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BODY:

In a March 2010 decision, United States v. Burden,[1] the U.S. Court of Appeals for the Second Circuit achieved a relative rarity, tackling two major evidentiary issues in the same case.

Briefly stated, the first issue involved a novel application of the U.S. Supreme Court's path-breaking Confrontation Clause opinion, Crawford v. Washington,[2] to recorded remarks by a wired government informant who did not testify at trial and was thus unavailable for cross-examination. The second issue, more straightforward but also sparsely litigated, concerned the admissibility of prior consistent statements by an impeached government witness, under Fed. R. Evid. 801(d)(1)(B), for rehabilitation purposes.

This article explores the Second Circuit's analysis of each issue, arguing that it got them both wrong and made bad law along the way.

Background

In its seminal *Crawford* ruling, the Supreme Court upset years of Sixth Amendment precedent and revolutionized its Confrontation Clause jurisprudence in one bold stroke. Previously, under Ohio v. Roberts[3] and associated cases, courts had admitted over confrontation objection out-of-court statements bearing adequate indicia of reliability, i.e., those falling within firmly rooted hearsay exceptions or carrying particularized guarantees of trustworthiness. In practice, this

meant that hearsay statements by witnesses who did not testify at trial and had never been cross-examined were nonetheless admissible, despite the Sixth Amendment mandate of face-to-face confrontation, so long as a judge personally found them reliable.

But *Crawford* abrogated *Roberts* and rebuked its amorphous reliability-based approach. Instead, *Crawford* substituted a bright-line inquiry that principally asks whether a proffered hearsay statement qualifies as "testimonial" in nature. If so, the Court explained in an opinion by Justice Antonin Scalia, then the statement is barred by the Confrontation Clause unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine him. While declining to precisely define the term "testimonial" or delimit the class of hearsay statements within its scope, the Court made clear that they minimally include, as relevant here, most responses to interrogations by police and other law enforcement officers.

The Wired Informant

At issue in *Burden* was *Crawford's* application to recorded statements made by a wired government informant to unsuspecting defendants--there, statements regarding a drug transaction. More specifically, the question for the Second Circuit was whether the statements constituted prohibited testimonial hearsay as contemplated in *Crawford* where the informant did not appear at trial. (The court had already determined, in United States v. Saget,[4] that non-testifying co-conspirator statements to a wired informant are exempt from *Crawford's* strictures and therefore admissible.) The court answered in the negative and affirmed the statements' admission on demonstrably flawed reasoning.

Misapprehending 'Crawford'

First, the court emphasized what it viewed as the informant's subjective purpose in making the challenged statements: not to accuse the defendant of a crime--testimony's hallmark per *Crawford*--but simply to elicit incriminating admissions from the defendant himself. As Eighth Circuit Judge John Gibson, sitting by designation, wrote for the *Burden* court:

[T]o the extent that Saunders [the informant] knew his statements could be used at a future trial, this is not a case in which anything Saunders said was spoken for the purpose of accusing. Rather, his comments were made to elicit inculpating statements by others present. [T]he declarant's purpose in speaking matters. [Saunders] was attempting to elicit statements from others, and anything he said was meant not as an accusation in its own right but as bait.[5]

That logic was unobjectionable as far as it went. The problem, however, is that it did not go far enough. For in Davis v. Washington,[6] a post-*Crawford* decision, the Supreme Court prescribed a specific method for divining a hearsay declarant's subjective purpose: a method that is purely objective in character.

In particular, *Davis* clarified that statements are testimonial when made under circumstances objectively indicating that a police interrogation's primary purpose is to prove events potentially relevant to later criminal prosecution. As the justices recently reaffirmed in Michigan v. Bryant:

[T]he relevant inquiry is *not* the subjective or actual purpose of the individuals involved in a particular [citizen-police] encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.[7]

Objectively speaking, the *Burden* informant was undoubtedly acting as an agent of law enforcement investigating a potential crime--and gathering evidence in the process--when he asked what the defendant charged for a quantity of drugs and whistled at the high price. This is true regardless of the actual purpose--non-accusatory or otherwise--that the Second Circuit somehow managed to extrapolate and ascribe to the informant. Indeed, *Davis* itself suggested as much when it assumed that civilian personnel conducting interrogations may be deemed law enforcement operatives, and imputed their acts directly to the police.[8]

Burden's wholly subjective approach thus contravenes *Davis's* objective test for discerning a hearsay declarant's intentions, rendering it both misplaced and unsound.

Truth or Context?

Second, in casting the *Burden* informant as a passive conduit for the defendant's inculpatory admissions, the Second Circuit implied that the informant's statements amounted to mere context for the defendant's own remarks, not hearsay declarations admitted for their truth. This was an apparent attempt to fit the case into *Crawford's* exception for even "testimonial statements [offered] for purposes other than establishing the truth of the matter asserted,"[9] which the Confrontation Clause does not preclude.

But nothing in *Burden* indicates that the jury received a limiting instruction directing it not to consider the informant's statements for their truth. That contrasts with post-*Crawford* cases like United States v. Goldstein,[10] where the jury was expressly and repeatedly so cautioned. Accordingly, because the *Burden* jury was free to consider the informant's statements for any and all purposes including their truth--i.e., that the defendant sold high-priced narcotics--the Second Circuit's second basis for affirming is equally unavailing.

Overly Broad Holding

Third, *Burden* purported to "hold" that the core class of testimonial hearsay outlined in *Crawford* categorically excludes "a confidential informant's statements on a body wire he is wearing."[11] That sweeping decree defies the Second Circuit's own recognition[12] that *Crawford* "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'"[13] Instead, the justices chose to let the law evolve through "context-dependent"[14] case-by-case adjudication based on the totality of the circumstances. By reaching beyond the facts presented to announce an overly broad holding, the *Burden* court stopped that evolution dead in its tracks, short-circuiting the traditional common law decision-making process that *Crawford* envisioned and *Bryant* exemplifies.

Prior Consistent Statements

The second evidentiary issue addressed in *Burden* involved the admissibility of a prior consistent statement under Fed. R. Evid. 801(d)(1)(B). A crack cocaine dealer and apparent cooperating witness testified at the *Burden* trial that one of the defendants had shot him. On cross-examination, the witness was impeached with an earlier statement to police casting doubt on his identification.

On redirect, the government was permitted to introduce another statement, written a month later, in which the witness also identified the defendant as the shooter. The Second Circuit affirmed, opining that the written statement was properly admitted to rebut a charge of recent fabrication.

Misapplying 'Tome.'

In Tome v. United States,[15] however, the Supreme Court adorned Rule 801(d)(1)(B) with a "premotive" gloss, holding prior consistent statements inadmissible unless made before the alleged motive to fabricate arose. And in United States v. Forrester,[16] the Second Circuit recognized that such a motive generally arises upon a suspect's arrest.

Because the written statement in *Burden* presumably post-dated the cooperator's drug arrest and attending motive to lie, it had no legitimate potential to rehabilitate or tendency to rebut any recent fabrication. Rather, its true purpose was to reinforce by repetition the cooperator's trial testimony, bolstering his credibility with a post-motive, out-of-court identification. It follows that the written statement should have been excluded as inadmissible hearsay.

Conclusion

Having misconstrued a pair of vital evidentiary issues--the nature of testimonial hearsay under *Crawford* and the

contours of *Tome's* premotive rule--*Burden* seems ripe for en banc reconsideration in an appropriate case.

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Endnotes:

1. 600 F.3d 204 (2d Cir.), cert. denied, *131 S. Ct. 251 (2010)*.

2.541 U.S. 36 (2004).

3. 448 U.S. 56 (1980).

4. 377 F.3d 223 (2d Cir. 2004).

5. *600 F.3d at 225*.

6. 547 U.S. 813 (2006).

7. No. 09-150, --*S.Ct.*--, *2011 WL 676964, at *10 (Feb. 28, 2011)* (footnote omitted) (emphasis supplied).

8. See *547 U.S. at 823 n.2*.

9. *541 U.S. at 59 n.9* (citation omitted).

10. 442 F.3d 777, 784-85 (2d Cir. 2006).

11. *600 F.3d at 225 n.7*.

12. See ibid. at 224.

13. *541 U.S. at 68 n.10*.

14. *Bryant, 2011 WL 676964, at *11*.

15. 513 U.S. 150 (1995).

16. 60 F.3d 52, 64 (2d Cir. 1995).

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