IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. JOHN ALEXANDER RICCARDI, Defendant-Appellant.	)	Crim. No. S056842

Appeal from the Superior Court of the State of California
County of Los Angeles (Case No. A086662)
The Honorable David D. Perez, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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No. S056842

APPELLANT'S SUPPLEMENTAL BRIEF

I. APPELLANT'S RIGHT TO CONFRONT WITNESSES WAS VIOLATED WHEN HEARSAY TESTIMONY WAS ADMITTED AT TRIAL.

A. THE LAW

On December 9, 2003, appellant filed an opening brief, arguing, among other issues, three instances of Confrontation Clause violations. Respondent's Brief is not due to be filed until July 7, 2004. On March 8, 2004, the U.S. Supreme Court issued an opinion in *Crawford v. Washington* (2004) __U.S.__[124 S. Ct. 1354], which held that admission of "testimonial" hearsay statements against a criminal defendant violates the Confrontation Clause of the Sixth Amendment if the declarant is unavailable to testify and the defendant had no previous opportunity to cross-examine. A new rule for the conduct of criminal prosecutions is to be applied retroactively to cases not final on appeal. (*Griffith v. Kentucky* (1987) 479 U.S. 314.)

In *Crawford*, the defendant was charged with assault and attempted murder. He claimed that the stabbing was done in self-defense. At trial, the prosecution attempted to

introduce a statement made by Crawford's wife Sylvia to the police. Although her statement regarding the fight corroborated the defendant's in most respects, it was arguably different with regard to whether the victim drew a knife before the defendant assaulted him. When Sylvia asserted her marital privilege at trial and did not testify, the defendant claimed that the admission of the statement violated his right to confrontation under the Sixth Amendment.

Prior to *Crawford*, the leading case United States Supreme Court case on confrontation was *Ohio v. Roberts* (1980) 448 U.S. 56. In *Roberts*, the High Court permitted the use of an unavailable witness's statement against a criminal defendant where the statement was reliable. Extrajudicial statements met the reliability test when they either fell within a firmly rooted exception or bore particularized guarantees of trustworthiness. However, in *Crawford,* the Court revisited and overruled *Roberts.* Recognizing that the *Roberts* test was unpredictable and included the admission of statements that the Confrontation Clause meant to exclude, the Supreme Court now held that in order for extra judicial "testimonial" statements to be admissible in a criminal trial, the Confrontation Clause required that the declarant be unavailable and that the defendant had a prior opportunity for cross-examination. (*Crawford, supra.*)

The Court did not explain what "testimonial" evidence means. In fact Justice Scalia specifically stated, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'." (*Crawford, supra*, 124 S. Ct. at p. 1374.) But

it did list "various formulations" of the class of testimonial statements: 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; testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Crawford, supra*, 124 S. Ct. at p. 1364.)

The court further stated that "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." The court used the term interrogation in its colloquial, rather than any technical legal sense. It reasoned that the statement at issue in the *Crawford* case was knowingly given in response to structured police questioning, and consequently qualified under any conceivable definition. (Id at p. 1365, fn. 4.)

In *People v. Sisavath* (May 27, 2004, No. F041885) __ Cal.App.__ [2004 WL 1172880], the California Court of Appeal held that a statement is testimonial if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer. In that case, the prosecution proffered the testimony of two young children: victim 1 and victim 2. The court found that victim 2 was not qualified to testify because she could not express herself and was incapable of

understanding her duty to tell the truth. The trial court allowed into evidence two out-of-court statements, one made by victim 2 to a responding police officer, and a videotaped interview with an interviewer trained in interviewing children suspected of being victims of abuse. The prosecution argued that the statement to the trained interviewer was not testimonial, he was not a government employee, the statement was made in a neutral setting, and the interview might have been intended for a therapeutic purpose. The Court of Appeal disagreed. The Court held that a statement is testimonial if an objective observer would reasonably expect the statement to be available for use in a prosecution. The Court of Appeal held that the out-of-court statements violated the Confrontation Clause under Crawford, and should have been excluded.

B. THREE CRAWFORD VIOLATIONS

In the case at bar, appellant argued three Confrontation Clause violations:

1. Detective Purcell's statements

In Argument II of his Opening Brief, appellant asserted that his Sixth Amendment rights of confrontation and cross-examination were violated when the trial court admitted a taped interview in which Marilyn Young and Detective Purcell theorized about appellant's guilt and whether Ms. Young was in danger from appellant. Ms Young testified at the trial, but Detective Purcell, who had retired from the force, was not called as a witness.

After Ms. Young testified, the prosecutor moved to admit the audio recording of

the interview under Evidence Code section 1236, as a prior consistent statement on claim of fabrication. (10 RT 1764.) The defense objected. The defense also requested that if the tape were to be admitted, only those portions be played that were directly relevant to the claim of recent fabrication. The court ruled that the prosecution could play the entire tape for the jury. The court gave a limiting instruction:

> Ladies and gentlemen, we're going to take a 15 minute recess at this time. Before we do, I want to make a comment about the tape. When you hear the participants, that is , the witness and the investigating officer, talking and theorizing about what they think went on and things like that, you're not to consider that at all, all right? That's pure speculation on their part. We're only interested in what the witness indicates she told the police officer. (10 RT 1784.)

The entire tape was played to the jury.

In his Opening Brief, appellant argued that the taped interview between Marilyn Young and Detective Purcell was not properly admitted as a prior consistent statement, and therefore it was hearsay improperly admitted for the truth. (AOB, page 84.) Appellant argued that the Sixth Amendment precludes the admission of hearsay testimony which does not fall under a firmly rooted exception absent independent indicia of reliability, citing *Ohio v Roberts*. (AOB 83.) Since *Crawford* overruled *Ohio v. Roberts*, this issue must be examined in light of the new rule announced in *Crawford*.

Crawford forbids the use of testimonial statements without the opportunity to cross-examine. It is clear that Marilyn Young's statements to Detective Purcell were testimonial. The question here is whether Detective Purcell's statements to Young were

also testimonial, or were admissible at all. Here, an objective witness would reasonably believe that the statements of both Marilyn Young and Detective Purcell would be available for use at a later trial.

The admission of testimonial statements of Detective Purcell who did not appear at trial and where the defendant had no prior opportunity for cross-examination should not be admitted into evidence to decide the guilt of a defendant facing the death penalty. The jury heard Detective Purcell's recorded statements that Young should stay somewhere else for a few days in case appellant came after her next (II Supp CT 025); that Purcell would tell Young how to protect herself in case appellant came to kill her next (II Supp CT 50); Purcell told Young he would not let her walk out of the station alone. (II Supp CT 51-52.)

At one point on the tape, Purcell said: "Well because with his crazy mind, if he [appellant] wants – if he thinks you know all this stuff, just the fact that you know it, you're probably in as much danger as if he thinks you told it if not more. If you've already told it, then what's he got to gain by silencing you? It's already been told. But if he thinks you've got that knowledge and you might not've told us yet, then you would probably be in more danger." (II Supp CT 48.)

These inflammatory statements violated appellant's rights under the state and federal constitution to confront witnesses and deprived him of his state and federal rights to a fair trial.

2. Connie Navarro's Statements

In Argument IV, appellant asserted that admission at trial of the hearsay statements of the deceased Connie Navarro expressing fear of appellant violated his Sixth Amendment right to confrontation and cross-examination. (AOB 133.)

The prosecutor argued that Navarro's statements of fear were admissible under Evidence Code 1250 to show the victim's state of mind, and also that they were not being admitted for the truth of the matter. (7 RT 1148-1151.)

Both Marilyn Young and James Navarro testified to Connie Navarro's statements of fear. Connie Navarro was one of the murder victims, and thus could not be cross-examined.

In the Opening Brief, appellant argued first that Connie Navarro's state of mind was not in dispute, and her state of mind was not at issue. Therefore the statements were admitted for the truth, that Connie Navarro was in fear of appellant. (AOB 133.) Appellant then argued that the statements did not fall under a firmly rooted exception (*Ohio v. Roberts*) and thus violated the confrontation clause. Since *Crawford* overruled *Ohio v. Roberts*, this issue must be examined in light of the new rule announced in *Crawford*.

Connie Navarro did not testify at trial, and if her testimony was received for the truth, the pertinent question is whether an objective observer would reasonably expect her statements to be available for use in a prosecution. (*People v. Sisavath*, *supra.*) Under the

analysis used in *Sisavath,* statements of fear to friends would be available for use, and therefore testimonial.

The admission of Connie Navarro's statements violated the Confrontation Clause, and violated appellant's right to a fair trial.

3. Patrick Riccardi's statement

In Argument VI of his Opening Brief, appellant asserted that his stepmother's testimony that appellant supposedly confessed the murders to his now deceased father constituted double-hearsay and violated his confrontation and due process rights. (AOB 155.) The admission of the alleged statement of appellant's father to his step-mother was premised on the theory of spontaneous declaration. (Cal. Evidence Code section 1240.) Appellant argued that the statements were hearsay, and that under *Ohio v. Roberts*, the statements did not bear any indicia of reliability. *Crawford* requires a reexamination of the basis for treating spontaneous declarations as admissible hearsay.

Was the statement testimonial? The statement was one made by defendant to his father and was overheard by the step-mother, who testified in court. In *People v. Sisavath* (May 27, 2004, No. F041885)__ Cal.App.__ [2004 WL 1172880], the Court of Appeal held that a statement is testimonial if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer. Under what has been termed the "omniscient observer" test, the question presented is whether under the circumstances as they existed (not necessarily as they were known to the declarant) it can be anticipated that the statement would be used in prosecution. Here, the

statement in question is that of appellant's father to his step-mother, stating that the appellant said he killed the two girls. An objective observer would reasonably foresee that this statement would be used in a prosecution. Therefore, under the holding in *Sisavath*, the statement is testimonial, and violated appellant's rights under the Confrontation Clause.

C. STANDARD OF REVIEW

This Court must decide whether the admission of these statements was harmless beyond a reasonable doubt. The *Chapman* harmless error standard applies, because the admission of the statements was federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The *Chapman* standard requires the beneficiary of a federal constitutional error to prove beyond a reasonable doubt that the error did not contribute to the result obtained. *(People v Neal* (2003) 31 Cal 4th 63, 86.) To say that an error did not contribute to the result is to find that error unimportant in relation to everything else the factfinder considered on the issue in question, as revealed in the record. (*Yates v. Evatt* (1991) 500 U.S. 391, 403.)

The statements of Detective Purcell that Marilyn Young should hide so that appellant did not kill her next were so chilling a jury could not have ignored them, especially given that they came from a police officer. The magnitude of the impact on the jury from the repeated hearsay on the tape rendered the limiting instruction futile. The statements of Connie Navarro that she was in fear of the defendant likewise carried great force. So-called "prophetic" expressions of fear are especially prejudicial because they

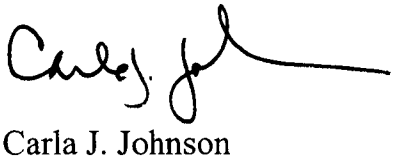
misleadingly suggest that the victim had accurate knowledge of the defendant's intention to harm the victim, and that the defendant subsequently acted in conformity with this state of mind. These statements could not be ignored.

The statement of the deceased father that appellant confessed to him is equally chilling. Confessions, as a class, almost invariably will provide persuasive evidence of a defendant's guilt. This Court has held that evidence of confessions "often operate as a kind of evidentiary bombshell which shatters the defense." (*People v Cahill* (1993) 5 Cal. 4th 478, 503.) In this case, there were no eye-witnesses to the crime, and no physical evidence linked appellant to the crime. Since the entire case against appellant was circumstantial, the hearsay statements admitted at trial can not be found to be harmless beyond a reasonable doubt.

D. CONCLUSION

Appellant's Sixth Amendment right to confront was violated by the admission of hearsay evidence. The magnitude of the impact on the jury from the hearsay statements of Detective Purcell that Marilyn Young could be the next victim, the statements of the deceased Connie Navarro that she was in fear of appellant, and the statement of appellant's father that he confessed to the murders, cannot be ignored. It cannot be said that this evidence was harmless beyond a reasonable doubt.

Respectfully submitted,



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I am a resident of the County of Los Angeles, I am over the age of 18 years and not a party of the within entitled action. My business address is: Attorney Carla J. Johnson, P.O. Box 30478, Long Beach, CA 90853.

On June 15, 2004, I served APPELLANT'S SUPPLEMENTAL BRIEF by placing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at: Long Beach, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 15, 2004 at Long Beach, California.

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CERTIFICATE OF WORD COUNT

I, CARLA J. JOHNSON, counsel on appeal for appellant JOHN A. RICCARDI in Appeal No. S056842, certify that Appellant's Supplemental Opening Brief consists of 2578 words, excluding tables, proof of service, and this certificate, according to the word count of the word-processing program with which the brief was produced. (Cal. Rules of Court, rules 14(c), 37(d).)

DATE: June 17, 2004

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