Criminal Law and Procedure

Maximum Confusion: A Prosecutor's View of *Crawford* v. *Washington*

*By Donald LaRoche**

In *Crawford v. Washington*,[1] the Supreme Court decided that the Confrontation Clause of the Sixth Amendment bars admission of the testimonial statements of an unavailable witness absent an opportunity for cross-examination. The Court's decision left judges and prosecutors, on the federal and state levels, in the dark as to the definition of "testimonial evidence." The admissibility of statements made to the police by a witness during or immediately following a startling event is particularly unclear. This article will discuss *Crawford* and how the decision has been treated with regards to "police interrogations" in the short time since its issuance. As will be seen, the Supreme Court has yet again left prosecutors, defense counsel and judges with an unclear decision that insures maximum confusion and numerous appeals.

Crawford involved a defendant who was convicted in a Washington state court for assaulting a man who allegedly tried to rape his wife.[2] During his trial, the prosecution played for the jury the defendant's wife's tape-recorded statement to the police describing the assault and completely refuting the defendant's claim of self-defense.[3] The defendant did not have an opportunity to cross-examine his wife because she never testified, having invoked the state marital privilege.[4] Because the state marital privilege does not extend to a spouse's out-of-court statements, the state invoked the hearsay exception for statements against penal interest.[5]

The defendant argued that admitting the statements would violate his federal constitutional right to be "confronted with the witnesses against him."[6] The judge admitted the statements on the grounds that they bore "particularized guarantees of trustworthiness."[7] The jury subsequently convicted the defendant of assault.[8] The Washington Court of Appeals reversed the conviction finding that the statements did not meet a nine-factor test designed to determine whether they "bore particularized guarantees of trustworthiness."[9] This standard was taken from the Supreme Court's decision in *Ohio v. Roberts*, where the Court held that an unavailable witness's statement is admissible if it bears "adequate indicia of reliability."[10]

A unanimous Washington Supreme Court reinstated the conviction.[11] That court held that, although the wife's statement "did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness."[12] The court opined that, even though her statements were contradictory, further inspection found that they appeared to overlap with the defendant's statements.[13]

Justice Scalia, writing for the Supreme Court, reversed.[14] Justice Scalia concluded that the main problem at which the Confrontation Clause was directed was the use of *ex parte* examinations as evidence against the accused in a criminal proceeding.[15] This was a common practice in the countries that utilized the civil-law mode.[16] Sixteenth and Seventeenth Century English justices of the peace were notorious for using *ex parte* examinations of witnesses in felony cases as evidence against the accused in place of live testimony.[17]

The Court rejected the view that the Confrontation Clause applies only to in-court testimony and that its application to out-of-court statements introduced at trial depends upon the current law of evidence.[18] Such a view would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.[19] Justice Scalia wrote that the Confrontation Clause applies to "witnesses" against the accused; those who "bear testimony."[20] "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."[21]

The Court listed various formulations of this core class of "testimonial" statements: "*ex parte* in-court testimony or its functional equivalent, 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."[22] Justice Scalia also added that statements taken by police officers in the course of interrogations are testimonial under even a narrow standard.[23] He opined that police interrogations bear a striking resemblance to examinations by justices of the peace in England.[24]

"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."[25] For the Court, testimonial hearsay is a primary object of the Sixth Amendment, and interrogations by law enforcement officers fall within the class of statements the Sixth Amendment was designed to regulate.[26]

The Court also found that the historical record supports a proposition that the Framers would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination.[27] The right to be confronted with witnesses against the accused was read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the Founding.[28]

The Court reasoned that the requirement of prior opportunity to cross-examine as a condition for admissibility of testimonial statements was dispositive and not merely one of several ways to establish reliability.[29] Justice Scalia acknowledged that "there were always exceptions to the general rule of exclusion" of hearsay evidence.[30]

The Court also questioned the continuing viability of *White v. Illinois*.[31] *White* involved the statements of a child victim to an investigating police officer admitted as spontaneous declarations.[32] The *Crawford* Court doubted that testimonial statements would have been admissible on that ground in 1791 (the year the Sixth Amendment was adopted).[33] In *White*, however, the only question presented was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue.[34] The Court there took it as given that the testimony properly fell within the relevant exception to the Confrontation Clause.[35]

The Court in *Crawford* did not explicitly overrule the holding in *White* that the Confrontation Clause allows the prosecution to admit statements under the "spontaneous declaration" and "medical examination" exceptions to the hearsay rule. The Court similarly did not spell out a comprehensive definition of "testimonial." It held that whatever else the term covered it applied at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations.[36] With regards to police interrogations, the Court would not enunciate a precise definition. It left to the imagination the various definitions of "interrogations."[37]

By not precisely defining "testimonial" or "interrogation," the Court left prosecutors, defense counsel, and judges in the criminal justice system the arduous task of figuring out what evidence will be testimonial and what will not. Of note are the domestic violence cases that produce statements from frantic callers to a 911 operator or the statements of a hysterical victim to a first responder to an emergency situation. *Crawford* provides precious little guidance as to whether these statements are admissible or not.

Chief Justice Rehnquist in his concurrence criticized the majority for just this. He noted that the majority "grandly" declared that it "'leave[s] for another day any effort to spell out a comprehensive definition of "testimonial."'"[38] He implored the majority to give "the thousands of federal prosecutors and the tens of thousands of state prosecutors" an answer as to what beyond the specific kinds of "testimony" the Court lists is covered by the new rule.[39] The Chief Justice wrote, "They need them now, not months or years from now. Rules of evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner."[40] The Chief Justice would have eschewed the Court's grand pronouncement and reversed the conviction because the statement at question did not meet the *Ohio v Roberts* test.[41]

Several lower courts have begun to tackle the problem that the Court unceremoniously dumped on them. In *People v. Moscat*,[42] one of the first cases to interpret *Crawford*, a New York trial court had to determine whether a 911 call made by the victim was testimonial. The court criticized the *Crawford* decision for failing to give "urgently needed guidance as to how to apply the Sixth Amendment right now, in the 21st Century."[43] The court opined, "It thus falls to trial courts to work out the concrete meaning of *Crawford*, at least in the short term."[44] Furthermore, this "issue is of special importance to courts -- like this one -- dedicated to trying cases of alleged domestic violence."[45]

The court noted that, because complainants in domestic violence cases often do not appear for trial, prosecutors have in recent years increasingly tried to fashion "victimless" prosecutions.[46] Prosecutors are left with proving their cases by offering certain out-of-court statements made by the victim. "Perhaps the most common form of such evidence is a call for help made by a woman to 911."[47] The court wrote, "Prior to *Crawford*, such a call for help to 911 would ordi-

narily be admitted into evidence as an 'excited utterance' . . . [and] would not violate the Sixth Amendment's Confrontation Clause."[48]

The court held a 911 call for help is essentially different in nature than the "testimonial" materials listed in *Crawford*.[49] The court opined:

> A 911 call is typically initiated not by the police, but by the victim of a crime. It is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril. Thus a pretrial examination is clearly "testimonial" in nature in part because it is undertaken by the government in contemplation of pursuing criminal charges against a particular person. But a 911 call is fundamentally different; it is undertaken by a caller who wants protection from immediate danger. A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid.[50]

In *Moscat*, the court opined that the nature of the 911 calls is simply not equivalent to a formal pretrial examination by a justice of the peace in Reformation England.[51] "If anything, it is the electronically augmented equivalent of a loud cry for help."[52] For these reasons, the court found that a 911 call for help was not "testimonial" in nature, as that term was used in *Crawford*.[53]

Another case criticizing *Crawford* is *Hammon v. State*,[54] a domestic violence case where a trial judge admitted a defendant's wife's statements to a police officer that the defendant had physically attacked her by throwing her down into the glass from a shattered heater and that he punched her twice in the chest.[55] The Indiana Court of Appeals held that, "when the police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not 'testimonial.'"[56]

In *Hammon*, the court criticized the *Crawford* decision for not defining the "crucial words" "testimonial" and "police interrogations."[57] It opined, "It appears as though the common denominator underlying the Supreme Court's discussion of what constitutes a 'testimonial' statement is the official and formal quality of such a statement."[58] Using a dictionary definition of "police interrogation," the court concluded that it does not apply to investigatory questions asked at the scene of a crime shortly after it has occurred.[59] The court wrote, "Such interaction with witnesses on the scene does not fit within a lay conception of police 'interrogations' bolstered by television, as encompassing an 'interview' in a room at the stationhouse."[60] The court went on, "it does not bear the hallmarks of an improper 'inquisitorial practice.'"[61] The statements to the police officer in *Hammon* were deemed not "testimonial" and its admissibility was not affected by the new rule announced in *Crawford*.[62]

These are just two of the many courts trying to resolve the confusion left by the *Crawford* opinion. Justice Scalia had no doubt that the lower courts in *Crawford* were acting in "utmost good faith when they found reliability."[63] Justice Scalia opined, "The Framers, however, would not have been content to indulge this assumption."[64]:

> They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable.[65]

The irony is that, by not explicitly providing a comprehensive definition of "testimonial" and leaving it for another day, the Court took the very posture against which the Framers wanted to guard. The Court's indefinite decision in *Crawford* assures that either the rights of countless victims of domestic violence will be violated by an overly expansive interpretation of Justice Scalia's words, or the rights of countless defendants will be violated by an overly narrow interpretation. The opinion failed to provide an articulable standard that the judges, defense counsel, and prosecutors could rely on to properly serve justice, an alarming trend of this past Term.

For example, in *Blakely v. Washington*,[66] the Court struck down Washington's sentencing guidelines and held that every defendant has the right to

insist that the prosecutor prove to a jury all facts legally essential to the punishment.[67] The Court, however, pointedly refused to opine on whether the federal sentencing guidelines survived its opinion, thus throwing the federal justice system into chaos.[68] In dissent, Justice Breyer bemoaned the fact that the Court left federal and state prosecutors without guidance on what to do next, "how to handle tomorrow's case."[69]:

> [T]his case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court's view.[70]

For Justice Scalia, refusal to articulate a comprehensive definition of "testimonial" in the *Crawford* opinion "can hardly be any worse than the status quo."[71] At best this could be true in the sense that being shot in the arm can hardly be any worse than being shot in the head; and provides no explanation why the Court did not take the effort to provide guidance to the courts. But it is not true even in that limited sense. Since *Crawford*, state courts have been very busy attempting to draw an exact line separating testimonial and non-testimonial.[72] At least following *Roberts* and its progeny provided "an evenhanded, predictable, and consistent development of legal principles, fostering reliance on judicial decisions, and contributing to the actual and perceived integrity of the judicial process."[73] The majority in *Crawford* has taken the criminal justice system into the realm of the unknown without any directives as to how to proceed, or even an apology.

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Footnotes

[1] Crawford v. Washington, 124 S. Ct. 1354 (2004).

[2] *Id.* at 1357.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 1358.

[6] *Id.*

[7] *Id*.

[8] *Id.*

[9] *Id.*

[10] Ohio v. Roberts, 448 U.S. 56, 65 (1980).

[11] Crawford v. Washington, 54 P.3d 656, 663 (Wash. 2002).

[12] *Id.*

[13] *Id.*

[14] *Crawford*, 124 S. Ct. at 1374.

[15] *Id.* at 1363.

[16] *Id.* at 1359.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1364.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1365.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1363.

[28] *Id.*

[29] *Id.* at 1367.

[30] *Id.*

[31] White v. Illinois, 502 U.S. 346 (1992).

[32] *Id.* at 349.

[33] *Crawford*, 124 S. Ct. at 1368 n.8.

[34] *Id.*

[35] *White*, 502 U.S. at 351.

[36] *Crawford,* 124 S. Ct. at 1374.

[37] *Id.* at 1365.

[38] *Id.* at 1378 (Rehnquist, C.J., concurring in the judgment (quoting *Crawford*, 124 S. Ct. at 1374).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] People v. Moscat, 777 N.Y.S.2d 875, 2004 N.Y. Misc. LEXIS 231 (N.Y. City Crim. Ct. 2004).

[43] *Id.* at 878.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 878-79.

[49] *Id.* at 879.

[50] *Id.*

[51] *Id.* at 881.

[52] *Id.*

[53] Other courts following the *Moscat* opinion are State v. Forrest, 596 S.E.2d 22 (N.C. Ct. App. 2004), and People v. Isaac, No. 23398/02, 2004 N.Y. Misc. LEXIS 814 (N.Y. Dist. Ct. June 16, 2004).

[54] Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004).

[55] *Id.* at 947-48.

[56] *Id.* at 952.

[57] *Id.*

[58] *Id.*

[59] *Id*.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Crawford*, 124 S. Ct. at 1373.

[64] *Id.*

[65] *Id.*

[66] 124 S. Ct. 2531, Blakely v. Washington (2004).

[67] *Id.* at 2537.

[68] *Id.* at 2538 n.9.

[69] *Id.* at 2561 (Breyer, J., dissenting).

[70] *Id.* at 2562.

[71] *Crawford*, 124 S Ct. at 1374 n.10.

[72] In the four months since *Crawford* was handed down it has been cited by**:** Ko v. New York, 124 S. Ct. 2839 (2004); Goff v. Ohio, 124 S. Ct. 2819 (2004); Prasertphong v. Arizona, 124 S. Ct. 2165 (2004); Shields v. California, 124 S. Ct. 1653 (2004); Corona v. Florida, 124 S. Ct. 1658 (2004); Delarosa v. Bissonette, 2004 U.S. App. LEXIS 14402 (1st Cir. July 14, 2004); United States v. Brown, 2004 U.S. Dist. LEXIS 11623 (D. Mass. June 25, 2004); Roy v. Coplan, 2004 U.S. Dist. LEXIS 4892 (D.N.H. 2004); United States v. Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004); United States v. Pandy, 96 Fed. Appx. 50 (2004); Wilson v. McGinnis, 2004 U.S. Dist. LEXIS 12653 (S.D.N.Y. July 7, 2004); United States v. Perez, 2004 U.S. Dist. LEXIS 7500 (D. Conn. Apr. 29, 2004); United States v. Paulino, 2004 U.S. Dist. LEXIS 6036 (S.D.N.Y. Apr. 12, 2004); United States v. Ricks, 96 Fed. Appx. 96 (2004); United States v. Ricks, 96 Fed. Appx. 93 (2004); United States v. Mitchell, 365 F.3d 215 (3d Cir. 2004); United States v. DeGideo, 2004 U.S. Dist. LEXIS 12238 (E.D. Pa. June 18, 2004); United States v. Moussaoui, 365 F.3d 292 (4th Cir. 2004); United States v. Avants, 367 F.3d 433 (5th Cir. 2004); United States v. Robinson, 367 F.3d 278 (5th Cir. 2004); Lave v. Dretke, 2004 U.S. Dist. LEXIS 11217 (N.D. Tex. June 17, 2004); United States v. Gaines, 2004 U.S. App. LEXIS 14168 (6th Cir. July 7, 2004); Scott v. Gundy, 2004 U.S. App. LEXIS 11550 (6th Cir. June 9, 2004); Dorchy v. Jones, 2004 U.S. Dist. LEXIS 9436 (E.D. Mich. May 26, 2004); Johnson v. Renico, 314 F. Supp. 2d 700 (E.D. Mich. 2004); United States v. Hite, 364 F.3d 874 (7th Cir. 2004); Purtle v. Knowles, 2004 U.S. App. LEXIS 13536 (9th Cir. June 24, 2004); United States v. Nielsen, 371 F.3d 574 (9th Cir. 2004); United States v. Jarvis, 94 Fed. Appx. 501 (2004); State v. Brown, 2004 Ark. LEXIS 168 (Ark. Mar. 25, 2004); People v. Nissen, 2004 Cal. LEXIS 2229 (Cal. Mar. 17, 2004); People v. Warner, 119 Cal. App. 4th 331 (2004); People v. Cervantes, 118 Cal. App. 4th 162 (2004); People v. Gomez, 2004 Cal. App. LEXIS 462 (Cal. App. Apr. 6, 2004); People v. Seijas, 2004 Cal. App. LEXIS 377 (Cal. App. Mar. 24, 2004); People v. Seijas, 115 Cal. App. 4th 1301 (2004); People v. Lockett, 2004 Cal. App. Unpub. LEXIS 6326 (2004); People v. Kilday, 2004 Cal. App. Unpub. LEXIS 6290 (2004); People v. Merrill, 2004 Cal. App. Unpub. Lexis 6225 (2004); People v. Kennan, 2004 Cal. App. Unpub. Lexis 6194 (2004); People v. Carrier, 2004 Cal. App. Unpub. Lexis 6140 (2004); People v. Engel, 2004 Cal. App. Unpub. Lexis 6024 (2004); People v. Clutts, 2004 Cal. App. Unpub. Lexis 6002 (2004); People v. Stout, 2004 Cal. App. Unpub. Lexis 5962 (2004); People v. Miranda, 2004 Cal. App. Unpub. Lexis 5885 (2004); People v. Fajardo, 2004 Cal. App. Unpub. Lexis 5648 (2004); People v. Hunter, 2004 Cal. App. Unpub. Lexis 5548 (2004); People v. Nissen, 2004 Cal. App. Unpub. Lexis 5248 (2004); People v. Phan, 2004 Cal. App. Unpub. Lexis 5047 (2004); People v. Holloway, 2004 Cal. App. Unpub. Lexis 5122 (2004); People v. Caballero, 2004 Cal. App. Unpub. Lexis 4669 (2004); People v. Gatica, 2004 Cal. App. Unpub. Lexis 4565 (2004); People v. Brown, 2004 Cal. App. Unpub. Lexis 4545 (2004); People v. Ewell, 2004 Cal. App. Unpub. Lexis 4398 (2004); People v. Martin, 2004 Cal. App. Unpub. Lexis 4411 (2004); People v. Lewis, 2004 Cal. App. Unpub. Lexis 4325 (2004); People v. Martin, 2004 Cal. App. Unpub. Lexis 3938 (2004); People v. Sammakieh, 2004 Cal. App. Unpub. Lexis 3916 (2004); People v. Zarazua, 2004 Cal. App. Unpub. Lexis 3831 (2004); People v. Reyes, 2004 Cal. App. Unpub. Lexis 3740 (2004); People v. Becerra, 2004 Cal. App. Unpub. Lexis 3702 (2004); People v. Conwell, 2004 Cal. App. Unpub. LEXIS 3557 (2004); People v. Becerra, 2004 Cal. App. Unpub. LEXIS 2692 (2004); People v. Conwell, 2004 Cal. App. Unpub. LEXIS 2409 (2004); People v. Edwards, 2004 Colo. App. LEXIS 1259 (Colo. Ct. App. July 15, 2004); People v. Candelaria, 2004 Colo. App. LEXIS 1021 (Colo. Ct. App. June 17, 2004); State v. Ross, 269 Conn. 213 (2004); State v. Crocker, 2004 Conn. App. LEXIS 292 (Conn. App. Ct. July 6, 2004); Globe v. State, 2004 Fla. LEXIS 416 (Fla. Mar. 18, 2004); Moody v. State, 277 Ga. 676 (2004); State v. Carter, 91 P.3d 1162 (Kan. 2004); State v. Young, 277 Kan. 588 (2004); Stoddard v. State, 850 A.2d 406 (Md. Ct. Spec. App. 2004); Commonwealth v. Sena, 441 Mass. 822 (2004); Commonwealth v. Negron, 441 Mass. 685 (2004); People v. Stephens, 2004 Mich. LEXIS 1305 (Mich. June 30, 2004); People v. Jackson, 2004 Mich. LEXIS 1207 (Mich. June

25, 2004); People v. Bell, 2004 Mich. LEXIS 1158 (Mich. June 11, 2004); People v. Brown, 470 Mich. 851 (2004); People v. Deshazo, 469 Mich. 1036 (2004); People v. Jackson, 2004 Mich. App. Lexis 1886 (Mich. Ct. App. July 8, 2004); People v. Brown, 2004 Mich. App. Lexis 1853 (Mich. Ct. App. July 6, 2004); People v. Tincher, 2004 Mich. App. Lexis 1834 (Mich. Ct. App. June 29, 2004); People v. Dabney, 2004 Mich. App. Lexis 1750 (Mich. Ct. App. June 24, 2004); People v. Peay, 2004 Mich. App. Lexis 1628 (Mich. Ct. App. June 17, 2004); People v. Jones, 2004 Mich. App. Lexis 1457 (Mich. Ct. App. June 10, 2004); People v. Al-Timimi, 2004 Mich. App. Lexis 1440 (Mich. Ct. App. June 8, 2004); People v. Rossbach, 2004 Mich. App. Lexis 1350 (Mich. Ct. App. May 27, 2004); People v. Williams, 2004 Mich. App. Lexis 1217 (Mich. Ct. App. May 13, 2004); People v. Landers, 2004 Mich. App. Lexis 1206 (Mich. Ct. App. May 13, 2004); People v. Mcmillian, 2004 Mich. App. LEXIS 1156 (Mich. Ct. App. May 6, 2004); State v. Stiernagle, 2004 Minn. App. LEXIS 776 (Minn. Ct. App. July 6, 2004); People v. Reynoso, 2004 N.Y. LEXIS 1541 (N.Y. June 10, 2004); People v. A.S. Goldmen, Inc., 2004 N.Y. App. Div. LEXIS 9449 (N.Y. App. Div. July 8, 2004); People v. Rogers, 2004 N.Y. App. Div. LEXIS 8851 (N.Y. App. Div. June 24, 2004); People v. McBee, 778 N.Y.S.2d 287 (N.Y. App. Div. 2004); People v. Rivera, 778 N.Y.S.2d 28 (N.Y. App. 2004); People v. Nunez, 776 N.Y.S.2d 551 (N.Y. App. Div. 2004); People v. Newland, 775 N.Y.S.2d 308 (N.Y. App. Div. 2004); State v. Tomlinson, 2004 Ohio 3295 (Ohio Ct. App. June 24, 2004); State v. Midgett, 680 N.W.2d 288 (S.D. 2004); State v. Ausmus, 2004 Wash. App. LEXIS 1220 (Wash. Ct. App. June 15, 2004); State v. Sherman, 2004 Wash. App. LEXIS 1131 (Wash. Ct. App. June 1, 2004); State v. Castilla, 121 Wn. App. 198 (2004).

Distinguished by: United States v. Stewart, 2004 U.S. Dist. LEXIS 12538 (S.D.N.Y. July 8, 2004); Diaz v. Herbert, 317 F. Supp. 2d 462 (S.D.N.Y. 2004); Llaca v. Duncan, 2004 U.S. Dist. LEXIS 7916 (S.D.N.Y. May 4, 2004); United States v. Cuong Gia Le, 316 F. Supp. 2d 330 (E.D. Va. 2004); Wheeler v. Dretke, 2004 U.S. Dist. LEXIS 12809 (N.D. Tex. July 6, 2004); Lies v. Jackson, 2004 U.S. App. LEXIS 10334 (6th Cir. May 24, 2004); United States v. Cozzo, 2004 U.S. Dist. LEXIS 7391 (N.D. Ill. Apr. 16, 2004); Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004); United States v. Reyes, 362 F.3d 536 (8th Cir. 2004); United States v. Barazza, 2004 U.S. Dist. LEXIS 9732 (S.D. Cal. May 17, 2004); People v. Gomez, 117 Cal. App. 4th 531 (2004); Watkins v. United States, 846 A.2d 293 (D.C. 2004); Springer v. State, 2004 Fla. App. LEXIS 7939 (Fla. Dist. Ct. App. June 4, 2004); Al-Amin v. State, 2004 Ga. LEXIS 413 (Ga. May 24, 2004); Clark v. State, 808 N.E.2d 1183 (Ind. 2004); Hendricks v. State, 809 N.E.2d 865 (Ind. Ct. App. 2004); People v. Geno, 2004 Mich. App. LEXIS 1067 (Mich. Ct. App. Apr. 27, 2004); State v. Tate, 2004 Minn. App. LEXIS 730 (Minn. Ct. App. June 29, 2004); Cassidy v. State, 2004 Tex. App. LEXIS 4519 (Tex. App. May 20, 2004); State v. McClanahan, 2004 Wash. App. LEXIS 597 (Wash. Ct. App. Apr. 5, 2004).

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[73] Crawford, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring in the judgment).