

NO. A05-2264

State of Minnesota
In Supreme Court

Derrick Ramon Dukes,

Appellant,

v.

State of Minnesota,

Respondent.

APPELLANT'S BRIEF

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PROCEDURAL HISTORY

- April 1, 1994 One man shot and another killed in St/ Paul following attempted robberies. Dukes and two co-defendants arrested.
- September 21, 1994 Jury trial before the Honorable Salvador M. Rosas. Dukes found guilty of aiding and abetting attempted aggravated robbery of B [REDACTED] C [REDACTED] (Count 1), attempted first degree murder of C [REDACTED] (Count 2), and first degree murder of J [REDACTED] M [REDACTED] (Count 3).
- October 20, 1994 Dukes sentenced to life in prison for first degree murder and 180 months consecutive for attempted first degree murder.
- February 16, 1996 Minnesota Supreme Court affirms Dukes' conviction and sentence; *State v. Dukes*, 544 N.W.2d 13 (Minn. 1996) (*Dukes I*).
- September 20, 1999 Petition for Postconviction Relief filed in district court.
- February 17, 2000 Evidentiary hearing held on Petition.
- March 20, 2000 Petition denied by district court.
- February 1, 2001 Minnesota Supreme Court remands for supplemental evidentiary hearing. *Dukes v. State*, 621 N.W.2d 246 (Minn. 2001) (*Dukes II*).
- October 10, 2001 Supplemental evidentiary hearing held in district court.
- February 7, 2002 Petition for Postconviction Relief again denied by district court.
- May 15, 2003 Minnesota Supreme Court affirms. *Dukes v. State*, 660 N.W.2d 804 (Minn. 2003) (*Dukes III*).
- October 26, 2004 Second Petition for Postconviction Relief filed in district court.
- October 21, 2005 District court denies second Petition.
- November 10, 2005 Notice of Appeal to Minnesota Supreme Court timely filed.

LEGAL ISSUES

I. Whether *Crawford v. Washington* should be applied retroactively to Dukes' 1994 conviction where it announced a bedrock procedural rule essential to the fairness and accuracy of a trial?

The postconviction court ruled that Crawford v. Washington should not be applied retroactively.

Apposite Authorities

Crawford v. Washington, 541 U.S. 36 (2004).
Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005).
Danforth v. State, 700 N.W.2d 530 (Minn. App. 2005), review granted (Minn. Oct. 18, 2005)

II. Whether the error in admitting testimonial evidence of a codefendant's guilty plea transcript where Dukes had no opportunity to cross examine the witness was harmless?

The postconviction court did not rule.

Apposite Authorities

State v. Shoen, 598 N.W.2d 370 (Minn. 1999).
State v. Pride, 528 N.W.2d 862 (Minn. 1995).

STATEMENT OF THE CASE

This is an appeal from a denial of a Petition for Postconviction Relief in a first degree murder case. Dukes' previous challenges to his conviction include a direct appeal and a prior petition for post-conviction relief. This last challenge ended on January 12, 2004, when the United States Supreme Court declined Dukes' Petition for Writ of Certiorari from the decision of the Minnesota Supreme Court in *Dukes v. State*, 660 N.W.2d 804 (Minn. 2003). *Dukes v. Minnesota*, 540 U.S. 1107 (2004).

On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), holding that prior testimonial evidence is inadmissible in a criminal trial unless the declarant is unavailable and the accused had the opportunity for cross examination. Dukes sought to have *Crawford* applied retroactively. Under *Crawford* the admission of the transcript of a codefendant's guilty plea at Dukes' trial violated his right to confrontation where Dukes never had the opportunity to cross examine this witness.

Crawford should be applied retroactively. *Crawford* announced a watershed rule that altered our understanding of a bedrock procedural element essential to the fairness of a trial: the right to confrontation. The error was not harmless and warrants a new trial.

STATEMENT OF FACTS

This case arises out of the shooting death of J ■ M ■ and the attempted shooting of B ■ C ■. Both incidents occurred on April 1, 1994, within blocks of each other in St. Paul. The facts of this case are set forth in detail in *State v. Dukes*, 544 N.W.2d 13 (Minn. 1996).

This second collateral attack to Dukes' convictions again centers on the admission of co-defendant Kevin Lewis' guilty plea. The State offered a plea bargain to Lewis in order to obtain Mr. Lewis' testimony at the trials of Dukes and a third co-defendant, Steve Morrison. *Dukes*, 544 N.W.2d at 17. According to the plea agreement initially negotiated between Lewis and the State, Lewis was to plead guilty to attempted first degree murder of C ■ and intentional second degree murder of M ■. In exchange for the pleas, the State was prepared to recommend concurrent sentences for both convictions (G.P.T. at 5.)¹ Mr. Lewis' counsel anticipated a sentence of 366 months based on the plea negotiations (G.P.T. at 5.) Implicit in Lewis' plea agreement was the State's expectation that Lewis would testify against Dukes at trial. *Dukes*, 544 N.W.2d at 17. (*See also* G.P.T. at 3.) Lewis ultimately did not testify in Dukes' trial.

Lewis' withdrawn guilty plea was read to the jury nearly verbatim at Dukes' trial. (T. at 186-214.)² After the reading the prosecutor told the jury "Mr. Lewis has not appeared to testify. He has withdrawn his guilty plea. He will stand trial. Thank you." (T. at 214.)

¹ "G.P.T." refers to the transcript from Lewis's guilty plea; See Attachment A to first Petition for Postconviction Relief.

² "T" refers to the transcript from Dukes' trial.

Lewis' guilty plea included the following statements inculcating Dukes in the murder plot:

- Dukes drove the car involved in the crime to Saint Paul (T. at 188);
- Dukes had a .32 semi-automatic (T. at 188-89);
- Three participants (Lewis, Morrison and Dukes) were driving to Saint Paul "[t]o rob someone." (T. at 189-90);
- Dukes drove up next to Mr. C [REDACTED] (T. at 191);
- They (all three men) were going to rob Mr. C [REDACTED] (T. at 191-93);
- Dukes drove off after the shooting (T. at 193-95);
- All three men were acting together (T. at 194);
- "[W]e (Lewis and Dukes) knew he (Morrison) was going to rob J [REDACTED] M [REDACTED]." (T. at 195);
- Dukes drove over to where Morrison went, in front of M [REDACTED]'s car, and stopped (T. at 196);
- All of them went to Saint Paul to rob somebody (T. at 198);
- Dukes was still in the car after the shooting (*Id.*);
- He drove away with the shooters and dropped Morrison off (T. at 199);
- Lewis, "Derrick Dukes and Steve Morrison left Minneapolis to go to Saint Paul intending to rob someone" (T. at 200);
- After the shooting Dukes took both pistols from Lewis and Morrison (T. at 201-02);
- Dukes cleaned off the pistols and put them in his bedroom, and then gave one pistol to Morrison (T. at 202.)

The prosecutor relied heavily upon Lewis' withdrawn guilty plea in her final argument.

Her references to Lewis' testimony included:

- Mr. Lewis said that "they were going to Saint Paul for the purpose of robbing people" (T. at 644);
- Lewis, Morrison and Dukes headed to Saint Paul to commit robberies (T. at 647);
- Dukes supplied the gun to Lewis (*Id.*);
- Dukes supplied the gun and Dukes needed money (T. at 648);
- "You heard through Kevin Lewis' plea transcript" (stated twice) Dukes' gun, his need for money, their intent to rob (T. at 649-50);
- Lewis said Dukes was driving (T. at 652);
- "Lewis said through his transcript that 'we knew' meaning Mr. Lewis and the defendant knew 'what Mr. Morrison was going to do when he pulled his gun out. . .'" (*Id.*);
- Dukes had a choice to follow Morrison or take off, "that's in Mr. Lewis' plea," (T. at 654);
- Dukes gave Lewis a semiautomatic (*Id.*);
- After M█████'s murder Dukes takes the guns back and cleans them, (T. at 655-56);
and
- Dukes gave Lewis the gun that killed J█████ M█████ (T. at 657).

ARGUMENT

CRAWFORD ANNOUNCED A WATERSHED RULE OF CRIMINAL PROCEDURE THAT SHOULD BE APPLIED RETROACTIVELY. UNDER *CRAWFORD*, DUKES WAS DENIED HIS RIGHT TO CONFRONTATION. THE STATE CANNOT SHOW THAT SUCH ERROR WAS HARMLESS. DUKES IS THEREFORE ENTITLED TO A NEW TRIAL.

I. *Crawford* applies retroactively.

A. General Rule: New constitutional rules of criminal procedure nonretroactive.

Minnesota courts follow the rulings of the United States Supreme Court in determining whether a new rule of federal constitutional criminal procedure is applied retroactively. *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004). Ordinarily, a defendant whose conviction has already become final when the new rule is announced is not entitled to retroactive application of such new rule. *Id.* (citing *Teague v. Lane*, 489 U.S. 288, 310-11 (1989)). There are three steps in applying *Teague* to determine whether a new rule of criminal procedure applies to a case on collateral review:

First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by precedent then existing, compels the rule. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 524 U.S. 406, 411 (2004) (internal citations omitted).

B. Dukes' conviction final in 1996.

A conviction becomes final when a “judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari [has been filed and] finally denied.” *O’Meara*, 679 N.W.2d at 339 (citing *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)). Dukes’ conviction became final on May 17, 1996, 90 days after entry of the Minnesota Supreme Court’s opinion in *State v. Dukes*, 544 N.W.2d 13 (Minn. 1996); when the time to file a petition for a writ of certiorari expired. *See* Sup. Ct. R. 13.1.

C. Is the *Crawford* rule actually new?

The next step in the *Teague* analysis is to determine the “legal landscape” at the time the defendant’s conviction became final. A rule is “new” where it “‘breaks new ground,’ ‘imposes a new obligation on the States or the Federal Government,’ or was not ‘dictated by precedent existing at the time the defendant’s conviction became final.’” *Graham v. Collins*, 506 U.S. 461, 467 (citing *Teague*, 489 U.S. at 301) (emphasis in original).

Crawford’s rule is not new but is rather a restatement of the long established right of an accused to confront the witnesses against him. Writing for the majority in *Crawford*, Justice Scalia charted the historical roots of the Confrontation Clause and thoroughly reviewed prior Supreme Court cases interpreting the clause. Looking back as far as Roman times, he found that “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.” *Crawford*, 541 U.S. at 50. He noted that the “historical record” supported the proposition “that the Framers would not

have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Id.* at 53-54.

Against this background, *Crawford's* rule can hardly be said to be new.

To the contrary, under the Supreme Court’s analysis, the rule is the principal reason why the Confrontation Clause was adopted in the first place.

As Justice Scalia points out, the Supreme Court’s Confrontation Clause jurisprudence has been largely consistent with these principles. *Id.* at 57. Justice Scalia noted that, beginning with *Mattox v. United States*, 156 U.S. 237 (1895), the Court’s Confrontation Clause cases consistently adhere to the “holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine.” *Crawford*, 541 U.S. at 57 (citing *Mancusi v. Stubbs*, 408 U.S. 204, 213-216 (1972); *California v. Green*, 399 U.S. 149, 165-168 (1970); *Pointer v. Texas*, 380 U.S. 400, 406-408 (1965)).

In ruling Lewis’ guilty plea testimony admissible, both the trial court and this Court relied on *Williamson v. United States*, 512 U.S. 594 (1994). *Dukes*, 544 N.W.2d at 18-19. *Williamson* does not dictate that the admission of prior self-inculpatory testimony from the guilty plea of an unavailable witness, where the accused did not have an opportunity to cross-examine the witness, comports with the Sixth Amendment.

Williamson is not a Confrontation Clause case. *Williamson* is a hearsay case. Its holding is limited to the scope of the statement against penal interest exception under Fed. R. Evid. 804(b)(3). The *Williamson* court specifically declined to address *Williamson’s* Confrontation Clause claim. *Williamson*, 512 U.S. at 605. The Court’s

intimation that a genuine self-inculpatory statement would be admissible under the Confrontation Clause is dicta and not binding authority. *See id.* at 605.

Thus, the legal landscape as of May 16, 1996, compelled the rule that the prior testimony of an unavailable witness was not admissible under the Confrontation Clause where the accused had not had an opportunity to cross-examine the witness. *Crawford* did not break new ground; it followed the clear path of Confrontation Clause jurisprudence that had existed for over 100 years, if not longer. *Crawford's* rule is not new and should be applied retroactively.

D. If “new,” the *Crawford* rule falls within the “watershed rule” exception to nonretroactivity.

Under *Teague*, a new constitutional rule of criminal procedure is applied retroactively to cases on collateral review when the rule “(1) places certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to proscribe, or (2) requires the observance of those procedures that ... are implicit in the concept of ordered liberty,” i.e. “a watershed rule of criminal procedure that alters ‘our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.’” *Meemken v. State*, 662 N.W.2d 146, 149 (Minn. App. 2003) (citing *Teague*, 489 U.S. at 307, 311) (emphasis in original). A watershed rule is one that improves the accuracy of a trial. *Id.*

The rule announced in *Crawford* falls within the second exception. Subjecting a witness who has given testimonial evidence to cross examination improves the accuracy of any trial and is essential to the fairness of any conviction.

Justice Scalia could not have been any clearer in his *Crawford* opinion: the right to confront one's accusers is a "bedrock procedural guarantee." *Crawford*, 541 U.S. at 42. A prior opportunity to cross-examine, the Supreme Court recognized, was historically a prerequisite to the admissibility of testimonial evidence, and dispositive of the evidence's reliability. *Id.* at 55-56. The Confrontation Clause reflects the judgment that a prior opportunity to cross-examine a witness who has given testimonial evidence is "how reliability can best be determined." *Id.* at 61. As Justice Byron White succinctly stated; cross-examination is the "greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158 .

Crawford makes clear that an opportunity to cross examine is "the constitutionally prescribed method of assessing reliability." 541 U.S. at 62 The Court ruled that the flexible test of *Ohio v. Roberts*, 448 U. S. 56 (1980), should not be applied when determining whether to admit "testimonial" evidence. *Crawford*, 541 U.S. at 62.³ In doing so, the Supreme Court made clear that when it comes to testimonial evidence, there is no substitute for cross examination:

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Id.

The United States Supreme Court has twice before given retroactive application to cases announcing "new rules" under the Confrontation Clause. In *Barber v. Page*, 390 U.S. 719 (1968), the Court held that admission of an absent witness' preliminary hearing

³ "Testimonial" was not precisely defined but includes at a minimum "prior testimony at a preliminary hearing, before a grand jury, or at a former trial." *Crawford*, 541 U.S. at 68.

testimony violated a defendant's right to confrontation unless the State made a good-faith effort to secure the witness' presence. Noting that the inability to cross-examine a witness whose preliminary hearing testimony is admitted at trial may have a "significant effect on the 'integrity of the fact-finding process,'" the Supreme Court later made the *Barber* rule retroactive. *Berger v. California*, 393 U.S. 314, 315 (1969) (citation omitted).

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that admission at a joint trial of a defendant's extra-judicial statement implicating a codefendant violated the codefendant's Sixth Amendment right of cross-examination under the Confrontation Clause. The *Bruton* rule was applied retroactively because the error at issue "went to the basis of fair hearing and trial because the procedural apparatus never assured the (petitioner) a fair determination' of his guilt or innocence." *Roberts v. Russell*, 392 U.S. 293, 294 (1968) (citation omitted).

The rule in *Crawford* should also be given retroactive application as it is truly a bedrock procedural element. The Ninth Circuit so ruled in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005). Bockting's conviction for sexual abuse became final in 1993. His conviction was largely based on his stepdaughter's police interview. The stepdaughter did not testify at trial. Bockting later sought to collaterally attack his conviction under *Crawford*.

The Ninth Circuit was careful to heed the Supreme Court's admonition that the class of retroactive "rules is extremely narrow'" *Bockting*, 399 F.3d at 1016 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)). Nonetheless, the Ninth

Circuit found that *Crawford's* cross-examination requirement implicated the accuracy of a criminal proceeding and therefore merited retroactive application. *Bockting*, 399 F.3d at 1016-17. The *Bockting* Court noted that *Crawford* announced a rule that implicated the "fundamental fairness and accuracy of the criminal proceedings." *Id* at 1016-20.

The Ninth Circuit also held that the fact that Confrontation Clause violations are subject to harmless error review has nothing to do with whether *Crawford* announced a watershed rule or not. *See id.* at 1020. The watershed rule concept is concerned with the accuracy of a criminal trial while harmless error review concerns the weight of an error. "Accuracy and measurability are different concepts...." *Id.* Thus, the Court held, the *Crawford* rule is still a watershed rule though it is subject to harmless error review. *Id.* The *Crawford* rule must be applied retroactively, the Ninth Circuit concluded, as it "is one without which the likelihood of accurate conviction is seriously diminished." *Id.* at 1021. Other courts agree with *Bockting's* conclusions. *See People v. Encarnacion*, 6 Misc.3d 1027(A), 800 N.Y.S.2d 352 (Table), No. 5804/95, 2005 WL 433252, at 8-9 (N.Y. Sup. Ct. Feb. 23, 2005) (stating "a watershed rule of constitutional criminal procedure that excludes [testimonial hearsay] evidence satisfies the final prerequisite for retroactive application under *Teague*"); *People v. Carrieri*, 778 N.Y.S.2d 854, 855 (N.Y. Sup. Ct. 2004) (stating that the *Crawford* rule affects the fact or truth finding process itself); *People v. Watson*, 5 Misc.3d 1013(A), 798 N.Y.S.2d 712 (Table), No. 7715/90, 2004 WL 2567124, at 7 (N.Y. Sup. Ct. Nov. 8, 2004) (concluding that *Crawford* states a "watershed rule" and must be applied retroactively on collateral review); *see also Tidwell v. Calderon*, 134 Fed.Appx. 141 (9th Cir. 2005); *Kopp v. Hill*, No. CV 02-222-MA, 2005 WL 1389062 (D.Or. June 7, 2005); *Grosvenor v. Hill*, No. CV 03-1265-MA, 2005 WL

1173320 (D.Or. Apr. 26, 2005); *People v. Dobbin*, 791 N.Y.S.2d 897, 905 (N.Y. Sup. Ct. 2004).

Examining the right to confrontation under Article 1, § 6 of the Minnesota Constitution shows how essential cross examination is to a trial as a truth finding process and to the fairness of any conviction. In a prescient dissent in *State v. Lanam*, 459 N.W.2d 656 (Minn. 1990), Justice Kelly wrote how both the framers of the Minnesota Constitution and the Minnesota Supreme Court had historically “tended to maximize the basic constitutional right that an accused be afforded the right to confront the accuser.” *Lanam*, 459 N.W.2d at 663 n.1 (Kelly, J. dissenting). Justice Kelly emphasized that “[t]he right to confrontation and the resultant right to cross-examination, as a corollary, are part of our tradition of fair play and a means of reaching the truth in the trial.” *Id.* at 664. Justice Kelly concluded;

Minnesota strongly prefers that an accusing witness present evidence in court and that the accusation not be permitted by hearsay testimony. This court has repeatedly addressed the primacy of the concerns of the confrontation clause, to ensure that the fact finder has an adequate basis upon which to evaluate the truthfulness of every statement.

Id. at 666.

Putting finality over fundamental fairness and the integrity of the truth finding process, the postconviction court found that *Crawford* did not create a watershed rule of criminal procedure. The district court relied on the Minnesota Court of Appeals’ decision in *Danforth v. State*, 700 N.W.2d 530 (Minn. App. 2005), *review granted* (Minn. Oct. 18, 2005), and ruled that *Crawford* would not be applied retroactively to Dukes’ 1994 conviction. Both the district court and the *Danforth* panel erred in not applying *Crawford* retroactively.

The *Danforth* court rejected the holding in *Bockting* and instead followed the conclusion of the other five federal circuit courts that have considered the issue. These courts have held that the rule announced in *Crawford* does not meet the test for retroactive application under *Teague*. *Danforth*, 700 N.W.2d at 531 (citing cases). These courts have generally made a qualitative assessment that *Crawford's* rule does not rise to the level of the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the right to counsel is fundamental). See e.g., *Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. 2005); *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004).

The *Crawford* decision itself as well as the holdings in *Barber* and *Roberts* demonstrate that such assessment is mistaken. Rather, *Crawford's* rule, like *Gideon's*, is amongst that small group that merit retroactive application. As has been the case with other “new” confrontation clause rules, *Crawford's* rule improves the accuracy of a trial and is essential to the fairness of any conviction.

This Court should follow the reasoning in *Bockting* and find that the *Crawford* rule is a watershed rule that must be applied retroactively. *Crawford* leaves no doubt: where testimonial evidence is concerned, an opportunity for cross-examination is essential to reliability. A conviction cannot be fair where it is based on unreliable evidence. *Crawford* recognizes that the likelihood of an accurate conviction is seriously diminished when testimonial evidence is admitted against the accused without an opportunity for cross-examination. The *Crawford* rule is a watershed rule that should be applied retroactively.

II. The constitutional error was not harmless.

Dukes' right to confrontation was clearly violated under *Crawford* when the trial court admitted the transcript of Lewis' guilty plea where Dukes had no prior opportunity for cross-examination. The postconviction court did not rule on whether such error was harmless. In the interests of judicial efficiency and economy, Dukes asks that this Court rule that he is entitled to a new trial as the prosecution did not meet its burden of showing that the error was harmless.

The prosecution bears the burden of establishing that any error was harmless. *State v. Shoen*, 598 N.W.2d 370, 377 n.2 (Minn. 1999). As this case involves error of constitutional magnitude, the burden is beyond a reasonable doubt. *Shoen*, 598 N.W.2d at 377. "For an error to be harmless beyond a reasonable doubt, the guilty verdict actually rendered . . . [must be] surely unattributable to the error." *Id.* (Internal quotations and citations omitted).

Courts conducting harmless error review in cases where cross-examination has been improperly limited consider the following factors in their analysis:

[T]he importance of the witness' testimony in light of the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

State v. Pride, 528 N.W.2d 862, 867 (Minn. 1995) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). While this case involves cross-examination that was improperly eliminated, the factors do help measure the harm that resulted from the improper admission of Lewis' guilty plea.

Lewis' testimony cannot be dismissed as mere background information. It provided the jury with critical inculpatory evidence going to Dukes' state of mind. Lewis' testimony directly implicated Dukes in the robbery/murder plot by putting Dukes in both the planning and cover up stages of the crime. Evidence of a defendant's conduct before and after a crime directly bears on whether he is guilty as an aider and abettor. *State v. Ulvinen*, 313 N.W.2d 425, 428 (Minn. 1981). Through Lewis, the state was able to involve Dukes in planning the crimes, including having him provide one of the guns; to involve Dukes in the execution of the crime by giving Lewis his gun knowing what he was going to do with it; and to involve Dukes in efforts to avoid detection by cleaning the guns down after the shootings. This testimony was so important to the prosecution's case that 13 of the 23 pages of the state's closing argument are based on Lewis' testimony.

The testimony was not cumulative. No other witness was able to provide the purported inside information that Lewis gave through his plea. The prosecution had no source of evidence other than Lewis to put Dukes in the planning and cover up phase. Without Lewis, the state would have been left with little more than Dukes' mere presence in the car.

The next factors also demonstrate the harm from the violation. Because Lewis was the only source for the purported inside information, there is little if any corroborative evidence on these material points. There was also no contradicting evidence. In fact, Lewis' testimony effectively went untested and unchallenged. This key witness was never cross-examined. In so far as Lewis was concerned, Dukes never had the opportunity to use the greatest tool he had to discover the truth of the witness' testimony.

Finally, the strength of the state's case would have been significantly less without Lewis' testimony. His testimony was vital to the essential elements of knowledge and intent. In its initial affirmance of Dukes' conviction, this Court noted:

We believe the evidence of intent was strong enough that the jury could not rationally have acquitted appellant on the first-degree charge, where appellant and his accomplices planned the robbery, armed themselves with loaded handguns, proceeded to St. Paul for the express purpose of executing their plan, located two victims, and finally, in the course of their robbery spree, shot M [REDACTED] in the back of the head at close range.

State v. Dukes, 544 N.W.2d at 20. Almost all of this "strong evidence" of intent is solely based on Lewis's guilty plea testimony. Without Lewis, the evidence of intent was weak.

The prosecution cannot show that Dukes' conviction was surely unattributable to the error in admitting the testimonial evidence of Lewis' guilty plea. There certainly is a reasonable doubt as to whether Dukes' convictions are to some extent attributable to the erroneous admission of the evidence. The error was therefore not harmless and Dukes is entitled to a new trial.

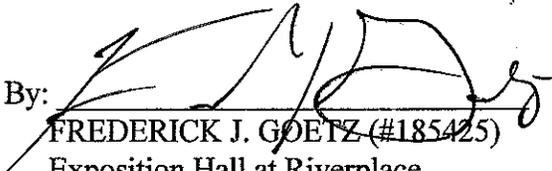
CONCLUSION

Crawford v. Washington should be applied retroactively to Dukes' case. Under *Crawford*, the admission of Lewis' guilty plea transcript violated Dukes' right to confrontation where Dukes had no opportunity to cross-examine Lewis. Such error was not harmless. Dukes is therefore entitled to a new trial.

Dated this 3rd day of January, 2005.

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