

A defendant was charged with robbery of a savings and loan branch after being arrested near the scene and found with marked bills. An hour after the robbery, the officer investigating the crime videotaped an interview with an eyewitness, in which the eyewitness described the crime and the robber. The officer then arranged for a lineup, at which the teller who was robbed identified the defendant as the robber. The officer later obtained computerized records of that day's deposits and withdrawals at the savings and loan, which allowed the calculation of how much cash was taken in the robbery.

A month later, the teller testified before a grand jury, which indicted the defendant. The teller and the eyewitness both died of unrelated causes shortly afterward. At trial, the defendant's attorney objects to evidence offered against the defendant on the basis that it violates the confrontation clause.

Which of the following, if properly authenticated, may be admitted against the defendant over this objection?

- A. A transcript of the teller's sworn grand jury testimony.
- B. The computerized records from the savings and loan.
- C. The officer's testimony that the teller picked the defendant out of the lineup as the robber.
- D. The videotape of the eyewitness's statement.

Explanation:

Testimonial v. Nontestimonial evidence

Testimonial Evidence made primarily for purpose of criminal investigation or prosecution—eg:

- Witness statements made after apprehension of suspect
- Grand jury testimony
- Lab results
- Transcripts of prior testimony
- Affidavits

Nontestimonial Any other evidence—eg:

- Witness statements made before apprehension of suspect
- Statements made to assist police in ongoing emergency
- 911 calls
- Jail booking records

The Sixth Amendment **confrontation clause** secures a defendant's right to confront witnesses offering **testimonial evidence** against him/her in a **criminal case**. Evidence is **testimonial** in nature if it was made primarily for use in a criminal investigation or prosecution, and it is inadmissible *unless*:

the declarant is **unavailable** as a witness at trial *and*

the defendant had a prior **opportunity to cross-examine** the declarant.

Here, the savings and loan's computerized records of deposits and withdrawals on the day of the robbery were made for ordinary business purposes. Therefore, they are *not* testimonial in nature and can be admitted over the defendant's objection.

In contrast, transcripts of sworn grand jury testimony, identifications at police lineups, and videotapes of eyewitness statements are made primarily for use in a criminal investigation or prosecution. Here, the witnesses who offered this testimonial evidence—the teller and eyewitness—have died and are unavailable for cross-examination. And since there is no indication that the defendant had a prior opportunity to cross-examine them, this evidence is inadmissible (**Choices A, C & D**).

Educational objective:

The confrontation clause limits the admissibility of testimonial evidence—ie, evidence made primarily for use in a criminal investigation or prosecution—against a criminal defendant. Such evidence is inadmissible unless (1) the declarant is unavailable as a witness and (2) the defendant had a prior opportunity to cross-examine the declarant.

References

Crawford v. Washington, 541 U.S. 36, 68 (2004) (defining testimonial hearsay).

Copyright © 2011 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.