

*State v. Tsosie*: The Confrontation  
Clause and Testimonial Hearsay

New Mexico State Bar Annual Conference  
2023

# CONFRONTATION CLAUSE!

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”

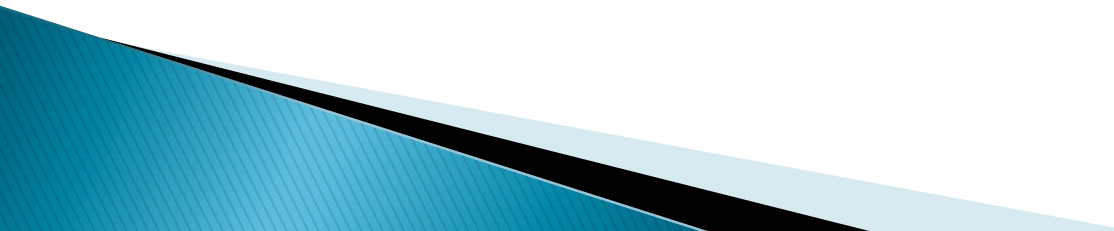
# Sixth Amendment Confrontation Clause

- ▶ The question is, if a HEARSAY statement comes in through a hearsay exception, is it a problem because the defendant does not get to CONFRONT the out-of-court declarant?

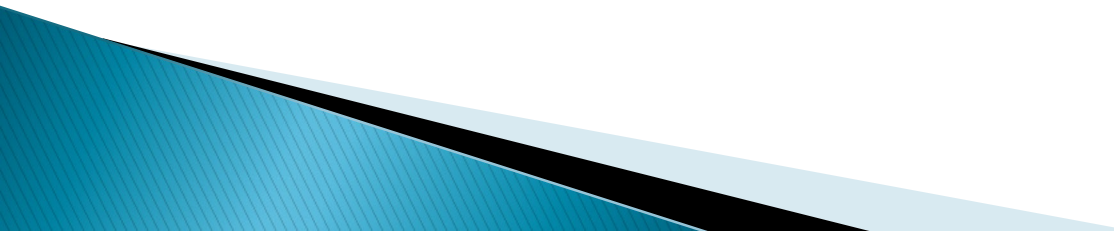
# The Old Approach

- ▶ Pre-Crawford.
- ▶ *Ohio v. Roberts*: hearsay from a non-testifying declarant violated the Confrontation Clause if it was introduced against a criminal defendant, unless the statement had “indicia of reliability” meaning:
  - ▶ A) the statement fell within a “firmly rooted hearsay exception” [all except residual exception], or
  - ▶ B) the statement bore “particularized guarantees of trustworthiness.”

# *Crawford v. Washington* (2004)

- ▶ Michael and Sylvia Crawford went to confront Kenneth Lee about Lee's attempt to rape Sylvia.
  - ▶ Lee was stabbed.
  - ▶ Crawford was charged with assault and attempted murder. He argued self-defense.
  - ▶ Crawford invoked a marital privilege to keep his wife from testifying (under Washington law).
  - ▶ State offered recorded statements that Sylvia made during interrogation by police.
  - ▶ Hearsay exception: statements against interest.
- 

# *Crawford*

- ▶ The trial court admitted Sylvia's tape-recorded statements as statements against interest.
  - ▶ WASHINGTON TRIAL COURT: Applying Roberts, the statements contained sufficient indicia of reliability, so the Confrontation Clause did not exclude them.
  - ▶ She was an eyewitness! [Who had shut her eyes . . . .]
  - ▶ She was being questioned by a neutral police officer. (!)
- 

# *Crawford* history

- ▶ WASHINGTON CT. APP.: It reversed applying NINE FACTORS to determine reliability, said it was not trustworthy.
- ▶ “This nine-part test examines factors that show particularized guaranties of the statement's trustworthiness.”

*State v. Crawford*, 2001 WL 850119,  
4 (Wash.App. Div. 2, 2001)

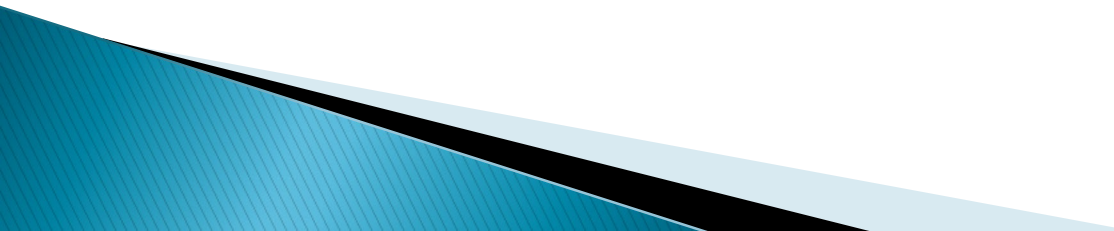
# *State v. Crawford,* 147 Wash.2d 424 (2002)

- ▶ Washington Supreme Court: found it *was* trustworthy, because of the “interlocking character” of Sylvia’s and Michael’s statements: BOTH WERE EQUALLY AMBIGUOUS AS TO WHEN AND WHETHER THE VICTIM WAS ARMED.



# GIFT–WRAPPED for Scalia:

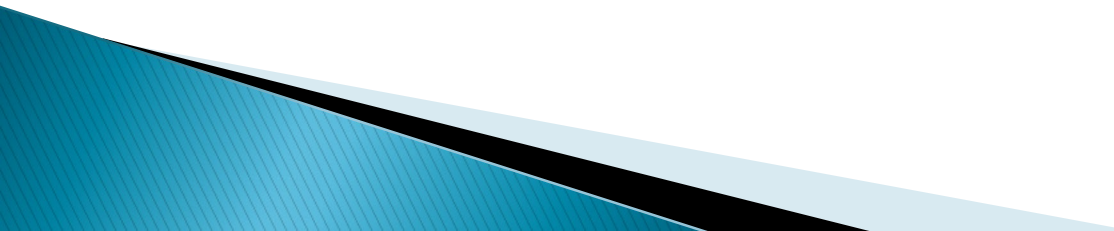
“Reliability is an amorphous, if not entirely subjective, concept.”

- ▶ “There are countless factors bearing on whether a statement is reliable; the nine–factor balancing test applied by the Court of Appeals below is representative.”
  - ▶ (Washington was not alone, Colorado had an eight–factor test.)
- 

# *Crawford*

- ▶ The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.
- ▶ The Marian *ex parte* inquisitions!

# Confrontation Clause

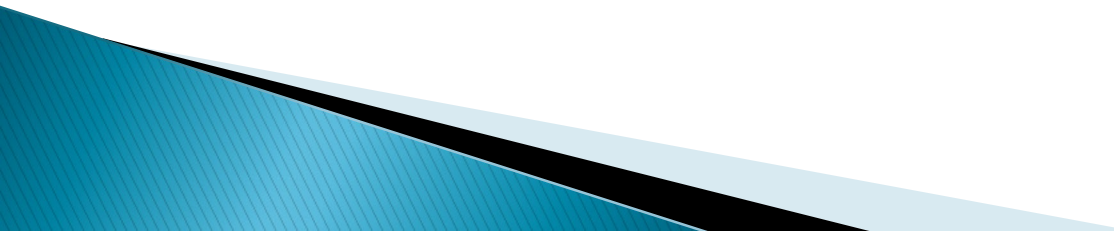
- ▶ The concern is with witnesses who have not been/cannot be cross-examined.
  - ▶ Witnesses: defined as those who “bear testimony.”
  - ▶ So, what is the primary object of the Confrontation Clause?
- 

# PRIMARY OBJECT OF THE SIXTH AMENDMENT CONFRONTATION CLAUSE IS ...

. . . “TESTIMONIAL HEARSAY”!

- ▶ NOTE THE SHIFT: THE FOCUS IN CRAWFORD IS NOT ON RELIABILITY, BUT ON WHETHER THE HEARSAY IS TESTIMONIAL.

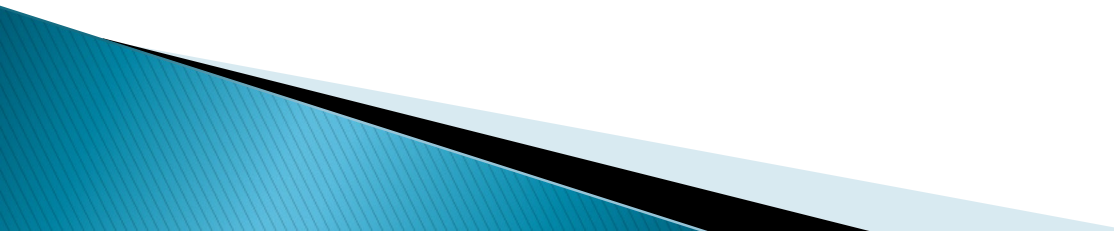
# “Testimonial”

- ▶ “A solemn declaration or affirmation made for the purpose of establishing or proving some fact.”
  - ▶ The functional equivalent of *ex parte* in-court testimony: affidavits, custodial examinations, prior testimony that the defendant was not able to cross-examine or similar pretrial statements one would expect to be used prosecutorially.
- 

# *Crawford* “formulations”

“[E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”

“[S]tatements 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.”

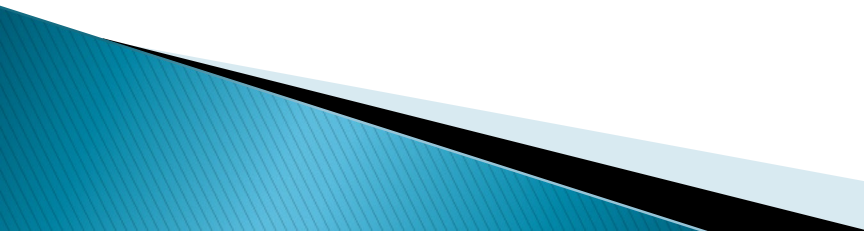


# The “primary purpose” test

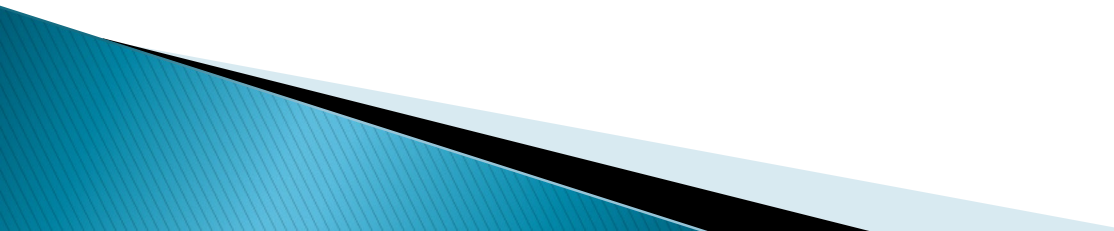
For example – with law enforcement:

“Statements are nontestimonial when made in the course of a 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.”

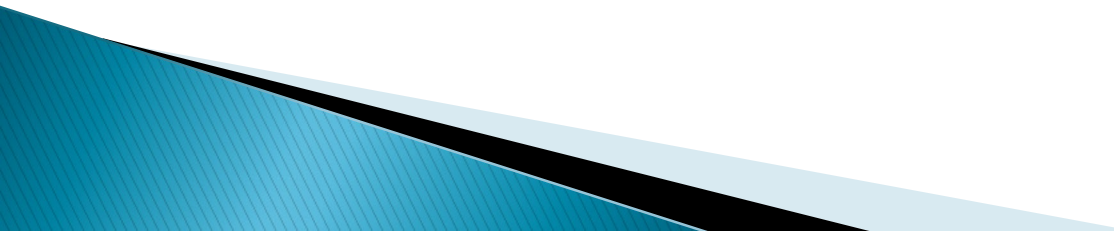


# *Davis v .Washington* (911 call)


- ▶ “He’s here jumping on me again!”
  - ▶ “[No weapons] – he’s using his fists!”
  - ▶ “His name is Adrian Martell Davis.”
  - ▶ “He’s runnin’ now.”
  - ▶ OPERATOR: “Stop talking and answer my questions.”
- 



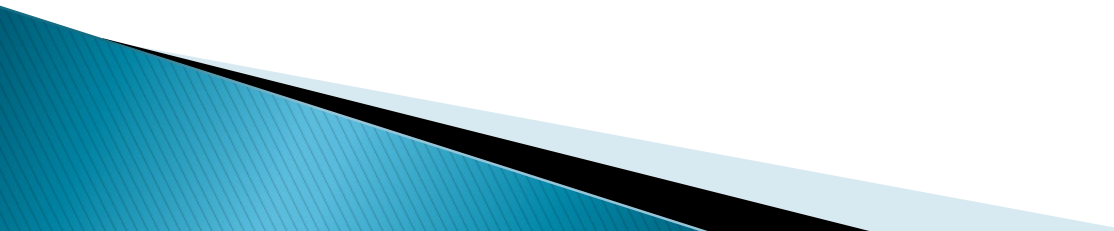
# *Hammon v. Indiana* (Victim affidavit)

- ▶ When the police arrived, the victim was alone on the porch, frightened, but saying that “nothing was the matter.”
  - ▶ Officer interviewed victim and took a statement in the form of an affidavit.
  - ▶ Separate rooms. Everybody calm.
- 

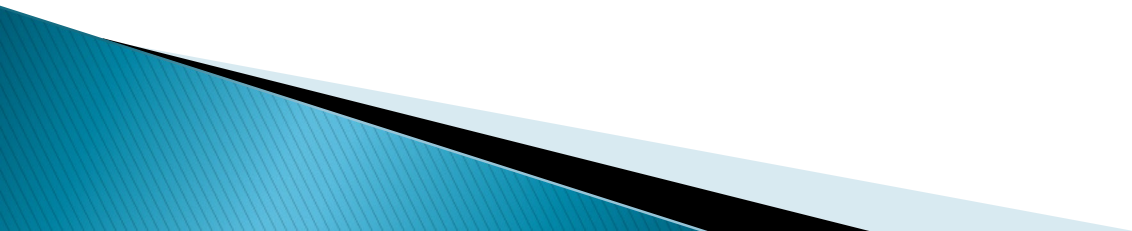
# *Davis* 911 call

- ▶ Initial inquiry and response was not “testimonial”
  - ▶ The PRIMARY PURPOSE was to ascertain what was happening at THAT moment and provide EMERGENCY ASSISTANCE.
  - ▶ BUT IT EVOLVED: “STOP TALKING AND ANSWER MY QUESTIONS.” THAT IS MORE LIKE MARIAN INQUISITION. The PRIMARY PURPOSE was to glean info for the prosecution.
- 


# *Hammon*

- ▶ Investigation into past conduct.
  - ▶ “What happened” not “What’s happening!”
  - ▶ No emergency.
  - ▶ Victim: “Things were fine.”
  - ▶ The **PRIMARY PURPOSE** was to investigate a possible crime.
- 

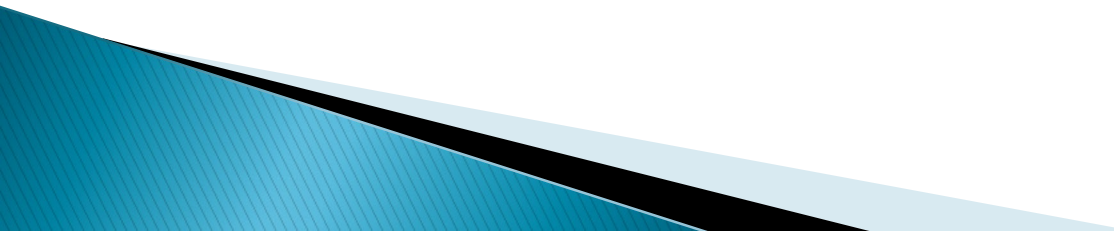
# OBJECTIVE INQUIRY

- ▶ NOT THE ACTUAL PURPOSE OF THE PARTIES.
  - ▶ BUT THE PURPOSE THAT REASONABLE PARTICIPANTS WOULD HAVE HAD.
  - ▶ LOOKING AT THE PARTIES' STATEMENT AND ACTIONS AND THE CIRCUMSTANCES.
- 

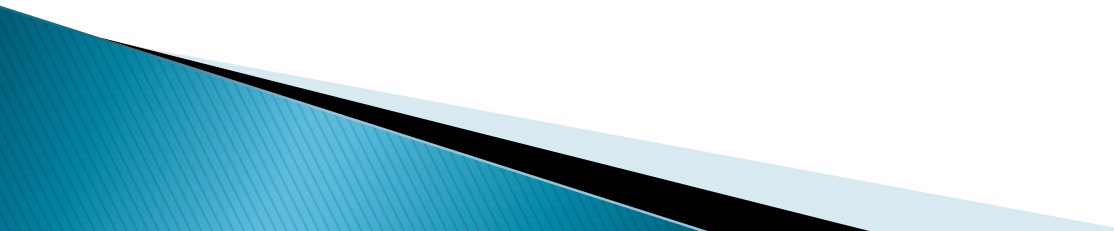
# *Michigan v. Bryant*

- ▶ Victim is found at a gas station 25 minutes after he was shot.
  - ▶ In response to police questioning, he says, “Rick [Bryant] shot me.” Had a conversation through the back door and was shot.
  - ▶ Victim fled defendant’s house after being shot, made it to the gas station.
  - ▶ Questioned in a public area, before arrival of EMS.
  - ▶ Question by five police officers. Who did it? How? When? How tall is shooter? What do they weigh? What address?
  - ▶ He dies. Trial court permits the officers to testify as to the victim’s statements.
- 

# IS THERE AN EMERGENCY?

- ▶ HIGHLY CONTEXTUALIZED.
  - ▶ Is there a threat to the first responders?
  - ▶ What kind of weapon was employed – will shape whether there remains an emergency.
  - ▶ Fists? Less likely. Gun? More likely to be an emergency.
- 

# IS THERE AN EMERGENCY?

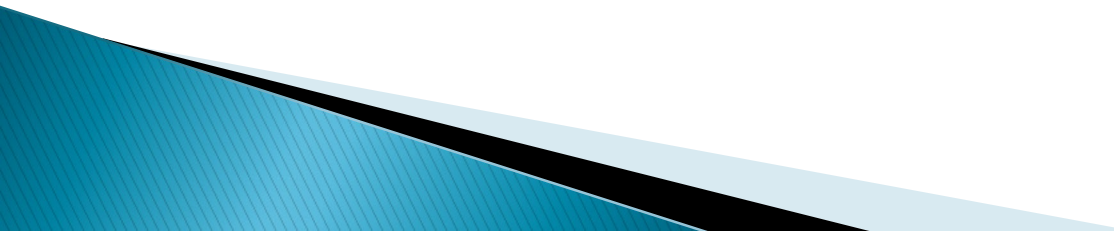
- ▶ Has the perpetrator been disarmed?
  - ▶ Apprehended?
  - ▶ If so, probably NOT an emergency.
  - ▶ Thus, victim statements are likely testimonial.
- 

# “Combination inquiry”

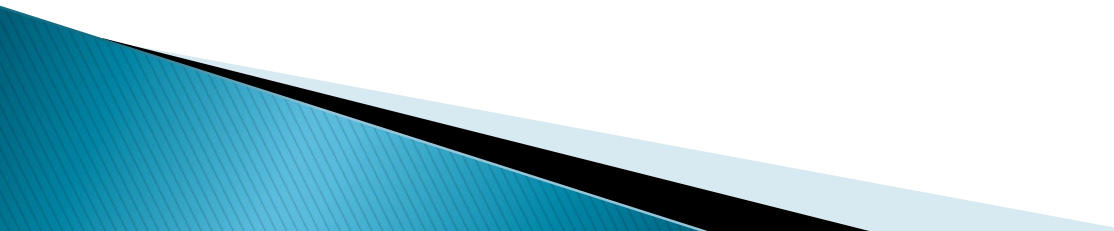
- ▶ The questions and statements of both the interrogators and the witnesses should be looked at to ascertain objective reasons.



# EXAMINING COVINGTON:

- ▶ He was gasping for breath and bleeding.  
NON-TESTIMONIAL
  - ▶ Asking about EMS. NON-TESTIMONIAL
  - ▶ Would a person in Covington's situation have had a "primary purpose" to establish or prove past events potentially relevant to later criminal prosecution? NON-TESTIMONIAL
- 


# EXAMINING THE POLICE:

- ▶ They did not know who, why, where, or when. WHAT WAS HAPPENING. NON-TESTIMONIAL
  - ▶ They did not where the shooter was or why it occurred. NON-TESTIMONIAL.
  - ▶ They needed to assess the situation.
  - ▶ The threat to their safety.
  - ▶ Danger to the victim?
  - ▶ To the public?
  - ▶ TO MEET AN ONGOING EMERGENCY. NON-TESTIMONIAL
- 

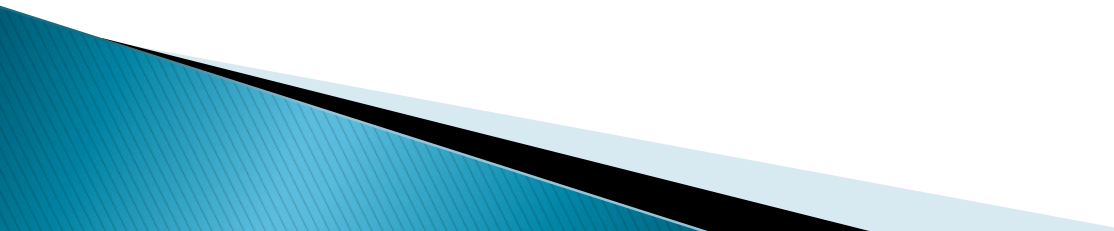
# Whiffs of *Roberts*

- ▶ “In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”
- ▶ Statements ‘relating to a startling event or condition’ are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood . . . .”

# Scalia, dissenting

- ▶ Five officers asking him successive questions, NOT for the purpose of protecting him, but of figuring out who his killer was.
  - ▶ Focus on the declarant – why the declarant is speaking.
  - ▶ Here: it's easy to answer, in response to REPEATED QUESTIONING, he was explaining who the bad guy was to ensure **his eventual arrest and prosecution.**
- 

# Scalia, dissenting

- ▶ Do you need to know where the shooting took place, the name of the shooter, the height and weight of the shooter, to provide medical care?
  - ▶ NO!
  - ▶ It was testimonial!
  - ▶ It was like a DIRECT EXAMINATION AT TRIAL.
  - ▶ The police questioning was an *ex parte* examination (LIKE THE MARIAN INQUISITION!)
- 

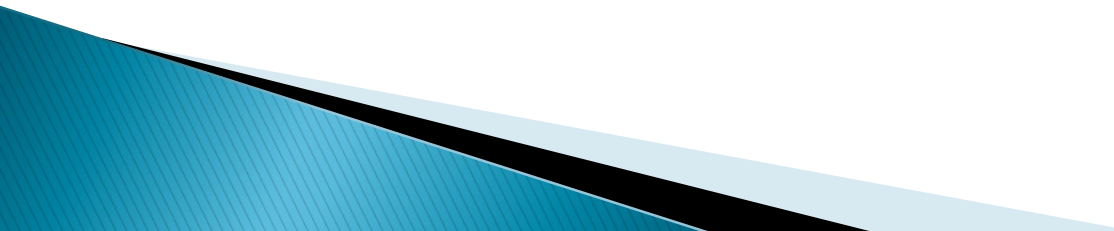
# Scalia, dissenting

- ▶ The “highly contextualized inquiry” is no better than the nine-factor test rejected in *Crawford*.

# *Ohio v. Clark* (2015)

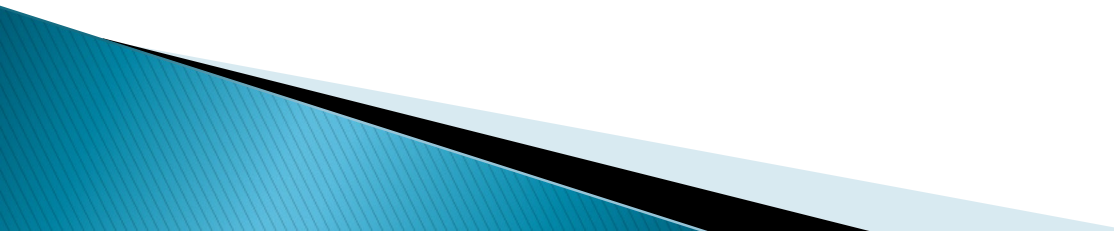
- ▶ Statements regarding child abuse made to teachers (not to law enforcement).
- ▶ The Ohio rules permit them to be admitted as an exception to hearsay rule.

# *Ohio v. Clark*

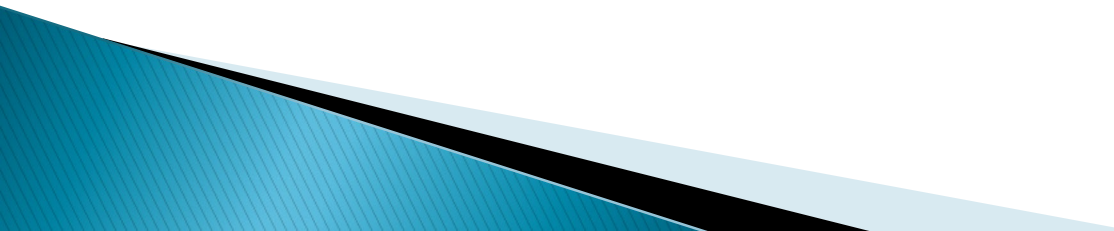
- ▶ Concern was stopping the abuse/emergency.
  - ▶ Lack of formality.
  - ▶ Teachers, not law enforcement (mandatory reporting statutes notwithstanding).
  - ▶ Also, similar statements were probably admitted as a historical matter.
  - ▶ Young children's statements can rarely be testimonial.
- 



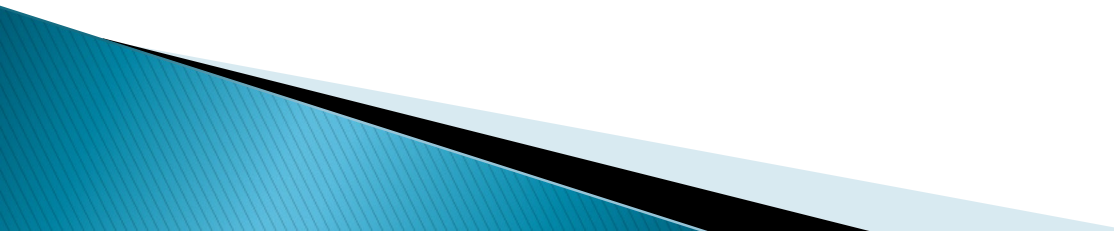
## *State v. Tsosie*, 2022–NMSC–017

- ▶ The State challenged the district court's pretrial ruling that almost all statements made by Declarant Kimbro Talk to SANE nurse Gail Starr were inadmissible as violating Defendant Oliver Tsosie's confrontation rights under the Sixth Amendment.
- 

# *Tsosie*

- ▶ Declarant was transported by law enforcement to the Family Advocacy Center where he underwent the SANE examination conducted by Starr.
  - ▶ Declarant died in June 2018, and the record offers no evidence that Defendant had an opportunity to cross-examine Declarant regarding his statements recorded in the SANE exam report.
- 

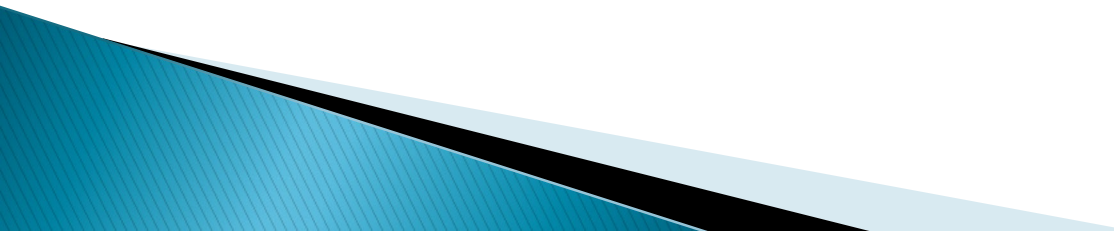
# Starr's testimony at the hearing

- ▶ [W]e are a medical exam. It's very important to treat somebody who has been a victim of trauma ... to give them support and psychosocial support ... to do a safety assessment, make sure they're not at risk for re-offense, re-harm ... to give them medications to prevent sexually transmitted diseases, to help their body and help them feel ... less dirty ... to give them resources to assist them to heal.
  - ▶ We also do forensic photography ... and ... for sexual assault, we also do the sexual assault evidence kit as a part of the exam, as well.
- 

# *Tsosie*

- ▶ We note at the outset that the complexity of testimonial analysis is further complicated by the “*dual* role” of a SANE nurse, which we have recognized in the hearsay context.
- ▶ Further complicating testimonial analysis, *which* of the dual roles is *more* present is likely to change multiple times over the course of a SANE exam, as a typical SANE exam is not partitioned into one medical care component and one forensic component.

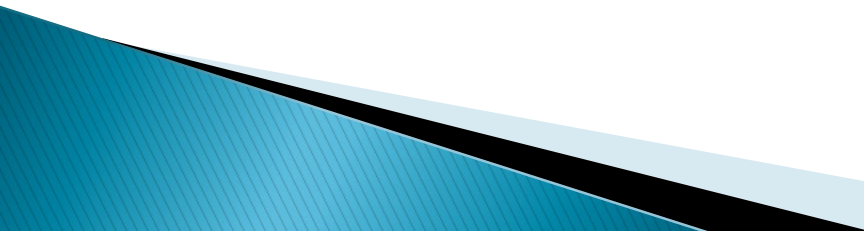
# *Tsosie*

- ▶ New Mexico [district] courts must ‘shoulder the heavy responsibility of sifting through statements, piece-by-piece, making individual decisions on each one.’ ”
  - ▶ [A] district court must also be vigilant that a SANE nurse's dual role is not used by the prosecution to end-run the Confrontation Clause by introducing SANE exam statements made for a testimonial primary purpose under the guise of having been made for a medical care primary purpose.
- 


# *Tsosie*

- ▶ If facts necessary for the testimonial inquiry are not elicited by direct examination or cross-examination during the admissibility hearing, “[t]he court may examine a witness” to complete the record.

# *Tsosie*

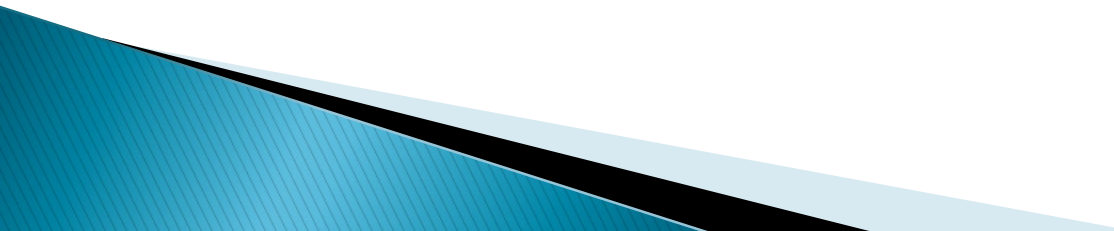
- ▶ In addition, as discussed above, *Bryant* directs that “standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”
  - ▶ [W]e hold that a district court must articulate any credibility concerns regarding a SANE nurse's uncontradicted testimony where the district court determines that testimony regarding the SANE nurse's medical care role is pretextual in masking a forensic primary purpose.
- 

# *Tsosie*

- ▶ We hold that where it centers on the provision of medical care, a SANE exam similarly “focuses the participants on something other than ‘proving past events potentially relevant to later criminal prosecution.’”
  - ▶ [Davis, Bryant, Clark:] these cases represent that the *focus or motive of the participants* is a relevant factor in determining whether the primary purpose of challenged statements was to “creat[e] an out-of-court substitute for trial testimony.”
- 



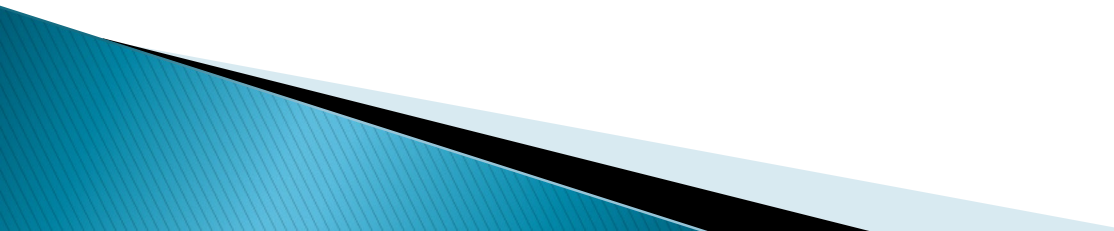
# *Tsosie*

- ▶ Applying the reasoning in *Davis*, we hold that a significant factor [is whether] the information sought was important to enable the provision of medical care.
  - ▶ Where the objective circumstances demonstrate the information sought was indeed important in that regard, the focus of the participants is likely to have been on something other than creating an out-of-court substitute for trial testimony.
  - ▶ We also recognize that, whereas formality in a law enforcement encounter may suggest a testimonial purpose . . . formality in a medical care encounter may enable the provision of medical care.
- 

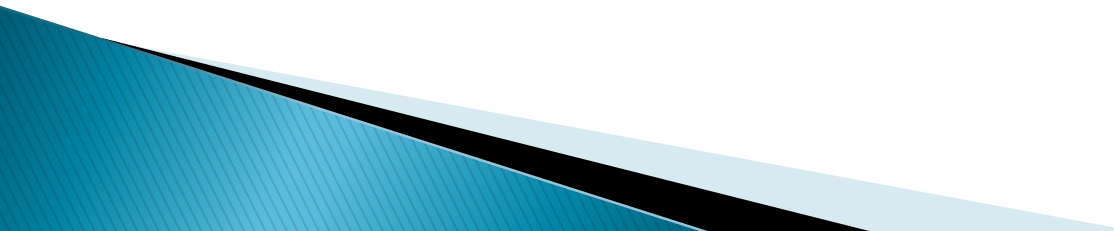
# *Tsosie*

- ▶ As required by *Bryant*, we begin our “highly context-dependent inquiry” with objective analysis of the circumstances in which the parties interacted, then conduct an objective and combined inquiry into the parties’ statements and actions.
- ▶ The relevant surrounding circumstances here include the time elapsed between the alleged assault and the SANE exam, the location of the SANE exam, the role of law enforcement in the SANE exam, and the identity of the SANE nurse as Starr's dual role bears on the challenged statements.


# The circumstance of the time elapsed between the alleged assault and the SANE exam.

- ▶ The SANE exam here, on referral from UNMH, occurred in the same night as the alleged assault, thereby supporting the relevance of the exam to the provision of medical care.
  - ▶ Starr testified that she assessed multiple considerations of Declarant's medical situation—including prophylaxis, safety plan, suicide assessment, and homicide assessment—that objectively suggest the relevance of recency of the assault to the medical purposes of the SANE exam.
- 

# The circumstance of the location of the SANE exam

- ▶ The location of the SANE exam also weighs toward a nontestimonial primary purpose, as the clinic at the Family Advocacy Center is a setting conducive to providing trauma-informed medical treatment.
  - ▶ Starr testified that SANE exams can be done in a hospital setting but that the clinic setting is “absolutely” better in allowing the examinee to “be really relaxed and comfortable” for the exam.
- 

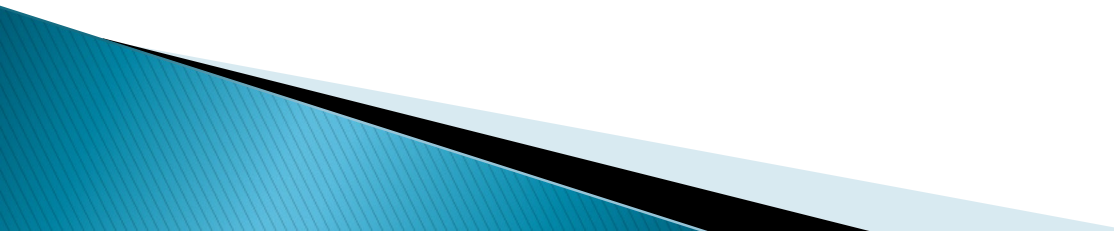
# The circumstance of law enforcement involvement in the SANE exam

- ▶ Relevant to our analysis, Starr testified that law enforcement officers are not allowed in the SANE exam, that APD detectives are housed in a different area of the building, that SANE nurses “do not work for the police,” and that the Family Advocacy Center is a “nonprofit and ... separate” from the police.
- 

# Law enforcement involvement in SANE exam

- ▶ While consenting to the release of evidence to law enforcement is noteworthy, Starr testified that she conducts the SANE exam regardless of whether a patient wants to report to police. In addition, the release in question was one of two sections signed by Declarant in the SANE exam consent form, the other of which included his consent to multiple medical care and forensic components of the exam.
- ▶ Under *Bryant's* objective test, the question for this circumstance is whether a reasonable declarant signing the two portions of the consent form would have understood that law enforcement was so involved in the SANE exam as to render the primary purpose of his statements to be the creation of evidence for Defendant's prosecution.

# The circumstance of the SANE nurse's identity as it bears on the challenged statements

- ▶ For this circumstance to weigh toward a testimonial primary purpose for an individual statement, the forensic purpose of the relevant SANE exam question must be more important than its medical care purpose, thus rendering Starr's forensic role greater than her medical care role regarding that question.
- 

# Consent Form

- ▶ First, regarding the *Consent Form*, Starr testified that, as discussed above, “the top part [of the form] is very much all about medical treatment,” an intermediate paragraph acknowledges “that we shared [with Declarant] a notice of privacy,” and the final part “is so that we can release this to law enforcement.”
- ▶ She also testified that Declarant “signed for STI prevention [medical care] and photography [forensics] as well as talking about what happened and allowing me to do a basic medical assessment on him.”
- ▶ The foregoing evidence indicates that, as regards the *Consent Form* as a whole, **Starr's identity was informed as much or more by her medical care role than her forensic role, thus weighing more toward a nontestimonial ruling. As regards the law enforcement release portion alone, Starr's identity was forensic.**



# Sexual Assault Form

- ▶ Second, regarding the *Sexual Assault Intake* form, Starr testified that its purpose is to “[g]et a basic medical background ... [including] statistical data.” She testified that the information obtained in the form is not different from that obtained in a typical intake form in a hospital. On cross-examination, Starr testified that the form's inclusion of the police report case number was relevant for the forensic purpose of cataloguing evidence properly.
- ▶ The foregoing evidence indicates that Starr's medical care role informed her identity regarding the *Sexual Assault Intake* form as much as or more than her forensic role, thus weighing more toward a nontestimonial ruling.

# History and Strangulation Forms

- ▶ **History form:** The foregoing evidence indicates that Starr's medical care role informed her identity regarding the *History* form as much as or more than her forensic role, thus weighing more toward a nontestimonial ruling.
- ▶
- ▶ **Strangulation form:** Starr testified that, based on her specialized training in strangulation, the information regarding its method and manner was relevant to her treatment to “really assess the neck carefully” and to assess possible brain injury. Starr testified that her ability to assess injury resulting from strangulation is informed by “symptoms that the patient will report, and ... signs that [the SANE nurse] can see, and we want to document both of those.” It follows logically that in posing the questions in the *Strangulation Documentation* form that would elicit information regarding such symptoms and signs, Starr's medical care role informed her identity as much as or more than her forensic role.

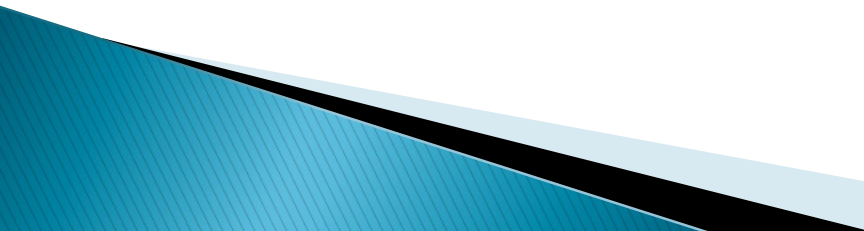
# Patient Narrative Form

- ▶ Fifth, regarding the *Patient Narrative* form, Starr testified that it was medically necessary to learn “what happened to [Declarant], what happened to his body and how he felt, [and] how he's doing.” Starr affirmed that the SANE exam medical history is not different from taking a general history at a general wellness visit, because “[w]e want to know ... what the scenario was when patients are talking about their illness or their issues.”

# *Acts Described by Patient Form*

- ▶ Sixth, regarding the *Acts Described by Patient* form, Starr testified that knowing “what went where” is important for medical purposes relating to prophylaxis and locations of injuries to treat, as well as for forensic purposes relating to locations to swab for evidence. Starr testified that ejaculation is medically relevant because “we're worried about illness, disease, [and] ... cleanliness.”

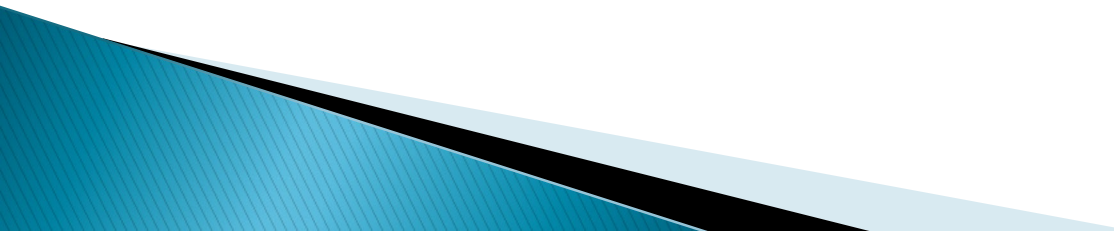
# *Physical Exam and Body Map Forms.*

- ▶ Physical exam form – nontestimonial.
  - ▶ Eighth, regarding the *Body Map – Physical Exam/Assessment* form, Starr testified to the medical importance of its general descriptions to help assess the injuries she observed.
  - ▶ We note that these descriptions appear to be largely Starr's statements of observation but include some statements from Declarant about those injuries. Starr testified that she treats injuries described in this form “if it's necessary.”
- 

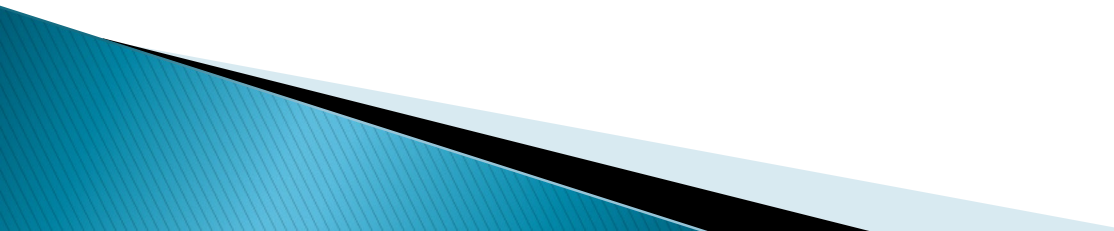
# Combined inquiry into the participants' statements and actions

- ▶ Starr's statements conveying those questions generally weigh toward a nontestimonial result, with the specific exception of the law enforcement release.
- ▶ The majority of Declarant's responses to Starr's questions provided information that was important to guide the provision of medical care in relation to the medical care purposes of the particular questions.
- ▶ Declarant's statements within that scope are nontestimonial. A response by Declarant exceeding that scope became testimonial where it also identified Defendant or accused him of specific criminal acts.

# Declarant's statements in the Forms

- ▶ First, in the *Consent Form*, we hold to be testimonial only Declarant's consent to release records and evidence to law enforcement, for reasons previously discussed.
  - ▶ Second, in the *Sexual Assault Intake* form, we hold to be testimonial only Declarant's statement that Defendant “stole his phone.” That statement is not important to the provision of medical care and is accusatory, presumably toward Defendant.
- 

# Declarant's statements

- ▶ Third, in the *History* form, we hold to be testimonial only Declarant's statement identifying Defendant as "Oliver."
  - ▶ The alleged assailant's identity was important to the provision of medical care regarding his relationship and continued access to Declarant in order for Starr to complete her risk assessment.
  - ▶ However, Starr testified that the scope of such information important to her risk assessment for Declarant did not include the perpetrator's name. This statement identifying and accusing Defendant is therefore testimonial.
- 



# Declarant's statements

- ▶ Fourth, in the *Strangulation Documentation* form, we hold all of the relevant statements to be nontestimonial.
- ▶ We recognize that Declarant's statements specifying the alleged method and manner of strangulation might be prejudicial, such as in specifying that Defendant used two hands and that his grip was “really strong.”
- ▶ However, we also recognize that Starr logically would use such statements to guide her discovery and assessment of signs of strangulation, thus rendering the statements important to her provision of medical care.
- ▶ Because “every strangulation is different,” Starr logically would rely on all such details to inform her assessment of Declarant's injury.
- ▶ analysis under Rule 11–403 NMRA.

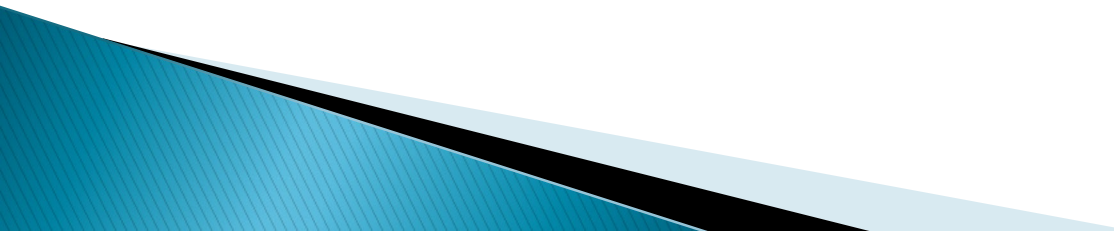
# Statements in the Strangulation Form

- ▶ Albeit a close call, we deem the method and manner statements to serve a medical care purpose more than a forensic purpose, thus rendering them nontestimonial. We also note that any prejudicial nature within such statements is a matter for the district court's post-confrontation

# Testimonial Statements in Patient Narrative

- ▶ We hold the following statements to be testimonial as exceeding the scope of the medical care purposes underlying the form and as identifying Defendant or accusing him of specific criminal acts:
- ▶ I asked how they got in there. They said they crawled over the gate.
- ▶ The way they were saying things to me, trying to make me mad. Things like why don't I let them in, or take their calls. Asking about my "new boyfriend" I said he is just a friend, nothing going on.
- ▶ I went to the bedroom, then they both came into the bedroom and tied me up. They used a trash bag, they used a towel over my mouth so I wouldn't yell ... They tied my feet too ... Oliver ... was trying to get his friend to take part, he just watched and held me down.
- ▶ He took my clothes off, I noticed when I got up, I was naked, they stole my TV, DVD player, stereo system and my phone. I don't know what else they took.

# The remaining statements

- ▶ Sixth, in the *Acts Described by Patient* form, we hold all of the relevant statements to be nontestimonial as within the scope of information important to guide Starr's provision of medical care.
  - ▶ Seventh, in the *Physical Exam* form, we hold all of the relevant statements to be nontestimonial as within the scope of information important to guide Starr's provision of medical care.
  - ▶ Eighth, regarding the *Body Map – Physical Exam/Assessment* form, we hold all of the relevant statements to be nontestimonial. Declarant's statements included accusatory descriptions regarding particular injuries of “where he punched me” and “where I was tied.” However, those descriptions also convey the nature of the injuries and thus are within the scope of information that was important to guide Starr's provision of medical care.
- 

# Review *Tsosie*

- ▶ The Court must conduct a “highly context-dependent inquiry”:
  - ▶ with objective analysis of the circumstances in which the parties interacted,
  - ▶ then conduct an objective and combined inquiry into the parties’ statements and actions.
- 