

EXAMINERS' ANALYSIS OF QUESTION NO. 10

Defendant is arguing his Sixth Amendment right to confrontation is involved because the Sixth Amendment states in pertinent part, "In all criminal prosecutions, the accused shall enjoy...the right to be confronted with the witnesses against him." Because Defendant is being criminally prosecuted, the Sixth Amendment's confrontation clause is in play.

The prosecution seeks to introduce the statements made by Johnson through her report. Defendant claims he is entitled to cross examine or confront Johnson, the report's author and the maker of the challenged statements. Because the People seek to introduce the statements to prove the substance tested is cocaine (i.e. for their truth), the statements are hearsay.

However, Defendant has not objected under the rules of evidence but rather on constitutional confrontation clause grounds. To employ such an argument, the statements must be determined to be "testimonial hearsay" or testimonial evidence. The Sixth Amendment does not apply to non-testimonial hearsay or evidence. See *Crawford v Washington*, 541 US 36 (2004), requiring a classification of "testimonial" for the Sixth Amendment to apply. Once so classified, the statements are inadmissible if the statement maker is unavailable and the accused had no prior opportunity for cross examination. See *Crawford*.

Testimonial evidence includes statements made during police interrogations; ex parte testimony; affidavits; and laboratory, scientific and other reports. One test for determining whether a statement is testimonial is whether the primary purpose of the statement is to establish or prove past events potentially relevant to later criminal prosecution. Stated somewhat differently, a statement will be deemed testimonial where made under circumstances that would lead an objective person to reasonably believe that they would be available for use at a criminal trial.

Applying these principles to the facts at hand yields the conclusion that the statements made in Dr. Johnson's report are testimonial for a number of reasons. First, it is clear that

the report is not simply a statement but rather it is tantamount to an ex-parte affidavit, given it was sworn to by Johnson before a notary public. Second, the purpose for Johnson, an employee of the Michigan State Police crime lab, to test the substance was to determine whether it was cocaine. Third, the request came from the officer in charge of the ongoing prosecution of Defendant. Fourth, the results were being returned to the officer in charge of the case. These facts combine to lead clearly to the conclusion that the statements made by Dr. Johnson were testimonial in nature. See *MelendezDiaz v Massachusetts*, 557 US 305 (2009).

Having determined that the evidence is testimonial, Defendant's right to confrontation can only be satisfied by confrontation. The facts suggest Johnson is not available for trial. The facts further indicate Defendant had no prior opportunity to confront Johnson. Given that (1) the evidence in question is testimonial, (2) that Johnson is unavailable, and (3) Defendant had no prior opportunity to cross-examine her, admission of the report would violate Defendant's Sixth Amendment right to confrontation.

This analysis would be unaffected by the prosecutor's argument for admission based on the report's reliability and trustworthiness. These articulations for admission were sufficient under *Ohio v Roberts*, 448 US 56, 66 (1980). *Crawford* overruled *Roberts* and requires confrontation to satisfy the amendment's requirements.

Some applicants may refer to MCR 6.202. This rule, effective January 1, 2013, delineates notice and demand provisions for appearance of the laboratory expert who authorized a report sought to be introduced. No applicant will lose points for not referencing this rule. The question tests the knowledge of the applicant regarding the confrontation clause, not the recent Michigan court rule's amendment. Points, however, will be assigned for reference to the rule. Without reference to the rule, an applicant can still receive a score of 10 points.