

Confrontation of Witnesses - Standard Language

A. Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to...be confronted with the witnesses against him...". U.S. Const. Amend. VI.

1. Application pre-*Crawford v. Washington*

Formerly, in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), an unavailable witness's statement was admissible against a criminal defendant if the statement showed "adequate indicia of reliability." The United States Supreme Court defined "adequate indicia of reliability" as "firmly rooted hearsay exception[s]" or statements which bear "particularized guarantees of trustworthiness." *Id.*

2. Application post-*Crawford v. Washington*

"Where testimonial evidence is at issue...the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004). In other words, where a witness has or will provide testimonial evidence, and is unavailable to testify in Court, that witness's testimony is inadmissible unless the defendant has had a prior opportunity to cross examine that witness.

The Supreme Court did not define what constituted testimonial evidence in *Crawford*. Very generally, the Court described it as "typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51. The Court provided a few specific examples of testimonial evidence. "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.." *Id.* at 68.

3. Applicability of Sixth Amendment in Immigration Proceedings

Although *Crawford* had a significant impact on evidentiary issues in criminal trials, it should have no impact in immigration proceedings because the Ninth Circuit and Board of Immigration Appeals have previously concluded that the sixth amendment does not apply in immigration proceedings. See *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (since deportation and removal proceedings are civil, they are "not subject to the full panoply of procedural safeguards accompanying criminal trials"); *Matter of Abellana and Donovan*, 14 I&N Dec. 262, 265 (BIA 1973) ("Counsel contends that respondent's Sixth Amendment right to confront witnesses and cross-examine evidence was violated. The Sixth Amendment applies to criminal cases. Deportation proceedings are civil in nature.").

B. Other Confrontation Rights In Immigration Proceedings

An alien's right to confront witnesses in removal proceedings is dictated by the Fifth Amendment and the INA. See *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674 (9th Cir. 2005).

1. Fifth Amendment

The Fifth Amendment's Due Process Clause applies to all persons within the United States, including aliens, and requires that aliens be given a reasonable opportunity to confront and cross-examine witnesses. *Hernandez-Guadarrama*, 394 F.3d at 681 (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

Because the right to confront a witness falls under the Fifth Amendment, an alien must show that:

- (1) the absence of live testimony rendered the proceeding "so fundamentally unfair that the alien was prevented from reasonably presenting his case" *Platero-Cortez v. INS*, 804 F.2d 1127, 1132 (9th Cir.1986); and
- (2) he was prejudiced, which means that the outcome of the proceeding may have been affected by the alleged violation. See *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999); *Hartooni v. INS*, 21 F.3d at 336, 340 (9th Cir. 1994).

2. INA Provision

8 U.S.C. § 1229a(b)(4)(B); INA § 240(b)(4)(B) - Removal Proceedings

"[T]he alien shall have a reasonable opportunity...to cross-examine witnesses presented by the Government..."

8 C.F.R. § 1240.10(a)(4) - Hearing

"In a removal proceeding, the immigration judge shall...[a]dvice the respondent that he or she will have a reasonable opportunity to...cross-examine witnesses presented by the government..."

The Ninth Circuit has held that these statutory guarantees cannot be fulfilled "if the government's choice whether to produce a witness...is wholly unfettered." *Baliza v. INS*, 709 F.2d 1231, 1234 (9th Cir. 1983). Looking at the Ninth Circuit's case law over time, there seems to have been some strengthening of the Court's preference for live testimony. In an opinion from 1988, the Ninth Circuit stated that "the government must make a reasonable effort in INS proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her." *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988). In a more recent case, the Ninth Circuit ruled that "the INS may not use an affidavit from an absent witness unless the INS first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing." *Hernandez-Guadarrama*, 394 F.3d at 681 (2001). The latter language suggests an evidentiary burden that seemingly did not formerly exist.

One element of the analysis remains unchanged, the Government is obligated to prove reasonable efforts to provide the alien an opportunity for cross examination of its witnesses regardless of the fact that the burden is on the alien to demonstrate eligibility for relief. *Cunanan*, 856 F.2d at 1375.

Whether the Government has shown that it made reasonable efforts to provide cross examination tends to turn on the specific facts of each case, there are few bright line rules.

C. Asylum Officer Notes

In *Singh v. Gonzales*, 403 F.3d 1081, 1089-90 (9th Cir. 2005) the Ninth Circuit rejected an IJ's credibility analysis partially because his adverse finding was based on the asylum officer's notes in the "Assessment To Refer." The Circuit Court found that the notes were "unreliable." Although the opinion suggests that the reliability problem stemmed from the fact that the asylum officer did not testify, this is only one of many problems with the notes the Court identified. Based on the analysis set forth above, there is no reason why the notes should have been admitted unless the DHS showed that the officer was unavailable. Thus, one would anticipate a stronger statement from the Court, e.g. it was improper for the IJ to have included information derived from the notes in his credibility analysis as the asylum officer had not testified.

"In this case...the asylum interviewer did not testify, and the reliability of Singh's Assessment To Refer is insufficiently supported by the record. On the critical question of when Singh's second and third arrests occurred, for example, the assessment states that the asylum officer "pointed out" to Singh that his dates were inconsistent. With only a written summary, but no transcript or contemporaneous notes nor any testimony by the asylum officer...the asylum officer's Assessment To Refer is not sufficient evidence of what Singh said to permit evaluation of an asserted conflict...The Assessment To Refer does not contain any record of the questions and answers at the asylum interview, or other detailed, contemporary, chronological notes of the interview, but only a short, conclusory summary-essentially, an opinion. There is no transcript of the interview. There is no indication of the language of the interview or of the administration of an oath before it took place. The asylum officer did not testify at the removal hearing. Finally, the applicant was not asked at the hearing before the IJ about the accuracy of the asylum officer's report or given any opportunity to explain the discrepancies the asylum officer perceived. We conclude that under these circumstances, the Assessment To Refer, standing alone, is not substantial record evidence supporting the IJ's adverse credibility ground."