

## Does Crawford Apply in Pretrial Proceedings?

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A caller recently asked me: Does *Crawford* apply at pretrial proceedings, such as suppression hearings and hearing on motions in limine? Neither *Crawford* nor any of the Court's subsequent cases provide an answer for this simple reason: in all of the cases to reach the high Court, the defendant was challenging evidence admitted at the actual criminal trial. Nor do we have a North Carolina post-*Crawford* published case on point. However, a look at post-*Crawford* published cases from other jurisdictions shows that the overwhelming weight of authority holds that *Crawford* doesn't apply in pretrial proceedings. In fact, there appears to be just one published case applying *Crawford* to such proceedings. Here are the cases:

### Proceedings to determine probable cause

Peterson v. California, 604 F.3d 1166, 1169-70 (9th Cir. 2010) (in this §1983 case the court held that *Crawford* does not apply in a pretrial probable cause determination; “[T]he United States Supreme Court has repeatedly stated that the right to confrontation is basically a trial right.”); State v. Lopez, 314 P.3d 236, 237, 239 (N.M. 2013) (same; “The United States Supreme Court consistently has interpreted confrontation as a right that attaches at the criminal trial, and not before.”); Sheriff v. Witzenburg, 145 P.3d 1002, 1005 (Nev. 2006) (same); State v. Timmerman, 218 P.3d 590, 593-594 (Utah 2009) (same); State v. Leshay, 213 P.3d 1071, 1074-76 (Kan. 2009) (same); State v. O'Brien, 850 N.W.2d 8, 16-18 (Wis. 2014) (same); Gresham v. Edwards, 644 S.E.2d 122, 123-24 (Ga. 2007) (same), *overruled on other grounds*, Brown v. Crawford, 715 S.E.2d 132 (Ga. 2011); Com v. Ricker, \_\_\_ A.3d \_\_\_, 2015 WL 4381095 (Pa. Super. Ct. July 17, 2015) (same).

Notwithstanding this authority, it's worthwhile to note that in North Carolina, while Evidence Rule 1101(b) provides that the rules of evidence, other than with respect to privileges, do not apply to probable cause hearings, the criminal statutes limit the use of hearsay evidence at those hearings. Specifically, G.S. 15A-611(b) provides that subject to two exceptions, “[t]he State must by nonhearsay evidence, or by evidence that satisfies an exception to the hearsay rule, show that there is probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the defendant committed it.” The two exceptions are for (1) reports by experts or technicians and (2) certain categories of reliable hearsay, such as that to prove value or ownership of property. *Id.* at (b)(1) & (2).

### Suppression hearings

State v. Rivera, 192 P.3d 1213, 1214, 1215-18 (N.M. 2008) (confrontation rights “do not extend to pretrial hearings on a motion to suppress”); State v. Woinarowicz, 720 N.W.2d 635, 640-41 (N.D. 2006) (same); Oakes v. Com., 320 S.W.3d 50, 55-56 (Ky. 2010) (same); State v. Fortun-Cebada, 241 P.3d 800, 807 (Wash. Ct. App. 2010) (same); State v. Williams, 960 A.2d 805, 820 (N.J. Super. Ct. App. Div. 2008) (same), *aff'd on other grounds*, 2013 WL 5808965 (N.J. Super. Ct. App. Div. Oct. 30, 2013) (unpublished); People v. Brink, 818 N.Y.S.2d 374, 374 (N.Y. App. Div. 2006) (same); *People v. Felder*, 129 P.3d 1072, 1073-74 (Colo. App. 2005) (same); Vanmeter v. State, 165 S.W.3d 68, 69-75 (Tex. App. 2005) (same); Ford v. State, 268 S.W.3d 620, 621 (Tex. App. 2008), *rev'd on other grounds*, 305 S.W.3d 530 (Tex. Crim. App. 2009).

### Preliminary hearings on the admissibility of evidence

United States v. Morgan, 505 F.3d 332, 339 (5th Cir. 2007) (*Crawford* does not apply to a pretrial hearing on the admissibility of evidence at trial; at the pretrial hearing, grand jury testimony was used to authenticate certain business records); State v. Daly, 775 N.W.2d 47, 66 (Neb. 2009) (same; *Daubert* hearing).

#### Pretrial release & detention determinations

United States v. Hernandez, 778 F. Supp. 2d 1211, 1219-27 (D.N.M. 2011) (confrontation clause does not apply at a pretrial detention hearing; “[T]he Supreme Court has consistently held that the Sixth Amendment is a trial right . . . .”); United States v. Bibbs, 488 F. Supp.2d 925, 925-26 (N.D. Cal. 2007) (“Nothing in *Crawford* requires or even suggests that it be applied to a detention hearing under the Bail Reform Act, which has never been considered to be part of the trial.”); *Godwin v. Johnson*, 957 So. 2d 39, 39-40 (Fla. Dist. Ct. App. 2007) (“The confrontation clause of the Sixth Amendment expressly applies in ‘criminal prosecutions.’ . . . [T]his does not include proceedings on the issue of pretrial release.”)

#### Proceedings to determine jurisdiction under federal law

United States v. Campbell, 743 F.3d 802, 804, 806-08 (11th Cir. 2014) (holding that *Crawford* does not apply to a pretrial determination of jurisdiction under the Maritime Drug Law Enforcement Act; “[T]he Supreme Court has never extended the reach of the Confrontation Clause beyond the confines of a trial.”); United States v. Mitchell-Hunter, 663 F.3d 45, 51 (1st Cir. 2011) (same).

The only contrary authority that I found in the published case law is one Texas decision, that creates a split among sister courts on the issue. See *Curry v. State*, 228 S.W.3d 292, 296-298 (Tex. App. 2007) (disagreeing with *Vanmeter*, cited above, and holding that the confrontation clause applies at pretrial suppression hearings). If you know of other law on point, please chime in!