

# **52D MILITARY JUDGE COURSE**

## **SIXTH AMENDMENT AND CONFRONTATION**

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**LTC NICK LANCASTER  
MARCH 2009**

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# 52D MILITARY JUDGE COURSE

## SIXTH AMENDMENT

### I. INTRODUCTION

- A. The Sixth Amendment to the Constitutions reads as follows: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him**; to have compulsory process for obtaining witnesses in his favor; **and to have the Assistance of Counsel for his defense.**” U.S. CONST. amend. VI.
- B. This outline focuses on Confrontation, and includes coverage of cross-examination, the right to face-to-face confrontation, public trial, and the right to counsel. Compulsory process is addressed in the Discovery outline, Ineffective Assistance of Counsel (IAC) is covered in Professional Responsibility (PR), and Speedy Trial also gets its own outline.

### II. WAYS TO SATISFY THE CONFRONTATION CLAUSE

- A. Produce the witness. Producing the witness will satisfy the Confrontation Clause even if the witness cannot be cross-examined effectively. The Confrontation Clause guarantees only an *opportunity* to cross-examine witnesses. There is no right to meaningful cross-examination.
1. *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam). The Court held that an expert witness’ inability to recall what scientific test he had used did not violate the Confrontation Clause even though it frustrated the defense counsel’s attempt to cross-examine him. “[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness’ testimony.”
  2. *United States v. Owens*, 484 U.S. 554 (1988). While in the hospital, the victim identified the accused to an FBI agent. At trial, due to his injuries, which affected his memory, the victim could only remember that he earlier identified the accused, but not the reason for the identification. The victim was under oath and subject to cross-examination; the Confrontation Clause was satisfied.

3. *United States v. Rhodes*, 61 M.J. 445 (2005). Witness against accused testified but claimed a lack of memory. The previous confession of the witness, implicating accused, was admitted against appellant with certain conditions. The defense argued that the appellant's confrontation rights were violated because the witness did not "defend or explain" his statement as required by *Crawford v. Washington*. The court ruled that the Supreme Court's previous case of *United States v. Owens* was not overruled by *Crawford*. By presenting the witness, the government met the confrontational requirements of the Sixth Amendment.
4. *United States v. Gans*, 32 M.J. 412 (C.M.A. 1991). The military judge admitted a sexual abuse victim's statement given thirty months earlier to MPs as past recollection recorded (MRE 803(5)). At trial, victim could not remember details of sexual abuse incidents. Appellant claimed that because the daughter's recollection was limited, his opportunity to cross-examine was also limited. The Court of Military Appeals disagreed, relying on the *Fensterer* and *Owens* decisions that there is no right to meaningful cross-examination.
5. *United States v. Lyons*, 36 M.J. 183 (C.M.A. 1992). Appellant convicted of raping the deaf, mute, mentally retarded, 17-year-old daughter of another service member. The victim appeared at trial, but her responses during her testimony were "largely substantively unintelligible" because of her infirmities. In light of her inability, the government moved to admit a videotaped re-enactment by the victim of the crime. The military judge admitted the videotape as residual hearsay over defense objection. Appellant asserted that his right to confrontation was denied because the daughter's disabilities prevented him from effectively cross-examining her. The lead opinion assumed that the victim was unavailable and decided the case on the basis of the admission of a videotaped re-enactment. Chief Judge Sullivan, Judges Cox and Crawford did not perceive a confrontation clause issue because the victim testified.
6. *United States v. Carruthers*, 64 M.J. 340 (2007). Appellant was convicted of stealing over a million dollars worth of military property from the Defense Reutilization and Marketing Office (DRMO) at Fort Bragg over a three year period. At trial, one of his coconspirators, SFC Rafferty, testified for the government in return for an agreement to plead guilty in federal court to one count of larceny of government property valued over one thousand dollars. Appellant's civilian defense counsel cross-examined SFC Rafferty at length about his agreement with the government, however the government objected when the defense counsel attempted to delve further into the possible punishments SFC Rafferty might receive at his federal trial. The military judge sustained the objection. The issue was whether appellant was denied his Sixth Amendment right to confrontation when the military judge limited cross-

examination of a key government witness regarding the possible sentence under the witness's plea agreement. (There were two issues granted, the other involved instructions given by the military judge) The holding was: No, sufficient cross-examination was permitted, and the military judge properly identified and weighed the danger of misleading the members under M.R.E. 403. The military judge in this case had already allowed plenty of inquiry into the witness's bias as a result of his agreement with the government, and merely limited the defense from further questioning on another aspect of the agreement. Since sufficient cross-examination into bias as a result of the plea agreement was permitted, appellant's Sixth Amendment right to Confrontation was not violated by the military judge's limitation.

B. Waiver and Forfeiture. Demonstrating evidence of affirmative waiver or proving, generally by a preponderance of the evidence, forfeiture by wrongdoing will satisfy the Confrontation Clause.

1. Waiver. Affirmative

- a. *United States v. Martindale*, 40 M.J. 348 (C.M.A. 1994). During a deposition and again at an Article 39(a) session, a 12-year-old boy could not or would not remember acts of alleged sexual abuse. The military judge specifically offered the defense the opportunity to put the boy on the stand, but defense declined. Confrontation was waived and the boy's out-of-court statements were admissible.
- b. *United States v. McGrath*, 39 M.J. 158 (C.M.A. 1994). Government produced the 14-year-old daughter of the accused in a child sex abuse case. The girl refused to answer the trial counsel's initial questions, but conceded that she had made a previous statement and had not lied in the previous statement. The military judge questioned the witness, and the defense declined cross-examination. The judge did not err in admitting this prior statement as residual hearsay.
- c. *United States v. Bridges*, 55 M.J. 60 (2001). The Court of Appeals for the Armed Forces (CAAF) held that the Confrontation Clause was satisfied when the declarant took the stand, refused to answer questions, and was never cross-examined by defense counsel. The military judge admitted the declarant's hearsay statements into evidence. While a true effort by the defense counsel to cross-examine the declarant may have resulted in a different issue, the defense's clear waiver of cross-examination in this case satisfied the Confrontation Clause. Once the Clause was satisfied, it was appropriate for the military judge to consider factors outside the

making of the statement to establish its reliability and to admit it during the government case-in-chief under the residual hearsay exception.

2. Forfeiture. An equitable principle increasingly utilized to satisfy the requirements of the Confrontation Clause
  - a. Military Rule of Evidence 804(b)(6) provides that “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness” is not excluded by the hearsay rule if the declarant is unavailable. The overwhelming majority of federal courts apply a preponderance of the evidence standard to determine whether an accused engaged or acquiesced in wrongdoing. 2 STEPHEN A. SALTZBURG, LEE D. SCHINASI, AND DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 804.05[3][f] (2003).
  - b. *Giles v. California*, 128 S. Ct. 2678 (2008). The doctrine of forfeiture by wrongdoing requires the government to show that the accused intended to make the witness unavailable when he committed the act that rendered the witness unavailable. This is consistent with the Federal and identical Military Rule of Evidence 804(b)(6). It is not enough to simply show that the accused’s conduct caused the unavailability.
  - c. *United States v. Clark*, 35 M.J. 98 (C.M.A. 1992). Accused’s misconduct in concealing the location of the victim and her mother waived any constitutional right the accused had to object to the military judge’s ruling that the victim was “unavailable” as a witness.

### III. CONFRONTATION INTRODUCTION & SUMMARY

- A. The Sixth Amendment Confrontation Clause landscape changed abruptly in 2004 with the Supreme Court opinion in *Crawford v. Washington*.<sup>1</sup> Prior to *Crawford*, the test for admitting a hearsay statement satisfying the Confrontation Clause was provided by *Ohio v. Roberts*.<sup>2</sup> Under *Roberts*, a hearsay statement could be admitted if the proponent could show that it possessed adequate indicia of

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<sup>1</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>2</sup> *Ohio v. Roberts*, 448 U.S. 56 (1980).

reliability.<sup>3</sup> Indicia of reliability could be shown in one of two ways. First, if the statement fit within a firmly rooted hearsay exception, it would satisfy the Confrontation Clause.<sup>4</sup> Second, if it didn't fit within a firmly rooted hearsay exception, it could still satisfy the Confrontation Clause and be admitted if it possessed particularized guarantees of trustworthiness.<sup>5</sup> Particularized guarantees of trustworthiness could be shown using a nonexclusive list of factors such as mental state or motive of the declarant, consistent repetition, or use of inappropriate terminology.<sup>6</sup> Importantly, when analyzing particularized guarantees of trustworthiness, the proponent was limited to considering only the circumstances surrounding the making of the statement, i.e. extrinsic evidence was not permitted.<sup>7</sup>

B. *Crawford* divides hearsay statements into two categories, testimonial and nontestimonial.<sup>8</sup> Testimonial statements can only be admitted if the declarant is unavailable and there has been a prior opportunity for cross examination.<sup>9</sup> Nontestimonial hearsay statements by contrast can be admitted if they meet the requirements of the rules of evidence.<sup>10</sup> The obvious critical issue is determining whether a statement is testimonial or nontestimonial, however the Supreme Court has never provided a comprehensive definition of these terms.<sup>11</sup> In *Crawford* itself the Court provided some clues, describing three types of core testimonial statements, including 1) ex-parte in court testimony, 2) extrajudicial statements in

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<sup>3</sup> *Id.* at 66.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Idaho v. Wright*, 497 U.S. 805, 821 (1990) (providing factors for use in analyzing the reliability of hearsay statements made by child witnesses in child sexual abuse cases); *United States v. Ureta*, 44 M.J. 290, 296 (1996) (giving examples of factors to consider when looking at the circumstances surrounding the making of a hearsay statement when the declarant is unavailable).

<sup>7</sup> *Idaho v. Wright*, 497 U.S. 805, 819-24 (1990). This can be confusing, since this limit on extrinsic evidence only applied to the Confrontation Clause analysis. Once a statement meets the Confrontation Clause hurdle, extrinsic evidence is perfectly acceptable for analysis under the hearsay rules. Another source of confusion in military caselaw is the fact that the CAAF has stretched the meaning of circumstances surrounding the making of the statement to include statements made close in time, yet before the actual making of a particular statement in at least one case. *See United States v. Ureta*, 44 M.J. 290 (1996).

<sup>8</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>9</sup> *Id.* at 68.

<sup>10</sup> The issue of whether the Confrontation Clause applies to nontestimonial statements at all in light of *Whorton v. Bockting*, 127 S. Ct. 1173 (2007) is discussed later in this paper.

<sup>11</sup> The Court specifically states in *Crawford*, “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Crawford*, 541 U.S. at 68.

formalized trial materials, and 3) statements made under circumstances that would cause a reasonable witness to believe they could be used later at trial.<sup>12</sup> The Court also made it clear that statements made to law enforcement would likely be considered testimonial, whereas statements made to casual acquaintances would likely be considered nontestimonial.<sup>13</sup>

- C. Approximately two years after *Crawford*, the Court decided *Davis v. Washington*, where it provided additional guidance for determining whether a statement is testimonial or nontestimonial, at least in the context of police interrogations.<sup>14</sup> The Court in *Davis* held: “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.”<sup>15</sup>
- D. *Davis* and *Crawford* itself are the only Supreme Court cases that make any effort to explain the meaning of the terms testimonial and nontestimonial, therefore lower courts have spent considerable time and energy analyzing those two cases and attempting to develop workable definitions.
- E. The CAAF has begun using three questions when analyzing whether a statement is testimonial or nontestimonial. “First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the “statement” involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting the statements the production of evidence with an eye toward trial?” *United States v. Rankin*, 64 M.J. 348 (2007). This three factor analysis combines the primary purpose test from *Davis* with the governmental involvement and preparation for trial rationales from *Crawford* itself.
- F. Prior to *Crawford*, the proponent was required to show that a hearsay statement possessed adequate indicia of reliability before it could be admitted. *Ohio v. Roberts*, 448 U.S. 56 (1980). Post-*Crawford*, that is still the test for admission of

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<sup>12</sup> *Id.* at 51-52.

<sup>13</sup> *Id.* at 53.

<sup>14</sup> *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>15</sup> *Id.* at 822.

non-testimonial hearsay statements in the military.<sup>16</sup> To show that reliability, the proponent must either place the statement into one of the “firmly-rooted” hearsay exceptions (e.g., excited utterance or statement for medical diagnosis or treatment) or show that the statement possesses particularized guarantees of trustworthiness as shown by the circumstances surrounding its making. For example, non-testimonial statements admitted as excited utterances or under the medical treatment exception require no further Confrontation Clause analysis because both are firmly rooted hearsay exceptions. On the other hand, the residual hearsay exception is not firmly rooted, thus requiring finding particularized guarantees of trustworthiness. *Idaho v. Wright*, 497 U.S. 805, 817 (1990). If the proponent is able to show the hearsay statement possesses the required indicia of reliability, the statement satisfies the Confrontation Clause.

#### **IV. CONFRONTATION CLAUSE JURISPRUDENCE BEFORE CRAWFORD: THE INDICIA OF RELIABILITY UNDER OHIO V. ROBERTS**

- A. *Ohio v. Roberts*, 448 U.S. 387 (1980). In a case involving preliminary hearing testimony and its later admissibility at trial when the witness was unavailable at trial, the Supreme Court in *Ohio v. Roberts*, 448 U.S. 56 (1980) established the standard to determine when hearsay statements possess sufficient reliability to permit their introduction against an accused without violating the Confrontation Clause. The Court declared that the proponent must show that the declarant is *unavailable*<sup>17</sup> AND that the hearsay statement possesses sufficient “*indicia of reliability*.” *Id.* at 66 (emphasis added). To meet the indicia of reliability test, the proponent of the hearsay statement to demonstrate one of two things: (1) if the statement falls into a “firmly rooted” exception to the hearsay rule, the reliability of that statement may be inferred without more OR (2) if the hearsay statement did not fall into a firmly rooted exception to the hearsay rule, the proponent must show that the statement possesses “particularized guarantees of trustworthiness.”

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<sup>16</sup> In *Whorton v. Bockting*, 127 S. Ct. 1173 (2007), the Supreme Court stated: “Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.” Although this language clearly means that the Supreme Court will no longer apply Confrontation Clause analysis to nontestimonial hearsay statements, those statements may still require Confrontation analysis in the military. The CAAF has not been squarely presented with this issue since *Whorton* was decided in February, 2007, however there are indications they will rule IAW Supreme Court precedent. The most current relevant CAAF case addressing admissibility of nontestimonial hearsay statements is *U.S. v. Rankin*, 64 M.J. 348 (2007), which uses *Roberts* analysis.

<sup>17</sup> *Roberts* created a lot of confusion because it seemed to establish a requirement that the government show that a declarant is unavailable before a hearsay statement could be admitted against an accused without violating the Confrontation Clause. Later cases have limited *Roberts* to its facts. *United States v. Inadi*, 475 U.S. 387 (1986) (holding that “*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable”); *White v. Illinois*, 502 U.S. 346, 356 (1992) (holding that “*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding”). See also *United States v. Taylor*, 53 M.J. 195 (2000).

*Id.* The Court decided the particular issue before it on the second ground, thus leaving for another day what hearsay exceptions qualified as “firmly rooted.”

- B. The Supreme Court defined firmly rooted in the case *Lilly v. Virginia*, 527 U.S. 116 (1999). Reaffirming the *Roberts* standard,<sup>18</sup> the Court declared, “We now describe a hearsay exception as ‘firmly rooted’ if, in light of ‘longstanding judicial and legislative experience’ [citation omitted] it rests [on] such [a] solid foundation that admission of virtually any evidence within [it] comports with the ‘substance of the constitutional protection.’” *Lilly*, 527 U.S. at 126. Explaining its defining, the Court stated that “[e]stablished practice, in short, must confirm that statements falling within a category of hearsay inherently ‘carr[y] special guarantees of credibility’ essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony.” *Id.*

1. Which exceptions are firmly rooted hearsay exceptions?

a) Excited Utterance<sup>19</sup>

- (1) *White v. Illinois*, 502 U.S. 346 (1992). The victim never testified at trial; the government proved its case through hearsay statements of child victim. The government offered testimony summarizing the 4-year-old girl’s statements to her babysitter, her mother, a police officer, an emergency room nurse, and a doctor. The first three out-of-court statements were admissible under the hearsay exception for spontaneous declarations.<sup>20</sup>
- (2) Significant liberalization has occurred in child sex abuse cases when determining whether a statement was made

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<sup>18</sup> “[T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) ‘the evidence falls within a firmly rooted hearsay exception’ or (2) it contains ‘particularized guarantees of trustworthiness’ such that adversarial testing would be expected to add little, if anything, to the statement’s reliability.” *Lilly v. Virginia*, 527 U.S. 116, 124-25 (1999), quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>19</sup> “The following are not excluded by the hearsay rule even though the declarant is available as a witness . . . [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. MIL. R. EVID. 803(2). The Court of Appeals for the Armed Forces noted in *United States v. Donaldson*, 58 M.J. 477 (2003), that it is unsettled whether a statement made after the declarant calms down can never be an excited utterance.

<sup>20</sup> When codified, the hearsay exception for spontaneous declarations was split into present sense impressions and excited utterances. The requirements for a present sense impression under the rules of evidence are sufficiently distinct from the common law spontaneous declarations to fail to qualify as a firmly rooted hearsay exception. 1 FRANCES A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE, 821 (1991). The Illinois rule of evidence for spontaneous declarations has the same foundational requirements as M.R.E 803(2). *See White*, 502 U.S. at 350 n.1.

under the stress of a startling event or condition. Time delay alone is not dispositive in determining if the out-of-court statement is made under the stress of excitement created by a startling event.

- (3) Compare *United States v. Donaldson*, 58 M.J. 477 (2003) (finding statement made by three-year-old declarant roughly 11 to 12 hours after event to be an excited utterance); *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987) (finding an unsolicited, spontaneous statement from a 13-year-old sexual abuse victim to her school counselor at the first available opportunity was an excited utterance even though the statement was made twelve hours after the event) with *United States v. LeMere*, 22 M.J. 61 (C.M.A. 1986) (finding that a three-and-a-half-year-old declarant wasn't under the stress of excitement of a startling event twelve hours after the event).
- (4) Cf. *United States v. Grant*, 42 M.J. 340 (1995). Six-year-old victim reported sexual abuse 36-48 hours later. Statement did not qualify as an excited utterance because it was not made under the stress or excitement of the event, but was the product of sad reflection. *Id.* COMA, however, considered the elapsed time as a function of the victim's age. “[A]s the age of the declarant decreases, the more elastic the elapsed time factor, within reason.” *Id.* at 343.
- (5) Factors used by courts to determine whether a statement is an excited utterance include “lapse of time between startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement.” *United States v. Donaldson*, 58 M.J. 477 (2003) (quoting *Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999)). The focus, however, is on the whether the declarant was under the stress or excitement of the startling event rather than on the passage of any particular period of time. *United States v. Feltham*, 58 M.J. 470, 475 (2003).

b) Medical Diagnosis and Treatment.<sup>21</sup>

- (1) *White v. Illinois*, 502 U.S. 346 (1992). The government offered testimony summarizing the 4-year-old girl's statements to an emergency room nurse and a doctor. The two statements were admissible because they were made in the course of receiving medical treatment.
- (2) This exception is also broadened in child sex abuse cases. For example, in cases that do not involve domestic abuse, the identity of the perpetrator is normally not relevant for purposes of medical treatment. However, in sexual abuse cases, the identity of the perpetrator may be relevant to medical treatment. *See White v. Illinois*, 502 U.S. 346, 351 n.2 (1992) (noting that the Illinois statute defining the medical treatment exception includes the identity of the "cause of symptom, pain or sensations, or the general character of the cause or external source thereof" in sexual assaults); *United States v. Quigley*, 35 M.J. 345, 347 (noting that the identity of the perpetrator is important because if not identified, the child might go back into the same environment where she is being victimized and therapy would not be as effective); *United States v. Tome*, 61 F.3d 1446 (10th Cir. 1995) (observing that the identity of the defendant as the sexual abuser was necessary to therapeutic treatment of the victim, because effective treatment may require that the victim avoid contact with the abuser and because the psychological effects of sexual molestation by a father or other relative may require different treatment than those resulting from abuse by a stranger). *See also United States v. Turning Bear*, 357 F.3d 730 (8th Cir. 2004) (noting that that "hearsay statements disclosing the identity of a sexual abuser are admissible under [Federal] Rule [of Evidence] 803(3) only 'where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding'" (quoting *United States v. Renville*, 779 F.430, 438 (8th Cir. 1985))).

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<sup>21</sup> "The following are not excluded by the hearsay rule even though the declarant is available as a witness. . . [s]tatements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." MIL. R. EVID. 803(4). The statements made need not be made to a licensed physician to qualify for admission under this rule. *United States v. Donaldson*, 58 M.J. 477, 485 (2003).

- (3) Are the statements made for the purpose of medical treatment or for investigative purposes? It doesn't seem to matter. *The focus is on the declarant's expectation of medical treatment.*
- (4) *United States v. Haner*, 49 M.J. 72, 76 (1998) ("The fact that Mrs. Haner was referred to the hospital [by the district attorney] is not a critical factor in deciding whether the medical exception applies to the statements she gave to those treating her."). *See also U.S. v. Hollis*, 57 M.J. 74 (2002) (regarding applicability of the exception to young children).
- (5) *United States v. Ureta*, 44 M.J. 290 (1996) (holding that the judge must find the declarant had an actual expectation of receiving medical treatment).
- (6) *United States v. Siroky*, 44 M.J. 394 (1996) (finding that there was insufficient evidence on the record to show that statements made by three-year-old sexual abuse victim to psychotherapist were made with the expectation of receiving treatment). *See also United States v. Kelley*, 45 M.J. 275 (1996).

c) Co-conspirator Statements.<sup>22</sup>

- (1) *Bourjaily v. United States*, 483 U.S. 171 (1987). "We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements." *Id.* at 183-84.
- (2) "We think that these cases demonstrate that co-conspirators' statements, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion. Accordingly, we hold that the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)." *Id.*

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<sup>22</sup> "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." MIL. R. EVID. 801(d)(2)(E).

- (3) The Court in *Crawford v. Washington*, 124 S. Ct. 1354, 1367 (2004) noted that statements in furtherance of a conspiracy are *not* testimonial in nature.
- d) Then existing mental, emotional, or physical condition.<sup>23</sup>
- (1) *United States v. Lingle*, 27 M.J. 704 (A.F.C.M.R. 1988). “The keystone to the admission of such statements is a determination that they possess sufficient indicia of reliability so as to meet the Constitutional guarantee of confrontation. Well-rooted and long-established exceptions to the hearsay rule, such as a statement of ‘existing mental, emotional, or physical condition’ are inherently reliable.” *Id.* at 708.
- (2) *See also Terrovona v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988); *Barber v. Scully*, 731 F.2d 1073 (2d Cir. 1984); *United States v. Fling*, 40 M.J. 847 (A.F.C.M.R. 1994).
- e) Past Recollection Recorded. *Hatch v. Oklahoma*, 58 F.3d 1447 (10th Cir. 1995). “The exception for past recorded recollections is clearly a firmly rooted hearsay exception. . . . We therefore hold that the use of this recorded recollection testimony did not violate petitioner’s rights under the Confrontation Clause.”
- f) Dying Declarations; Prior *Trial* Testimony; Business Records; Public Records. *Roberts*, 448 U.S. at 66 n.8.
- (1) The *Crawford* Court did not decide whether dying declarations were testimonial. *Crawford*, 124 S. Ct. 1354, 1367 n.10.
- (2) Cross-examined prior trial testimony. *See Mancusi v. Stubbs*, 408 U.S. 204, 213-16 (1972) (declaring that prior trial testimony is admissible upon retrial if the declarant becomes unavailable).
- (3) Business and Public Records. The *Crawford* Court noted that business records are *not* testimonial. *Crawford*, 124 S. Ct. 1354, 1367 (2004). This statement has been

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<sup>23</sup> “The following are not excluded by the hearsay rule . . . [a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant’s will.” MIL. R. EVID. 803(3).

controversial, with many courts finding “business records” to be testimonial in certain circumstances. The Court has recently granted cert. in a case on this issue, *Melendez-Diaz v. Massachusetts*, 07-591.

- (a) Business records generally nontestimonial. *See State v. Bellerouche*, 2005 Wash. App. LEXIS 2648 (Wash. Ct. App. 2005) (trespass notice), *Ellis v. Phillips*, 2005 U.S. Dist. LEXIS 13910 (D.N.Y. 2005) (DNA report referenced by other expert testimony), *Eslora v. State*, 2005 Tex. App. LEXIS 2564 (Tex. App. 2005) (medical records), *Commonwealth v. Crapps*, 64 Mass. App. Ct. 915 (Mass. App. Ct. 2005) (drug analysis certificate), *Commonwealth v. Verde*, 444 Mass. 279 (Mass. 2005) (report of drug analysis), *State v. Windley*, 617 S.E.2d 682 (N.C. Ct. App. 2005) (fingerprint cards not testimonial), *United States v. Lopez-Montanez*, 2005 U.S. App. LEXIS 18945 (9th Cir. Cal. Aug. 26, 2005) (certificate of nonexistence of record nontestimonial).
- (b) Business records can be testimonial under some circumstances. *See People v. Hernandez*, 2005 NY Slip Op 25007 (N.Y. Misc. 2005) (fingerprint report made with an eye toward trial testimonial). *See United States v. Williamson*, 65 M.J. 706 (Army Ct. Crim. App. 2007). (lab report testimonial where evidence obtained at time of arrest)(discussed in detail above)

2. Which exceptions are not firmly rooted hearsay exceptions?

a) Statements against penal interest (SAPI).<sup>24</sup>

- (1) *United States v. Jacobs*, 44 M.J. 301 (1996). Following the weight of authority from the federal circuits, the CAAF held that the declaration against interest exception is a “firmly-rooted” hearsay exception. *Id.* at 306. *Cf. Williamson v. United States*, 512 U.S. 594, 605 (1994) (“[T]hat the very fact that a statement is genuinely self-

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<sup>24</sup> “The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true.” MIL. R. EVID. 804(b)(3).

inculpatory . . . is itself one of the ‘particularized guarantees of trustworthiness’ that make a statement admissible under the Confrontation Clause.”).

- (2) *Lilly v. Virginia*, 527 U.S. 116 (1999). “[A]ccomplices’ confessions that inculcate a criminal defendant are *not* within a firmly rooted exception to the hearsay rule.” *Id.* at 134 (plurality) (emphasis added).
  - (a) The Court analyzed statements against penal interest by addressing three principle situations in which they are commonly used:
    - (i) As voluntary admissions against the declarant;
    - (ii) As exculpatory evidence offered by a defendant who claims the declarant committed, or was involved in, the offense. *See Chambers v. Mississippi*, 410 U.S. 284 (1973);
    - (iii) As evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant.
  - (b) The Court noted that the first two categories do not raise Confrontation Clause issues, except in the case of joint trials. *See Gray v. Maryland*, 523 U.S. 185, 194-95 (1998) (Because use of an accomplice’s confession “creates a special, and vital, need for cross-examination,” a prosecutor desiring to offer such evidence must comply with *Bruton* [391 U.S. 123 (1968)], hold separate trials, use separate juries, or abandon the use of the confession).
  - (c) The out-of-court statements offered in *Lilly* and *Jacobs* fall into the third category.
  - (d) The Court considered the following factors:
    - (i) Expanding the statements against interest exception to the hearsay rule is of recent vintage;

- (ii) Offering accomplice's statements without calling the declarant is functionally similar to the condemned practices of the ancient *ex parte* affidavit system;
  - (iii) Statements falling into the third category are inherently unreliable. “Wigmore's treatise still expressly distinguishes accomplices’ confessions that inculpate themselves and the accused as beyond a proper understanding of the against-penal-interest exception because an accomplice often has a considerable interest in ‘confessing and betraying his co-criminals.’” *Lilly*, 527 U.S. at 131.
- (3) ***Jacobs after Lilly***. *Lilly* probably overrules *Jacobs*.
  - (a) *Jacobs* was decided based on the “weight of authority.” Six circuits recognized SAPI as firmly rooted hearsay and two did not. The 10th Circuit was in the majority. Since *Lilly*, the 10th Circuit has changed positions. Compare *United States v. Gomez*, 191 F.3d 1214 (10th Cir. 1999) (holding statements against penal interest is not a firmly rooted hearsay exception, interpreting *Lilly v. Virginia*) with *Jennings v. Maynard*, 946 F.2d 1502 (10th Cir. 1991) (holding that statements against penal interest is a firmly rooted hearsay exception).
  - (b) *United States v. Egan*, 53 M.J. 570 (Army Ct. Crim. App. 2000). The Army court declined to follow *Jacobs* in light of *Lilly*, holding that the trial judge erroneously admitted the statements of two unavailable witnesses as SAPI.
- (4) Statements against Penal Interest after *Lilly*.
  - (a) Statements against penal interest generally are not admissible if the statements are made to the police. See *United States v. McCleskey*, 228 F.3d 640 (6th Cir. 2000); *United States v. Ochoa*, 229 F.3d 631 (7th Cir. 2000); *United States v. Castelan*, 219 F.3d 690 (7th Cir. 2000); and *United States v. Triplett*, 56 M.J. 875 (Army Ct. Crim. App. 2002).

(b) However, statements against penal interest made to family or friends can be admissible. *See United States v. Scheurer*, 62 M.J. 100 (2005) (finding statements of appellant’s service member wife describing joint drug use with appellant to her coworkers were against her penal interest, possessed particularized guarantees of trustworthiness, and were admissible against appellant); *United States v. Tocco*, 200 F.3d 401 (6th Cir. 2000); *United States v. Boone*, 229 F.3d 1231 (9th Cir. 2000); *United States v. Shea*, 211 F.3d 658 (1st Cir. 2000).

b) Residual Hearsay. *Idaho v. Wright*, 497 U.S. 805 (1990). “We note at the outset that Idaho's residual hearsay exception . . . under which the challenged statements were admitted, is not a firmly rooted hearsay exception for Confrontation Clause purposes.” *Id.* at 817.

C. Particularized Guarantees of Trustworthiness. A finding that an out-of-court statement does not fall within a firmly rooted hearsay exception does not mean it can never be admitted. It simply means that the proponent must satisfy the particularized guarantees of trustworthiness test, which is the second component of the *Roberts* indicia of reliability test.

1. Although the rule prohibiting the admission of hearsay is based on similar interests, the overlap is not absolute. A statement may be admissible under a hearsay exception and still violate the Sixth Amendment Confrontation Clause. *See California v. Green*, 399 U.S. 149 (1970); *Idaho v. Wright*, 497 U.S. 805 (1990).
2. The particularized guarantees of trustworthiness must be shown from the totality of the circumstances surrounding the making of the statement.<sup>25</sup>

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<sup>25</sup> Limiting the reliability analysis to the circumstances surrounding the making of the statement does not apply when the Confrontation Clause has been satisfied. For example, the Confrontation Clause is satisfied when the hearsay declarant actually appears in court and testifies in person. Corroborating evidence can be used to determine reliability for purposes of the residual hearsay foundation because confrontation is satisfied. Once confrontation is satisfied, the military judge has the discretion to consider other extrinsic evidence, including facts tending to negate the reliability of the declarant’s statement, but is not required to do so. *United States v. Kelley*, 45 M.J. 275, 281 (1996); *United States v. Johnson*, 45 M.J. 666 (Army Ct. Crim. App. 1997); *United States v. Spotted War Bonnet*, 933 F.2d 471 (8th Cir. 1991). *See also United States v. Wellington*, 58 M.J. 420 (2003).

3. The relevant circumstances “include only those that surround the making of the statement and that render the declarant particularly worthy of belief.” *Wright*, at 819.
4. “We have squarely rejected the notion that ‘evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears particularized guarantees of trustworthiness.’” *Lilly*, 527 U.S. at 137-38.
5. Look at the factors that relate to whether the witness was likely to be telling the truth at the time the statement was made. The Court rejected “boot-strapping” by using corroborating factors like physical evidence; consistency among witnesses’ statements; and consistency with the accused’s confession. “The circumstantial guarantees of trust-worthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight.” *Wright*, 497 U.S. at 820.
6. The standard for admission under this part of the test is high. “Because evidence possessing ‘particularized guarantees of trustworthiness’ must be **at least as reliable as evidence admitted under a firmly rooted hearsay exception**, . . . we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability.” *Id.* at 821.
7. Residual Hearsay.
  - a) Residual hearsay is presumptively unreliable. The statement is admissible only if it bears adequate “indicia of reliability.” *Id.* at 817.<sup>26</sup>
  - b) The Court mentioned examples of factors (**non-exclusive list**) that should be used to determine if a hearsay statement made by a child witness in a child sex abuse case has sufficient indicia of reliability to satisfy the Confrontation Clause:
    - (1) Spontaneity;
    - (2) Mental state of the declarant;

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<sup>26</sup> Do not forget the additional foundational requirements of MIL. R. EVID. 807. Even if a statement is trustworthy, (1) it must be offered as evidence of a material fact; (2) it must be more probative on the point than any other evidence which the proponent can procure through reasonable efforts; and (3) the general purpose of the rules and the interests of justice must best be served by admission of the statement into evidence. MIL. R. EVID. 807.

- (3) Use of terminology unexpected of a child of a similar age;
- (4) Lack of motive to fabricate; and
- (5) Consistent repetition. *Id.*
  - (a) *But see United States v. Ureta*, 44 M.J. 290 (1996). The accused's 13-year-old daughter recanted her prior statements of abuse and invoked a German privilege to avoid testifying at trial. The videotaped interview of the accused's daughter was admitted as residual hearsay. Despite the clear language of *Wright*, the CAAF held the trial judge did not err by considering **extrinsic** evidence to determine the reliability of the statement.
  - (b) “The military judge properly considered K's statements immediately before the OSI interview as indicia of ‘consistent repetition.’ [citation omitted] Given the compressed sequence of events, we conclude that K's consistent statements to JH and Maj Boos immediately before the OSI interview were part of ‘the circumstances surrounding the making of the statement.’” *Ureta*, 44 M.J. at 297.
  - (c) To justify this departure, the CAAF cites *United States v. Pollard*, 38 M.J. 41 (C.M.A. 1993). *Pollard* is a child sex abuse case where the child-victim did testify and no Confrontation issues were raised. It was proper for the CAAF to consider extrinsic evidence in determining reliability. *Ureta*, 44 M.J. at 297.
  - (d) The “compressed sequence of events” were spread over two days. K’s statements to JH were made on the “afternoon of March 17, 1992.” *Id.* at 292. Then K talked to JH's mother. On the morning of March 18 K talked to an OSI investigator for thirty minutes. K then went to see a pediatrician, MAJ Boos. Major Boos talked to K extensively and performed a physical examination. Then K went back to OSI to give the videotaped statement. *Id.*

- (6) The CAAF added additional factors (**again – a non-exclusive list**) to consider:
  - (a) Use of open-ended, non-leading questions;
  - (b) Repeated emphasis on truthfulness; and
  - (c) Statements against the declarant's interest. *United States v. Ureta*, 44 M.J. 290 (1996).
  - (d) Whether the declarant can understand the significance of telling the truth. *United States v. Hughes*, 52 M.J. 278 (2000).

## V. CONFRONTATION POST-CRAWFORD

### A. Supreme Court Cases (Testimonial v. Nontestimonial)

#### 1. Crawford v. Washington, 541 U.S. 36 (2004)

- a) The paradigm for analyzing a hearsay's statement compliance with the requirements of the Confrontation Clause changed dramatically with the case of *Crawford v. Washington*, 541 U.S. 36 (2004). With respect to "testimonial" hearsay, the Supreme Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that a hearsay statement possesses sufficient indicia of reliability to satisfy the Confrontation Clause if the statement falls into a "firmly rooted" exception to the hearsay rule OR if the hearsay statement possesses sufficient "particularized guarantees of trustworthiness." The Court in *Crawford* held that a reliability guarantee is insufficient to satisfy the requirements of the Confrontation Clause; the Clause demands that before a testimonial statement of a hearsay declarant is admitted, the prosecution must show that the witness is unavailable and that the accused had a prior opportunity to cross-examine the declarant.
- b) Crawford was charged with assault and attempted murder when he stabbed the victim during an altercation that arose from the victim's alleged attempt to rape Crawford's wife, Sylvia. Sylvia led Crawford to the victim's apartment, thus facilitating the assault. Police arrested both Crawford and Sylvia and advised them of their *Miranda* rights. Each gave police two statements. Crawford claimed self-defense. Sylvia's second statement, which was recorded, the prosecution contended significantly undermined

Crawford's claim of self-defense. At trial, Crawford invoked Washington's marital privilege to prevent Sylvia from taking the witness stand. The prosecution then sought to admit her recorded statement to police as a statement against penal interest. Crawford claimed that the statement's admission would violate his right to confrontation.<sup>27</sup> In admitting the statement, the trial court used a *Roberts* analysis to arrive at its conclusion that Sylvia's statement possessed particularized guarantees of trustworthiness.

- c) The Washington Court of Appeals reversed Crawford's conviction, applying a nine-factor test to determine that Sylvia's statement did *not* possess sufficient particularized guarantees of trustworthiness. The Washington Supreme Court unanimously reinstated Crawford's conviction finding because the accused's and Sylvia's statements "interlocked," Sylvia's statement bore sufficient guarantees of trustworthiness.
- d) Justice Scalia, writing for a seven-member majority (Chief Justice Rehnquist, who concurred in the judgment (joined by Justice O'Connor), wrote separately), reviewed the pedigree of the confrontation clause and its meaning in English common law and early American jurisprudence. His review generated two important inferences: (1) the Confrontation Clause principally was directed against the civil-law mode of criminal procedure, particularly its use of *ex parte* examinations against a criminal defendant (*Crawford*, 124 S. Ct. at 1363) and (2) "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." *Id.* at 1365.
- e) Regarding the first inference, Justice Scalia noted that the Framers' focus on the mode of criminal procedure means that "not all hearsay implicated the Sixth Amendment's core concerns." *Id.* at

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<sup>27</sup> By invoking the marital privilege statute, Crawford made his wife unavailable, and yet was able to contend that the state violated his confrontation rights. In answering the point that Crawford waived his confrontation rights because he invoked a privilege, the first-level appellate court observed that "[f]orcing Michael to relinquish the marital privilege to preserve his right to confrontation would render the marital privilege meaningless. We decline to do so." *State v. Washington*, No. 25307-1-II, 2001 Wash. App. LEXIS 1723, \*4-5 (Wash. Ct. App. July 30, 2001). In reviewing this observation, the Washington Supreme Court noted that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice"; therefore, Crawford did not waive his confrontation rights. *State v. Crawford*, 54 P.3d 656, 660 (Wash. 2002). The State did not challenge the appellate courts' holding on this point at the Supreme Court. *Crawford v. Washington*, 124 S. Ct. 1354, 1359 n.1 (2004).

1364. *Testimonial*<sup>28</sup> hearsay, however, does have Sixth Amendment implications when the declarant is not available and was not subjected to a prior opportunity for cross-examination. *The Court refused to define the parameters of “testimonial,” but noted that, at a minimum, the term applies to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” Id.* at 1374.

- f) Regarding the second inference, the Court determined that the Sixth Amendment incorporates the common law (as understood in 1791) limitations on the admissibility of an absent witness’s examination “on unavailability and a prior opportunity to cross-examine.” *Id.* at 1366.
- g) The Court partially overruled *Roberts* declaring that “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protections to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” *Id.* at 1370. Most notable, the Court stated, “[The Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.*
- h) **HOLDING:** The Court held “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” *Id.* at 1374. Where nontestimonial evidence is at issue, however, “it is wholly consistent with the Framers’ design to afford the States flexibility in the development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Id.* Whether a nontestimonial statement must still be analyzed under the Confrontation Clause is an open question. *See infra.*

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<sup>28</sup> Justice Scalia listed the various formulations of the core class of “testimonial” statements: “*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examination, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants would reasonably expect to be used prosecutorially [citation omitted]; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions [citation omitted]; 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 [citation omitted].” *Crawford*, 124 S. Ct. at 1364. State and federal court interpreting the Court’s holding have looked at Justice Scalia’s review of the “core” class of testimonial statements for guidance in defining in greater detail what “testimonial” means. *See infra* for how lower courts are grappling with *Crawford*’s holding.

- i) The ramifications of *Crawford* for many of the previously admissible (for both evidentiary as well as Confrontation Clause purposes) hearsay statements under the rubric of “firmly rooted” are unclear. For example, the Court sought to downplay the decision’s impact on *White v. Illinois*, 502 U.S. 346 (1992) (“when the proffered statement is testimonial”) by noting that *White* involved the very narrow question of whether the *Roberts* unavailability requirement applied to excited utterances and statements made for medical diagnosis and treatment.<sup>29</sup> See *Crawford*, 124 S. Ct. at 1368 n.8.
  
- j) Also unclear is the decision’s impact on the residual hearsay rule, where the *Roberts* test came into play most often. Will the *character* (that is, whether it is accusatory in nature) have any play in whether the statement is testimonial or will the form (affidavit, prior testimony) of the statement carry the day? Will the purpose for which the statement was made be dispositive (investigative versus prosecutorial)? What weight, if any, does the intent of the declarant have?

## 2. **Davis v. Washington, 547 U.S. 813 (2006)**

- a) In *Davis v. Washington*, 547 U.S. 813 (2006), the Court decided two cases that dealt with statements made to government officials during or immediately after domestic violence situations. In *Hammon v. Indiana*, 2005 U.S. LEXIS 7860 (U.S. 2005), the Court held that statements made to the police at the scene of a domestic dispute, but after the actual incident, were testimonial and could not be admitted where the victim did not testify at trial. In the companion case, *Davis v. Washington*, 2005 U.S. LEXIS 7859 (U.S. 2005), the Court held that statements made in response to questions from a 911 operator while domestic violence was ongoing were nontestimonial, and thus could be admitted at trial even though the victim did not testify. The Court described as nontestimonial, statements “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.” And as testimonial, “when the circumstances objectively indicate that there is no such ongoing

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<sup>29</sup> *White* involved four statements made by a 4-year-old victim of sexual assault: one statement to a babysitter made immediately after the defendant left the bedroom she was sleeping in. The victim made a second statement to her mother, who arrived approximately thirty minutes after the assault. The victim made a consistent third statement to a police officer who arrived approximately forty-five minutes after first screaming. The victim also made statements to medical personnel (a nurse and a doctor) approximately four hours after the attack. The first three statements were deemed “spontaneous declarations” and the last two were “medical examination” statements and all were admitted over objection. The victim never testified at trial. *White v. Illinois*, 502 U.S. 346, 348-350 (1992).

emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

3. **Whorton v. Bockting, 127 S. Ct. 1173 (2007).**

- a) Respondent was convicted of sexual assault on his six-year-old step-daughter. At trial, the court determined the child was too distressed to testify, and allowed her mother and a police detective to testify about her out-of-court statements regarding the assaults. On direct appeal, the Nevada Supreme Court found admission of the child’s statements constitutional under *Ohio v. Roberts*, 448 U.S. 56 (1980). While awaiting decision by the 9<sup>th</sup> Circuit on a subsequent habeas petition denied by the district court, *Crawford v. Washington*, 541 U.S. 36 (2004) was decided, changing the landscape of Confrontation Clause analysis. The 9<sup>th</sup> circuit ultimately reversed, holding that *Crawford* was a watershed rule requiring retroactive effect to cases on collateral review. The granted issue was whether the decision in *Crawford* is retroactive to cases already final on direct review, or in other words, can *Crawford* be used to collaterally attack cases already final after direct review. More importantly: Do nontestimonial hearsay statements require any Confrontation Clause analysis at all after *Whorton v. Bockting*. The Holding was: No, *Crawford* is not retroactive to cases already final after direct review. More importantly: Under *Crawford*, the Confrontation Clause has no application to nontestimonial statements and therefore permits their admission even if they lack indicia of reliability. In its analysis of whether the procedural rule announced in *Crawford* is a watershed rule requiring retroactive application,<sup>30</sup> the Court stated: **Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.** The holding in *Whorton* is that *Crawford* is not retroactive to cases already final on direct review, however part of the basis for that holding is that *Crawford*’s impact on criminal procedure is equivocal. *Crawford*

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<sup>30</sup> The general rule on retroactivity of new rules comes from *Teague v. Lane*, 498 U.S. 288 (date). *Teague* says a new rule applies retroactively in a collateral proceeding only if the rule is substantive or is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of a criminal proceeding. *Id.* In order to qualify as watershed, a new rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction, and must alter the understanding of the bedrock elements essential to the fairness of a proceeding. *Id.*

results in the admission of fewer testimonial statements, while exempting nontestimonial statements from confrontation analysis entirely. Thus, it is not clear that in the absence of *Crawford* the likelihood of an accurate conviction was seriously diminished under the *Roberts* analysis. Since the *Crawford* rule did not significantly alter the fundamental fairness of criminal proceedings, it is not considered a watershed rule requiring retroactive effect on cases already final on direct review.

- b) *Whorton v. Bockting* is a case about the retroactive effect of *Crawford* on cases final after direct review, but considered in a collateral proceeding. While an important issue because of the possible impact of having to re-look a multitude of cases, a more fundamental issue is apparently resolved at the end of the opinion. *Crawford* clearly overruled *Roberts* where it applied to testimonial statements, however the opinion left open its effect on nontestimonial statements. The holding in *Davis* described when a statement made during police interrogation would qualify as testimonial, and found the statement in *Hammon v. Indiana* to be testimonial, while the statement in *Davis v. Washington* was nontestimonial. For *Hammon*, that was the end of the line, the statement should not have been admitted, however for *Davis*, presumably the confrontation analysis in *Roberts* was still required. Yet the Court did not analyze the statement under *Roberts* at all, but simply affirmed the judgment of the Washington state Supreme Court. There currently appears to be a split in state and federal courts on whether Confrontation Clause analysis is required at all for nontestimonial statements after *Crawford*. The CAAF, however, has held that nontestimonial statements still require confrontation analysis under *Roberts*. The controversy appears to have been resolved by the Court in *Whorton*. It seems unlikely that CAAF will continue to require the *Roberts* analysis for nontestimonial hearsay statements after *Whorton*, although for the time being that is still the law in courts-martial.
4. *Commonwealth v. Melendez-Diaz*, 870 N.E.2d 676 (Mass. App. Ct. 2007) (unpublished), *cert. granted*, 2008 U.S. LEXIS 7205 (U.S. Oct. 6, 2008) (No. 07-591). This is a Supreme Court case on the issue of the admissibility of lab reports under the business records exception to the hearsay rules. Oral argument was heard in the Fall of 2008, decision is expected Spring 2009.

## **B. Testimonial Statements**

1. **Statements made to a Sexual Assault Nurse Examiner (SANE).** *United States v. Gardinier*, 65 M.J. 60 (2007). Appellant was convicted of indecent acts and indecent liberties with a child under age 16 and the convening authority approved the sentence to a BCD, three years confinement, and reduction to E-1. The victim was appellant's five-year-old daughter, KG. KG received a medical exam the day she reported the acts. She was then interviewed a couple days later by a detective and a social worker, followed by a second interview with a sexual assault nurse examiner (SANE). The military judge admitted the "forensic medical form" completed by the SANE and also allowed her to testify about what KG had told her during the exam. The granted issue was whether statements KG made to the SANE were testimonial under *Crawford*. (There were three granted issues, but only this one implicated the Confrontation Clause. Of the other two issues, one involved Article 31 rights and the other admission of a videotaped statement.) The CAAF held KG's statements to the SANE were testimonial hearsay and their admission into evidence at the court-martial was error. The CAAF used the three factors previously identified in its opinion in *United States v. Rankin*, 64 M.J. 348 (2007) for distinguishing between testimonial and nontestimonial hearsay to analyze the statements KG made to the SANE. The three "factors include: (1) was the statement elicited by or made in response to law enforcement or prosecutorial inquiry?; (2) did the statement involve more than a routine and objective cataloging of unambiguous factual matters?; and (3) was the primary purpose for making, or eliciting, the statement the production of evidence with an eye toward trial?" *Id.* at 352. Taking the first and third factors together, the CAAF reasoned that on balance the statements were made in response to government questioning designed to produce evidence for trial. The SANE testified at trial that she conducts examinations for treatment, however the form itself is called a "forensic" medical examination form. She also asked questions beyond what might be necessary for mere treatment, including questions about what KG had told the police investigators. Also, the examination was arranged and paid for by the local sheriff's department. The totality of the circumstances indicated the statements made to the SANE were testimonial.
  
2. **Lab Results from physical evidence sent to the lab after arrest.** *United States v. Williamson*, 65 M.J. 706 (Army Ct. Crim. App. 2007). Appellant was convicted of wrongful possession with intent to distribute over three pounds of marijuana, based on his possession of a FedEx package containing three bundles of marijuana he mailed to himself on leave in New Orleans. He mailed the package from El Paso, where it was detected by DEA agents using a drug dog. Agents effected a controlled delivery to the address on the package in New Orleans, and executed a search warrant fifteen minutes later. After seizing the package, it was sent to the United States Army Criminal Investigation Laboratory (USACIL), where the

substance contained in the three bundles was confirmed to be marijuana. At trial, the government admitted the lab report over defense objection. The military judge admitted the lab report under the business records exception to the hearsay rules. The issue was whether the forensic lab report produced by USACIL at the request of the government after appellant had been arrested constitutes testimonial hearsay. The holding was: Yes, the forensic lab report does constitute testimonial hearsay where the lab report was requested after local police had arrested appellant. The court first briefly reviewed Supreme Court and CAAF caselaw on the Confrontation right since *Crawford*, before analyzing the facts of this case primarily using the three factors the CAAF enunciated in *Rankin*. First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Second, did the “statement” involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Clearly the testing was done and the report produced in response to a specific request by law enforcement. The lab report was limited to the identity and amount of the tested substance, however, the purpose of the testing was to produce incriminating evidence for use at trial. The court pointed out that this circumstance was described by the CAAF in *Magyari* as a situation where a lab report would likely be considered testimonial, i.e. prepared at the request of the government, while appellant was already under investigation, for the purpose of discovering incriminating evidence. Critical to the court’s reasoning was the fact that the testing was done after appellant had been arrested and charges had been preferred.

3. **Lab Results from physical evidence sent to the lab after arrest.** *United States v. Harcrow*, 66 M.J. 154 (2008). Appellant was found guilty of use and manufacture of various illegal drugs among other offenses. NCIS and local law enforcement officials arrested him at his house in Stafford County, Virginia, pursuant to a warrant issued on probable cause that he was manufacturing methamphetamine at his residence. While searching the house, plastic bags and metal spoons were seized as evidence consistent with the manufacture of methamphetamine. The plastic bags and spoons were subsequently tested by the Virginia forensic science lab and found to contain heroin and cocaine residue. The government introduced the lab reports against appellant at trial. The Confrontation issue was whether the forensic lab reports constituted testimonial hearsay prohibited by the Sixth Amendment. CAAF used its three factors from *Rankin* along with its reasoning in *Magyari* to conclude the lab reports were testimonial. The case is important as the first CAAF case to find a lab report inadmissible as a testimonial statement rather than admissible as a nontestimonial business record.

## C. Nontestimonial Statements

1. Application of CC to NT, i.e. Application of *Roberts* after *Crawford*.<sup>31</sup>
  - a) *Crawford v. Washington* clearly overruled *Ohio v. Roberts* where it applied to testimonial statements, however the opinion left open its effect on nontestimonial statements.<sup>32</sup> Since *Crawford* was decided in 2004, the CAAF has used *Ohio v. Roberts* as the standard for Confrontation Clause analysis of nontestimonial statements.<sup>33</sup> This was based primarily on language in *Crawford* itself, interpreted as a favorable view of the continued vitality of *Ohio v. Roberts* in this situation.<sup>34</sup>
  - b) The next Supreme Court Confrontation case following *Crawford*, *Davis v. Washington*, again provided unclear guidance on whether nontestimonial statements require Confrontation Clause analysis.<sup>35</sup> The holding in *Davis* described when a statement made during police interrogation would qualify as testimonial, and found the statement in *Hammon v. Indiana* to be testimonial, while the statement in *Davis v. Washington* was nontestimonial.<sup>36</sup> For *Hammon*, that was the end of the line, the statement should not have been admitted, however for *Davis*, presumably the confrontation analysis in *Roberts* was still required. Yet the Court did not analyze the statement under *Roberts* at all, but simply affirmed the judgment of the Washington state Supreme Court.<sup>37</sup> In addition to its failure to analyze the nontestimonial statement in *Davis* under *Roberts*, there was language in the Court’s opinion

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<sup>31</sup> The Court’s resolution of whether the Confrontation Clause applies *only* to testimonial statements is ambiguous. In the first instance, the Court rejected this proposal in *White*, which the Court revisited in *Crawford*, in the latter case refusing to resolve the issue: “Although our analysis in this case casts doubt on that holding [rejecting the proposal to apply the Confrontation Clause *only* to testimonial statements], we need not definitively resolve whether it survives our decision today . . . .” *Crawford*, 124 S.Ct. at 1370. Later in the same opinion, however, the Court notes that with respect to nontestimonial hearsay, it would be consistent with the Framers’ design to use an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Id.* at 1374.

<sup>32</sup> *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

<sup>33</sup> *See, e.g.* *United States v. Scheurer*, 62 M.J. 100 (2005); *United States v. Rankin*, 64 M.J. 348 (2007).

<sup>34</sup> “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—as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether.” *Crawford*, 541 U.S. at 68 (2004).

<sup>35</sup> *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>36</sup> *Id.* at 822.

<sup>37</sup> *Id.* at 834.

that would tend to the conclusion that the Confrontation Clause only applies to testimonial statements.<sup>38</sup>

- c) Following *Davis*, some courts required Confrontation analysis for nontestimonial statements and others did not.<sup>39</sup> The CAAF has stayed with the *Ohio v. Roberts* analysis for nontestimonial statements.<sup>40</sup> As recently as *US v. Rankin*, decided in January 2007, the CAAF was clear in its direction that *Roberts* is the standard for Confrontation Clause analysis of nontestimonial hearsay.<sup>41</sup>
- d) The next Supreme Court case on Confrontation after *Davis* was *Whorton v. Bockting*, a case that contained language making it clear that nontestimonial statements do not implicate the Confrontation clause.<sup>42</sup> Even though the Supreme Court guidance seems clear, CAAF is not necessarily bound by the language in *Whorton*, meaning that until CAAF speaks on the issue, military courts may still engage in the *Ohio v. Roberts* Confrontation Clause analysis when faced with a nontestimonial hearsay statement.<sup>43</sup> The CAAF has not directly addressed the issue since *Whorton* was decided in February 2007, however there is reason to

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<sup>38</sup> *Id.* “We must decide, therefore, whether the *Confrontation Clause* applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies. The answer to the first question was suggested in *Crawford*, even if not explicitly held: “The text of the *Confrontation Clause* reflects this focus [on testimonial hearsay]. It applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’ 1 N. Webster, *An American Dictionary of the English Language* (1828). ‘Testimony,’ in turn, is typically ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ *Ibid.* 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.” 541 U.S. at 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177. A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its “core,” but its perimeter.” *Id.* at 823-24.

<sup>39</sup> See, e.g., *United States v. Tolliver*, 454 F.3d 660 (7th Cir. 2006) (*Davis* holds that nontestimonial hearsay is not subject to the Confrontation Clause); but see *Harkins v. State*, 143 P.3d 706 (Nev. 2006) (nontestimonial statements are subject to analysis under *Roberts*).

<sup>40</sup> *United States v. Rankin*, 64 M.J. 348 (2007).

<sup>41</sup> *Id.*

<sup>42</sup> “Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.” *Whorton v. Bockting*, 127 S. Ct. 1173 (2007). See Discussion in Part V(A)(3) of this outline above.

<sup>43</sup> See H.F. “Sparky” Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005.

believe when the issue is squarely presented, CAAF will follow Supreme Court precedent.<sup>44</sup>

2. Nontestimonial Hearsay in the Military After *Whorton*.

- a) As stated above, the CAAF has not squarely addressed the applicability of Confrontation analysis to nontestimonial statements since *Whorton* was decided, however subsequent opinions provide clues to how it might decide the issue whenever it is squarely presented.<sup>45</sup> In *Foerster*, after finding the bank affidavit to be nontestimonial, the CAAF proceeded directly to the evidentiary analysis for the affidavit's admissibility, without ever mentioning the Confrontation Clause analysis required for nontestimonial statements in line with *Rankin*.<sup>46</sup> This omission would be more telling, except that the Confrontation Clause and evidentiary analyses are identical for statements that qualify as firmly rooted hearsay exceptions. It is only hearsay statements that do not qualify as firmly rooted exceptions, thus requiring particularized guarantees of trustworthiness analysis, that require a slightly different analysis under the Confrontation Clause than under the rules of evidence.<sup>47</sup> Nonetheless, in contrast to its previous opinions involving nontestimonial hearsay statements,<sup>48</sup> there is no mention of Confrontation Clause analysis once the statement is found to be nontestimonial.<sup>49</sup>
- b) In addition to the CAAF opinion in *Foerster*, Judge Stucky, concurring in the result in a case called *US v. Cucuzzella*, specifically cites *Whorton* and the fact that nontestimonial statements may be admitted even if they don't possess adequate indicia of reliability, meaning that nontestimonial statements do not require Confrontation Clause analysis before admission, but instead, only require analysis under the rules of evidence.<sup>50</sup> He

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<sup>44</sup> *See id.*

<sup>45</sup> *See* United States v. Foerster, 65 M.J. 120 (2007); United States v. Cucuzzella, 66 M.J. 57 (2008).

<sup>46</sup> United States v. Foerster, 65 M.J. 120 (2007).

<sup>47</sup> *See* FN 78.

<sup>48</sup> *See, e.g.* United States v. Scheurer, 62 M.J. 100 (2005); United States v. Rankin, 64 M.J. 348 (2007).

<sup>49</sup> *Foerster*, 65 M.J. at 125.

<sup>50</sup> United States v. Cucuzzella, 66 M.J. 57, \*16-17 (2008).

also cites *Whorton* for the proposition that *Crawford* overruled *Roberts*.<sup>51</sup>

- c) Interestingly, the ACCA also seems to recognize Supreme Court guidance in this area, however when it says nontestimonial statements do not require Confrontation Clause analysis, it cites the language in *Davis* rather than the more clear language found in *Whorton*.<sup>52</sup> In both *US v. Diamond* and *US v. Crudup*, ACCA cites language from *Davis* indicating that nontestimonial hearsay is not subject to the Confrontation Clause.<sup>53</sup>
- d) The fact that the last clear statement by the CAAF on the issue, contained in *Rankin*, even though decided before the Supreme Court's opinion in *Whorton*, is that nontestimonial hearsay statements require Confrontation Clause analysis under *Ohio v. Roberts* suggests that *Roberts* is still good law in the military. That said, however, it seems clear that CAAF will follow the Supreme Court and explicitly declare that the Confrontation Clause does not apply to nontestimonial statements whenever that issue is finally squarely presented for its decision. Military practitioners should be aware that the issue exists, however they should analyze nontestimonial statements under the rules of evidence without undue concern for Confrontation Clause issues.

### 3. Statements to nongovernmental people

- a) **Statements by child to parents.** *United States v. Coulter*, 62 M.J. 520 (N-M. Ct. Crim. App. 2005). Two-year old sex abuse victim tells parents that "he touched me here" pointing to vaginal area. Statement admitted under residual hearsay exception (with an alternative theory of present sense impression). Agreeing with trial court, the Navy-Marine Corps court found the statement was nontestimonial as there was no expectation that the statement would be use prosecutorially nor was there any government involvement.<sup>54</sup>

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<sup>51</sup> *Id.* at \*16.

<sup>52</sup> *United States v. Diamond*, 65 M.J. 876, 883 (Army Ct. Crim. App. 2007); *United States v. Crudup*, 65 M.J. 907, 909 (Army Ct. Crim. App. 2008).

<sup>53</sup> *Id.*

<sup>54</sup> Arguably the service court may have erred in considering extrinsic evidence to support the reliability of the statement, in this case medical evidence showing abuse. Nevertheless the court also found the statement admissible

- b) **Statements to co-workers.** *United States v. Scheurer*, 62 M.J. 100 (2005). CAAF undertook a substantive analysis of *Crawford* in this important case.
- (1) The accused and his wife were charged with various drug related offenses. Prior to the charges and over a period of months, the accused's wife engaged in a number of conversations in which she told her friend about the drug use of both herself and the accused. The friend eventually contacted OSI who in turn asked the friend to wear a wire and engage the wife in further conversations about the accused's drug use. Several inculpatory statements were obtained, some of which implicated the wife, some the accused, and some both the accused and the wife. At the accused's trial, the wife invoked spousal privilege and was thus declared unavailable.<sup>55</sup> The trial court then admitted the statements of wife to her friend against the accused.
  - (2) Citing *United States v. Hicks*, 395 F.3d 173 (3d Cir. 2005), the court first determined that the statements taken covertly were not "testimonial" in nature. Such statements, the court reasoned, did not implicate the specified definitions of testimonial as enumerated in *Crawford*. Further, the court found that such statements would be nontestimonial when the declarant did not contemplate the use of those statements at a later trial.<sup>56</sup>
  - (3) Upon a determination that the statements at issue were nontestimonial, the court then applied the analysis of *Ohio v. Roberts* finding that the statements, while not firmly-rooted, possessed the particularized guarantees of trustworthiness sufficient to establish the requisite indicia of reliability.<sup>57</sup>

#### 4. Business Records

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under a present sense impression theory which, as a firmly rooted hearsay exception, satisfies the confrontation clause requirements for a nontestimonial statement.

<sup>55</sup> In doing so, CAAF overruled *United States v. Hughes*, 28 M.J. 391 (C.M.A. 1989) which had previously held that a spouse who invoked spousal incapacity was still available for confrontation purpose since arguably the accused could still call the spouse to testify on his or her behalf.

<sup>56</sup> The court left open the possibility that the covert taking of a statement in similar circumstances could still rise to the level of a testimonial statement where the government did more than facilitate the statement, but was instead involved in "direction or suggestion." *Scheurer*, at 13.

<sup>57</sup> The court referenced several factors in finding particularized guarantees of trustworthiness. For example, the court noted that there was "no evidence of animosity toward the accused," "the conversations were initiated by the declarant" and "the statements were 'truly self-inculpatory.'"

a) **Lab Reports**

- (1) **Random Urinalysis.** *United States v. Magyari*, 63 M.J. 123 (2006). Draftsman First Class (E-6) Magyari was convicted against his pleas of wrongful use of methamphetamine. The CAAF granted on the following issue: Whether, in light of *Crawford v. Washington*, appellant was denied his Sixth Amendment right to confront the witnesses against him where the government's case consisted solely of appellant's positive urinalysis. Holding: "in the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not "testimonial" in nature." *U.S. v. Magyari*, 63 M.J. 123, 124 (2006).
  
- (2) **Command Directed Urinalysis.** *United States v. Harris*, 65 M.J. 594 (N-M Ct. Crim. App. 2007). Appellant was arrested for trespassing by local police after he was discovered digging in his neighbor's yard in the pouring rain, wearing only a pair of muddy shorts. One of his explanations for his unusual behavior was that he was "digging for diamonds." After he admitted to using crystal methamphetamine, he was ordered to undergo a command directed urinalysis based on probable cause. His urinalysis result came back positive, and was introduced against him at trial. The issue was whether the Navy Drug Lab Report on a command directed urinalysis admitted against appellant testimonial hearsay. (There were five assignments of error, however only one implicated the Sixth Amendment.) The holding was: No, the lab report was nontestimonial, and its admission did not violate appellant's Confrontation rights under the Sixth Amendment. Although the CAAF opinion in *Magyari* was limited to cases of random urinalysis, the result is the same here in the case of a command directed urinalysis because the lab procedures are the same regardless of the origin of the sample. More specifically, urinalysis samples are processed by the Navy lab in batches of 100, and given a separate identification number, such that there is no way for any lab technician to know which sample is being tested. The lab employees don't know whether prosecution is anticipated or whether the sample is from a random urinalysis. Therefore, urinalysis lab reports from testing

processed in the way it is done at the Navy lab, are nontestimonial hearsay admissible under the business records exception.

- (3) *United States v. Blazier*, ACM 36988, (A.F. Ct. Crim. App. Sep. 8, 2008). Blazier involved two separate urinalyses, first a unit 100%, and then another based on consent. Since the testing procedures were the same for both samples, and identical to the procedure the CAAF considered favorably in *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), the AFCCA held the lab reports were properly admitted as business records. Concurrence/Dissent. Judge Jackson concurred with the result as to the random urinalysis, but dissented on the consent urinalysis, reasoning that the majority focuses too much on the viewpoint or intent of the declarant (lab technicians). Instead, or in addition, he would look at the government's purpose in securing the consent urinalysis. Even though the lab technicians may have been neutral (cataloguing unambiguous factual matters), the government's purpose was gathering evidence for use at trial. The statements were: 1) prepared at the request of AFOSI for the potential prosecution of appellant, 2) requested while appellant was being investigated, 3) functioned as the equivalent of testimony on the identification of the THC found in appellant's urine, and 4) used at trial to prove appellant had used marijuana. This is a great case laying out the arguments for admitting or excluding urinalysis lab reports.
- (4) *See also United States v. Williamson & United States v. Harcrow* in Section above at V.B.

- b) **Affidavits.** *United States v. Foerster*, 65 M.J. 120 (2007). SGT Porter was deployed when he discovered somebody was using his identity to cash checks in his name. When he returned to home station he went to the bank and filled out a "forgery affidavit" containing the facts of his situation. Specifically, the sworn affidavit contained the check numbers and amounts he believed were false. This document was required by the bank in order for SGT Porter to get his money back. When the time came for trial, SGT Porter was already deployed again, and thus not available to testify. The government admitted the affidavit over defense objection in the place of SGT Porter's live witness testimony. The granted issue was whether an affidavit filled out by a victim of check fraud pursuant to internal bank procedures and without law enforcement involvement in the creation of the document is

admissible as a nontestimonial business record in light of *Crawford v. Washington* and *Washington v. Davis*. The court held that the affidavit was nontestimonial and properly admissible under the business records exception. The CAAF used the three factors previously identified in *Rankin* to analyze whether the bank affidavit in this case was testimonial. First, was the statement at issue elicited by or made in response to law enforcement or prosecutorial inquiry? Here there was no governmental involvement in the making of the affidavit at all. The affidavit was made out before appellant had even been identified as the forger, long before there was any request aimed at preparation for trial. Second, did the “statement” involve more than a routine and objective cataloging of unambiguous factual matters? The information contained in the affidavit merely cataloged objective facts, specifically the check numbers and amounts, and SGT Porter’s signature. Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial? Looking at the context in which the affidavit was made, it is clear that the purpose of the document was to protect the bank from being defrauded by an account holder. The CAAF acknowledged that the Supreme Court opinion in *Crawford* uses the term “affidavit” several times to describe documents considered testimonial hearsay, however the CAAF does not believe the Court intended for every document titled affidavit to be considered testimonial. If there is no governmental involvement in the making of a statement, then it is unlikely to be considered testimonial. Interestingly, although this case was decided after *Whorton v. Bockting*, and although *Whorton* is cited for its retroactive effect, the CAAF does not mention the fact that the opinion contains language stating nontestimonial hearsay is no longer subject to Confrontation Clause analysis. One possible explanation for this absence may be that where nontestimonial hearsay falls within a firmly rooted exception, the Confrontation Clause and hearsay analysis are virtually identical.

- c) **Personnel Records.** *United States v. Rankin*, 64 M.J. 348 (2007). The CAAF affirmed the lower court holding that service record entries for a period of unauthorized absences were not testimonial for the purposes of the Confrontation Clause. The CAAF found that three of the four documents introduced by the government were nontestimonial, and that although the fourth may have qualified as testimonial, the information it contained was cumulative with information in the other three. In analyzing the four documents, **the CAAF conducted a three factor analysis, looking first at prosecution involvement in the making of the statement. Second, the court asked whether the reports merely**

**catalogued unambiguous factual matters. And third, the court used a primary purpose analysis derived from *Davis v. Washington*.** After using the three steps to find that three of the four documents were nontestimonial, the court went on to conduct the confrontation analysis in *Roberts v. Ohio* and conclude that the documents were properly admitted under the business records exception to the hearsay rules.

## **VI. COMMENT ON EXERCISING SIXTH AMENDMENT RIGHTS**

- A. *United States v. Kirt*, 52 M.J. 699 (N-M. Ct. Crim. App. 2000). The accused testified at trial and was asked during cross-examination, “Do you admit here today that you are the only witness in this court who has heard the testimony of every other witness?” On appeal, the accused argued that this question improperly invited the members to infer guilt from the appellant’s exercise of his constitutional right to testify and confront the witnesses against him. The Court held that the question did not constitute error, but if it did, it was waived and did not constitute plain error.
  
- B. *Portuondo v. Agard*, 529 U.S. 61 (2000). In summation, the prosecutor commented that the defendant had the benefit of getting to listen to all other witnesses before testifying, giving the defendant a “big advantage.” The defendant argued that the prosecutor’s comments on his presence and ability to fabricate unlawfully burdened his Sixth Amendment right to be present at trial and to be confronted with witnesses against him and his Fifth and Sixth Amendment right to testify on his own behalf. The Court rejected the defendant’s arguments distinguishing comments that suggest exercise of a right is evidence of guilt and comments that concern credibility as a witness.

## **VII. LIMITATIONS ON CROSS-EXAMINATION**

- A. Cross-examination is an important part of the right to confront witnesses. The right to confrontation, however, is not absolute. The courts balance the competing state interest(s) inherent in rules limiting cross-examination with the accused’s right to confrontation.
  - 1. “The right of cross-examination is implicit in the constitutional right of confrontation, and helps assure the ‘accuracy of the truth-determining process.’” *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).
  - 2. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve

into the witness' memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

3. “[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).
4. “[T]he right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” *Chambers*, 410 U.S. at 295.
5. “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).
6. Although a criminal defendant waived his rights under the Confrontation Clause to object to the admission of hearsay statements because of his misconduct in intimidating a witness, he did not also forfeit his right to cross-examine that same witness. *Cotto v. Herbert*, 331 F.3d 217 (2d Cir. 2003).

- B. **Juvenile Convictions of Key Prosecution Witness.** *Davis v. Alaska*, 415 U.S. 308 (1974). The exposure of a witness's motivation is a proper and important function of cross-examination, notwithstanding state statutory policy of protecting the anonymity of juvenile offenders.
- C. **Voucher Rule.** *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The defendant was deprived of a fair trial when he was not allowed to cross-examine a witness who had confessed on numerous occasions that he committed the murder. The Court observed that “the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate ‘integrity of the fact-finding process’ and requires that the competing interest be closely examined (citations omitted).”
- D. **Ability to remember.** *United States v. Williams*, 40 M.J. 216 (C.M.A. 1994). Judge erred in precluding defense from cross-examining government witness (and accomplice) to robbery about drug use the night of the robbery.
- E. **Bias.**

1. *United States v. George*, 40 M.J. 540 (A.C.M.R. 1994). Judge improperly restricted defense cross-examination of government toxicology expert who owned stock in the lab that tested accused's urine sample pursuant to a government contract. Questions about the expert's salary were relevant to explore bias. Judge also erred in preventing defense from asking the defense expert about possible sources of contamination of the urine sample.
2. *United States v. Gray*, 40 M.J. 77 (C.M.A. 1994). Accused was charged with indecent acts with nine-year-old daughter of SGT M and sodomy and adultery with SGT M's wife. Evidence that DHS had investigated the "victim's" family was improperly excluded. Mrs. M. could have accused Gray of the offenses to divert attention away from her dysfunctional family and the evidence would have corroborated Gray's claim that he visited Mrs. M's home in response to requests for help. This violated accused's right to present a defense.
3. *United States v. James*, 61 M.J. 132 (2005). Before members, appellant pleaded guilty to using and distributing ecstasy. During the sentencing phase of the trial, appellant sought to cross-exam a witness whom the appellant argued had convinced him to try ecstasy. Specifically, appellant sought to cross-examine the witness concerning the specific terms of the witness' pretrial agreement with the government. The purpose of the cross-examination into the quantum of the agreement would be to establish that the friend had a reason to lie given the benefit of the deal afforded to him (his agreement was for eighteen months confinement from a maximum of fifty-two years). The military judge precluded cross-examination of the specifics of the agreement, but allowed the defense to cross-examine the witness on the existence and general nature of the agreement, the order by the convening authority to the witness to testify, the grant of immunity to the witness, and the considerations of pending clemency. The court found that that military judge did not err by reasonably limiting the scope of cross-examination to avoid the confusion of the issues.<sup>58</sup>

F. **Motive to lie.** *United States v. Everett*, 41 M.J. 847 (A.F.C.M.R. 1994). The military judge improperly prevented the defense counsel from cross-examining a rape victim about her husband's infidelity and his physical abuse of her.

G. **Discrepancy in Laboratory Tests.** *United States v. Israel*, 60 M.J. 485 (2005). In a urinalysis case, the military judge limited the defense ability to cross-examine witnesses regarding the possibility of error in the testing process by precluding the

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<sup>58</sup> The CAAF had previously held that the Confrontation Clause does not apply to presentencing, though the Due Process Clause does. *United States v. McDonald*, 55 M.J. 173 (2001). Nevertheless, the reasoning of *James* occurs within the context of the Confrontation Clause.

defense from confronting expert witnesses with material impeachment evidence. The CAAF held that the military judge abused his discretion in limiting the ability of the defense to cross-examine the government experts, and that the error was not harmless beyond a reasonable doubt.

H. **Rule 412.** See Evidence outline.

## VIII. LIMITS ON FACE-TO-FACE CONFRONTATION

A. The Supreme Court.

1. *Maryland v. Craig*, 497 U.S. 836 (1990). The child victim testified by one-way closed circuit television with a defense counsel and a prosecutor present. The testimony was seen in the courtroom by the accused, jury, judge, and other counsel.

a. The preference for face-to-face confrontation may give way if it is **necessary** to further an **important public policy**, but only where the **reliability of the testimony can otherwise be assured**.

b. **Necessity.** Before allowing a child victim to testify in the absence of face-to-face confrontation with the accused, the government must make a case specific showing that:

(1) the procedure proposed is necessary to protect the child victim,

(2) The child victim would be traumatized by the presence of the accused, and

(3) the emotional distress would be more than *de minimus*. What does *de minimus* mean? What's the constitutional minimum required? See *Marx v. Texas*, 987 S.W.2d 577 (Tex.). See also *United States v. McCollum*, 58 M.J. 323 (2003).

c. **Important Public Policy.** The state's interest in "protecting child witnesses from the trauma of testifying in a child abuse case" is an important state interest.

d. **Reliability Assured.** The Court stated that confrontation has four component parts that assure reliability. You preserve reliability by

preserving as many of these component parts as possible in the proposed procedure.

- 1) Physical presence;
- 2) Oath;
- 3) Cross-examination;
- 4) Observation of the witness by the fact finder.

B. Military Cases.

1. *United States v. Pack*, 65 M.J. 381 (2008). *US v. Pack* is a case involving remote live testimonial by a child victim witness. The CAAF held that the Supreme Court opinion in *Crawford* did not effect its earlier opinion in *Maryland v. Craig*, which laid out the standards for remote live testimony of child abuse victims.
2. *United States v. Anderson*, 51 M.J. 145 (1999). The court approved the government's repositioning of two child victims such that they did not face the accused and the government's use of a screen and closed circuit television. Closed circuit television was used so the military judge, counsel, and the reporter could all see the testimony.
3. *United States v. McCollum*, 58 M.J. 323 (2003). The CAAF approved the military judge's decision to permit a 12-year-old child victim to testify via two-way closed circuit television after finding the witness would be traumatized if required to testify in open court in the presence of the accused and that the witness would be unable to testify in open court in the accused's presence because of her fear that the accused would beat her. Accused absented from the courtroom himself UP R.C.M. 804(c). The military judge found that the victim would be unable to testify in the accused's presence because of both fear *and* trauma, linking the two concepts. CAAF noted that MIL. R. EVID. 611(d)(3)(A) and (B) are sufficient *independent of each of each other*, meaning that military judge must find that a witness will be unable to testify reasonably because of fear *or* trauma caused by the accused's presence. Further, as long as the finding of necessity is based on the fear or trauma caused by the accused's presence alone, "it is irrelevant whether the child would also suffer some fear or trauma from testifying generally." The CAAF also determined that a military judge is not required under the Sixth Amendment nor MIL. R. EVID. 611(d) to interview or observe a child witness before making a

necessity ruling. Further, the fear of a witness need not be fear of imminent harm nor need it be reasonable. Rather, the fear required under the rule must “be of such a nature that it prevents the child from being able to testify in the accused’s presence.”

4. **Options.** Several ways have been tried and approved by courts. They include:
  - a) **One-way closed circuit television.** *Maryland v. Craig*, 497 U.S. 836 (1990); *U.S. v. Longstreath*, 45 M.J. 366 (1996).
  - b) **Two-way closed circuit television.** R.C.M. 914A; 18 U.S.C. § 3509.
  - c) **A partition.** *United States v. Batten*, 31 M.J. 205 (C.M.A. 1990). An elaborate courtroom arrangement to protect the child victim, which included screens and closed circuit television. Testimony by a psychologist to show the impact conventional testimony would have on the witness. Special findings by the military judge (judge alone trial) that he relied on the child’s excited utterance and not on her courtroom testimony. Harmless error analysis by CMA as allowed by *Coy* and *Craig*. Case affirmed.
  - d) **Witness testifying with her back to the accused but facing the judge, and counsel.** *United States v. Thompson*, 31 M.J. 168 (C.M.A. 1990). The child victims testified at a judge alone court-martial with their backs to the accused. The military judge, defense counsel, and trial counsel could see them. A psychologist testified for the government in support of the courtroom arrangement.
  - e) **Profile to the accused.** *United States v. Williams*, 37 M.J. 289 (C.M.A. 1993). Child victim testified from a chair in the center of the courtroom, facing the military judge with the defense table to the immediate left of her chair. The accused was not deprived of his right to confrontation even though he could not look into the witness’ eyes. The witness testified in the accused’s presence and he could see her face and demeanor.
  - f) **Whisper Method.** *United States v. Romey*, 32 M.J. 180 (C.M.A.). The child victim whispered her answers to her mother who repeated the answers in open court. The mother was certified as an interpreter. *Craig* was satisfied when “[t]he judge impliedly made a necessity finding in this case” (emphasis added). The military judge relied on representations made about the Article 32

testimony; trial counsel's pretrial discussions with the child witness; and the military judge's observations of the child at an Article 39(a) session in the accused's presence. The Court also held that the child victim was available for cross-examination, and the accused's due process rights were not violated.

5. **Article 32 Investigation.** *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990). The child victim testified behind a partition at the Article 32 investigation. Accused could hear but not see the victim, but the defense counsel cross-examined him. The child testified at the court-martial without the partition. Held: (1) right to face-to-face confrontation is a trial right; (2) Article 32, UCMJ, only provides for the right of cross-examination, not confrontation; (3) an Article 32 investigation is not a critical stage of the trial; (4) *Bramel* is comparable to *Kentucky v. Stincer*, 482 U.S. 730 (1987) (defendant excluded from competency hearing of child witness); and (5) the accused did not have the right to proceed *pro se* at the Article 32 investigation.

6. **Do not remove the accused from courtroom.** See *United States v. Daulton*, 45 M.J. 212 (1996) (accused watched testimony of daughter over closed circuit television; confrontation rights violated); *United States v. Rembert*, 43 M.J. 837 (Army Ct. Crim. App. 1996) (accused watched testimony of 13-year-old carnal knowledge victim via two-way television in the deliberation room; without ruling on Sixth Amendment, the Army court agreed that accused's due process rights were violated). The accused may, under R.C.M. 804(c), voluntarily leave the courtroom to preclude the use of the procedures outlined in R.C.M. 914A.

C. **Can witnesses who are not victims use remote procedures?** Yes. Federal courts have interpreted 18 U.S.C. § 3509 to allow non-victim child witnesses to testify remotely. *United States v. Moses*, 137 F.3d 894 (6th Cir. 1998); *United States v. Quintero*, 21 F.3d 885 (9th Cir. 1994). Both cases interpret *Maryland v. Craig*. Both cases focus on the Court's approval of the state interest: "the state interest in protecting *child witnesses* from the trauma of testifying in a child abuse case." The courts do not comment on the fact that the four witnesses in *Craig* who testified remotely were all victims.

D. **Other issues in remote testimony.**

1. *United States v. Yates*, 2006 U.S. App. LEXIS 3433 (11th Cir. 2006). Prosecution witnesses living in Australia declined to travel to the United States for trial. The witnesses testified at trial via live, two-way video conference. The Eleventh Circuit, following an en banc hearing, held that this arrangement violated the defendants' Sixth Amendment right to confront witnesses against them. Citing to *Maryland v. Craig* as the

controlling case, the court found that the prosecutor's need for the video conference testimony to make a case and expeditiously resolve it were not the type of public policies that were important enough to outweigh defendants' rights to confront their accusers face-to-face. The court further found that the prosecution had failed to establish the necessity for the use of remote testimony when another viable option, deposition under the Federal Rules for Criminal Procedure, was available to the government.

2. *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001). Appellant was convicted of robbing an Argentinean couple. At trial, the victims were unavailable to testify in person because of illness and unwillingness to return to the United States. The trial judge agreed to allow testimony via satellite over defense objection. Citing to *Maryland v. Craig*, the Florida Supreme Court pointed out that the Confrontation Clause does not guarantee an absolute right to a face-to-face meeting between a defendant and witnesses; rather, the underlying purpose is to ensure the reliability of trial testimony. In this case, *Maryland v. Craig* was satisfied because (1) public policy considerations justified an exception to face-to-face confrontation, given the state interest “to expeditiously and justly resolve criminal matters that are pending in the state court system;” (2) the remote testimony was necessary, given the fact that the witnesses were absolutely essential to the government case and lived beyond the court’s subpoena power; and (3) the testimony was reliable because the witnesses were able to see the jury and the defendant, they were sworn by the clerk of court, the jury and the defendant were able to observe the witnesses testifying, and they were subject to cross-examination. On habeas review, the 11th Circuit concluded that Florida Supreme Court’s decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.
3. *United States v. McDonald*, 55 M.J. 173 (2001). Shortly before the presentencing portion of the court-martial, the government’s only witness was notified of a unit deployment to the Middle East. He was at Fort Stewart, some distance from the trial location and was scheduled to report to the terminal at midnight that night for a departure at 0600 hours the next morning. Over defense objection, the military judge allowed the witness to testify by telephone. On appeal, the issue was whether the Sixth Amendment’s Confrontation Clause applies to the presentencing portion of a court-martial. Agreeing with the Navy-Marine Corps Court of Criminal Appeals, the CAAF held that the Confrontation Clause does not apply to non-capital presentencing proceedings. However, the Due Process Clause of the Fifth Amendment requires that the evidence introduced in sentencing meet minimum standards of reliability. The Court pointed out that while the safeguards in the rules of evidence applied to the prosecution’s sentencing evidence, the language of RCM 1001(e)(2)(D) allowed relaxation of the evidence rules and did not specifically prohibit

telephonic testimony. The CAAF also emphasized that this was an unusual situation causing the military judge to “craft a creative solution,” lest the testimony be temporarily lost.

4. *United States v. Shabazz*, 52 M.J. 585 (N-M. Ct. Crim. App. 1999). The military judge allowed a government witness to testify via video teleconference (VTC). The trial was in Japan; the witness testified from California. The Navy-Marine Corps Court found a violation of the right to confrontation because the trial judge did not do enough to control the remote location.
5. *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). The U.S. government asserted that Gigante was the boss of the Genovese crime family and supervised its criminal activity. Gigante was convicted of racketeering, criminal conspiracy under the RICO statute, conspiracy to commit murder, and a labor payoff conspiracy. The government proved its case with six former members of the Mafia, including Peter Savino. Savino was allowed to testify via closed circuit television because he was in the Federal Witness Protection Program and was in the final stages of an inoperable, fatal cancer. The Court held the trial judge did not violate Gigante's right to confront Savino. *See also Minnesota v. Sewell*, 595 N.W.2d 207 (Minn. App. 1999).

- E. Testimony in disguise. *Romero v. State*, 136 S.W.3d 680 (Tex. Ct. App. 2004). A state’s witness testified wearing dark sunglasses, a baseball cap pulled low over his eyes, and a jacket with an upturned collar, leaving visible only his ears. The trial court made no finding of necessity to justify the witness’s appearance. The court held that the defendant’s right to confrontation was violated.

## **IX. RIGHT TO BE PRESENT AT TRIAL**

- A. General Rule. The accused has a right “to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Snyder v. Commonwealth*, 291 U.S. 97, 105-6 (1933).
- B. Disruptive Accused.
  1. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court held that a disruptive defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can

be reclaimed if the defendant is willing to conduct himself consistently with the decorum and respect inherent in judicial proceedings.

2. RCM 804. A military judge faced with a disorderly and disruptive accused has 3 constitutionally permissible responses:
  - a) bind and gag the accused as a last resort, thereby keeping him present;
  - b) cite the accused for criminal contempt;
  - c) remove the accused from the courtroom until he promises to conduct himself properly.
- C. Intentionally absent accused. Trial may continue in the absence of the accused when the accused voluntarily absents himself from trial. R.C.M. 804(b) and *United States v McCollum*, 56 M.J. 837 (A.F. Ct. Crim. App. 2002), *aff'd*, 58 M.J. 323, (2003) (accused voluntarily absented himself so that child-victim could testify in the courtroom).

## **X. PUBLIC TRIAL**

- A. References.
  1. Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 MIL. L. REV. 1 (2000).
  2. Major Mark Kulish, *The Public's Right of Access to Pretrial Proceedings Versus the Accused's Right to a Fair Trial*, ARMY LAW., Sept. 1998, at 1.
- B. “In addition to the Sixth-Amendment right of an accused to a public trial, the Supreme Court has held that the press and general public have a constitutional right under the First Amendment to access to criminal trials.” *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).
  1. “In *Waller v. Georgia*, . . . the Supreme Court applied the same test to a defendant’s objection to closure of a suppression hearing as had been applied in First-Amendment cases, stating ‘that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public’” *Hershey*, 20 M.J. at 436.

2. "Without question, the Sixth Amendment right to a public trial is applicable to courts-martial." *Id.* at 435.

C. First Amendment.

1. **The Test of Experience and Logic.** To determine if there is a media right of access to the proceedings, apply the test of experience and logic. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) [*PE I*].
  - a) Test of Experience. This part tests whether the United States has experienced a history of openness or public access to the type of proceeding at issue.
  - b) Test of Logic. This part tests whether public access to such proceedings logically plays a particularly significant role in the functioning of the judicial process and the government as a whole. At least six societal interests must be considered in evaluating the logic test:
    - (1) promotion of informed discussion of government affairs by providing the public with the more complete understanding of the judicial system;
    - (2) promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings;
    - (3) providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion;
    - (4) serving as a check on corrupt practices by exposing the judicial process to public scrutiny;
    - (5) enhancement of the performance of all involved; and
    - (6) discouragement of perjury. *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982).
  - c) If the proceedings have traditionally been open and public access is essential to the proper functioning of the judicial system, then the media has a qualified First Amendment right to attend the proceeding.

- d) The media has standing to challenge an order closing the proceeding. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).
2. The media has a right of access to:
- a) Criminal Trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).
  - b) Jury Selection Proceedings. *PE I*, 464 U.S. 501 (1984)
  - c) Probable Cause Hearings. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) [*PE II*]. See also *ABC, Inc. v. Powell*, 47 M.J. 363 (1997).
  - d) Suppression Hearings. *Waller v. Georgia*, 467 U.S. 39, 44-46 (1984) (holding closing the trial over defense objection violated the Sixth Amendment Right to a Public Trial; in *dicta* the Court recognized the media's right of access).
3. The party seeking closure must advance a compelling interest.
4. **Conduct a strict scrutiny analysis.** The judge must weigh the compelling interest asserted with the need and benefits for openness and make the following findings.
- a) Closure is essential to preserve a compelling interest
  - b) The judge must make individualized case-by-case findings to justify the closure.
  - c) The closure must be narrowly tailored to serve the compelling interest; the court must consider alternatives.
5. Mandatory closure statutes are unconstitutional. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-10 (1982).
6. Typical compelling interests.
- a) The accused's right to a fair trial. A proceeding cannot be closed unless the court makes a case specific finding that there is a substantial probability that the Sixth Amendment right to a fair trial will be prejudiced by publicity that closure would prevent and

that reasonable alternatives to closure cannot adequately protect the right to a fair trial. *PE I*, 464 U.S. at 512.

- b) Privacy of juror. *PE I*, 464 U.S.501 (1984).
- c) Trial participant's safety. *Unabom Trial Media Coalition v. District Court*, 183 F.3d 949 (9th Cir. 1999).
- d) Well-being of a victim. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).
- e) Protecting confidential law enforcement information. *Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997).
- f) Protecting trade secrets. *United States v. Andreas*, 150 F.3d 766 (7th Cir. 1998).
- g) Concealing the identity of juveniles. *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995).

7. Military cases.

- a) *United States v. Story*, 35 M.J. 677, 678 (A.C.M.R. 1992). “[P]rior to excluding all or portions of the public from viewing a court-martial, the military judge must articulate findings warranting, and limiting as narrowly as possible, the infringement upon the constitutional right of the public to attend courts-martial of the United States.” *See United States v. Terry*, 52 M.J. 574 (N-M. Ct. Crim. App. 1999) (trial judge erred when he closed the courtroom during the testimony of a rape victim).
- b) "It was stated in oral argument that it is practice in some military courts to bar admittance of spectators except during a recess. Employment of such a procedure is a denial of public access to courts-martial and should be discontinued.” *Hershey*, 20 M.J. at 438 n.6.
- c) *United States v. Short*, 36 M.J. 802 (A.C.M.R. 1993). When accused’s mother-in-law and 3 small children entered courtroom, military judge said: “No . . . no, out . . . out. This is not a waiting room for babies.” Although the judge should have articulated the reasons for the exclusion, there was no constitutional violation under the circumstances of this case.

8. Defense requested closure.
  - a) *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987). The accused wanted the courtroom closed because he was a confidential informant. The military judge refused. The accused did not present evidence of his cooperation with the Criminal Investigation Division. “Appellant was never denied the opportunity to present this evidence in an open courtroom; his failure to do so was his own election.” *Id.* at 63.
  - b) *United States v. Fiske*, 28 M.J. 1013 (A.F.C.M.R. 1989). “This is the second case we are aware of in this decade that a military judge has closed an Air Force court-martial trial without a reason therefor being articulated on the record . . . *That’s two too many.*” *Id.* at 1013. The accused was a confidential informant who requested that the court be closed. There was no controversy; no one was complaining. The concurring opinion discussed three guidelines concerning public trials. If the public wants access and accused wants the trial closed, the public wins. The majority reserved judgment on this issue.

D. Sixth Amendment.

1. *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985). No violation of the Public Trial Clause where the judge closed the courtroom for the testimony of a child victim of sexual abuse.
2. *United States v. Terry*, 52 M.J. 574 (N-M. Ct. Crim. App. 1999). Violation of the Public Trial Clause where the military judge, over defense objection, closed the courtroom during the testimony of the alleged rape victim.
3. Security Issues and Public Trials.
  - a) *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). No violation of the Sixth Amendment Public Trial Clause where the court was closed to receive classified information. *See also The Denver post Corporation v. Ayers*, No. 20041215 (Army Ct. Crim. App. Feb. 23, 2005). Article 32 Investigating Officer erroneously closed Article 32 hearing for purposes of protecting classified information without making specific findings of fact with regard to individual witnesses and portions of expected testimony.

- b) *United States v. Anzalone*, 40 M.J. 658 (N-M. Ct. Crim. App. 1994), *set aside on other grounds*, 43 M.J. 322 (1995). No violation of the right to a public trial when courtroom periodically closed during espionage trial. Court notes that closure was for short periods of time, when classified matters would be discussed, and only sixteen percent of the record covered times when the public was excluded.
- c) *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R.). Provision in pretrial agreement for waiver of public trial not against public policy.

E. Issues.

- 1. RCM 806 allows a military judge to close a court-martial for good cause. This could be unconstitutional.
- 2. RCM 806 only allows a military judge to close a court-martial over the objection of the accused only when expressly authorized by the MCM.
- 3. Must the media and public receive notice before a court-martial can be closed?
- 4. RCM 405 allows an Article 32 Investigation to be closed in the discretion of the commander who ordered the investigation. *See ABC, Inc. v. Powell*, 47 M.J. 363 (1997).
- 5. Military Rule of Evidence 412(c)(2) requires a closed hearing to determine the admissibility of evidence offered under Rule 412.

## **XI. RIGHT TO COUNSEL.**

A. *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006)

- 1. FACTS: Respondent was charged with conspiracy to distribute 100 kilograms of marijuana. His family hired a lawyer, John Fahle, to represent him. Respondent subsequently chose another attorney, Joseph Low, to represent him instead. Both lawyers represented respondent at an evidentiary hearing, where Low's provisional appearance was accepted by the magistrate, on condition he immediately file for admission *pro hac vice*. During that same hearing, the magistrate revoked Low's provisional appearance, on grounds that he violated a court rule against double teaming on cross by passing a note to the other lawyer. A few days later,

respondent decided he only wanted Low to represent him, and Low filed an application for *pro hac vice* admission. This application was denied by the district court and by the Eighth circuit on appeal. Attorney Fahle, meanwhile, filed a motion to withdraw and for sanctions against Low, accusing Low of contacting his client without his consent in violation of the rules of professional conduct. Low countered with a motion to strike. The district court granted Fahle's motion to withdraw, and respondent eventually hired a local attorney, Karl Dickhaus, to represent him. The district court also denied Low's motion to strike, and explained that it had denied his motion for *pro hac vice* admission because Low had violated the rule against communicating with a represented party in a separate case before it. At trial, respondent was represented by Mr. Dickhaus and found guilty. Low made another application for admission and was again denied. Low was also not permitted contact with respondent other than the night before the last day of trial. After trial, the district court granted Fahle's motion for sanctions against Low for violating the rule against contacting represented parties. Respondent appealed, and the Eighth circuit vacated the conviction, holding that the district court had misinterpreted the rule against contacting represented parties in both this case and in the matter it relied upon in denying Low's application for *pro hac vice* admission. The district court's denials were therefore erroneous and violated respondent's 6<sup>th</sup> Amendment right to paid counsel of his choosing.

2. ISSUE: Whether a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to a reversal of his conviction?
  
3. HOLDING: Yes, a trial court's erroneous deprivation of a criminal defendant's choice of counsel does entitle him to reversal of his conviction.
  
4. ANALYSIS: The Court has previously held that a defendant that does not require appointed counsel has the right to be defended by any otherwise qualified counsel who he can afford or who is willing to represent him. *Wheat v. United States*, 486 U.S. 153 (1988), *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). The government agrees that the respondent in this case was deprived of his right to choose his counsel, however the government contends that the violation is not complete unless defendant can show that substitute counsel was ineffective IAW *Strickland v. Washington*, 466 U.S. 668 (1984). This government argument is similar to the state of confrontation law before

*Crawford v. Washington*, 541 U.S. 36 (2004), where a statement could satisfy the Confrontation Clause by merely possessing indicia of reliability sufficient to find it trustworthy. In *Crawford* we said confrontation does not just require that evidence be reliable, but that it be tested in a particular fashion, i.e. cross-examination. In the same way, the right to counsel of choice does not merely guarantee a fair trial, but instead that a particular guarantee of fairness be provided, i.e. that the accused chose who is to defend him. Deprivation of the right to counsel of choice is complete when the accused is prevented from being represented by the lawyer he chooses, regardless of the quality of representation he ends up with.

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