deep pain and suffering from a head injury, making it impossible to speak and, therefore, could not have responded to any questions.
8. She has no recollection of being questioned by Officer James on August 13, 2014.
9. She was unable to speak for over one month following the attack on her and murder of her husband.
10. She claims that at no time has she identified who the attacker was.
11. She does not know who attacked her and killed her husband the evening of August 12-13, 2014.

LYNCH and MAURER

Attorneys at Law

Avery Park, Columbia

MEMORANDUM

TO: State v. Daniel File

FROM: Mary Lynch

RE: Summary of Interview of Harry Robinson

DATE: February 11, 2015

I spoke with Chief Robinson of the state police today by telephone. He indicated the following:

1. He went to Christopher Daniel's dorm room in College Station and questioned him at approximately 8:30 a.m. on August 13, 2014.
2. Christopher indicated that he was a student at Columbia State University in College Park.
3. Christopher indicated that he had been in his dorm room all night.
4. Christopher said he did not remember seeing anyone who could confirm his presence in the dorm.
5. Robinson asked to see Christopher's car.
6. Christopher identified a yellow Taurus, license plate 274 SUR, as his car.
7. It takes approximately 2½ to 3 hours to drive from College Station to Avery Park.

Transcript

911 Call Made August 13, 2014

12:43 a.m.

911: 911, what is your emergency?

CALLER: (background noise – heavy breathing)

911: Hello, 911. What is your emergency?

CALLER: Hello.

911: Hello, this is Avery Park Police. Are you trying to call 911?

CALLER: Uh, I've been beaten. It was a bat. My wife too.

911: What's going on?

CALLER: He left. He just drove off.

911: What's that?

CALLER: He just, he just left me.

911: Who just left you?

CALLER: My son. He's probably heading back to college.

911: So, what's going on there?

CALLER: My son. He's killed his mother.

911: I am sending police officers and an ambulance now. Hold on. Stay on the line.

CALLER: He's driving a Ford Taurus.

911: Sir, please hold on. Help is on the way. Sir, what is your son's name?

CALLER: Jonathan and Christopher.

911: Who did this?

CALLER: (unintelligible) . . . .

911: Sir, what color is the Taurus?

CALLER: Yellow.

911: Sir, do you know the license plate number?

CALLER: The license plate is 274 . . . .

911: Sir, are you at 365 Delmar Street?

CALLER: . . . . SUR.

911: Sir, where are you?

CALLER: In the house; the living room.

911: Okay, sir. Tell me where your wife is.

CALLER: 274 SUR . . . .

911: 274?

CALLER: (unintelligible)

911: Sir, what is your son's name?

CALLER: (unintelligible)

911: Sir?

CALLER: He was supposed to be (unintelligible) . . . .

911: Sir? Sir? Are you there Mr. Daniel?

Call Disconnected.

February 2015

California Bar Examination

Performance Test B

LIBRARY

STATE v. DANIEL

LIBRARY

SELECTED PROVISIONS
COLUMBIA RULES OF EVIDENCE

Rule 104. Preliminary Questions

(a) Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

* * *

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

* * *

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.—A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.—A ''declarant'' is a person who makes a statement.

(c) Hearsay.—''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

* * *

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(2) Excited utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

* * *

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

* * *

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(4) Certified copies of public records.—A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification.

Crawford v. Washington

U.S. Supreme Court (2004)

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police, made several hours after the stabbing, describing the stabbing. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to the victim's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest.

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause.

History supports two inferences about the meaning of the Sixth Amendment.

First, the principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. The Sixth Amendment must be interpreted with this focus in mind.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused -- in other words, those who "bear testimony." Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. 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. The constitutional text, like the history underlying the common law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition -- for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. The statements are not sworn testimony, but the absence of oath was not dispositive.

That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under civil law statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the

courts. Rather, the “right ... to be confronted with the witnesses against him” is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. The common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability.

Our case law has been largely consistent with these two principles. Our cases have 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.

Finally, to reiterate, 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. It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the declarant testifies to the same matters in court. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

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. 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.” 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. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Davis v. Washington

U.S. Supreme Court (2006)

This case requires us 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 Sixth Amendment's Confrontation Clause.

The relevant statements were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. She reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in this case:

911 Operator: Hello.
Complainant: Hello.
911 Operator: What's going on?
Complainant: He's here jumpin' on me again.
911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
Complainant: I'm in a house.
911 Operator: Are there any weapons?
Complainant: No. He's usin' his fists.
911 Operator: Okay. Has he been drinking?
Complainant: No.
911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
Complainant: I'm on the line.
911 Operator: Listen to me carefully. Do you know his last name?
Complainant: It's Davis.
911 Operator: Davis? Okay, what's his first name?
Complainant: Adrian.
911 Operator: What is it?
Complainant: Adrian.
911 Operator: Adrian?

Complainant: Yeah.

911 Operator: Okay. What's his middle initial?

Complainant: Martell. He's runnin' now.

As the conversation continued, the operator learned that Davis had "just run out the door" after hitting McCottry, and that he was leaving in a car with someone else. McCottry started talking, but the operator cut her off, saying, "Stop talking and answer my questions." She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. McCottry described the context of the assault, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you."

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings and her children so that they could leave the residence."

The State charged Davis with felony violation of a domestic no-contact order. The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries. McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis's objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him.

In *Crawford v. Washington* (U.S. 2004), we held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical portion of this holding, and the portion central to resolution of this case now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other

hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Without attempting to produce an exhaustive classification of all conceivable statements, or even all conceivable statements in response to police interrogation as either testimonial or nontestimonial, it suffices to decide the present case to hold as follows: Statements are nontestimonial 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.

If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.

The question before us, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements.

The difference between the interrogation here and the one in *Crawford* is apparent on the face of things. Here, McCottry was speaking about events as they were actually happening, rather than describing past events. Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in this case, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the

difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not testifying. What she said was not a weaker substitute for live testimony at trial. No “witness” goes into court to proclaim an emergency and seek help.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot evolve into testimonial statements, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the structured police questioning that occurred in *Crawford*.

We affirm the judgment of the Supreme Court of Washington.

Melendez-Diaz v. Massachusetts

U.S. Supreme Court (2009)

The Massachusetts courts in this case admitted into evidence affidavits reporting the results of forensic analysis that showed that material seized by the police and connected to the defendant was cocaine. The question presented is whether those affidavits are "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. At trial, the prosecution placed into evidence the bags seized. It also submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags "have been examined with the following results: The substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law.

Petitioner objected to the admission of the certificates, asserting that our Confrontation Clause required the analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as prima facie evidence of the composition, quality, and the net weight of the narcotic analyzed.

The jury found Melendez-Diaz guilty.

There is little doubt that the documents at issue in this case fall within the core class of testimonial statements as described in *Crawford v. Washington* (U.S. 2004). Our description of that category mentions affidavits. The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths. The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine -- the precise testimony the analysts would be expected to provide if called at

trial. The “certificates” are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.

Here, moreover, not only were the affidavits made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, but under Massachusetts law the sole purpose of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose -- as stated in the relevant state law provision -- was reprinted on the affidavits themselves.

In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were “witnesses” for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at trial.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Respondent argues that the analysts' affidavits are admissible without confrontation because they are “akin to the types of official and business records admissible at common law.” But the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. *See* Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.

Respondent also misunderstands the relationship between the business and official records hearsay exceptions and the Confrontation Clause. Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy. Business and public records are generally admissible absent confrontation not because they qualify under

an exception to the hearsay rules, but because, having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here -- prepared specifically for use at petitioner's trial -- were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

This case involves little more than the application of our holding in *Crawford v. Washington.* The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error. We therefore reverse the judgment of the Appeals Court of Massachusetts and remand the case for further proceedings not inconsistent with this opinion.

People v. Jackson

Supreme Court of Columbia (2009)

Defendant-Appellant Junior Salas Jackson appeals from a conviction on two charges of misdemeanor assault and one charge of misdemeanor family violence stemming from an auto-pedestrian collision involving his girlfriend, Julie Sandra Muna Gadia. Jackson asserts that the trial court erred in admitting out-of-court statements made by witness-victim Gadia as an excited utterance exception under Rule of Evidence 803(2) where such statements were made in response to police officers' questions nearly a week after being run over by a truck.

On the night of August 3, 2007, Emergency Medical Technicians (EMTs) and police officers found Gadia in critical condition after being run over by a 1997 Mazda pickup truck belonging to Gadia's boyfriend, Jackson. Gadia experienced such a degree of physical trauma that she could not verbally respond to the EMTs and all she could do was move her eyes in response to light and groan in pain. She was transferred to the Naval Hospital where she underwent surgery.

Gadia spent nearly a week recovering in the Intensive Care Unit of the Naval Hospital. On August 9, 2007, at around 11:55 a.m., Officer Donald Nakamura was informed that Gadia was awake and said that Jackson ran her over twice. Lt. Krejci of the Naval Hospital told Officer Nakamura that Gadia would be more awake and responsive for an interview in a few hours after the sedatives wore off.

At around 2:00 p.m. the same day, Officer Nakamura was informed that Gadia was more responsive. At 2:38 p.m., Officer Nakamura arrived at the Naval Hospital and met with Lt. Krejci, who said that Gadia spoke softly because the ventilator tube was recently removed from her mouth. Officer Nakamura then interviewed Gadia. After Gadia began coughing heavily and started to moan, Officer Nakamura ended the interview and informed Gadia that he would return at a later time to interview her again.

At the trial, Gadia testified that she did not remember speaking to Officer Nakamura on August 9, 2007.

The trial court admitted into evidence excerpts from Officer Nakamura's report which recorded what Gadia said during an interview on August 9, 2007. The trial court found that, since Jackson would have the opportunity to cross-examine the declarant and test the reliability of Officer Nakamura, Jackson's confrontation rights would be satisfied. On the stand, Officer Nakamura read aloud:

> I inquired from ... Gadia if it was an accident. [G]adia informed me in a low, slurred tone of voice, that he did it on purpose. I inquired from her to whom was she referring to. [G]adia stated, 'Junior, my boyfriend.'... Gadia, in a low tone of voice, stated that it was over her coworker. [G]adia started coughing heavily and started to moan. I then ceased the interview and told her that we will come back at a later time to interview her. [G]adia informed me that she was afraid of Junior and does not want to see him, that she wanted him to go to jail in regards to what he did to her.

For a statement to be admitted under an excited utterance exception to hearsay, most courts have interpreted Columbia Rule of Evidence 803(2) to require: 1) an event or condition startling enough to cause nervous excitement; 2) the statement relates to the startling event; and 3) the statement must be made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent. All three inquiries bear on the ultimate question: Whether the statement was the result of reflective thought or whether it was a spontaneous reaction to the exciting event.

It was not an abuse of discretion for the trial court to find the first two requirements, that the event or condition was startling enough to cause nervous excitement and that the statements relate to the startling event, were satisfied in this case. It was not an abuse of discretion for the trial court to find that Gadia being run over by a truck, experiencing life-threatening physical trauma, extensive surgery and intensive medical care was startling enough to cause nervous excitement.

The third requirement that the statement must be made while the declarant is under the stress of the excitement caused by the event consumes the bulk of the

contention and analysis in cases applying the excited utterance exception. Courts look at various external factors as indicia of the declarant's state of mind at the time of the statements and no one factor is dispositive. In deciding whether the statement was the product of stress and excitement rather than reflective thought, courts have considered various factors in totality which may include, but are not limited to: the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, age/maturity of the declarant, the physical and/or mental condition of the declarant, characteristics of the event, and the subject matter of the statements.

The lapse of time is often a central inquiry to determine whether the declarant spoke under the stress of the excitement caused by the event, but this factor is not dispositive. The inquiry focuses on the psychological impact of the event itself and not upon the contemporaneous nature of the startling event. Based on the totality of the circumstances, statements made hours after the startling event may still fall within the excited utterance exception.

Although not determinative, a statement made in response to an inquiry could bear on whether the statement was spontaneous or deliberative. However, a victim's statement made in response to an inquiry does not, without more, negate its spontaneity as an excited utterance.

Often, a witness' description of the declarant's emotional state is sufficiently weighty in determining whether the declarant's state of mind falls with the excited utterance exception. Describing the declarant's voice, appearance, demeanor, whether the declarant was crying or appeared frightened, is often sufficient to demonstrate that the declarant was in an excited state.

In cases where a declarant has lost consciousness or the ability to speak after sustaining fatal or nearly fatal wounds, declarant's accusatory statement made upon regaining consciousness or recovering the ability to speak is often admissible under an excited utterance exception to hearsay, despite the lapse of time.

Based on the totality of the circumstances, it is reasonable for the trial court to find a six-day delay between getting run over by a truck and speaking to Officer

Nakamura to fall within the excited utterance hearsay exception. Throughout those six days, Gadia was either semiconscious or unconscious and was unable to speak due to her physical condition, medication (painkillers and sedatives), anesthetic drugs and ventilator tube.

Accordingly, we AFFIRM the judgment of the Superior Court.