
Volume 21

Number 1 *New York State Constitutional Decisions:
2004 Compilation*

Article 4

December 2014

Appellate Division, Fourth Department, People v. Cortes

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Recommended Citation

Feldman, Jennifer (2014) "Appellate Division, Fourth Department, People v. Cortes," *Touro Law Review*: Vol. 21: No. 1, Article 4.
Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol21/iss1/4>

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Appellate Division, Fourth Department, People v. Cortes

Cover Page Footnote

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Feldman: Confrontation Clause
SUPREME COURT OF NEW YORK

People v. Cortes¹
(decided May 26, 2004)

Eugenio Cortes was prosecuted for attempted murder in the second degree, attempted assault in the first degree and other associated charges in relation to the shooting of Huston Pondexter.² At trial, the prosecution sought to admit into evidence two taped 911-telephone calls made by witnesses to the shooting.³ Although one witness was available for cross-examination at trial, the other caller remained anonymous.⁴ The court considered whether under the federal and New York State constitutional right to confrontation,⁵ recordings of 911 calls reporting crimes are considered testimonial evidence and consequently inadmissible when the accuser does not have an opportunity to cross-examine the witness.⁶ The court held in the affirmative stating that 911 reports were testimonial in nature and subject to the Confrontation Clause.⁷ Accordingly, the court barred admission of one 911 tape because the witness was not available for cross-examination by the accused while permitting admission of the other tape, made by the witness who was available at trial.⁸

¹ 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004).

² *Id.* at 402.

³ *Id.*

⁴ *Id.* at 403, 416.

⁵ U.S. CONST. amend. VI provides in pertinent part: "In any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him." N.Y. CONST. art. I, § 6 provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"

⁶ *Cortes*, 781 N.Y.S.2d at 404.

⁷ *Id.* at 402-03.

⁸ *Id.* at 402.

The tapes in question were made on the day of the alleged attempted murder approximately a minute and a half apart.⁹ During the first caller's telephone conversation with the 911 operator, the caller described a baldheaded man in a red shirt running with a gun.¹⁰ Shortly thereafter he began yelling "[h]e's killing him, he's killing him, he's shooting him again," and then warned the operator that he must "hang up because people, people are gonna think I'm out calling the cops."¹¹ The eyewitness did not provide the operator with identifying information nor could he be found by the police.¹² However, the second witness who called 911 was found by police and testified at the trial.¹³

In *Cortes*, the court ruled that recorded 911 calls were testimonial because such calls were made for the sole reason of sparking police action and triggering the prosecutorial process.¹⁴ The court reasoned that a 911 caller reporting a crime supplies information for the purpose of "investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes."¹⁵ In so reasoning, the court relied upon the recent United States Supreme Court case, *Crawford v. Washington*, which analyzed the Confrontation Clause with respect to an unavailable witness's out-of-court statements.¹⁶ Specifically, the

⁹ *Id.* at 403, 416.

¹⁰ *Id.* at 404.

¹¹ *Cortes*, 781 N.Y.S.2d at 404.

¹² *Id.* at 403.

¹³ *Id.* at 416.

¹⁴ *Id.*

¹⁵ *Id.* at 415.

¹⁶ *Crawford v. Washington*, 541 U.S. 36, 40 (2004).

Court considered whether petitioner's wife's tape-recorded statements to the police were admissible when petitioner would not have the chance to cross-examine her because of a state marital privilege prohibiting a spouse from testifying without the other spouse's permission.¹⁷

In *Crawford*, petitioner was charged with assault and attempted murder of a man who allegedly raped his wife, Sylvia.¹⁸ After his arrest and subsequent questioning, petitioner revealed that he had gone to the victim's apartment to search for him.¹⁹ At the apartment, a fight began and petitioner stabbed the victim in the torso and petitioner's hand was slashed.²⁰ Petitioner claimed self defense swearing the victim was "goin' for somethin' before, right before everything happened."²¹ The police then questioned Sylvia, whose story was similar to that of petitioner, except that her version of the story did not account for the victim drawing a weapon before petitioner stabbed him.²²

Prior to *Crawford*, the Confrontation Clause was not applied to out-of-court statements presented at trial. At that time, the law that governed out-of-court statements was developed in *Ohio v. Roberts*.²³ There, the test for admissibility of an unavailable witness's out-of-court statement was whether such

¹⁷ *Id.* See WASH. REV. CODE § 5.60.060 (1) (2004).

¹⁸ *Crawford*, 541 U.S. at 40.

¹⁹ *Id.* at 38.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 39.

²³ *Ohio v. Roberts*, 448 U.S. 56 (1979).

declarations possessed an “adequate indicia of reliability.”²⁴ The Court reasoned that as long as the evidence was included within the hearsay exceptions or as long as it was deemed trustworthy, the evidence was admissible.²⁵ In that case, defendant was charged with forging checks and possessing stolen credit cards.²⁶ At trial, the prosecution sought to introduce the preliminary hearing testimony of a witness who was unavailable to be cross-examined at trial.²⁷ The Court held that the evidence was properly admitted because the defendant’s counsel cross-examined the witness during the preliminary hearing and thus the testimony “afforded ‘the trier of fact a satisfactory basis for evaluating the truth of the prior statement.’”²⁸

Crawford, however, abandoned the view that the admissibility of out-of-court statements was contingent upon the “vagaries of the rules of evidence.”²⁹ The Court cautioned that the *Roberts* test allowed for too much judicial discretion. Such a test, *Crawford* explained, permits juries to hear misleading statements, unchallenged by the opposing counsel, simply because a judge pronounced the evidence reliable.³⁰ Accordingly, Justice Scalia warned, “[d]ispensing with confrontation because testimony is

²⁴ *Id.* at 66.

²⁵ *Crawford*, 541 U.S. at 40.

²⁶ *Roberts*, 448 U.S. at 58.

²⁷ *Id.* at 58-59.

²⁸ *Id.* at 73 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 216 n.12 (1972)).

²⁹ *Crawford*, 541 U.S. at 61.

³⁰ *Id.* at 62.

obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”³¹

Most importantly, the Court in *Crawford* warned that the *Robert's* test deviated from the original meaning of the Confrontation Clause which was designed to protect the colonists against the evils of the Crown.³² Specifically, the major evil the Confrontation Clause targeted was the use of *ex parte* proceedings as evidence against defendants.³³ In addition, the Framers would never have permitted testimonials to be used against accused individuals if there was no opportunity of cross-examination available.³⁴ This can be inferred since at the time of the founding, the common law of 1791 “conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine.”³⁵ These limitations are thus implied in the Confrontation Clause.³⁶

In overturning the *Roberts* test, the Court expanded the application of the Confrontation Clause to out-of-court statements made by third parties. Specifically, the Court held that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”³⁷ The Court reasoned that the Sixth Amendment bars the admission of an out-

³¹ *Id.*

³² *Id.* at 50.

³³ *Id.*

³⁴ *Crawford*, 541 U.S. at 53-54.

³⁵ *Id.* at 54.

³⁶ *Id.*

of-court testimonial statement of a witness unless the witness is available for cross-examination or was available at an earlier time for cross-examination.³⁸

Under *Crawford*, statements are subject to the Confrontation Clause protections if they are considered testimonial.³⁹ The Court, however, refused to elucidate an all-inclusive definition of testimonial.⁴⁰ Instead, the Court stated:

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.⁴¹

Since Sylvia’s statement was recorded in response to a police interrogation, the Court concluded that the statement was testimonial in nature and fell within the Confrontation Clause.⁴² Accordingly, Sylvia’s statement was inadmissible because the marital privilege foreclosed the accused from cross-examining her.⁴³

The Supreme Court’s scant explanation of “testimonial” has left the trial courts with little guidance.⁴⁴ As a result, the New

³⁷ *Id.* at 68-69.

³⁸ *Id.* at 68.

³⁹ *Crawford*, 541 U.S. at 68.

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Crawford*, 541 U.S. at 75 (Rehnquist, J., concurring).

York State trial courts are divided on the definition of the term “testimonial.” In *Cortes*, the court adopted a blanket approach stating that the very nature of 911 calls classifies them as testimonial.⁴⁵ On the other hand, in *State v. Moscat* and *State v. Conyers*⁴⁶ the courts rejected this broad all-encompassing approach and instead assumed a fact-specific analysis of the 911 call requiring the court to look at the motive of the caller.⁴⁷

In *Moscat*, the defendant moved *in limine* for an order barring the admittance of a taped 911 call made by the accuser in a domestic assault case.⁴⁸ Both sides conceded that the complainant was not expected to testify at the trial.⁴⁹ As a result, defendant contended that the admittance of the recording would violate his Sixth Amendment right since he would not be able to “confront the witnesses against him.”⁵⁰

The court in *Moscat* rejected defendant’s argument and concluded that recorded 911 tapes were not testimonial for several reasons.⁵¹ First, 911 calls are initiated by citizens to police officers. However, in a testimonial statement, it is the police who call the citizen to be a witness.⁵² Moreover, the purpose of 911 calls is to rescue an innocent bystander from danger; the purpose

⁴⁵ *People v. Mackey*, 785 N.Y.S.2d 870, 872 (N.Y. Crim. Ct. 2004).

⁴⁶ 777 N.Y.S.2d 274, 277 (N.Y. Sup. Ct. 2004).

⁴⁷ *Mackey*, 785 N.Y.S.2d at 872.

⁴⁸ *Moscat* 777 N.Y.S.2d at 875.

⁴⁹ *Id.*

⁵⁰ *Id.* See U.S. CONST. amend. VI.

⁵¹ *Moscat*, 777 N.Y.S.2d. at 879.

⁵² *Id.*

of testimonial statements is to facilitate the prosecutorial process.⁵³ Finally, a 911 call is considered part of the criminal act itself rather than part of the prosecution that ensues because the majority of 911 calls are made while the crime is still occurring.⁵⁴

Similarly, in *Conyers*, the court held that 911 tapes were not testimonial in nature.⁵⁵ In that case, the defendant was convicted of assault and criminal possession of a weapon resulting from a street fight between he and his brother-in law.⁵⁶ At trial, the prosecution introduced two 911 tapes from calls made by an eyewitness, Andrea Conyers, the mother of the defendant.⁵⁷ In these recordings, Mrs. Conyers is heard screaming for help while defendant is yelling “I’m going to murder you” to Mrs. Conyer’s son-in-law.⁵⁸ Defendant sought to overturn the conviction on the ground that since Mrs. Conyers was not called to testify at trial, his Sixth Amendment right to confrontation was violated.⁵⁹ The court rejected defendant’s argument and concluded that since the witness’ “intention in placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in future legal proceedings,” the 911 calls were not testimonial in nature under *Crawford* and were not subject to cross-examination in order to be admissible.⁶⁰

⁵³ *Id.*

⁵⁴ *Id.* at 880.

⁵⁵ *Conyers*, 777 N.Y.S.2d at 277.

⁵⁶ *Id.* at 274-75.

⁵⁷ *Id.* at 275.

⁵⁸ *Id.*

⁵⁹ *Id.* at 276.

⁶⁰ *Conyers*, 777 N.Y.S.2d at 277.

Furthermore, in *State v. Isaac*, the court held that 911 tapes were not subject to the requirements of the Confrontation Clause.⁶¹ In that case, defendant maintained his innocence against two misdemeanor charges of menacing.⁶² Because Section 60.50 of the New York Criminal Procedure Law forbids a court from finding a defendant guilty based solely on an admission, the State sought to introduce two taped 911 calls made by a caller who refused to identify herself, to corroborate an unsworn admission made by the defendant.⁶³ The court concluded that 911 telephone statements were not testimonial under *Crawford* and were consequently subject to the rules of evidence, not the Confrontation Clause.⁶⁴ The court agreed with Judge Greenberg's analysis in *Moscat*, reasoning that 911 calls are not made by callers with the intention to prosecute; rather, they are made by callers to secure help.⁶⁵

The Supreme Court established the standard: testimonial evidence is subject to the right of confrontation. Yet, it is left to the state courts to determine just what the Supreme Court meant by "testimonial." Examined separately, New York state court decisions seem to contradict one another: however, viewed collectively they are nonetheless consistent with the broader outline established by the federal government. Under both federal and state law the introduction of a witness's out-of-court

⁶¹ *Isaac*, No. 23398'02, 2004 WL 1389219, at *3 (N.Y. Dist. Ct. June 16, 2004).

⁶² *Id.* at *1.

⁶³ *Id.* See N.Y. CRIM. PROC. § 60.50 (McKinney 2005).

⁶⁴ *Isaac*, 2004 WL 1389219, at *3.

⁶⁵ *Id.*

testimonial statements requires the witness to be cross-examined by the accused. Both the United States Supreme Court and the New York trial courts refer to the importance of this “bedrock procedural guarantee”⁶⁶ from colonial times to present American jurisprudence.

In conclusion, a criminal defendant has a right to cross-examine a witness’s out-of-court testimonial statements under both the federal and state constitutional right to confrontation. It remains to be seen what types of evidence the Supreme Court intended to include as “testimonial.” The state trial courts have already begun the process of defining testimonial, but have come to inconsistent conclusions. Thus, a more comprehensive definition of the meaning of “testimonial” is necessary to preserve the original purpose of the Confrontation Clause and minimize the wide judicial discretion the Framers’s feared would occur.

Jennifer Feldman

⁶⁶ *Crawford*, 541 U.S. at 42.

DUE PROCESS

United States Constitution Amendment XIV:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law

New York Constitution Article I, Section 6:

No person shall be deprived of life, liberty, or property without due process of law.