

Confronting the Confrontation Objection: *Crawford* Update

Jessica Smith

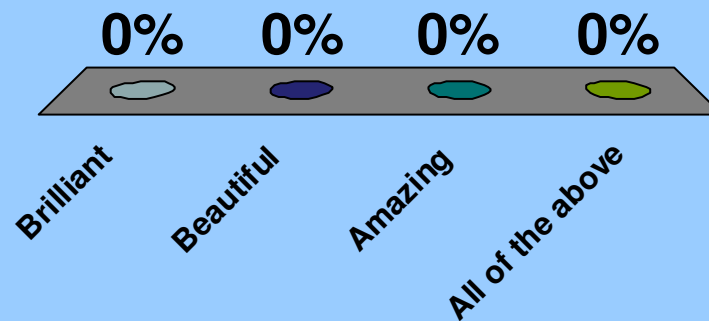
School of Government, UNC-Chapel Hill

October, 2006



Jessie's girls are:

1. Brilliant
2. Beautiful
3. Amazing
- ★ 4. All of the above



10

Objectives:

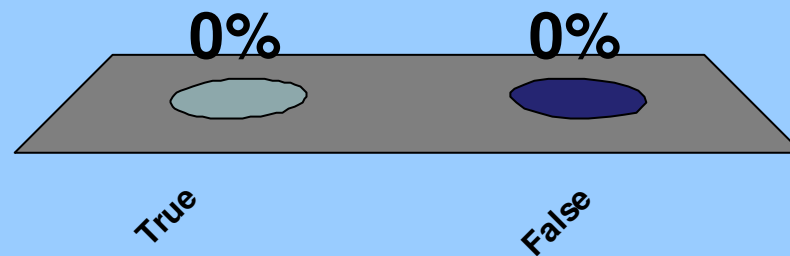
- 1) Understand & apply the U.S. Supreme Court's latest *Crawford* ruling
- 2) Be prepared for argument on issues left open by that case
- 3) Be familiar with other “hot” *Crawford* topics

Reference Materials:

- 1) Smith, *Crawford v. Washington*:
Confrontation One Year Later
- 2) Smith, Supplement to *Crawford v. Washington*: Confrontation One Year Later
- 3) Markham, The Forfeiture by Wrongdoing
Exception to the Confrontation Rule

I feel confident that I can accurately state *Crawford's* holding.

1. True
2. False



10

Crawford Holding:

“Testimonial” statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and there has been a prior opportunity to cross examine.

Crawford Holding:

Examples of nontestimonial statements:

- 1) Offhand remarks
- 2) Casual remarks to an acquaintance
- 3) Business records
- 4) Statements in furtherance of a conspiracy

Crawford Holding:

Examples of testimonial statements:

- 1) Prior testimony
- 2) Plea allocations
- 3) Police interrogations

Davis v. Washington

- 911 call statements
- V doesn't testify
- Trial court admits recording of the 911 call

Hammon v. Indiana

- Reported domestic disturbance
- V initially says everything is fine
- In 2nd statement, V recounts abuse
- V doesn't testify at trial
- State puts on officer, who testifies to V's statements

Davis/Hammon Rule:

Davis/Hammon Rule:

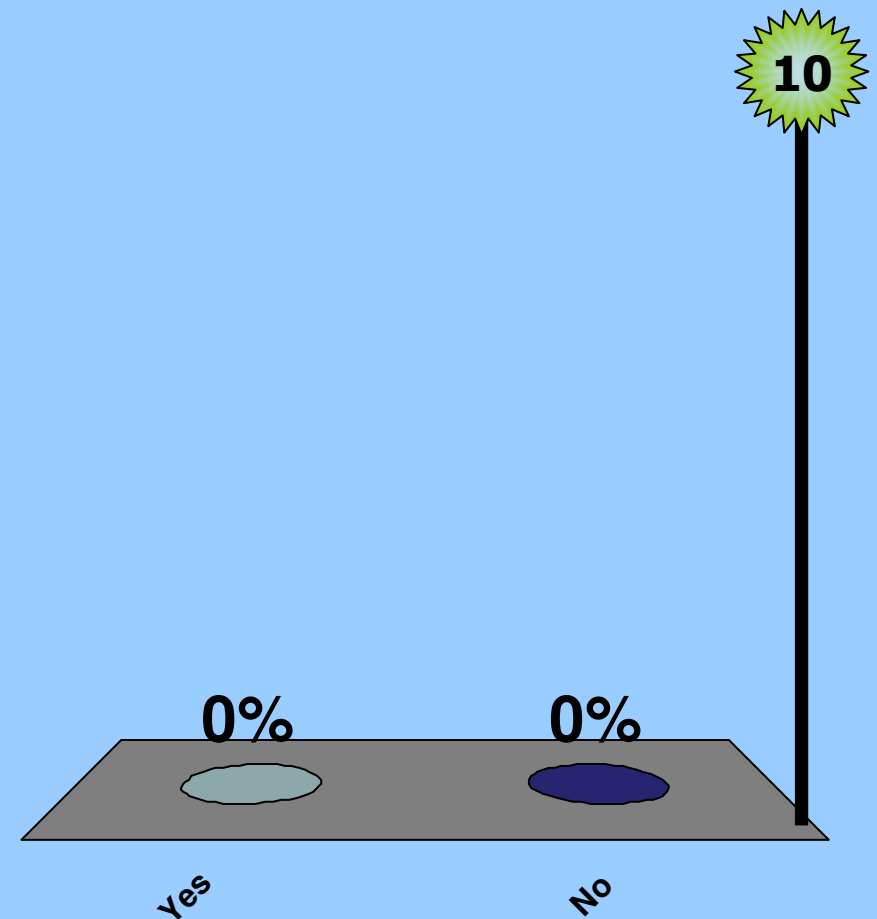
(1) Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.*

Davis/Hammon Rule:

(2) 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.*

Were the victim's statements during the 911 call testimonial?

1. Yes
- ★ 2. No



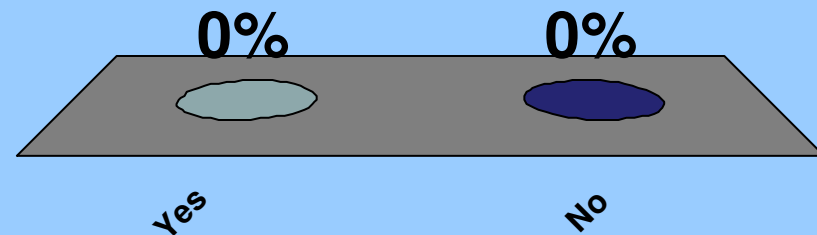
Davis Holdings:

(1) 911 call statements = nontestimonial

- V spoke about events as they were happening, not later
- V facing ongoing emergency
- Q&A necessary to resolve emergency (including ID of D)
- Formality lacking

Were Amy's statements to the police testimonial?

- ★ 1. Yes
- 2. No



10

Davis Holdings:

(2) Amy's statements at the scene =
testimonial

- Not much different from those in *Crawford*
- Interrogation was investigation of past conduct
- No ongoing emergency
- 2nd questioning
- Was "formal enough"

Crawford Holding:

“Testimonial” statements by declarants who do not testify at trial may not be admitted unless the declarant is unavailable and there has been a prior opportunity to cross examine.

Davis/Hammon Rule (Again) for Police Interrogation:

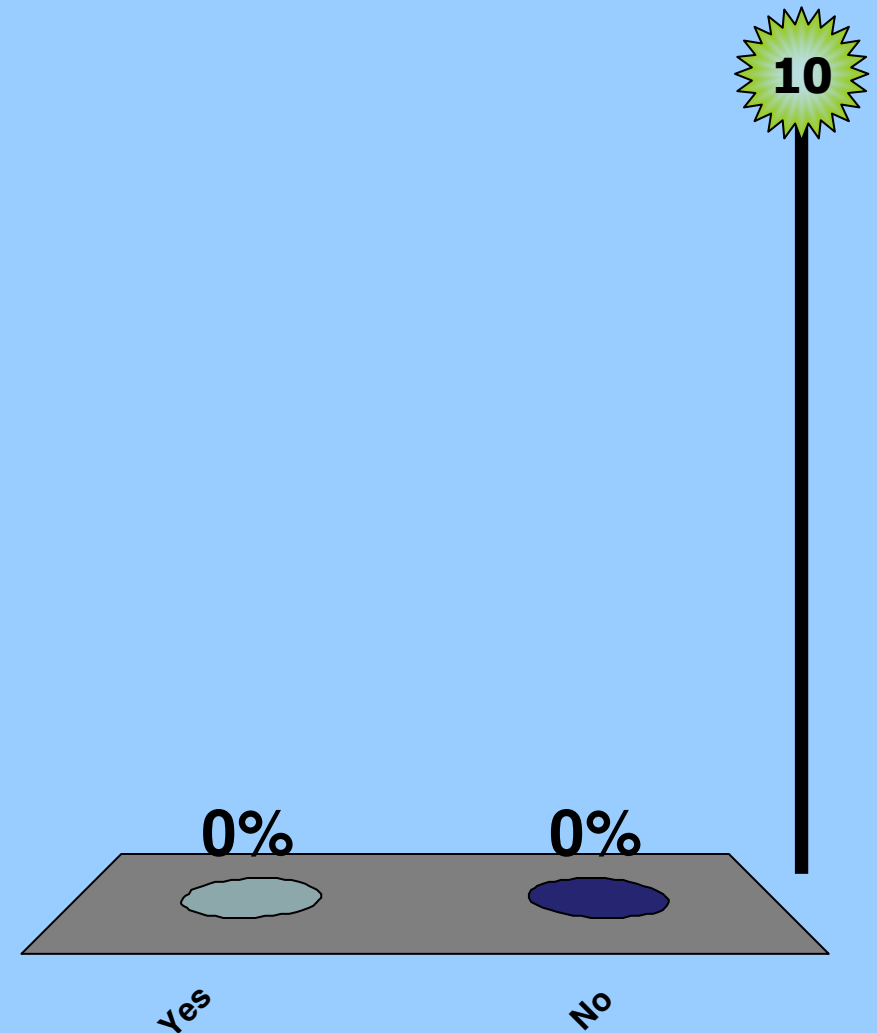
- (1) Nontestimonial when: circumstances objectively indicate primary purpose is to enable police to meet an ongoing emergency
- (2) Testimonial when: circumstances objectively indicate primary purpose is to establish/prove past events for criminal prosecution

Fact pattern:

- Officer X responds Ms. C's apartment
- Neighbor approaches
- Officer speaks with Mrs. C.
- Detective U is called to the scene
- Later that evening, Mrs C. identifies D for Det. U, from photo lineup
- Mrs. C doesn't testify at trial

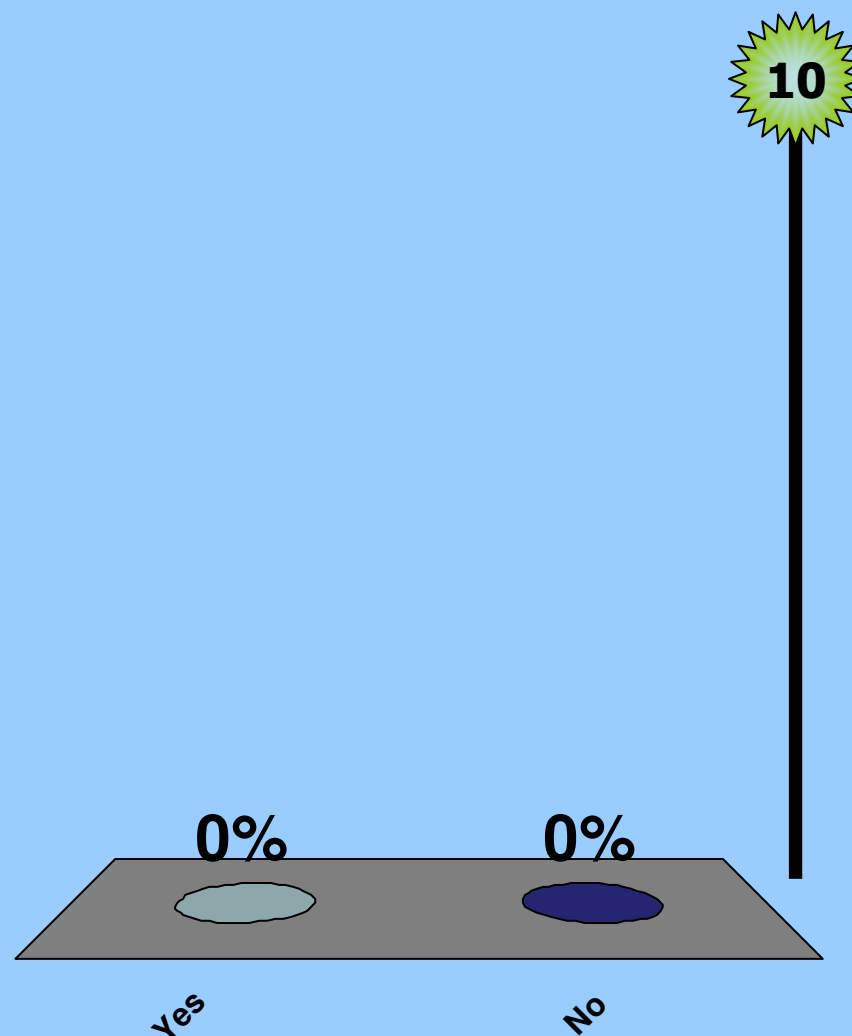
Was Ms. C's photo identification of D testimonial?

- ★ 1. Yes
- 2. No



Were Mrs. C's statements to the responding officer testimonial?

1. Yes
2. No

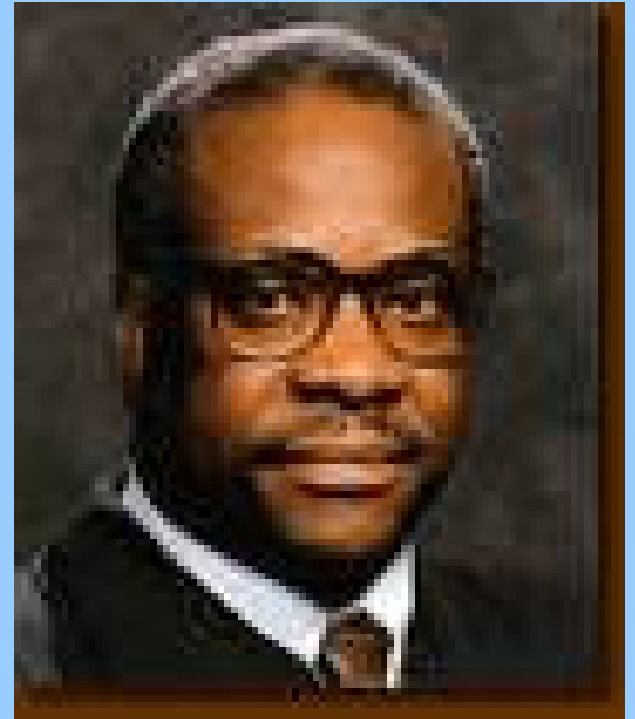


Open Issues

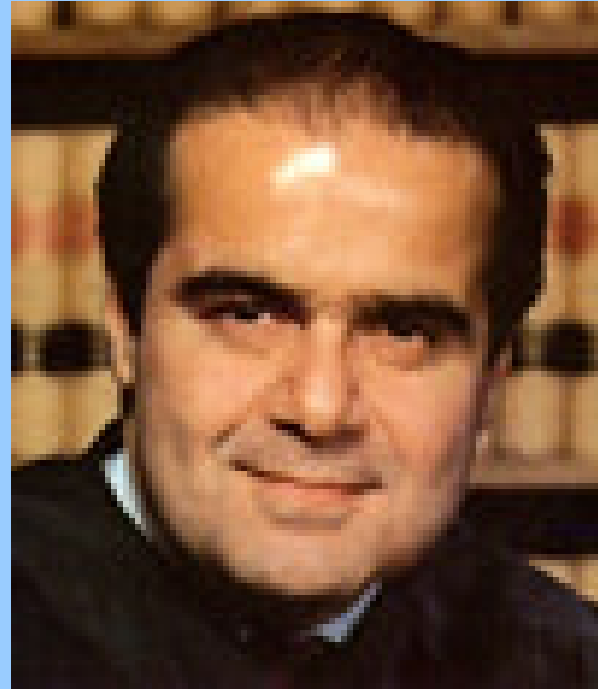
Open Issues

- 1) How do *you* determine the primary purpose of a police interrogation?

“Assigning . . . primacy
requires constructing a
hierarchy of purpose that
rarely will be present—
and not reliably
discernible. It will
inevitably be, quite simply,
an exercise in fiction.”



The test is “quite workable”



Open Issues

- 2) What constitutes an emergency and when does an emergency end?

Open Issues

- 3) Who are police agents for purposes of police interrogation?

Open Issues

- 4) What formality is required for a statement to be testimonial?

Open Issues

- 5) Should the primary purpose test be applied to questioning by people other than the police or their agents?

Open Issues

- 6) How should you evaluate statements that are volunteered to the police?

Open Issues

- 7) How should you apply the forfeiture by wrongdoing exception?

The Good News

JOB SECURITY

Other Stuff You Need to Know About

1) Business records, test reports & related materials

1) Business records, test reports & related materials

***State v. Windley* (NC App): fingerprint
card in AFIS is nontestimonial**

1) Business records, test reports & related materials

***State v. Cao* (NC App.): “mechanical”
tests are nontestimonial**

1) Business records, test reports & related materials

***State v. Melton* (NC App.): following
*Cao***

1) Business records, test reports & related materials

***State v. Forte* (NC): SBI agent's
testing of bodily fluid evidence
nontestimonial**

1) Business records, test reports & related materials

Impact of *Davis*?

2) Statements offered for a purpose other than the truth of the matter asserted fall outside of *Crawford*

3) Retroactivity to be decided by US Supreme Court next term

4) ***Davis*** said the confrontation clause only applies to testimonial statements

Objectives:

- 1) Understand & apply the U.S. Supreme Court's latest *Crawford* ruling
- 2) Be prepared for argument on issues left open by that case
- 3) Be familiar with other “hot” *Crawford* topics