

## **CRAWFORD AND THE CONFRONTATION CLAUSE: AN ANALYTICAL OUTLINE**

So defendant is claiming that his rights under *Crawford v Washington*, 541 US ; 124 S Ct 1354; 158 L Ed 2d 177 (2004), were violated. Here's a general series of questions to analyze the issue.

1. Is the issue even preserved for appeal? An objection on hearsay grounds does not preserve a Confrontation issue for appeal. *People v Geno*, 261 Mich App 624, 630; 683 NW2d 687 (2004); *People v Ortiz*, 249 Mich App 297, 310; 642 NW2d 417 (2001), lv den 467 Mich 854; 650 NW2d 338 (2002).
2. Did the declarant testify at trial? If so, no Sixth Amendment violation. *Hutchison v Bell*, 303 F3d 720, 730 (CA 6, 2002), cert den 539 US 983; 123 S Ct 2608; 156 L Ed 2d 631 (2003); *Gibson v United States*, 271 F3d 247, 255 (CA 6, 2001).
3. Did defendant procure the declarant's absence? If so, no Sixth Amendment violation. *Crawford*, 124 S Ct 1370; *Reynolds v United States*, 98 US 145; 25 L Ed 244 (1879); *People v McIntosh*, 142 Mich App 314, 328, n 8; 370 NW2d 337 (1985), lv den 422 Mich 951; 376 NW2d 653 (1985).
4. Was the statement presented for the truth of the matter? If not, no Sixth Amendment violation. *People v McPherson*, 263 Mich App 124, 134; 687 NW2d 370 (2004); *Anthony v DeWitt*, 295 F3d 554, 563 (CA 6, 2002).
5. Is the statement "testimonial"? If not, no Sixth Amendment violation. *United States v Cromer*, 389 F3d 662 (CA 6, 2004), does a good job of defining "testimonial."

6. If defendant has made it through each of the preceding, his rights are violated if either he had no opportunity to cross examine or the declarant is not legally unavailable. *Crawford*, 124 S Ct 1367, 1368; *Barber v Page*, 390 US 719, 722-725; 88 S Ct 1380; 20 L Ed 2d 255 (1968); *Motes v United States*, 178 US 458; 20 S Ct 993; 44 L Ed 1150 (1900).
7. Is any error harmless beyond a reasonable doubt? *McPherson*, 263 Mich App 131-132.

## **SOME PRE-CRAWFORD CASES THAT ARE STILL PROBABLY GOOD LAW**

If State's coconspirator's statements go beyond common law exception, can still be Sixth Amendment violation. *Hill v Brigano*, 199 F3d 867 (CA 6, 1999), cert den 529 US 1134; 120 S Ct 2015; 146 L Ed 2d 964 (2000).

When the witness is legally available, presenting his videotaped testimony is a Sixth Amendment violation, *Gall v Parker*, 231 F3d 265 (CA 6, 2000), cert den 533 US 941; 121 S Ct 2577; 150 L Ed 2d 739 (2001), even if defendant cross examined on the tape, *Brumley v Wingard*, 269 F3d 269, 641 (CA 6, 2001).

As long as the motives to cross examine are sufficiently similar, the court may allow in the unavailable declarant's prior civil trial testimony. *United States v Vartanian*, 245 F3d 609, 613-614 (CA 6, 2001).

A codefendant's statement to his wife does not violate the Sixth Amendment: "It is unlikely that he concocted this story and shared it with his wife in order to secure some future legal benefit." *Anthony*, 295 F3d 564.

Only an opportunity to cross examine is required, not that it be effective. Therefore, allowing in a child's statements to four others that defendant had sexually abused her does not violate the Sixth Amendment even though she did not remember particularly much while testifying. *Bugh v Mitchell*, 329 F3d 496, 508 (CA 6, 2003), cert den 540 US 930; 124 S Ct 345; 157 L Ed 2d 236 (2003).

[J. Schrotenboer, 2/05]