

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
 Plaintiff,)
vs.)
 Defendant.) Case No.

**MOTION OBJECTING TO ADMISSIBILITY OF HEARSAY AND
COMBINED MEMORANDUM OF LAW**

Comes now the Defendant above, by and through his attorney of record, Glen R. Graham, and does hereby move this court to hold inadmissible any and all hearsay evidence under the specific facts of this case and does object to the admissibility of hearsay evidence in violation of the defendant's rights to due process of law, and rights to confrontation, under both the Art.2, § 7, §20 of the Oklahoma Constitution, and the 6th and 14th Amends., of the U.S. Constitution, and under case law there under, and as further set forth in the incorporated memorandum of law herein. Defendant requests that this court conduct a hearing on the admissibility of any hearsay evidence before trial out of the presence of the jury.

Crawford v. Washington, 541 U.S. 36, 90 S.Ct. 1354 (2004), held that a defendant's Sixth Amendment right of confrontation was denied when his wife's statement was admitted, even if the statement may be reliable, its admission violates the constitutional right to confrontation. The Court held the Confrontation Clause bars "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." 541 U.S. at 53-54. While declining to define "testimonial," the Court held

that the term, at a minimum, includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68. Because the defendant did not have the opportunity to cross-examine his wife during her police interrogation, the Court held that admission of the interrogation statements violated the defendant's Sixth Amendment right to confrontation. 541 U.S. at 68-69.

The court in *Crawford* recognized that the defendant's wife was **unavailable** and the statement was found to possess a sufficient indicia of reliability, but since it was **testimonial** the procedural guarantee of confrontation precluded admission.

The *Crawford* court held that the confrontation clause must be interpreted with the historical inference that the principal evil of which the clause was directed was that ex parte communications should not be admitted as evidence against an accused unless the defendant had a prior opportunity for cross examination.

The defendant notes that even if the court deems the statement to be admissible under a hearsay exception, our U.S. Supreme Court has often found that a constitutional violation still has occurred. Hearsay exceptions, even if arguably recognized under the rules of evidence, do not completely overlap confrontation clause issues. See *California v. Green*, 399 U.S. 149, 90 S.Ct. 1130 (1970).

In, *Davis v. Washington*, 547 U.S. 813 (2006), the USSC held that hearsay statements made in a 911- call asking for aid was not "testimonial" in nature and thus their introduction at trial did not violate the Confrontation Clause as defined in *Crawford*. In *Davis v Washington*, and in *Hammon v Indiana*, 547 U.S. ____ (2006) (both decided June 19, 2006), the Court held that statements are non-testimonial when made in the

course of police interrogation under circumstances objectively indicating that the primary purpose of 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. It is the trial judge who will ultimately make the decision as to admissibility, applying this objective test as to the primary purpose for the questions.

A call to report a crime (especially when followed by questions and answers with an operator) is testimonial, but a call that asks for help may not be. See, *Richard D. Friedman & Bridget McCormack, Dial-In Testimony*, 150 Pa. L. Rev. 1171, 1240-42 (2002). But even in the latter situation, statements made in a call in the heat of the moment that say more than come help me should still be considered testimonial. *Id.*; *United States v. Arnold*, 410 F.3d 895 (6th Cir. 2005); *People v. Cortes*, 2004 N.Y. Slip Op. 24185, 2004 WL 1258018 (N.Y. Sup. Ct. 2004) (holding that 911 call was testimonial) ; *People v. Dobbin*, 2004 N.Y. Slip Op. 24534 (N.Y. Sup. Ct. 2004) (same); *People v. West*, 823 N.E.2d 82, 91-92 (Ill. App. 2005) (statements asking for immediate help are not testimonial but statements or responses to questions posed for the purpose of collecting information useful to the criminal justice system are testimonial); *State v. Davis*, 111 P.3d 844 (Wash. 2005) (parts of 911 call seeking assistance and protection from peril are non-testimonial but those seeking to assist police in investigation or assist the State in prosecution testimonial) ; *State v. Powers*, 99 P.3d 1262 (Wash. App. 2004) (911 call to report domestic violence was testimonial) ; but see *United States v. Brito*, ____

F.3d ___, 2005 WL 2673671 (1st Cir. Oct 20, 2005) (anonymous 911 call to report crime and request help not testimonial).

The defendant notes that even if the court deems the statement to be admissible under a hearsay exception, our U.S. Supreme Court has often found that a constitutional violation still has occurred. At a jury trial when hearsay is the only or primary evidence, the indicia of reliability of hearsay evidence must be substantial, but even then the U.S. Supreme Court has held that the same is inadmissible in violation of the defendant's constitutional rights to confrontation and that the ***rules of evidence, do not usurp confrontational clause issues.***

Wherefore, Defendant objects to the admissibility of the hearsay evidence in this proceeding.

Respectfully submitted,

Glen R. Graham OBA 12110
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CERTIFICATE OF DELIVERY

This is to certify that on the ___ day of _____, 20___, a true and correct copy of the above and foregoing Motion was hand delivered by the undersigned to the Tulsa County District Attorney's Office, 9thFloor- Tulsa County Court House, 500 S. Denver Ave., Tulsa, Oklahoma.

By: _____
Glen R. Graham