

***Crawford v. Washington:* Confrontation One Year Later**

Jessica Smith

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Contents

I. Introduction	1	B. Exceptions to the <i>Crawford</i> Rule	26
II. The <i>Crawford</i> Case	3	1. Forfeiture by Wrongdoing	26
III. Post-<i>Crawford</i> Case Law from North Carolina and around the Nation	7	2. Statements Offered for a Purpose Other Than Truth of the Matter Asserted	27
A. The Testimonial/Nontestimonial Distinction	7	3. Dying Declarations	28
1. Grand Jury Testimony, Plea Allocutions, and Prior Trial Testimony	7	4. Defendant's Own Statements	28
2. Co-Defendants' and Accomplices' Statements During Police Interrogations or While in Custody	7	C. Availability for Cross-Examination	28
3. Co-Conspirators' Statements in Furtherance of a Conspiracy	8	D. Establishing Unavailability	30
4. Business Records and Affidavits	9	E. Prior Opportunity to Cross-Examine	30
5. Test Reports and Related Affidavits	10	1. Prior Trials	30
a. Blood and Blood Alcohol Testing	10	2. Depositions	31
b. Autopsy Reports	10	3. Preliminary Hearings	31
c. Drug Testing	11	F. Waiver and Invited Error	31
6. Victims' Statements to Police Officers	11	G. Retroactivity	32
7. 911 Calls	16	H. Proceedings to Which <i>Crawford</i> Applies	33
8. Victims' Statements to Medical Personnel	17	1. Penalty Phase of Capital Trials	33
9. Witnesses' Statements to Police Officers	18	2. Noncapital Sentencing	33
10. Informants' Statements	18	3. Proceedings to Revoke Probation or Supervised Release	33
11. Statements to Friends, Family, and Similar Private Parties	19	4. Proceedings to Find Minor Abused and Dependent	34
12. Diary Entries	19	5. Sex Offender Proceedings	34
13. Excited Utterances	19	I. Harmless Error Review	34
14. Children's Statements	21	J. Confrontation Test for Nontestimonial Evidence	34
a. Statements to Police Officers	21		
b. Statements to Social Workers and Child Protective Services Workers	22		
c. Statements to Medical Personnel	23		
d. Statements to Family and Friends	24		
e. Other Statements by Children	25		
15. Wiretap Recordings	25		
16. Statements to Prosecutors	25		
17. Redacted Co-Defendants' Statements Not Offered against Defendant	26		
18. Miscellaneous Cases	26		
		Appendix: A Tool for the Trial Judge: The <i>Crawford</i> Inquiry	35

I. Introduction

On March 8, 2004, the United States Supreme Court issued its decision in *Crawford v. Washington*.¹ In *Crawford*, the Court struck a new course for confrontation clause analysis.² *Crawford* held that under the confrontation clause, testimonial statements of witnesses who are not subject to cross-examination at trial may be admitted only if the witness is unavailable and there has been a prior opportunity for cross-examination. Notwithstanding the centrality of the concept of “testimonial” statements to the new analysis, the Court declined to comprehensively define that term. As a result, when the lower courts were flooded with *Crawford* objections and assertions of error, they were forced to muddle through the new analysis, sometimes with wildly varying conclusions.

This publication is not designed to set out a theory for confrontation clause analysis or to critique any court’s confrontation decisions. Rather, it is designed to serve as a practical tool for North Carolina judges who find themselves faced with *Crawford* issues.

The publication begins with a summary of the *Crawford* case. Because the case is so revolutionary, a detailed understanding of its facts and the basis and limitations of its holding is critical. It continues with a catalogue of post-*Crawford* cases from North Carolina and around the nation, with a focus on published decisions. The catalogue includes cases reported through Westlaw’s KeyCite Alert service through March 8, 2005, one year after the *Crawford* decision was issued. The North Carolina courts have yet to address many *Crawford*-related issues; thus, judges may find it helpful to review the law that is developing in other jurisdictions when

deciding *Crawford* issues. Also, such a review will help trial judges anticipate new *Crawford* objections. Finally, this publication provides an analytical tool for decision makers dealing with *Crawford* issues. Specifically, it provides a series of seven questions to help decision makers work through the new *Crawford* analysis.

1. 124 S. Ct. 1354 (2004).

2. See, e.g., *United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005) (*Crawford* “changed the legal landscape”) (quoting *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004), cert. denied, 125 S. Ct. 971 (2005)); *United States v. McClain*, 377 F.3d 219 (2d Cir. 2004) (*Crawford* “substantially alters” the analysis).

II. The *Crawford* Case

Defendant Crawford was tried for assault and attempted murder of Kenneth Lee. The police arrested Crawford on the night of the crime. After giving Crawford and his wife, Sylvia, *Miranda* warnings,³ detectives interrogated them. Crawford confessed that he and Sylvia went looking for Lee because Lee had tried to rape Sylvia. When they found him, there was a fight and Lee was stabbed in the torso. Crawford's account of the fight indicated that he acted in self-defense. Sylvia generally corroborated Crawford's story but cast doubt on whether Crawford acted in self-defense. At trial, Crawford claimed self-defense. Sylvia did not testify because of the Washington state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. Because this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, the State sought to introduce Sylvia's statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted that she led Crawford to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest. The trial court rejected Crawford's contention that admitting the evidence would violate his federal constitutional right to be confronted with the witnesses against him and admitted the evidence.

The issue before the United States Supreme Court was this: Did the State's use of Sylvia's statements violate the Sixth Amendment's confrontation clause? Justice Scalia, writing for the majority and answering this question in the affirmative, held that "testimonial" statements of witnesses who are not subject to cross-examination at trial may be admitted only when the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. Concluding that the text of the Sixth Amendment did not resolve the case, the Court turned to the historical background of the confrontation clause in order to understand its meaning. It noted that the immediate source of the concept of confrontation was the English common law, with its tradition of live, in-court testimony that was subject to adversarial testing. This was in contrast to the civil law, which allowed private examinations by judicial officers. The Court

noted, however, that at times England adopted aspects of civil law practice. One notorious example was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated Raleigh in an examination before the Privy Council and in a letter. At Raleigh's trial, this evidence was read to the jury. Raleigh argued that Cobham had lied to save himself and demanded that he be called to appear. The judges refused, and Raleigh was convicted and sentenced to death. This case and others led to criticism of the practice of civil law examination. Eventually, through a series of reforms, English law developed a right of confrontation. By 1791, the year the Sixth Amendment was ratified, that right included requirements of unavailability and a prior opportunity for cross-examination as to non-testifying witnesses.

The Court noted that when controversial examination practices were used in the American Colonies, they too were criticized. Moreover, although many declarations of rights adopted around the time of the American Revolution guaranteed a right of confrontation, the proposed Federal Constitution did not. The First Congress responded to criticism regarding this omission by including the confrontation clause in the proposal that became the Sixth Amendment. Early state decisions confirmed that this right included an opportunity for cross-examination.

This history, the Court concluded, supports two inferences about the meaning of the confrontation clause. "First, the principal evil at which it was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."⁴ It was these practices, used in trials such as Raleigh's, that the confrontation clause was meant to prohibit. The text of the confrontation clause, the Court indicated, reflects this focus as it applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony", in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."⁵ Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he

3. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

4. *Crawford*, 124 S. Ct. at 1363.

5. *Id.* at 1364.

was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁶ This, the Court noted, was the practice in 1791.

Stating that its cases have been largely consistent with these principles, the Court acknowledged that *White v. Illinois*⁷ is “arguably in tension” with them. *White* involved, in part, statements of a child victim to an investigating police officer admitted as spontaneous declarations. The Court found it “questionable” whether testimonial statements “would ever have been admitted on that ground in 1791.”⁸ However, it distinguished *White* on the basis that the case only addressed whether the confrontation clause imposed an unavailability requirement on the types of hearsay at issue. According to the Court, *White* did not address whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. The Court did acknowledge, however, that its opinion “casts doubt on that holding.”⁹

The Court noted that under *Ohio v. Roberts*,¹⁰ the confrontation clause does not bar admission of an unavailable witness’s statement if the statement falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. The Court concluded that the *Roberts* test “departs from the historical principles identified above” in two respects. First, it is too broad: “It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony[, and thus] . . . results in “close constitutional scrutiny in cases that are far removed from the core concerns of the Clause.” The test is also too narrow: “It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability[]” and as such “often fails to protect against paradigmatic confrontation violations.” Noting that the goal of the confrontation clause is to ensure reliability of evidence, the Court concluded that “it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”¹¹

The Court went on to state that two options have been proposed to revise its doctrine to reflect more accurately the original understanding of the confrontation clause. The first option is for the Court to apply the clause only to testimonial statements, leaving the remainder to regulation by hearsay law. The second option is for it to impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine. The Court noted that *White* considered the first proposal and rejected it. Acknowledging that its

opinion casts doubt on *White*, the Court said that it was not necessary to resolve whether *White* remained good law, because the statements in the case before it were clearly testimonial under any definition. Although not expressly overruling *Roberts* as it applies to nontestimonial hearsay, the Court left open the possibility that it might one day adopt the first option. Specifically, it stated: “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”¹² Turning to the second proposal, the Court noted that it was squarely implicated by the case presented. The Court went on to adopt it, stating: “Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”¹³

Although the Court declined to provide a comprehensive definition of the term “testimonial”, it indicated that the term includes three categories of evidence: (1) prior testimony at a preliminary hearing, before a grand jury, or at a former trial;¹⁴ (2) plea allocutions showing the existence of a conspiracy;¹⁵ and (3) police interrogations.¹⁶ The Court noted that it used the term interrogation “in its colloquial, rather than any technical legal, sense.”¹⁷ Also, the Court identified four categories of nontestimonial evidence: (1) off-hand remarks,¹⁸ (2) a casual remark to an acquaintance,¹⁹ (3) business records,²⁰ and (4) statements in furtherance of a conspiracy.²¹

The Court went no further in delineating what constitutes testimonial versus nontestimonial evidence. It noted that “[v]arious formulations of . . . ‘testimonial’ statements exist,” including (1) materials that are the functional equivalent of *ex parte* in-court testimony, such as affidavits, custodial examinations, prior testimony, and similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained

12. *Id.* at 1374.

13. *Id.*

14. *Id.*

15. *Id.* at 1372.

16. *Id.* at 1374.

17. *Crawford*, 124 S. Ct. at 1365 n.4.

18. *Id.* at 1364 (“An off-hand, overheard remark . . . bears little resemblance to the civil-law abuses the Confrontation Clause targeted.”).

19. *Id.* (“Testimony . . . is 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.”).

20. *Id.* at 1367.

21. *Id.*; see also *id.* at 1368 (favorably discussing *Bourjaily v. United States*, 483 U.S. 171, 181–84 (1987), a case that admitted statements of a co-conspirator to an FBI informant after applying a test that did not require cross-examination; this citation suggests that the Court agreed that such statements were nontestimonial).

6. *Id.* at 1365.

7. 502 U.S. 346 (1992).

8. *Crawford*, 124 S. Ct. at 1368 n.8.

9. *Id.* 124 S. Ct. at 1370.

10. 448 U.S. 56 (1980), *overruled in part by Crawford*, 124 S. Ct. 1354.

11. *Crawford*, 124 S. Ct. at 1370.

in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.²² However, it did not entirely adopt any of these formulations.²³ In other portions of the opinion, the Court noted that the fact that a statement is not sworn is not dispositive of the testimonial/nontestimonial inquiry,²⁴ and that “[i]nvolvement of government officers in the production of testimony with an eye toward trial represents unique potential for prosecutorial abuse”²⁵ However, having categorized three types of evidence as testimonial and four as nontestimonial, the Court left the testimonial/nontestimonial determination as it applies to the many other categories of evidence to be sorted out by the lower courts.²⁶

The Court did make clear that if the declarant is subject to cross-examination at trial, there is no confrontation clause violation.²⁷ Pre-*Crawford* law provided that the confrontation clause guarantees only “an opportunity for effective cross-examination.”²⁸ Under these cases, the confrontation clause does not bar testimony concerning a prior, out-of-court identification when the identifying witness is unable to explain the basis for the identification due to memory loss.²⁹ Normally, a witness is subject to cross-examination “when he is placed on the stand, under oath, and responds willingly to questions.”³⁰ However, “limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination . . . no longer exists.”³¹ On the issue of unavailability, pre-*Crawford* case law held that a witness is not unavailable unless the State has made a “good faith” effort to obtain the witness’s presence at trial.³²

Significantly, *Crawford* recognized several exceptions to its new rule. First, if the evidence is admitted for a purpose other than for the truth of the matter asserted, the confrontation clause is not implicated.³³ Under traditional evidence rules, such purposes would include, for example, for impeachment, for corroboration, and as the basis of an expert’s

opinion. Second, *Crawford* acknowledged cases supporting a dying declaration exception, but declined to rule on the point.³⁴ However, even if the Court ultimately declines to adopt a dying declaration exception, many dying declarations, such as those made to a friend or family member,³⁵ may be nontestimonial and thus not covered by *Crawford* for that reason.³⁶ Third, the Court noted that a defendant may forfeit his or her confrontation clause rights by wrongdoing;³⁷ for example, killing a witness to prevent the witness from appearing at trial.³⁸

Of course, a *Crawford* violation results only when the defendant had no prior opportunity to cross-examine the unavailable declarant.³⁹ Under pre-*Crawford* case law, a defendant had an opportunity to cross-examine when, for example, the declarant testified at the defendant’s earlier trial⁴⁰ or preliminary hearing.⁴¹ And finally, even if no *Crawford* violation is found, the evidence still must be otherwise admissible.

If the evidence is nontestimonial, *Crawford* suggests that *Roberts* still applies. Although there is some question as to the future viability of *Roberts*, *Crawford* did not overrule *Roberts* as it applies to nontestimonial evidence.⁴² Under *Roberts*, the confrontation clause does not bar admission of an unavailable witness’s statement if the statement bears “adequate indicia of reliability.” To meet that test, the evidence must either fall within a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.”⁴³ *United States v. Inadi*,⁴⁴ and later *White*, clarified that under *Roberts*, unavailability is required only when the challenged statement is prior testimony.

22. *Crawford*, 124 S. Ct. at 1364.
23. *But see* Commonwealth v. Gray, 867 A.2d 560 (Pa. Super. Ct. 2005) (applying *Crawford* as if it adopted these formulations).

24. *Crawford*, 124 S. Ct. at 1364.

25. *Id.* at 1367 n.7; *see also id.* at 1365.

26. *See infra* at § IIIA (discussing the post-*Crawford* cases).

27. *See Crawford*, 124 S. Ct. at 1369 n.9; *see also infra* at § IIIC (discussing availability for cross-examination).

28. *United States v. Owens*, 484 U.S. 554, 559 (1988).

29. *See id.*

30. *Id.* at 561 (discussing Fed. R. Evid. 801).

31. *Id.* at 561–62 (noting parallel between Rule 801 and the constitutional prohibition).

32. *Barber v. Page*, 390 U.S. 719, 724–25 (1968); *see infra* at § IIID (discussing post-*Crawford* cases pertaining to how the State establishes unavailability).

33. *See Crawford*, 124 S. Ct. at 1369 n.9; *see also infra* at § IIIB2 (discussing this exception).

34. *See Crawford*, 124 S. Ct. at 1367 n.6. (“We need not decide . . . whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.”); *see also infra* at § IIIB3 (discussing this exception).

35. *See infra* at § IIIA11 (discussing nontestimonial nature of many statements made to family, friends, and other private parties).

36. *See Crawford*, 124 S. Ct. at 1367 n.6.

37. *See Crawford*, 124 S. Ct. at 1370 (“the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds”) (citing *Reynolds v. United States*, 98 U.S. 145 (1878)).

38. *See infra* at § IIIB1 (discussing post-*Crawford* forfeiture in more detail).

39. *See infra* at § IIIE (discussing prior opportunity to cross-examine cases).

40. *See California v. Green*, 399 U.S. 149, 165 (1970) (citing *Mattox v. United States*, 156 U.S. 237 (1895)); *Crawford*, 124 S. Ct. at 1367 (discussing *Mattox*).

41. *See Green*, 399 U.S. at 165–66.

42. *But see Crawford*, 124 S. Ct. at 1374 (Rehnquist, C.J., concurring) (dissenting from the Court’s “decision to overrule [*Roberts*].”); *see also infra* at § IIIJ (discussing post-*Crawford* cases on the test for nontestimonial evidence).

43. *Crawford*, 124 S. Ct. at 1358.

44. 475 U.S. 387 (1986).

III. Post-*Crawford* Case Law from North Carolina and around the Nation

Crawford was decided on March 8, 2004. The decision worked a significant change in the law, and since that date there have been hundreds of citing references to the decision. This section summarizes the significant post-*Crawford* cases from North Carolina and around the nation.

A. The Testimonial/Nontestimonial Distinction

Because *Crawford* applies only to “testimonial” evidence, the central inquiry in any *Crawford* analysis will always focus on whether the evidence at issue is testimonial or nontestimonial. The subsections that follow explore the complexities of this critical determination.

1. Grand Jury Testimony, Plea Allocutions, and Prior Trial Testimony

A number of cases from North Carolina and around the nation follow *Crawford*'s mandate that grand jury testimony, prior trial testimony, and plea allocutions are testimonial.⁴⁵ Also, at least two post-*Crawford* cases have indicated that declarations included in court filings are testimonial.⁴⁶

45. See *State v. Clark*, ___ N.C. App. ___, 598 S.E.2d 213 (July 6, 2004) (prior trial testimony), *review denied*, 358 N.C. 734 (2004); *United States v. McClain*, 377 F.3d 219 (2d Cir. 2004) (plea allocutions); *State v. Hale*, 691 N.W.2d 637 (Wis. 2005) (prior trial testimony); *People v. Hardy*, 814 N.E.2d 471 (N.Y. 2005) (plea allocution); *People v. Patterson*, 808 N.E.2d 1159 (Ill. App. Ct. 2004) (grand jury testimony), *appeal allowed*, ___ N.E.2d ___ (Ill. Oct. 6, 2004); *People v. A.S. Goldmen, Inc.*, 779 N.Y.S.2d 489 (App. Div. 2004) (plea allocutions), *leave to appeal denied*, 818 N.E.2d 673 (N.Y. 2004); *People v. Shepherd*, 689 N.W. 2d 721 (Mich. Ct. App. 2004) (plea transcript); *People v. Carrieri*, 778 N.Y.S.2d 854 (Sup. Ct. 2004) (plea allocutions of co-defendants); *People v. Woods*, 779 N.Y.S.2d 494 (App. Div. 2004) (same).

46. See *People v. Pantoja*, 18 Cal. Rptr. 3d 492 (Ct. App. 2004) (concluding that murdered victim's declaration included in an application for a restraining order that was filed several days before she was killed

2. Co-Defendants' and Accomplices' Statements During Police Interrogations or While in Custody

Based on the facts of *Crawford*, the North Carolina Court of Appeals and courts in many other jurisdictions easily have concluded that statements made by co-defendants and accomplices during interrogation or while in police custody are testimonial. In *State v. Pullen*,⁴⁷ for example, the North Carolina Court of Appeals held that the oral and written confessions of a non-joined accomplice, given during a police interrogation at the police station, were testimonial. *State v. Morton*⁴⁸ is similar. In that case, the defendant was convicted of possession of stolen goods. The court held that the declarant's statements to a detective, made during an interview at the sheriff's department and after *Miranda* warnings had been given, were testimonial. The declarant's statement indicated that he had sold stolen property to the defendant and that the defendant knew it was stolen. As noted, many similar federal and state cases exist.⁴⁹ One

and stating that defendant had threatened to kill her was testimonial, but resting holding on nonconstitutional grounds); *People v. Thompson*, 812 N.E.2d 516 (Ill. App. Ct. 2004) (declarant's written statements made in the course of obtaining an order of protection from the court were testimonial; the State conceded that use of this document to impeach the defendant was improper) [Author's Note: even if the statement was testimonial, if it was used only for impeachment purposes, it should fall within *Crawford*'s exception for statements offered for a purpose other than the truth of the matter asserted. See *Crawford*, 124 S. Ct. at 1369 n.9; *infra* at § IIIB2 (discussing this exception).].

47. 163 N.C. App. 696 (2004).

48. ___ N.C. App. ___, 601 S.E.2d 873 (Sept. 21, 2004).

49. See also *United States v. Jones*, 371 F.3d 363 (7th Cir. 2004) (co-conspirator's confession); *United States v. Rashid*, 383 F.3d 769 (8th Cir. 2004) (co-defendant's post-arrest, custodial statements to FBI agents), *cert. denied*, 125 S. Ct. 941 (2005); *United States v. Trala*, 386 F.3d 536, 544 (3d Cir. 2004) (statements made during police questioning at vehicle stop); *Vigil v. State*, 98 P.3d 172, 179 (Wyo. 2004) (accomplice's statements made during interview upon his arrest); *State v. Johnson*, 98 P.3d 998, 1002 (N.M. 2004) (accomplice's custodial

post-*Crawford* case rejected a defendant's attempt to broadly define the term "interrogation" to include an undercover officer's communication with a co-conspirator. Specifically, the court rejected the argument that an undercover officer interrogated a co-conspirator as the two were trying to arrange the details of a drug transaction.⁵⁰

In *United States v. Jordan*,⁵¹ the United States District Court for the Eastern District of Virginia dealt with a situation where, at the urging of a friend, an accomplice voluntarily came to the police to give a statement. The interview, which was videotaped, began with officers asking the accomplice whether she would be willing to testify in court if needed. She responded in the affirmative. During the first twenty-five minutes of the interview, the accomplice spoke "essentially extemporaneous[ly]," with occasional questions asked by the officers. In the second portion of the interview, the accomplice responded to the officers' questions. The reviewing court noted that the interview was neither police initiated nor designed to elicit incriminating responses. The court, however, concluded that the question about being willing to testify put the accomplice "on notice that her

interview); *State v. Alvarez-Lopez*, 98 P.3d 699, 707 (N.M. 2004) (same), *cert. denied*, 125 S. Ct. 1334 (2005); *Clark v. State*, 891 So. 2d 136 (Miss. 2004) (accomplice's custodial statements); *Davis v. United States*, 848 A.2d 596 (D.C. 2004) (accomplice's statement during a police interrogation); *People v. McPherson*, 687 N.W.2d 370 (Mich. Ct. App. 2004) (accomplice's post-arrest statement to police); *Brooks v. State*, 132 S.W.3d 702 (Tex. Crim. App. 2004) (co-defendant's written statement given during custodial police interrogation); *Jahanian v. State*, 145 S.W.3d 346 (Tex. Crim. App. 2004) (suspected accomplice's written statement given while being detained and after having been read her *Miranda* rights); *Lee v. State*, 143 S.W.3d 565 (Tex. Crim. App. 2004) (statement by co-defendant during a noncustodial roadside stop and in response to police officer's questioning relating to the money laundering for which defendant, a passenger in the car, had already been arrested); *Gutierrez v. State*, 150 S.W.3d 827 (Tex. Crim. App. 2004) (accomplice's videotaped statement voluntarily given to the police); *Hale v. State*, 139 S.W.3d 418 (Tex. Crim. App. 2004) (written statement by non-testifying accomplice during a custodial interrogation); *People v. Song*, 22 Cal. Rptr. 3d 118 (Ct. App. 2004) (co-defendants' statements to police); *State v. Page*, 104 P.3d 616 (Or. Ct. App. 2005) (custodial interview of accomplice); *State v. Cutlip*, 2004 WL 895980 (Ohio Ct. App. Apr. 28, 2004) (co-defendants' statements given during custodial police interrogation); *State v. Carter*, 2004 WL 2914921 (Ohio Ct. App. Dec. 16, 2004) (co-defendant's statement to police during interrogation); *State v. Hernandez*, 875 So. 2d 1271 (Fla. Dist. Ct. App. 2004) (co-defendant's out-of-court statements made during controlled phone call while in police custody; after the co-defendant's arrest, the police persuaded him to engage in a controlled phone call to defendant to obtain admissions by defendant), *review granted* (Fla. Jan. 19, 2005); *State v. Cox*, 876 So. 2d 932 (La. Ct. App. 2004) (co-defendant's statement during a police interrogation); *People v. Ryan*, ___ N.Y.S.2d ___, 2005 WL 486846 (App. Div. Mar. 3, 2005).

50. See *People v. Redeaux*, 823 N.E.2d 268 (Ill. App. Ct. 2005) (noting that although undercover officer asked questions during the conversation, the questions were designed to facilitate the cocaine sale and the officer did not press the co-conspirator for information beyond what was necessary for that purpose).

51. ___ F. Supp. 2d ___, 2005 WL 399679 (E.D. Va. Jan. 28, 2005), *motion for recons. denied* (Feb. 9, 2005).

statement might be used in future judicial proceedings." Thus, it held that the statement "had enough of the indicia of 'testimonial evidence'" to trigger application of *Crawford*.

Of course, admitting a co-defendant's confession to the police also may implicate *Bruton v. United States*.⁵² In *Bruton*, the Supreme Court held that a defendant is deprived of his or her rights under the confrontation clause by the introduction of a non-testifying co-defendant's confession that expressly implicates the defendant in a crime. Later case law held that there is no confrontation clause violation when such a confession is redacted to eliminate the defendant's name or reference to his or her existence and a limiting instruction is provided.

3. Co-Conspirators' Statements in Furtherance of a Conspiracy

A number of cases from other jurisdictions are in accord with *Crawford*'s indication that statements in furtherance of a conspiracy are non-testimonial.⁵³ *Crawford* cited *Bourjaily v. United States*⁵⁴ for the proposition that statements in furtherance of a conspiracy are non-testimonial. That case involved a co-conspirator's statements to an informant. Consistent with *Bourjaily*, several post-*Crawford* cases have held that a declarant's statements in furtherance of a conspiracy to an informant or undercover officer whose true status is unknown to the declarant are non-testimonial.⁵⁵ One post-*Crawford* case involving a statement

52. 391 U.S. 123 (1968).

53. See *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004) (declarant's statements to his brother confessing to three murders were non-testimonial co-conspirator statements made in furtherance of criminal activity; the declarant shared this information with his brother to explain why he needed to dispose of weapons quickly and to, among other things, enlist his brother's help in selling them); *United States v. Robinson*, 367 F.3d 278, 292 n.20 (5th Cir. 2004) (*Crawford* does not apply because hearsay was made during a conspiracy and is non-testimonial), *cert. denied*, 125 S. Ct. 623 (2004); *Bush v. State*, ___ So. 2d ___, 2005 WL 312039 (Miss. Feb. 10, 2005) (same); *People v. Cook*, 815 N.E.2d 879 (Ill. App. Ct. 2004) (statements made in furtherance of conspiracy are not testimonial), *appeal denied*, ___ N.E.2d __ (Ill. Nov. 24, 2004); *Wiggins v. State*, 152 S.W.3d 656 (Tex. Crim. App. 2004) (same); see also *United States v. Rashid*, 383 F.3d 769 (8th Cir. 2004) (noting that co-conspirators' statements are not testimonial), *cert. denied*, 125 S. Ct. 941 (2005).

54. 483 U.S. 171 (1987) (admitting statements of co-conspirator to an FBI informant).

55. See *United States v. Reyes*, 362 F.3d 536, 540-41 & n.4 (8th Cir. 2004) (indicted co-conspirator's statements to undercover agents while the conspiracy was ongoing), *cert. denied*, 124 S. Ct. 2926 (2004); *United States v. Saget*, 377 F.3d 223, 229-30 (2d Cir. 2004) (statements to confidential informant whose identity is not known), *cert. denied*, 125 S. Ct. 938 (2005); *United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005) (*Crawford* does not bar admission of co-conspirator statements made to a confidential informant and surreptitiously recorded by the informant); *People v. Redeaux*, 823 N.E.2d 268 (Ill. App. Ct. 2005) (trial court did not commit a *Crawford* error by admitting tape-recorded conversations between co-conspirator and an undercover officer; rejecting defendant's argument that the undercover officer interrogated the co-conspirator).

made by a co-conspirator to an undercover officer rejected the argument that a statement is not in furtherance of a conspiracy if it is not made “between co-conspirators.”⁵⁶

For cases pertaining to statements on wiretap recordings, see *infra* at § IIIA15.

4. Business Records and Affidavits

Crawford indicated that business records are nontestimonial.⁵⁷ On the other hand, *Crawford* acknowledged that under one formulation, affidavits are in a core class of testimonial statements, along with custodial examinations and prior testimony. However, the Court neither adopted nor rejected this formulation.⁵⁸ It therefore is not surprising that courts have reached different conclusions as to whether or not affidavits are testimonial.⁵⁹

Cases dealing with test reports and related affidavits are discussed in the next section. Other cases pertaining to the business records exception are summarized below.

Immigration Records

United States v. Rueda-Rivera, 396 F.3d 678 (5th Cir. 2005) (in a deportation case, the court adopted the reasoning and holding of an earlier unpublished decision in

56. *Redeaux*, 2005 WL 287495.

57. See *Crawford*, 124 S. Ct. at 1367; see also *Riner v. Virginia*, 601 S.E.2d 555 (Va. 2004) (parties agreed that pawn shop journal was a business record excepted from *Crawford*).

In his concurring opinion in *Crawford*, Chief Justice Rehnquist read the Court’s analysis of the term “testimonial” to exclude both business records and “official records.” *Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring); see generally N.C. GEN. STAT. § 8C-1 R. 803(8) (hereinafter G.S.) (public record and report exception to hearsay rule). In fact, the Court’s opinion mentions only business records.

58. *Crawford*, 124 S. Ct. at 1364; see *supra* at § II.

59. Compare *People v. Capellan*, __ N.Y.S.2d __, 2004 WL 2921882 (Crim. Ct. Dec. 9, 2004) (in prosecution for unlicensed operation of a motor vehicle, affidavit of regularity/proof of mailing executed by DMV Certified Document Center’s Records Manager was not a business record; because document was not executed until over 10 years after the suspension order was prepared, it was not made at the time the suspension order was made or reasonably soon thereafter; in fact, affidavit was not created for more than 6 months after the case commenced; affidavit was created expressly for use in the litigation), and *City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004) (state law provided that the affidavit of a person who withdraws a sample of blood from another for analysis by an expert is admissible to prove the occupation of the declarant, the identity of the person from whom the declarant withdrew the sample, the fact that the declarant kept the sample in his or her sole custody or control and in substantially the same condition as when he or she first obtained it until delivering it to another, and the identity of the person to whom the declarant delivered it; a health professional’s affidavit prepared pursuant to this law is prepared solely for the prosecution’s use at trial and is testimonial), modified by 100 P.3d 658 (Nev. 2004), with *People v. Shrek*, __ P.3d __, 2004 WL 2137067 *13 (Col. App. Ct. Sept. 23, 2004) (documentary evidence consisting of DOC “penitentiary pack” and Oregon records showing defendant’s prior convictions were business or official records; also holding that the affidavits of judges and court clerks that normally accompany these documents are nontestimonial because they merely verify the chain of custody and authenticity of the underlying documentary evidence), cert. denied, 2005 WL 453078 (Colo. Feb. 28, 2005).

which it “likened an immigration file to business records and concluded that the file contained statements that by their nature were not testimonial”; the court held that a certificate of Nonexistence of Record, admitted to show an absence of a record that defendant had received consent to re-enter the country, was not testimonial).

Department of Correction and Prior Conviction Records

People v. Shrek, __ P.3d __, 2004 WL 2137067 *13 (Colo. App. Ct. Sept. 23, 2004) (citing *State v. Thackaberry*, discussed in § IIIA5c below, and holding that documentary evidence consisting of DOC “penitentiary pack” and Oregon records showing defendant’s prior convictions were business or official records; also holding that the affidavits of judges and court clerks that normally accompany these documents are nontestimonial because they merely verify the chain of custody and authenticity of the underlying documentary evidence), cert. denied, 2005 WL 453078 (Colo. Feb. 28, 2005).

Frazier v. State, __ So. 2d __, 2005 WL 468463 (Miss. Ct. App. Mar. 1, 2005) (Alabama “pen pack” consisting of records maintained on inmates sentenced to the custody of the Department of Corrections and offered to establish prior convictions for habitual offender status was not testimonial; author of pen pack was the custodian of records for the Alabama Department of Corrections and certificate indicated that the custodian swore that the documents were true and correct copies).

Police Records

People v. Hernandez, __ N.Y.S.2d __, 2005 WL 88995 (Sup. Ct. Jan. 6, 2005) (officer’s Latent Print Report was testimonial and could not be admitted as a business record; report described the officer’s activities in connection with obtaining a fingerprint from a burglary scene and the result of comparison testing; rather than being taken for administrative use, the fingerprints were obtained “with the ultimate goal of apprehending and successfully prosecuting a defendant”).

State v. Arita, __ So. 2d __, 2005 WL 474298 (La. Ct. App. Mar. 1, 2005) (latent fingerprint that was admitted pursuant to public record and report exception to hearsay rule, see *supra* n.57, was “clearly non-testimonial”).

Johnson v. Renico, 314 F. Supp. 2d 700 (E.D. Mich. 2004) (stating, in dicta, that statements made to police during bookings and recorded in “booking information sheets” were nontestimonial).

Hospital Records

People v. Rogers, 780 N.Y.S.2d 393 (App. Div. 2004) (sexual assault victim’s hospital records were business records; noting that although the sexual assault information sheet had a dual purpose of investigation and treatment of the victim’s potential physical and psychological injuries, because the history was germane to treatment, the document was a business record).

5. Test Reports and Related Affidavits

Several jurisdictions have struggled with the admissibility of various types of reports and related affidavits. The cases are summarized below by type of report. For a detailed discussion of the use of a chemical analyst's affidavit in North Carolina district court after *Crawford*, see Robert Farb, *Constitutionality of G.S. 20-139.1(e1) (Use of Chemical Analyst's Affidavit in District Court) After Crawford v. Washington* (June 4, 2004), at www.iog.unc.edu/programs/crimlaw/crawford.pdf. For cases pertaining to business records and affidavits generally, see the immediately preceding section.

a. Blood and Blood Alcohol Testing

State v. Dedman, 102 P.3d 628 (N.M. 2004) (lack of opportunity to cross-examine nurse who drew blood sample did not violate confrontation rights; report was nontestimonial because: (1) the blood alcohol report was generated by personnel in the Scientific Laboratory Division of the Department of Health, not law enforcement; (2) the report is not investigative or prosecutorial; (3) although the report was prepared for trial, the process was routine, non-adversarial, and made to ensure an accurate measurement; (4) while a government officer prepared the report, the officer was not producing testimony for trial; and (5) the report is very different from the examples of testimonial hearsay noted by *Crawford*).

City of Las Vegas v. Walsh, 91 P.3d 591 (Nev. 2004) (state law provided that the affidavit of a person who withdraws a sample of blood from another for analysis by an expert is admissible to prove the occupation of the declarant, the identity of the person from whom the declarant withdrew the sample, the fact that the declarant kept the sample in his or her sole custody or control and in substantially the same condition as when he or she first obtained it until delivering it to another, and the identity of the person to whom the declarant delivered it; a health professional's affidavit prepared pursuant to this law is prepared solely for the prosecution's use at trial and is testimonial), *modified* by 2004 WL 2538565 (Nev. Nov. 10, 2004).

Napier v. State, 820 N.E.2d 144 (Ind. Ct. App. 2005) (the certificates of inspection and compliance with regulations pertaining to a breath test machine were not testimonial; however, defendant's confrontation rights were violated when the State introduced a test result from the machine without any "live testimony" from the officer who conducted the test).

People v. Rogers, 780 N.Y.S.2d 393 (App. Div. 2004) (admission of a report giving the results of testing on the victim's blood was testimonial; the test was initiated by the prosecution and generated by the desire to discover evidence against defendant; the test result established the victim's blood alcohol content and was the basis of expert testimony regarding her blood alcohol content at the time of the rape, a significant fact because the victim's intoxication level related to her ability to consent).

b. Autopsy Reports

In North Carolina, the pre-*Crawford* case of *State v. Watson*⁶⁰ remains good law. That case held that the trial court violated the defendant's due process rights and rights under the confrontation clause by admitting "the hearsay and conclusory statement contained in the death certificate, 'that the immediate cause of death was hemorrhage and asphyxia due to or as consequence of stab wound of the left neck.'" This holding suggests that under North Carolina law, a statement regarding cause of death in an autopsy report would be inadmissible under the confrontation clause regardless of *Crawford*. One early post-*Crawford* Alabama case seems to be in accord with this holding.⁶¹ However, another Alabama case decided by the same court on the same day held an autopsy report to be nontestimonial without addressing the cause of death issue.⁶²

The more recent *Crawford* cases on autopsy reports signal continued disagreement. In *Rollins v. State*,⁶³ the Maryland Court of Special Appeals weighed in on the issue. *Rollins* was a murder case in which the State argued that the defendant smothered the victim with a pillow. In defense, the defendant asserted that the victim died of natural causes. The State's case rested heavily on the testimony of medical examiner Dr. Mary G. Ripple, who did not perform the autopsy on the victim. The autopsy was performed by Dr. Joseph Pestaner, who did not testify. Dr. Ripple testified that she reviewed the case file and that in her expert opinion, the victim died of asphyxia from smothering. Her conclusion was based on the physical findings in Dr. Pestaner's autopsy report and other information in the file. On appeal, the defendant argued that by admitting the autopsy report, the trial court violated his confrontation clause rights. The Maryland court disagreed, concluding that the information contained in the autopsy report "f[e]ll squarely" within the business records exception and was nontestimonial.

In reaching this conclusion, the court distinguished between opinions in an autopsy report and findings of the physical condition of the decedent. "Conclusions and conclusory findings susceptible to different interpretations that

60. 281 N.C. 221 (1972).

61. See *Smith v. State*, ___ So. 2d ___, 2004 WL 921748 (Ala. Crim. App. Apr. 30, 2004) (autopsy evidence and autopsy report were nontestimonial; however, admission without the testimony of the medical examiner who performed the autopsy under the business-records exception to the hearsay rule violated defendant's rights under the confrontation clause; because the indictment charged death by asphyxiation and that manner of death was an element of the offense, "the Confrontation Clause precluded the prosecution from proving an essential element of its case by hearsay evidence alone"; error, however, was harmless).

62. See *Perkins v. State*, ___ So. 2d ___, 2004 WL 923506 (Ala. Crim. App. Apr. 30, 2004) (autopsy report is a nontestimonial business record).

63. 866 A.2d 926 (Md. Ct. Spec. App. 2005).

are critical to a central issue in the case,” it held, are testimonial. In the case before it, the trial court had redacted Dr. Pestaner’s opinion that asphyxia was the cause of death and that the manner of death was homicide. Because this opinion was excluded, a challenge to this portion of the report could not succeed. The court held that the unredacted portions of the report containing findings as to physical condition were nontestimonial:

We hold that the findings in an autopsy report of the physical condition of a decedent, which are routine, descriptive and not analytical, which are objectively ascertained and generally reliable and enjoy a generic indicium of reliability, may be received into evidence without the testimony of the examiner.

Shortly after *Rollins* was decided, the Texas Court of Appeals issued its decision in *Moreno Denoso v. State*,⁶⁴ holding that an autopsy report, including its conclusion as to cause of death, was nontestimonial. In that murder case, the defendant challenged the admission of the autopsy report because the pathologist who prepared it was not available at trial. The court noted that the report “set forth matters observed pursuant to a duty imposed by law.” The report described the state of the body, approximated the time of death, contained observations about the victim’s body and articles of partially burned clothing found on the body, and set out the location and nature of injuries. It also determined the cause of death as

[Multiple] shotgun wounds and gunshot wound to the head[.] Shotgun wound to the back of the head and neck with brain injury and multiple fractures secondary to the explosive force of the pellet load[.] Gunshot wound to the left side of the head with brain injury and multiple fractures of crania vault and base secondary to explosive force of the bullet[.] Shotgun wound to right side of the chest with injury to the right lung.

The Texas court held that the report was not testimonial, reasoning that it was not prior testimony and not made in response to police interrogation.

c. Drug Testing

People v. Johnson, 18 Cal. Rptr. 3d 230, 231–33 (Ct. App. 2004) (applying *Crawford* to determine the scope of the “more limited” right of confrontation held by probationers at revocation proceedings under the due process clause; concluding that a report from the county crime laboratory analyzing a rock of cocaine was nontestimonial documentary evidence; stating, “A laboratory report does not ‘bear testimony,’ or function as the equivalent of in-court testimony. If the preparer had appeared to testify at [the] hearing, he or she would merely have authenticated the document.”).

State v. Thackaberry, 95 P.3d 1142 (Or. Ct. App. 2004) (applying plain error analysis and concluding that there was a reasonable dispute as to whether a laboratory report confirming the presence of methamphetamine and amphetamine in defendant’s urine was testimonial), *review denied*, 107 P.3d 27 (Or. Jan. 25, 2005).

6. Victims’ Statements to Police Officers

In *State v. Forrest*,⁶⁵ the North Carolina Court of Appeals held that statements made by a victim at a crime scene were nontestimonial. In that case, law enforcement officers rescued Cynthia Moore from the defendant, her kidnaper. Moore suffered lacerations and bruises, including one very deep laceration, which was bleeding profusely. Moore was shaking, crying, and very nervous after the incident, at which time she told Detective Melanie Blalock what the defendant had done to her. Moore did not testify at trial. Turning to the issue of whether Moore’s statements to Blalock were testimonial, the court found instructive a post-*Crawford* New York case holding that a 911 call was nontestimonial. The court concluded that Moore’s conversation with Blalock was not a testimonial “police interrogation” under *Crawford*, stating:

Just as with a 911 call, a spontaneous statement made to police immediately after a rescue can be considered “part of the criminal incident itself, rather than as part of the prosecution that follows.” Further, a spontaneous statement made immediately after a rescue from a kidnapping at knife point is typically not initiated by the police. Moore made spontaneous statements to the police immediately following a traumatic incident. She was not providing a formal statement, deposition, or affidavit, was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings. *Crawford* protects defendants from an absent witness’s statements introduced after formal police interrogations in which the police are gathering additional information to further the prosecution of a defendant. *Crawford* does not prohibit spontaneous statements from an unavailable witness like those at bar.

Judge Wynn dissented, arguing that the 911 analogy was inapt. Wynn contended that Blalock’s sole purpose was to obtain Moore’s statement for use in prosecution of the defendant. When the statement was taken, the scene was secure, the defendant was absent, and Moore was no longer in peril. Blalock was not the first police officer Moore encountered at the scene but was the officer designated to get Moore’s statement. Moore did not speak to Blalock to get assistance but because she knew that the police were there to gather evidence concerning the crime. Thus, Judge Wynn disagreed with the majority’s statement that the

64. 156 S.W.3d 166 (Tex. Crim. App. 2005).

65. 164 N.C. App. 272 (2004).

witness “was not aware that she was bearing witness, and was not aware that her utterances might impact further legal proceedings.”

Five months later, the North Carolina Court of Appeals again considered a victim’s statements to the police and this time found them to be testimonial. In *State v. Lewis*,⁶⁶ the defendant assaulted the victim, an elderly woman who later died for unrelated reasons. The victim was discovered in her apartment by a friend and neighbor, who called the police. When an officer arrived on the scene, he took a statement from the victim in which the victim recounted the assault and described her assailant. The victim then was taken to the hospital. While at the hospital on the day of the attack, another officer presented her with a photo line-up, at which time the victim identified the defendant as her attacker. At trial, the defendant challenged the admissibility of both the victim’s statement at the scene as well as her identification of the defendant at the hospital.

Citing *State v. Pullen*⁶⁷ and *State v. Clark*,⁶⁸ the court held that the victim’s statement to the officer at the scene was testimonial. The court went on to hold that the victim’s identification of the defendant in the photographic line-up was testimonial, stating: “Just like [the victim’s] first statement, her identification in the photo line-up provided information that implicated defendant and that was presented at trial in order to establish the state’s case against defendant.” The North Carolina Supreme Court has granted the State’s petition to review this decision.

More recently, the North Carolina Supreme Court considered the issue in a capital case and held that a statement by a victim to an officer was testimonial. In *State v. Bell*,⁶⁹ the State called an officer to testify about an incident that was offered in support of the aggravating circumstance that the defendant had committed a prior crime of violence. The officer took the stand and testified that when he received a call about a robbery, he investigated the crime and took a statement from the victim. The court held: “[T]he statement made by [the victim] was in response to structured police questioning by [the officer] regarding the details of the robbery committed by defendant. There can be no doubt that this statement was made to further [the officer’s] investigation of the crime. [The] statement contributed to defendant’s arrest and conviction of common-law robbery.

66. __ N.C. App. __, 603 S.E.2d 559 (Oct. 19, 2004), *stay and review allowed*, 359 N.C. 195 (2004).

67. 163 N.C. App. 696 (2004) (oral and written confessions of a non-joined accomplice, given during a police interrogation at the police station, were testimonial); *see supra* text accompanying n.47 (discussing *Pullen*).

68. __ N.C. App. __, 598 S.E.2d 213 (July 6, 2004) (witness’s statement to officer and affidavit identifying defendant as the individual she saw walking with the victim were testimonial), *review denied*, 358 N.C. 734 (2004), *appeal dismissed*, 359 N.C. 192 (2004); *see infra* text accompanying n.87 (discussing *Clark*).

69. 359 N.C. 1 (2004).

Therefore, [the] statement is testimonial in nature”

Although it is possible to distinguish *Forrest* from *Lewis* and *Bell*, it is not yet clear whether the North Carolina Supreme Court will do so when confronted with the issue.

A number of other jurisdictions have analyzed whether victims’ statements to police officers are testimonial, with many of those cases arising in the domestic violence context. Few clear rules have emerged in this area. In fact, a close look at the cases reveals that the very factors that led one court to hold that a statement is nontestimonial may be irrelevant to another court that goes the other way. Thus, one court may hold a statement to be nontestimonial because the victim initiated contact with the police, while another may hold a statement to be testimonial, notwithstanding this fact.⁷⁰ Similar conflicts can be found with other factors, such as the excited nature of the statements.⁷¹ Two consistent themes that seem to be emerging in this area are: (1) the longer the time lag between the crime and the victim’s statement, the more likely the statement is to be testimonial;⁷² and (2) the more formal the nature of the inquiry—for instance, when it is tape-recorded or videotaped—the more likely the victim’s statement is to be testimonial.⁷³

Finally, one new approach for classifying victims’ statements has emerged. In *Stancil v. United States*,⁷⁴ the court determined that statements made to police officers while they are “securing the scene” often are not testimonial. However, the court continued, “once the scene has been secured, and once the officers’ attention has turned to investigation and fact-gathering, statements made by those on the scene, in response to police questioning, tend in greater measure to take on a testimonial character.” Although the earlier California case of *People v. Kilday*⁷⁵ did not express this approach so succinctly, its holding, as the *Stancil* court

70. *Compare* *Leavitt v. Arave*, 383 F.3d 809, 830 & n.22 (9th Cir. 2004) (nontestimonial; victim called the police), *with* *Henry v. State*, 604 S.E. 2d 469 (Ga. 2004) (testimonial; victim flagged officer down).

71. *Compare* *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004) (nontestimonial; excited utterance), *transfer granted* (Dec. 9, 2004), *with* *Lopez v. State*, 888 So. 2d 693 (Fla. Ct. App. 2004) (testimonial even though victim was excited).

72. *See* *Wall v. State*, 143 S.W.3d 846 (Tex. Crim. App. 2004) (testimonial; statements made in hospital); *People v. West*, 823 N.E.2d 82 (Ill. App. Ct. 2005) (same); *People v. Ochoa*, 18 Cal. Rptr. 3d 365, 372 (Ct. App. 2004) (testimonial; statements made the afternoon after the incident and several days later), *review granted*, 101 P.3d 478 (Cal. 2004). *But see* *Cassidy v. State*, 149 S.W.3d 712 (Tex. Crim. App. 2004) (victim’s statements made to police officer at hospital one hour after assault were not testimonial).

73. *See* *People v. Pirwani*, 14 Cal. Rptr. 3d 673 (Ct. App. 2004) (videotaped statement testimonial); *People v. Kilday*, 20 Cal. Rptr. 3d 161 (Ct. App. 2004) (tape-recorded interview testimonial), *review granted*, 105 P.3d 114 (Cal. 2005); *State v. Courtney*, 682 N.W.2d 185 (Minn. Ct. App. 2004) (police officer’s tape-recorded interview with victim was testimonial), *review granted* (Sept. 29, 2004).

74. 866 A.2d 799 (D.C. 2005).

75. 20 Cal. Rptr. 3d 161 (Ct. App. 2004), *review granted*, 105 P.3d 114 (Cal. 2005).

noted, is entirely consistent with it. In *Kilday*, the court held that certain statements made by the victim were testimonial and that others were nontestimonial. It held to be nontestimonial the statements made to responding officers when “the area was unsecured and the situation uncertain” and when the officers were not aware of the nature of the crime, the assailant’s identity, his location or whether he was dangerous, or whether the victim needed medical attention. On the other hand, the victim’s statements to a detective summoned to the scene by the first-arriving officers were testimonial because the detective’s purpose was to obtain a statement and not to provide safety and security.

Other cases are consistent with *Stancil*’s approach. For example, in *People v. West*,⁷⁶ the court followed *Kilday* and held that a sexual assault victim’s statements to an officer who responded to the home where the victim went for help were nontestimonial. The court noted that the statements were obtained “in response to the officer’s preliminary task of attending to the medical concerns of a victim shortly after the commission of an offense.” On the other hand, *West* held that the victim’s statements to officers at the hospital were testimonial. At this time, the defendant was in custody, the officers had some information about his involvement in the crime, their questioning was done to further investigate his involvement and to gather evidence to be used in a criminal trial, the officers asked “specific, purposeful questions,” and they were given detailed answers. The court explained: “These investigative, evidence-producing actions bore statements which, if used to convict the defendant, would implicate the central concerns underlying the confrontation clause.” Another example is *Key v. State*.⁷⁷ Citing *Kilday*, *Stancil*, and other cases, that court held that the victim’s statements to an officer who arrived on the scene were nontestimonial. The court explained: “[The officer] was responding to a call and was involved in the preliminary task of securing and assessing the scene. Such unstructured interaction between an officer and a witness bears no resemblance to a formal or informal police ‘interrogation’ as that term is used in *Crawford*.”⁷⁸

The cases involving victims’ statements to the police are summarized below.⁷⁹ For cases dealing with 911 calls, see

76. 823 N.E.2d 82 (Ill. App. Ct. 2005).

77. ___ S.W.3d ___, 2005 WL 467167 (Tex. Crim. App. Feb. 28, 2005).

78. *Id.* (citing *Kilday*, 20 Cal. Rptr. 3d 161).

79. In *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004), the Second Circuit held that the defendant could not rely on *Crawford* because it did not apply retroactively to his case. See *infra* at § III G (discussing *Crawford*’s retroactive application). Because the court reached this conclusion, it did not need to address whether the victim’s statements to the police were testimonial. However, in an effort to help define the term testimonial, the court offered in dictum “some speculation” as to how the concept might apply to the case before it, in which a victim made statements to responding officers identifying the man who had shot him and the motive for the shooting. Two groups of statements were at

infra at § IIIA7. For cases involving child victims’ statements to police officers and others, see *infra* at § IIIA14.

Statements Held to Be Nontestimonial⁸⁰

Leavitt v. Arave, 383 F.3d 809, 830 & n.22 (9th Cir. 2004) (murder victim’s statements to the police on the night before her death were not testimonial; frightened by a prowler who tried to break into her house, the victim called the police and spoke to dispatchers and police officers, stating among other things that she thought the prowler was the defendant; “Although the question is close, . . . [w]e do not think that [the victim’s] statements to the police she called to her home [are testimonial.] [The victim], not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home.”).

State v. Barnes, 854 A.2d 208, 209–12 (Me. 2004) (murder victim’s statements to police pertaining to defendant’s prior assault on her and threats to kill her were not testimonial; statements were made after declarant drove herself to the police station and while crying and sobbing; declarant went to the station on her own and not at the request of the police; the statements were made while declarant was still under the stress of the alleged assault and the questions asked were targeted at determining why she was distressed; and finally, declarant was not responding to structured police questioning but instead seeking safety and aid).

State v. Nix, 2004 WL 2315035 (Ohio Ct. App. Oct. 15, 2004) (even if solicited by questioning, murder victim’s statements to police officer who arrived first at the scene were not testimonial because victim was not a suspect in

issue. In the first were responses to a series of “investigatory and hot-pursuit questions,” including whether “[t]hose guys running” were the shooters, whether the victim knew where the shooters were going, and upon overtaking them, whether they were the perpetrators. The second set of statements was made minutes later, after the perpetrators were in custody. At this point, the officers pressed the victim for clarification as to “exactly who shot [him].” The victim identified the defendant and stated that the men tried to rob him. The Second Circuit analyzed the statements as follows:

As for the answers to the early questions delivered in emergency circumstances to help the police nab [the victim’s] assailants, we doubt that these were of the type of declarations the Court would regard as testimonial. As for the final statement, however, made after [the assailants] had been caught, and after [the victim] had confirmed that they were the men who shot him, specifically that it was [defendant] who shot the gun and that the motive was robbery, this statement seems to have been made in greater formality with a view to creating a record and proving charges. It seems more likely to fall within the category the Court described as testimonial.

80. See also *State v. Wright*, 686 N.W.2d 295 (Minn. Ct. App. 2004) (declining to decide whether statements made by assault victims, defendant’s girlfriend and her 15-year-old sister, to police officer upon arrival at scene were testimonial but suggesting that they were not), *review granted* (Nov. 23, 2004).

his own shooting, was not under police custody, and his statements were not the product of any form of “structured” questioning; also noting that while the question of the testimonial nature of the victim’s statements to an officer in the hospital after questioning was a closer one, “it is not clear that they constitute ‘testimonial’ evidence” for similar reasons; criticizing the broad approach taken by some courts that would render testimonial anything said to a police officer involved in investigating a crime).

Key v. State, ___ S.W.3d ___, 2005 WL 467167 (Tex. Crim. App. Feb. 28, 2005) (victim’s statements to an officer who arrived on the scene were nontestimonial; statements were excited utterances made when the officer “was responding to a call and was involved in the preliminary task of securing and assessing the scene”).

Cassidy v. State, 149 S.W.3d 712 (Tex. Crim. App. 2004) (assault victim’s statements describing his assailant and made to police officer at hospital one hour after assault were not testimonial).

State v. Corella, 18 Cal. Rptr. 3d 770 (Ct. App. 2004) (statements made by assault victim to officer who arrived on the scene when victim was crying, distraught, and appeared to be in pain were not testimonial; stating that the victim’s “spontaneous statements describing what had just happened did not become part of a police interrogation merely because Officer Diaz was an officer and obtained information from [the victim]. Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an interrogation.”).

People v. Kilday, 20 Cal. Rptr. 3d 161 (Ct. App. 2004) (victim’s statements to responding officers were not testimonial; victim was frightened and upset, “the area was unsecured and the situation uncertain;” officers were not aware of the nature of the crime or the identity of the assailant, his location, or whether he posed a danger to them and did not know whether the victim needed medical attention; declining to adopt a blanket rule that statements obtained by officers responding to a scene are nontestimonial and stating that the inquiry will be a fact-specific one focusing on whether the officer is acting in an investigative capacity or is securing and assessing the scene), *review granted*, 105 P.3d 114 (Cal. 2005). *But see Kilday infra* (holding that two other sets of statements by same victim were testimonial).

People v. West, 823 N.E.2d 82 (Ill. App. Ct. 2005) (following *Kilday*, summarized immediately above, and holding that sexual assault victim’s statements to officer who responded to the home where the victim went for help were nontestimonial; statements were obtained “in response to the officer’s preliminary task of attending to the medical concerns of a victim shortly after the commission of an offense.”). *But see West infra* (holding that other statements were testimonial).

Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004) (domestic battery victim’s statements to officer who arrived at scene were not testimonial; statement “was not given

in a formal setting even remotely resembling an inquiry before King James I’s Privy Council” or during a pretrial hearing or deposition and was not contained in a formalized document; although statement was made in direct response to the officer’s questions, *Crawford* spoke of police interrogation, not police questioning; “[W]hen police arrive . . . in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not ‘testimonial.’ Whatever else police ‘interrogation’ might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police ‘interrogation,’ bolstered by television, as encompassing an ‘interview’ in a room at the stationhouse. It also does not bear the hallmarks of an improper ‘inquisitorial’ practice”; concluding that an “excited utterance” is not testimonial “in that such a statement, by definition, has not been made in contemplation of its use in a future trial”), *transfer granted* (Dec. 9, 2004).

Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004) (following *Hammon*, discussed above, and holding that assault victim’s statements describing the incident given to police officer within seven minutes of officer’s arrival at the scene were not testimonial; when the statements were given, victim was bleeding from a cut on his forehead, his voice was shaky, and he was visibly upset and shaking all over; stating that *Hammon* noted “that the very concept of an ‘excited utterance’ is such that it is difficult to perceive how such a statement could ever be ‘testimonial’”).

Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004) (statements made by a domestic battery victim to a police officer at the time of defendant’s arrest were not testimonial; responding to a 911 domestic disturbance call, the officer arrived at the scene in approximately five minutes and saw the victim with blood coming from her nose and what appeared to be blood on her shirt and pants; approximately ten minutes later, the officer asked the victim what happened and the victim, while moaning and crying, stated that defendant punched her; the officer then arrested the defendant; guided by the analysis in *Hammon*, discussed above, the court concluded that the nature of the police interrogation (statement was not given in a formal setting or during any type of pretrial hearing or deposition, was not contained within a formalized document of any kind, and the questioning did not qualify as classic police interrogation) and the nature of the statement itself (an excited statement) rendered it nontestimonial), *transfer granted* (Dec. 9, 2004).

Beach v. State, 816 N.E.2d 57 (Ind. Ct. App. 2004) (following *Hammon* and *Fowler*, discussed above, and concluding that domestic battery victim’s statements to officers made upon their arrival at the scene were nontestimonial).

People v. King, ___ P.3d ___, 2005 WL 170727 (Colo. Ct. App. Jan. 27, 2005) (following *Fowler*, discussed above,

and distinguishing *Lopez*, discussed below, and holding that sexual assault and stabbing victim's statements to officer over a period of two hours were nontestimonial; during the time that the officer was with the victim, the victim was still distressed by the assault and was in a substantial amount of pain due to the life threatening nature of her injuries; victim made excited utterances in a noncustodial setting without indicia of formality).

State v. Maclin, 2005 WL 313977 (Tenn. Crim. App. Feb. 6, 2005) (victim's statements to officers were nontestimonial; "[T]he victim had summoned the officers to her home, fearing her safety, and she, subsequently, talked to the police about the events upon their arrival. This was not a formal statement or a police interrogation . . .").

Commonwealth v. Gray, 867 A.2d ___, 2005 WL 110244 (Pa. Super. Ct. 2005) (statement to police by victim's daughter, who also was assaulted by defendant at the time of the events in question, was nontestimonial under any of the formulations of that term contemplated by the *Crawford* Court; daughter made statements to police after approaching them as they exited their vehicle at the scene).

United States v. Webb, 2004 WL 2726100 (D.C. Super. Nov. 9, 2004) (assault victim's statements made in response to officer's questions "what happened?" and "why?" were not testimonial; questions were posed when officer arrived at the crime scene).

People v. Mackey, 785 N.Y.S. 2d 870 (Crim. Ct. 2004) (applying a "fact-specific analysis" and finding that victim's statements to officer were not testimonial; victim initiated contact with officer immediately after the defendant had allegedly punched her, pushed her down, and tried to take her children; when victim, who was crying and had a red and swollen face, approached officer, officer asked what was wrong and victim responded; statements were not given in a formal setting or contained in a formalized document).

Statements Held to Be Testimonial

Moody v. State, 594 S.E.2d 350, 354 & n.6 (Ga. 2004) (victim's statement to a police officer at the scene "shortly after" defendant shot into the bedroom in which victim was sleeping was testimonial; "the [*Crawford*] Court stated that the term [testimonial] certainly applies to statements made in a police interrogation, and it appears that the term encompasses the type of field investigation of witnesses at issue here.").

Bell v. State, 597 S.E.2d 350 (Ga. 2004) (statements made by victim to police officers during the officers' investigation of complaints made by the victim against defendant were testimonial).

Henry v. State, 604 S.E.2d 469 (Ga. 2004) (murder victim's statements to officer during prior incidents in which victim flagged officer down were testimonial; victim reported an assault and that she was having problems retrieving her car keys from the defendant).

Brown v. State, 607 S.E.2d 579 (Ga. 2005) (murder victim's statement to police officer, made months before

her murder, reporting that she was assaulted by the defendant was testimonial).

Pitts v. State, __ S.E.2d ___, 2005 WL 127049 (Ga. App. Ct. Jan. 24, 2005) (victim's statements to police were testimonial because they "resulted from police questioning during the investigation of a crime"; at the time the statements were made, the defendant was handcuffed, taken outside, and placed in a patrol car; a person would reasonably believe that the statements would be available for use at a later trial).

Lopez v. State, 888 So. 2d 693 (Fla. Dist. Ct. App. 2004) (victim's statements to officer who arrived at the scene were testimonial; although victim was excited, "he surely must have expected" that his statement to the officer might be used in court against defendant).

Manuel v. State, __ So. 2d ___, 2005 WL 17708 (Fla. Dist. Ct. App. Jan. 5, 2005) (citing *Lopez*, discussed immediately above, and holding that victim's statement to a police officer as to how victim was injured and in response to the officer's direct questioning was testimonial).

Wall v. State, 143 S.W.3d 846 (Tex. Crim. App. 2004) (disagreeing with *Cassidy*, discussed above, and holding that assault victim's statements about assault and identity of perpetrator made in response to officer's questions posed at hospital were testimonial; "a police officer conducting an interview of a witness at a hospital is . . . 'structured police questioning'" and thus testimonial).

State v. Adams, 16 Cal. Rptr. 3d 237 (Ct. App. 2004) (victim's statements to sheriff's deputies were testimonial), *review granted*, 99 P.3d 2 (Cal. 2004).

People v. Pirwani, 14 Cal. Rptr. 3d 673 (Ct. App. 2004) (videotaped statement made by an unavailable dependent adult to a law enforcement official that was admissible under the state evidence code was testimonial under *Crawford*, as conceded by the State; whatever the limits of the term testimonial, "a formalized statement, such as the instant videotape, wherein there is an inquisitorial interaction between a law enforcement official and the victim relating to the facts at issue at trial, appears to clearly fit within [its] scope").

People v. Ochoa, 18 Cal. Rptr. 3d 365, 372 (Ct. App. 2004) (sexual assault victim's statements to police officer and district attorney investigator, made the afternoon after the incident and several days later, were testimonial; "although [the victim] was not being 'interrogated' by the officers in a technical sense, the officers and the investigator were acting in an investigative and/or prosecutorial capacity at the time she made the statements to them. Based on the officers' involvement in the production of testimonial evidence to be used against [defendant] in a criminal prosecution, the statements are 'testimonial' . . ."), *review granted*, 101 P.3d 478 (Cal. 2004).

People v. Kilday, 20 Cal. Rptr. 3d 161 (Ct. App. 2004) (victim's statements, during tape-recorded interview with detective in a hotel room, were testimonial; victim's earlier statements to the detective summoned to the scene by

first-arriving officers were also testimonial because the detective's purpose was to get a statement rather than to provide safety and security, the detective had been given background information by first-arriving officers, and the detective was specifically summoned to question the victim), *review granted*, 105 P.3d 114 (Cal. 2005). *But see Kilday supra* (holding that a third set of statements by the same victim was not testimonial).

State v. Courtney, 682 N.W.2d 185 (Minn. Ct. App. 2004) (police officer's tape-recorded interview with domestic assault victim was testimonial), *review granted* (Sept. 29, 2004).

People v. West, 823 N.E.2d 82 (Ill. App. Ct. 2005) (sexual assault victim's statements to officers at hospital were testimonial; at the time the victim was questioned, the defendant was in custody and the officers had some information about his involvement in the crime, their questioning was done to further investigate his involvement and to gather evidence to be used in a criminal trial, the officers asked "specific, purposeful questions" and were given detailed answers; "[t]hese investigative, evidence-producing actions bore statements which, if used to convict the defendant, would implicate the central concerns underlying the confrontation clause"). *But see West supra* (holding that other statements were nontestimonial).

People v. Victors, 819 N.E.2d 311 (Ill. App. Ct. 2004) (victim's statements to responding officer were testimonial; statements were made in response to police questioning while the officer was conducting an investigation and were used to "establish an element of the offense").

7. 911 Calls

A number of decisions have dealt with 911 calls. A majority of the early cases held these calls to be nontestimonial.⁸¹ Some recent cases, however, have declined to adopt a bright-line rule with respect to this evidence, instead opting for a fact-based approach.⁸² In *People v. West*,⁸³ this approach led the Illinois Court of Appeals to hold that some statements made during a 911 call were testimonial, while others were nontestimonial. Considering the two lines of cases that have developed in this area, the *West* court rejected the notion of a bright-line rule. It said that

81. *But see* State v. Meeke, 88 P.3d 789 (Kan. 2004) (assuming *arguendo* that much of the 911 call by neighbor was testimonial because the 911 operator was affiliated with law enforcement and questioned the caller; concluding that there was no confrontation clause violation because the few intelligible voices belonged to witnesses who testified at trial and because by killing the victim, defendant forfeited any confrontation clause challenge to the victim's statements as heard on the call).

82. *See, e.g.*, State v. Powers, 99 P.3d 1262 (Wash. Ct. App. 2004) (discussed below); *People v. West*, 823 N.E.2d 82 (Ill. App. Ct. 2005) (discussed below); *see generally supra* at § IIIA6 (discussing emerging trend of fact-based inquiries with respect to victims' statements).

83. 823 N.E.2d 82 (Ill. App. Ct. 2005).

the testimonial nature of a 911 call must be determined pursuant to a fact-specific inquiry that seeks to determine whether the statement made to the 911 dispatcher "was (1) volunteered for the purpose of initiating police action or criminal prosecution; or (2) provided in response to an interrogation, the purpose of which was to gather evidence for use in a criminal prosecution." In the first instance, the court explained, the statement is testimonial because an objective declarant would reasonably believe that when he or she reports a crime, he or she is "bearing witness" and that the statement may be used in a later criminal prosecution. In the second instance, it continued, the statement is testimonial—because "it is the product of evidence-producing questions, the responses . . . if used to convict . . . would implicate the central concerns underlying the confrontation clause." The court went on to add that statements made to obtain immediate assistance in the face of danger would be nontestimonial in nature.

Applying these principles, the court held that the victim's 911 statements concerning the nature of the attack, her medical needs, and her age and location were nontestimonial in nature. However, her statements describing the vehicle and other property that had been stolen and the direction in which the assailants fled were testimonial.

Whether the fact-specific inquiry adopted by the *West* court will take hold is not yet clear. What is clear is that the law in this area is still evolving, even within jurisdictions.⁸⁴ Although the North Carolina appellate courts have not yet addressed the issue, the Court of Appeals has favorably cited an early New York case holding that 911 calls are nontestimonial.⁸⁵ The post-*Crawford* 911 call cases are summarized below.

For cases dealing with excited utterances generally, see *infra* at § IIIA13.

Nontestimonial 911 Call Statements

People v. West, 823 N.E.2d 82 (Ill. App. Ct. 2005) (victim's statements on 911 call concerning the nature of the alleged attack, her medical needs, and her age and location were nontestimonial; statements were given immediately after victim was brutally assaulted and in a state of shock for the purpose of requesting medical and police assistance; dispatcher's questions about what was wrong, whether she needed an ambulance, and her age and location were designed to obtain information about the situation and secure medical attention for the victim, not to produce evidence for a future trial). *But see West* (listed below and summarizing other statements that were testimonial).

84. *Compare* People v. Cortes, 781 N.Y.S.2d 401 (Sup. Ct. 2004) (testimonial), and People v. Dobbin, __ N.Y.S.2d __, 2004 WL 3048648 (Sup. Ct. Dec. 22, 2004) (testimonial), with People v. Conyers, 777 N.Y.S.2d 274 (Sup. Ct. 2004) (nontestimonial).

85. *See supra* at § IIIA6 (discussing *State v. Forrest*).

State v. Wright, 686 N.W.2d 295 (Minn. Ct. App. 2004) (statements made by assault victims, defendant's girlfriend and her fifteen-year-old sister, during 911 call made immediately after an assault were not testimonial; stating that even under the broadest definition of the term "testimonial," the 911 call does not qualify: "Statements in a 911 call by a victim struggling for self-control and survival only moments after an assault simply do not qualify as knowing responses to structured questioning in an investigative environment in which the declarant reasonably expects that the responses will be used in later judicial proceedings"; distinguishing *Cortes*, discussed below).

Pitts v. State, ___ S.E.2d ___, 2005 WL 127049 (Ga. App. Ct. Jan. 24, 2005) (victim's 911 call, made while the incident was in progress, was nontestimonial; the statements were made to prevent or stop a crime as it was occurring).

State v. Corella, 18 Cal. Rptr. 3d 770 (Ct. App. 2004) (assault victim's statements made during 911 call were not testimonial because they were not knowingly given in response to structured police questioning and are not similar to the official and formal quality of the types of statements deemed testimonial by *Crawford*; noting that declarant, not the police, initiated the call and stating: "Not only is a victim making a 911 call in need of assistance, the 911 operator is determining the appropriate response, not conducting a police interrogation in contemplation of a future prosecution.").

People v. Caudillo, 19 Cal. Rptr. 3d. 574 (Ct. App. 2004) (911 call initiated by a citizen-witness was not testimonial; details provided were elicited to facilitate a police response, not to provide evidence for trial), *review granted*, 104 P.3d 97 (Cal. 2005).

People v. Conyers, 777 N.Y.S.2d 274 (Sup. Ct. 2004) (911 calls by third-party witness were nontestimonial; in the first call, the witness screamed for police assistance to stop a fight between her son and son-in-law; in the second, she screamed for an ambulance; "[t]he calls . . . were generated . . . [as the witness] reacted to the life threatening crisis unfolding before her eyes. . . . [I]t is clear to this Court, having heard the panicked and terrified screams of [the witness] that her intention in placing the 911 calls was to stop the assault in progress and not to consider the legal ramifications of herself as a witness in a future proceeding.").

People v. Moscat, 777 N.Y.S.2d 875 (Crim. Ct. 2004) (911 call made by the female victim in a domestic assault case was nontestimonial; 911 call typically is initiated not by the police but by the victim of a crime and is not generated by the desire of the prosecution or police to seek evidence against a suspect but rather by the urgent desire of a citizen to be rescued from immediate peril; 911 calls differ from pretrial examinations undertaken by the government in contemplation of pursuing criminal charges against a person because they are "undertaken by a caller who wants protection from immediate danger"; testimonial statements are produced when "the government summons a citizen to be a witness," but in a 911 call, "it is the citizen

who summons the government to her aid"; the 911 call is not equivalent to a formal pretrial examination—rather, "[i]f anything, it is the electronically augmented equivalent of a loud cry for help"; a 911 call "can usually be seen as part of the criminal incident itself, rather than as part of the prosecution that follows;" a person who gives a formal statement is conscious that he or she is bearing witness, but that is not usually the case with a 911 call; "a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a 'witness' in future legal proceedings; she is usually trying to simply save her own life").

State v. Nelson, 2004 WL 2626817 (Ohio Ct. App. Nov. 19, 2004) (Gorman, J., concurring) (victim's 911 call was not testimonial because excited utterances to 911 operator were not made during police interrogation or in response to structured questioning and victim was not a suspect).

Testimonial 911 Call Statements

People v. West, 823 N.E.2d 82 (Ill. App. Ct. 2005) (victim's statements on 911 call describing vehicle and other property that had been stolen and the direction in which her assailants fled were testimonial; these statements were in response to questions posed by the dispatcher for the stated purpose of involving the police). *But see West* (listed above and summarizing other statements that were nontestimonial).

State v. Powers, 99 P.3d 1262 (Wash. Ct. App. 2004) (adopting a "case-by-case" approach to the testimonial nature of 911 calls and holding that the call was testimonial; caller dialed 911 to report defendant's violation of a protective order and described defendant to assist in his apprehension and prosecution rather than to protect herself or her child from his return).

People v. Cortes, 781 N.Y.S.2d 401 (Sup. Ct. 2004) (without mentioning *Conyers* or *Moscat*, discussed above, court held that 911 call was testimonial; caller stated, "I just saw a man running with a gun"; as 911 operator asked questions, caller stated that the man was "shooting" at someone; the 911 operator asked questions about the shooter's location, description, and direction of movement, and the caller responded; "the method for taking the calls falls within the definition of interrogation").

8. Victims' Statements to Medical Personnel

Cases dealing with child victims' statements to medical personnel are discussed *infra* at § IIIA14c. The one post-*Crawford* case dealing with an adult victim's statements to medical personnel is summarized below.

People v. West, 823 N.E.2d 82 (Ill. App. Ct. 2005) (following *In re T.T.* (a child victim case summarized *infra* at § IIIA14) and holding that the victim's statements to an emergency room nurse and doctor regarding the nature of the alleged attack and the cause of her symptoms and pain were nontestimonial but that statements identifying the defendant as the assailant were testimonial).

9. Witnesses' Statements to Police Officers

Two North Carolina cases hold that witnesses' statements to the police during investigations are testimonial. In *State v. Morgan*,⁸⁶ an officer interviewed a witness in a murder investigation. The interview occurred approximately one and one-half hours after the first officer arrived at the scene. The witness described an altercation between the defendant and the victim, the defendant's threats and violence toward the witness, and other matters. The North Carolina Supreme Court found the statement to be testimonial because it was knowingly given in response to structured police questioning. Similarly, in *State v. Clark*,⁸⁷ the North Carolina Court of Appeals held that a witness's statements and affidavit identifying the defendant as the individual she saw walking with the victim prior to a robbery were testimonial. The witness made the statement to an officer who responded to the victim's call to the police. The officer saw the witness in the area and questioned her. In addition to making statements to the officer, the witness executed a notarized statement during police interrogation.⁸⁸ These decisions are consistent with a number of cases from other jurisdictions holding that witnesses' statements to officers during investigations are testimonial, although the holdings appear to depend on the circumstances in which the statements are made (for example, audiotaped) and not on the fact that the declarant is a witness.⁸⁹

86. 359 N.C. 131 (2004).

87. ___ N.C. App. ___, 598 S.E.2d 213 (July 6, 2004), *review denied*, 358 N.C. 734 (2004), *appeal dismissed*, 359 N.C. 192 (2004).

88. *See also* *State v. Morton*, ___ N.C. App. ___, 601 S.E.2d 873 (Sept. 21, 2004) (discussed *supra* at § IIIA2).

89. *See* *United States v. Nielsen*, 371 F.3d 574 n.1 (9th Cir. 2004) (noting that the prosecution conceded that admission of the statement was improper and stating that declarant's statement, made in response to police questioning during the course of a search, was testimonial; police asked declarant who had access to the safe where the methamphetamine was found, and declarant replied that she did not and that defendant did); *United States v. Gonzalez-Marichal*, 317 F. Supp. 2d 1200 (S.D. Cal. 2004) (granting defendant's motion in limine to exclude the custodial statements of a material witness made during interrogation in the investigation); *Brawner v. State*, 602 S.E.2d 612 (Ga. 2004) (declarant-eyewitness's statement to police within two to three days of the homicide, made during the course of a police investigation; there was no evidence that the declarant was involved in the shooting); *Ross v. State*, 603 S.E.2d 268, 270 (Ga. 2004) (witness's audiotaped interview with police approximately two days after the murder); *Porter v. State*, 606 S.E.2d 240 (Ga. 2004) (witness's statement to police during questioning); *Jenkins v. State*, 604 S.E.2d 789 (Ga. 2004) (defendant's uncle's statements to police during investigation were testimonial; among other things, the uncle told the police that defendant was not home on the day in question from 1 p.m. until after midnight; uncle also identified a gun found on the victim's property as belonging to him); *Samarron v. State*, 150 S.W.3d 701 (Tex. Crim. App. 2004) (witness's statement given to police at police station one hour after murder was testimonial; witness did not spontaneously tell the detective what happened at the scene; rather, after being questioned, he gave a formal, signed, written statement); *People v. Lee*, 21 Cal. Rptr. 3d 309 (Ct. App. 2004) (police officers' tape-recorded interview with witnesses shortly after an assault are testimonial); *cf.* *United States v. Gilbert*, 391 F.3d 882 (7th

In *Wilson v. State*,⁹⁰ however, the Texas Court of Appeals held that the defendant's girlfriend's statements to the police were nontestimonial. In that case, the defendant challenged certain statements made by his girlfriend to the police at the scene where a car chase ended. The court explained that three factors supported its determination that the girlfriend's statements were nontestimonial. First, the girlfriend initiated contact with the officers by approaching them at the scene where her car had been wrecked and abandoned. Second, her statements were made while she was inquiring about her car and the missing occupants and was visibly upset; thus the officer's questions were in response to her inquiries and made to determine why she was upset. And finally, the girlfriend was not responding to "tactically structured" questioning regarding any known criminal activity on her part; in fact, the police had no reason to know of her relationship with the driver until she volunteered that information to them.

The New York case of *People v. Newland*⁹¹ is similar. That case held that a statement given by an individual to an officer canvassing for possible witnesses to a crime was not testimonial. The court concluded that "a brief, informal remark to an officer conducting a field investigation, not made in response to 'structured police questioning' should not be considered testimonial, since it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."⁹²

Finally, at least two cases have held that "excited" statements of witnesses made to or overheard by first-responding officers are nontestimonial.⁹³

10. Informants' Statements

As yet, few courts have analyzed the testimonial nature of a confidential informant's statements to the police that are offered at trial. In *United States v. Cromer*,⁹⁴ the Sixth Circuit held such statements to be testimonial. The court reasoned that statements made knowingly to the authorities and describing criminal activity are almost always testimonial.⁹⁵ It continued:

Cir. 2004) (government concedes that defendant's wife's statements to police while they were executing a search warrant at her residence were testimonial); *see also* *United States v. Solomon*, 399 F.3d 1231 (10th Cir. 2005) (concluding that under *Crawford*, the trial court should not have admitted vehicle driver's statements to police at the scene of the vehicle stop where the defendant, a passenger in the vehicle, was arrested, but going on to hold that defendant had waived the issue).

90. 151 S.W.3d 694 (Tex. Crim. App. 2004).

91. 775 N.Y.S.2d 308 (App. Div. 2004).

92. *Id.* (quotation and citations omitted).

93. *See* *State v. Anderson*, 2005 WL 171441 (Tenn. Crim. App. Jan. 27, 2005) (excited utterances of juvenile witnesses who flagged down officer to report that a man had broken into a building were not testimonial); *Stancil v. United States*, 866 A.2d 799 (D.C. 2005) (victim's daughter's "excited" request to her father to stop hurting her mother that was overheard by responding officer was not testimonial).

94. 389 F.3d 662 (6th Cir. 2004).

95. *See id.*

Tips provided by confidential informants are knowingly and purposefully made to authorities, accuse someone of a crime, and often are used against the accused at trial. The very fact that the informant is confidential—*i.e.*, that not even his identity is disclosed to the defendant—heightens the dangers involved in allowing a declarant to bear testimony without confrontation. The allowance of anonymous accusations of crime without any opportunity for cross examination would make a mockery of the Confrontation Clause.⁹⁶

11. Statements to Friends, Family, and Similar Private Parties

In *State v. Blackstock*,⁹⁷ the North Carolina Court of Appeals held that a deceased victim's statements to his wife and daughter were nontestimonial. The statements at issue described the robbery and the shooting that led to the charges against the defendant. The court noted that the statements were made in personal conversations, at a time when the victim's physical condition was improving. The court concluded that it was unlikely that the victim made the statements under a reasonable belief that they later would be used prosecutorially, because at the time, the victim could have fully expected to testify at trial himself. Moreover, the court continued, the fact that the victim made the statements to his wife and daughter mitigates against the possibility that he understood he was "bearing witness" against the defendant.

With one exception, the cases from other jurisdictions all hold that if the declarant's statements were made to family members or friends, they are not testimonial.⁹⁸ Also, one case held that statements by a victim to a "concerned citizen" are

96. *Id.* at 675.

97. 165 N.C. App. 50 (2004).

98. See *infra* at § IIIA14d (discussing child victims' statements to family and friends); *United States v. Morgan*, 385 F.3d 196, 209 n.8 (2d Cir. 2004) (letter written by a co-defendant to her boyfriend); *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004) (statements during a "private conversation"), *cert. denied*, 125 S. Ct. 971 (2005); *United States v. Manfre*, 368 F.3d 832 at n.1 (8th Cir. 2004) (deceased co-conspirator's statements to his half brother, two friends, and his fiancée); *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004) (declarant's statements to his mother confessing to the murders and other criminal activities; declarant made the statements to his mother over a year before she had any contact with law enforcement agents); *Ramirez v. Dretke*, 398 F.3d 691 n.3 (5th Cir. 2005) (defendant's statements to individual at whose home he was staying); *State v. Ferguson*, 607 S.E.2d 526 (W. Va. 2004) (murder victim's statement to friends that defendant had threatened to kill him); *Demons v. State*, 595 S.E.2d 76 (Ga. 2004) (victim's statements to co-worker and friend that defendant was going to kill him); *State v. Rivera*, 844 A.2d 191 (Conn. 2004) (co-defendant's statement to his nephew); *People v. Griffin*, 93 P.3d 344 n.19 (Cal. 2004) (statement made by murdered child victim to a friend at school, stating that defendant was fondling her); *People v. Shepherd*, 689 N.W.2d 721 (Mich. Ct. App. 2004) (jailhouse statements made to relatives and overheard by guards and letter written by accomplice and delivered to defendant); *Miller v. State*, 98 P.3d 738 (Okla. Crim. App. 2004) (declarant's confession to witness; relationship between the two was that declarant lived in a car parked in witness's parents' back yard); *People v. Compan*, 100 P.3d 533 (Colo. Ct. App. 2004) (domestic violence victim's excited utterances to

not transformed into testimonial statements if the citizen relays the statements to the police.⁹⁹ *In re E.H.*¹⁰⁰ is the one case holding statements to a family member to be testimonial. In that case, discussed *infra* at § IIIA14d, a divided panel of the Illinois Court of Appeals held that a child sexual assault victim's statements to her grandmother about the abuse were testimonial.

For cases pertaining to statements on wiretap recordings, see *infra* § IIIA15.

12. Diary Entries

At least one federal appellate court has held that a victim's diary entries are not testimonial.¹⁰¹

13. Excited Utterances

Two lines of cases have developed regarding the classification of excited utterances.¹⁰² One line holds that regardless

her friend about her husband's conduct; the statements were not made to a law enforcement or judicial officer; although they were not "casual or off-hand" because the victim was distraught, they were not the kind of "solemn or formal" declarations that *Crawford* associated with testimonial statements and were not made for the purpose of establishing facts in a subsequent proceeding), *cert. granted*, 2004 WL 2376474 (Col. Oct. 25, 2004); *People v. Garrison*, __ P.3d __, 2004 WL 2278287 (Colo. Ct. App. Oct. 7, 2004) (victim's statements to training manager at work); *State v. Saechao*, 98 P.3d 1144, 1146 (Or. Ct. App. 2004) (co-defendant's statements to a friend during a telephone conversation from the county jail); *People v. Cervantes*, 12 Cal. Rptr. 3d 774 (Ct. App. 2004) (co-defendant declarant's statement to third party; third party, who was a surgical medical assistant, was the declarant's neighbor and knew him for twelve years; statement was made when declarant sought medical attention from "a friend of long standing" who had come to visit his home); *People v. Butler*, 25 Cal. Rptr. 3d 154 (App. Ct. 2005) (spontaneous statements to co-workers); *State v. Aguilar*, __ P.3d __, 2005 WL 487124 (Ariz. Ct. App. Mar. 3, 2005) (excited utterances made by one victim and overheard by his son and by second victim to her brother-in-law); *State v. Manuel*, 685 N.W.2d 525 (Wis. Ct. App. 2004) (statement to girlfriend), *review granted*, 689 N.W.2d 55 (Wis. 2004); *Brooks v. State*, __ So. 2d __, 2004 WL 1516503 (Miss. Ct. App. June 29, 2004) (declarant's statement to half sister, made under great distress, implicating defendant in the crime), *cert. granted*, 888 So. 2d 1177 (Miss. 2004); *People v. Rivera*, 778 N.Y.S.2d 28 (App. Div. 2004) (finding that defendant had not preserved the confrontation clause claim but concluding that even if he had, victim's girlfriend's telephoned statement to the victim's sister, identifying defendant as the assailant, made within minutes of the stabbing by a crying, screaming declarant, was not testimonial); *State v. Nix*, 2004 WL 2315035 (Ohio Ct. App. Oct. 15, 2004) (murder victim's statements to friends at the scene); *Woods v. State*, 152 S.W.3d 105 (Tex. Crim. App. 2004) (en banc) (casual remarks spontaneously made to acquaintances); *Commonwealth v. Eichele*, 2004 WL 2002212 (Pa. Com. Pleas. June 15, 2004) (witness-declarant's statements to his girlfriend upon discovering the victim's body).

99. See *People v. West*, 823 N.E.2d 82 (Ill. App. Ct. 2005) (rape victim came to citizen's door crying for help; citizen took victim into her home, asked what happened, and later conveyed this information to the 911 dispatcher).

100. __ N.E.2d __, 2005 WL 195376 (Ill. App. Ct. Jan. 28, 2005).

101. See *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004).

102. See *Commonwealth v. Gray*, 867 A.2d 560 (Pa. Super. Ct. 2005) ("The aforementioned cases illustrate some divergence on the

of the speaker, statements are nontestimonial when they exhibit the hallmarks of an excited utterance. As one court put it: “Conceptually, . . . excited utterance[s] [are] at the opposite end of the hearsay spectrum from testimonial hearsay. . . . [They] do not exhibit any of the hallmarks of a testimonial statement: one which is solemn, deliberate and anticipated to be used formally.”¹⁰³ While some early post-*Crawford* cases implicitly rejected the notion of a bright-line rule excepting excited utterances from the scope of the term “testimonial”, more recent cases have done so expressly. Although some of these more recent cases find that the excited nature of the statements is relevant to the testimonial/nontestimonial distinction, they reject the notion that this fact is dispositive of the issue. The relevant cases are summarized below.

For cases dealing with 911 calls, see *supra* at § IIIA7.

Cases Relying on the Excited Nature of the Statement to Conclude That it is Nontestimonial

State v. Forrest, 164 N.C. App. 272 (2004) (victim’s “spontaneous” statement to a police officer “immediately after a rescue” was nontestimonial).

United States v. Griggs, 2004 WL 2676474 (S.D.N.Y. Nov. 23, 2004) (no *Crawford* violation by having police officer testify that when he arrived at the scene he heard the statement “Gun! Gun! He’s got a gun!” and saw the declarant gesture at the defendant; excited utterance/present sense impression was nontestimonial).

State v. Barnes, 854 A.2d 208, 209–12 (Me. 2004) (murder victim’s statements to police pertaining to defendant’s prior assault on her and threats to kill her were not testimonial; statements were made after declarant drove herself to the police station and while crying and sobbing; declarant went to the station on her own and not at the request of the police, the statements were made while still under the stress of the alleged assault, the questions asked were targeted at determining why she was distressed, and declarant was not responding to structured police questioning but instead seeking safety and aid).

State v. Corella, 18 Cal. Rptr. 3d 770 (Ct. App. 2004) (statements made by assault victim to officer who arrived on the scene when victim was crying, distraught, and appeared to be in pain were not testimonial; victim’s “spontaneous statements describing what had just happened did not become part of a police interrogation merely because [an officer] . . . obtained information from [the victim]. Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an interrogation.”).

Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004) (domestic battery victim’s statements to officer who ar-

rived at scene were not testimonial; an “excited utterance” is not testimonial “in that such a statement, by definition, has not been made in contemplation of its use in a future trial”), *transfer granted* (Dec. 9, 2004).

Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004) (following *Hammon*, discussed above, and holding that assault victim’s statements describing the incident given to police officer within seven minutes of officer’s arrival at the scene were not testimonial; when the statements were given, victim was bleeding from a cut on his forehead, his voice was shaky, and he was visibly upset and shaking all over; stating that *Hammon* noted “that the very concept of an ‘excited utterance’ is such that it is difficult to perceive how such a statement could ever be ‘testimonial’”).

Fowler v. State, 809 N.E.2d 960 (Ind. App. Ct. 2004) (statements made by a domestic battery victim to a police officer at the time of defendant’s arrest were not testimonial; responding to a 911 domestic disturbance call, the officer arrived at the scene in approximately five minutes and saw the victim with blood coming from her nose and what appeared to be blood on her shirt and pants; approximately ten minutes later, the officer asked the victim what happened and the victim, while moaning and crying, stated that defendant punched her; the officer then arrested the defendant; guided by the analysis in *Hammon*, discussed above, the court concluded that the nature of the police interrogation and the nature of the statement itself (an excited statement) rendered it nontestimonial), *transfer granted* (Dec. 9, 2004).

State v. Orndorff, 95 P.3d 406, 408 (Wash. Ct. App. 2004) (declarant’s excited utterance to victim that she saw a man with a pistol in the house, saw two men leave the house, and tried to call 911 was nontestimonial; statement was a spontaneous declaration made in response to a stressful incident she was experiencing).

People v. Compan, 100 P.3d 533 (Colo. Ct. App. 2004) (domestic violence victim’s excited utterances to her friend about her husband’s conduct were not testimonial), *cert. granted*, 2004 WL 2376474 (Colo. Oct. 25, 2004).

Key v. State, __ S.W.3d __, 2005 WL 467167 (Tex. Crim. App. Feb. 28, 2005) (“we are persuaded that the underlying rationale of an excited utterance supports a determination that it is not testimonial in nature”).

State v. Aguilar, 107 P.3d 377 (Ariz. Ct. App. 2005) (excited utterances heard by lay witnesses are not testimonial; “[w]e discern nothing in [the] description of an excited utterance that is even remotely similar to most of what *Crawford* offers as an example of a testimonial statement”; noting that excited utterances to police officers in response to the officers’ questions might be different but finding that it need not address that issue).

State v. Anderson, 2005 WL 171441 (Tenn. Crim. App. Jan. 27, 2005) (excited utterances of juvenile witnesses who flagged down officer to report that a man had broken into a building were not testimonial; “the essential characteristics that cause the juveniles’ statements to fall within

issue of whether every excited utterance should fall outside the class of ‘testimonial’ statements.”).

103. *Commonwealth v. Eichele*, 2004 WL 2002212 (Pa. Com. Pleas. June 15, 2004).

the ambit of the excited utterance exception conflict with the characteristics that would make them testimonial”).

Commonwealth v. Gray, 867 A.2d 560 (Pa. Super. Ct. 2005) (statement to police by victim’s daughter, who also was assaulted by defendant at the time of the events in question, was nontestimonial; “an unsolicited excited utterance to police that is made to obtain assistance during the commission of a crime would not constitute a statement made in contemplation of prosecution” and is not testimonial).

Commonwealth v. Eichele, 2004 WL 2002212 (Pa. Com. Pleas. June 15, 2004) (witness-declarant’s statements to his girlfriend upon discovering the victim’s body were “not only a classic example of an excited utterance, but clearly nontestimonial”; court states: “conceptually, an excited utterance is at the opposite end of the hearsay spectrum from testimonial hearsay”).

Cases Rejecting a Testimonial Exception for Excited Utterances
Lopez v. State, 888 So. 2d 693 (Fla. Dist. App. Ct. 2004) (“we do not think that excited utterances can be automatically excluded from the class of testimonial statements”).

Stancil v. United States, 866 A.2d 799 (D.C. 2005) (following *Lopez*, discussed above, and concluding: “Some excited utterances are testimonial, and others are not, depending upon the circumstances in which the particular statement was made. Especially in light of the apparent expansion in recent years of the kinds of statements which fall under the rubric of the hearsay exception for excited utterances, we conclude that such utterances cannot automatically be exempted from the strictures of *Crawford*.”).

People v. King, ___ P.3d ___, 2005 WL 170727 (Colo. App. Ct. Jan. 27, 2005) (“classification of an excited utterance, *while not dispositive*, supports a conclusion that a statement is nontestimonial”) (emphasis added).

14. Children’s Statements

As the cases summarized below reveal, difficult issues have arisen in other jurisdictions in prosecutions involving child victims and child witnesses. These cases often involve challenges to multiple statements by the child victim to different individuals, including family members, medical personnel, social workers, and the police.¹⁰⁴ The cases tend to analyze the statements separately, sometimes categorizing one set as testimonial and another as nontestimonial.¹⁰⁵ And even within one set of statements—such as those to medical personnel—some courts have categorized part to be testimonial and part to be nontestimonial.¹⁰⁶ This approach is

104. *See, e.g., In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004) (involving challenges to statements made by child to police, Department of Child and Family Services investigator, and doctor).

105. *See, e.g., id.* (holding that statements to police and Department of Child and Family Services investigator were testimonial but that certain statements made to doctor were nontestimonial).

106. *See, e.g., id.* (holding that some statements to doctor were nontestimonial but that others were testimonial).

consistent with some of the more recent 911 call and adult victim cases that have rejected a bright-line approach and adopted a fact-based inquiry.¹⁰⁷

a. Statements to Police Officers

Crawford cited *White v. Illinois*¹⁰⁸ as a case “arguably in tension” with the new *Crawford* rule.¹⁰⁹ The facts of *White* specifically noted by the Court involved statements of a child victim to an investigating officer, admitted as spontaneous declarations. In light of this, it is not surprising that almost all of the post-*Crawford* cases that have analyzed children’s statements to police officers have found them to be testimonial.¹¹⁰ Another explanation for these holdings might be the factual scenarios in which cases involving child victims tend to arise. As the cases annotated below reveal, in child victim cases, there is often a lag of time between the alleged criminal activity and the involvement of the police. Typically, the child first notifies a family member and then is taken to a medical provider for examination. Thus, in the usual scenario, some time elapses before an officer attempts to obtain information from the child, and this lag time can reach months in length. By the time the officer initiates contact with the child, he or she typically already has gathered evidence from family, doctors, and others who were involved from the start. When the communication finally begins with the child, the investigation is already underway and, not surprisingly, the child’s statements to the officer are found to be testimonial.

This typical fact pattern also may explain the difference in results between adult victims’ statements to police and those by child victims. As noted above, with adult victims, the courts have reached different results on whether the statements are testimonial or not.¹¹¹

The cases involving statements by child victims to police officers are summarized below.

Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005) (admission of nontestifying child sexual assault victim’s hearsay statements to police during an interview violated *Crawford*; victim made statements two days after she reported the incident to her mother).

People v. R.F., ___ N.E.2d ___, 2005 WL 323718 (Ill. App. Ct. Feb. 10, 2005) (three-year-old sexual assault victim’s statements to officer were testimonial; victim was taken to the hospital by her mother one day after reporting the incident; officer interviewed the victim’s mother at the hospital but deferred interviewing the victim until the next day; at that time, officer told victim that he was there

107. *See supra* at §§ IIIA6 & IIIA7.

108. 502 U.S. 346 (1992).

109. *Crawford*, 124 S. Ct. at 1368 n.8.

110. *But see* *People v. Cage*, 15 Cal. Rptr. 3d 846 (Ct. App. 2004) (discussed below), *review granted*, 99 P.3d 2 (2004).

111. *See supra* at § IIIA6.

to help her, asked the victim preliminary questions, and then asked her to repeat what she had told her mother).

In re T.T., 815 N.E.2d 789 (Ill. App. Ct. 2004) (seven-year-old sexual assault victim's statements to police officer were testimonial; victim was interviewed at police headquarters six months after the alleged assault; detectives told child that they were police officers and were assigned to investigate sex crimes).

In re Rolandis G., 817 N.E.2d 183 (Ill. App. Ct. 2004) (following *In re T.T.*, discussed above, and holding that seven-year-old child victim's statements to police officer who responded to call from the victim's mother were testimonial; statements were the result of formal and systematic questioning by the officer, who was investigating a report of a sexual assault).

People v. Sisavath, 13 Cal. Rptr. 3d 753 (Ct. App. 2004) (prosecutor conceded and court found that four-year-old child victim's statement to an officer who responded when the victim's mother called the police was testimonial; statement was knowingly given in response to structured police questioning).

People v. Cage, 15 Cal. Rptr. 3d 846 (Ct. App. 2004) (distinguishing *Sisavath*, discussed above, and holding that fifteen-year-old child victim's statement to law enforcement officer at hospital was nontestimonial; officer went to the hospital where he found the victim in the emergency room prior to treatment; the officer asked the victim what happened between him and the defendant and the victim stated, among other things, that defendant cut him with a piece of glass; "We cannot believe that the framers would have seen a 'striking resemblance' between [the] Deputy[']s interview with [the victim] at the hospital and a justice of the peace's pretrial examination. There was no particular formality to the proceedings. [The] Deputy . . . was still trying to determine whether a crime had been committed and, if so, by whom. No suspect was under arrest; no trial was contemplated. [The] Deputy . . . did not summon [the victim] to a courtroom or a station house; he sought him out, at a neutral, public place. There was no 'structured questioning,' just an open-ended invitation for [the victim] to tell his story. The interview was not recorded. There is no evidence that [the] Deputy . . . even so much as recorded it later in a police report. Police questioning is not necessarily police interrogation. When people refer to a 'police interrogation,' however colloquially, they have in mind something far more formal and focused."), *review granted*, 99 P.3d 2 (Cal. 2004).

State v. Courtney, 682 N.W.2d 185 (Minn. Ct. App. 2004) (videotaped interview of a child who witnessed domestic assault of her mother was testimonial; interview was conducted by a child protection worker and a law enforcement officer to develop the case against defendant; the same police officer who questioned the mother observed the child's interview via satellite; at one point, the interview was stopped by the police officer when he directed the interviewer to ask the child to draw the guns

she saw used; the circumstances show that the interview was made in preparation for the case against defendant), *review granted* (Sept. 29, 2004).

People ex rel. R.A.S., ___ P.3d ___, 2004 WL 1351383 (Colo. Ct. App. June 17, 2004) (on juvenile's appeal from judgment of delinquency, court held that victim's statements during interview with police investigator were testimonial; during videotaped "forensic interview" conducted three days after the incident at a facility for abused children, victim stated that juvenile made him "suck" and "lick" his "pee pee," and that juvenile had touched alleged victim's own "pee pee"; court concluded that the statement was taken by an investigating officer "in a question and answer format appropriate to a child" and "was 'testimonial' within even the narrowest formulation of the [United States Supreme] Court's definition of that term").

People v. Vigil, 104 P.3d 258 (Colo. Ct. App. 2004) (in sexual assault case, seven-year-old child's statements made during a police officer interview about the incident were testimonial; "[a]lthough the interview . . . was conducted in a relaxed atmosphere, with open-ended nonleading questions, and although no oath was administered . . . , it [was an] . . . interrogation under *Crawford*"; the interviewing officer was trained to interview children, the child was told that the interviewer was a police officer, the officer ascertained that the child understood the difference between being truthful and lying, and the child was told he needed to tell the truth; rejecting the prosecution's argument that the statements were nontestimonial because a seven-year-old child would not reasonably expect them to be used prosecutorially; noting in this regard that during the interview the officer asked the child what should happen to the defendant and the child replied that he should go to jail, and that the officer told the child he would have to speak with a "friend" who worked for the district attorney and who was going to try to put the defendant in jail for a long time), *cert. granted*, 2004 WL 2926003 (Colo. Dec. 20, 2004).

Somervell v. State, 883 So. 2d 836 (Fla. Dist. Ct. App. 2004) (autistic child's statements to a police officer who conducted interview at child advocacy center "would appear to be erroneous in light of *Crawford*," but any error was harmless).

b. Statements to Social Workers and Child Protective Services Workers

Only nine published cases have dealt with the testimonial or nontestimonial nature of statements by child victims to social workers or child protective services workers. Based on this limited body of law, it appears that the more police officer or prosecutor involvement there is with the social and child protective services workers, the more likely the child's statements are to be testimonial. The relevant cases are summarized below.

State v. Mack, 101 P.3d 349 (Or. 2004) (statements made by three-year-old child to Department of Human

Services caseworker during police-directed interview were testimonial; police asked caseworker to interview child, and during both interviews the police were present and videotaped the interviews; the caseworker was a “proxy for the police”).

State v. Snowden, 867 A.2d 314 (Md. 2005) (child abuse victims’ statements to social worker were testimonial; children were interviewed by sexual abuse investigator for the county Department of Health and Human Services at a detective’s request; detective was present during the interviews).

In re T.T., 815 N.E.2d 789 (Ill. App. Ct. 2004) (seven-year-old sexual assault victim’s statements to Department of Child and Family Services (DCFS) investigator were testimonial; “where DCFS works at the behest of and in tandem with the State’s Attorney with the intent and purpose of assisting in the prosecutorial effort, DCFS functions as an agent of the prosecution”; court reviewed investigator’s testimony in the context of the mechanics of the DCFS investigatory process and concluded that the investigator was working as an agent of the prosecutors; court rejected argument that the statements were non-testimonial because they were made during an unscheduled interview at the child’s home, in response to open-ended questions, and in the absence of any law enforcement officers; court declined to hold that all statements to social workers are *per se* testimonial, noting that a report to the DCFS hotline or statements of sexual abuse overheard by a social worker might be nontestimonial).

In re Rolandis G., 817 N.E.2d 183 (Ill. App. Ct. 2004) (following *In re T.T.*, discussed above, and holding that seven-year-old child victim’s statements to a child advocacy worker were testimonial; statements came in response to formal questioning, with a police officer watching through a two-way mirror).

People v. Geno, 683 N.W.2d 687 (Mich. Ct. App. 2004) (two-year-old’s response to interviewer’s question “[do you] ha[ve] an owie?” stating “yes, [defendant] hurts me there” and pointing to her vaginal area was nontestimonial; after father noted injury, he contacted Children’s Protective Services, which arranged for an assessment and interview of the child by the Children’s Assessment Center; during the interview, victim asked interviewer to accompany her to the bathroom, at which time the interviewer noticed blood on her underwear and posed the question; assuming the confrontation challenge was properly presented, the court held that child’s statement was nontestimonial because it was made to an employee of the Children’s Assessment Center, not a government employee, and the child’s answer to the question was not a statement in the nature of *ex parte* in-court testimony or its functional equivalent).

People v. Sisavath, 13 Cal. Rptr. 3d 753 (Ct. App. 2004) (videotape of an interview of a child victim by a trained interviewer at the county’s Multidisciplinary Interview Center (MDIC), a facility specially designed and staffed for interviewing children suspected of being victims of

abuse, was testimonial; the interview took place after the prosecution was initiated, was attended by the prosecutor and the prosecutor’s investigator, and was conducted by a person trained in forensic interviewing; “[I]t does not matter what the government’s actual intent was in setting up the interview, where the interview took place, or who employed the interviewer. It was eminently reasonable to expect that the interview would be available for use at trial”; court noted that it was not holding that every MDIC interview is testimonial).

People v. Warner, 14 Cal. Rptr. 3d 419 (Ct. App. 2004) (three-year-old child victim’s statements during interview by a Multidisciplinary Interview Center (MDIC) specialist two days after incident were testimonial; MDIC interview is similar to a police interrogation; court noted that although the MDIC interview is not intended solely as an investigative tool for criminal prosecutions, that is one of its purposes; court noted that an advisory committee had determined that specially trained child interview specialists should be used to conduct comprehensive interviews of children once a criminal or dependency investigation was determined to be warranted, that law enforcement was involved in the training of the specialists, that a detective observed the interview, and that it was reasonably expected that the interview would be used at trial), *review granted on another issue*, 97 P.3d 811 (Cal. 2004).

State v. Courtney, 682 N.W.2d 185 (Minn. Ct. App. 2004) (videotaped interview of a child who witnessed domestic assault of her mother was testimonial; interview was conducted by a child protection worker and a law enforcement officer to develop the case against defendant; the same police officer who questioned the mother observed the child’s interview via satellite; at one point, the interview was stopped by the police officer when he directed the interviewer to ask the child to draw the guns she saw used; the circumstances show that the interview was made in preparation for the case against defendant), *review granted* (Sept. 29, 2004).

State v. Bobadilla, 690 N.W.2d 345 (Minn. Ct. App. 2004) (following *Courtney*, discussed immediately above, and holding that child victim’s videotaped statement was testimonial; the fact that the child protection worker interviewed the child in the presence of a detective and the questions posed “clearly indicate that the interview was conducted for purpose of developing a case against [defendant]”), *review granted* (Feb. 15, 2005).

c. Statements to Medical Personnel

Crawford stated that the holding in *White v. Illinois* that a child’s statements to a police officer were admissible as spontaneous declarations was “arguably in tension” with its new confrontation clause rule.¹¹² However, *White* also involved statements by that same child to the child’s babysitter,

112. *Crawford*, 124 S. Ct. at 1368 n.8.

mother, and medical personnel. The child's statements to the babysitter and mother were admitted as spontaneous declarations. The statements to medical personnel were admitted as statements for the purpose of medical treatment. While the *Crawford* Court raised a potential *Crawford* issue as to the admission of the child's statement to the police, it said nothing about the admission of these other statements. Although this silence could be interpreted as a suggestion that statements to medical personnel are not testimonial, several post-*Crawford* cases have concluded otherwise. This area of the law, however, is developing, and there are cases going both ways on the issue. The relevant cases are summarized below.

In re T.T., 815 N.E.2d 789 (Ill. App. Ct. 2004) (seven-year-old sexual assault victim's statements to doctor describing the cause of symptoms or pain and the general character of the assault were nontestimonial, but statements identifying defendant as the perpetrator were testimonial; although doctor was a member of a child abuse protection unit at the hospital and had previously testified as an expert witness in child abuse cases, doctor was not charged with facilitating the prosecution of the case and doctor's "primary investment in cooperating with law enforcement agencies was in facilitating the least traumatic method of diagnosis and treatment for the alleged victim").

People v. Vigil, 104 P.3d 258 (Colo. Ct. App. 2004) (in sexual assault case, seven-year-old child's statements to doctor who examined him after the incident were testimonial; doctor was a member of a child protection team that provides consultations at area hospitals in cases of suspected child abuse, had previously provided extensive expert testimony in child abuse cases, was asked to perform a forensic sexual abuse examination on the child, and spoke with the police officer who accompanied the child before performing the examination; concluding that the statements were made under circumstances that would lead an objective witness reasonably to believe that they would be used prosecutorially; although the doctor was not a government officer or employee, he was not unassociated with government activity; the doctor elicited the statements after consultation with the police and understood that the information he obtained would be used in a child abuse prosecution), *cert. granted*, 2004 WL 2926003 (Colo. Dec. 20, 2004).

People v. Harless, 22 Cal. Rptr. 3d 625, 636–37 (Ct. App. 2004) (child's statements during a sexual abuse examination to doctor who was Director of Pediatric Services and the Child Abuse Center and during a sexual abuse examination were testimonial).

State v. Vaught, 682 N.W.2d 284 (Neb. 2004) (four-year-old child victim's statements, identifying defendant as the perpetrator, to emergency room physician who treated and diagnosed the victim were nontestimonial; the victim's identification of the defendant as the perpetrator was a statement made for the purpose of medical diagnosis or treatment after the victim was taken to the hospital by her family to be examined; the only evidence regarding the purpose of the medical examination indicated that it

was to obtain medical treatment; there was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination; court concluded by noting that "Our decision as to whether the statement at issue is 'testimonial' under *Crawford* does not preclude a different conclusion based on a different set of facts.>").

State v. Scacchetti, 690 N.W.2d 393 (Minn. Ct. App. 2005) (three-year-old victim's statements to nurse practitioner with the Midwest Children's Resource Center were nontestimonial; nurse sought information in order to provide a medical diagnosis, and she did not work on behalf of or in conjunction with police officers).

d. Statements to Family and Friends

As noted above, all of the post-*Crawford* cases have held that statements made by adults to family, friends, and similar private parties are nontestimonial.¹¹³ With one exception, this consensus holds with regard to statements made by children to family and friends.¹¹⁴ The one exception is *In re E.H.*¹¹⁵ In that case, a divided panel of the Illinois Court of Appeals relied on the accusatory nature of a child sexual assault victim's statements to her grandmother and held the statements to be testimonial.

In *In re E.H.*, the minor defendant, E.H., was charged with, among other things, sexual assault against five-year-old K.R. and two-year-old B.R. The victims' grandmother testified that after overhearing the victims talking at her house, she asked them what they were discussing. K.R. told her that they were discussing E.H. and went on to describe sexual acts that E.H. made them perform on her. B.R. told the grandmother the same thing, specifically stating that E.H. made them suck her "puckets," her term for breasts, and lick her "front behind" and "back behind," the child's terms for

113. *See supra* at § IIIA11.

114. *See State v. Aaron*, 865 A.2d 1135 n.21 (Conn. 2005) (statement made by two-and-one-half-year-old child to mother was nontestimonial; child stated: "I'm not going to tell you that I touch daddy's pee-pee"; statement was made "to a close family member more than seven years before the defendant was arrested"); *In re Doe*, 103 P.3d 967 (Idaho Ct. App. 2004) (four-year-old child's statements to her mother and grandmother about abuse were nontestimonial); *People v. Vigil*, 104 P.3d 258 (Colo. Ct. App. 2004) (in sexual assault case, seven-year-old child's statements to his father and his father's friend, made immediately after the incident when the child was crying and upset, were not testimonial; noting that statements were not solemn or formal statements and were made to persons unassociated with government activity); *cert. granted*, 2004 WL 2926003 (Colo. Dec. 20, 2004); *People v. R.F.*, ___ N.E.2d ___, 2005 WL 323718 (Ill. Ct. App. Feb. 10, 2005) (three-year-old sexual assault victim's statements to mother and grandmother were nontestimonial; "*Crawford* applies only to statements made to governmental officials"); *In re Rolandis G.*, 817 N.E.2d 183 (Ill. App. Ct. 2004) (seven-year-old child victim's statements to his mother were not testimonial); *State v. Bobadilla*, 690 N.W.2d 345 (Minn. Ct. App. 2004) (three-year-old child's statements to mother), *review granted* (Feb. 15, 2005); *see also supra* at § IIIA14c (discussing *White*, its holding as to the child's statements to the mother and babysitter, and *Crawford's* impact on those holdings).

115. ___ N.E.2d ___, 2005 WL 195376 (Ill. App. Ct. Jan. 28, 2005).

her vaginal area and buttocks, respectively. Although K.R. testified, B.R. did not. On appeal, defendant E.H. argued that admission of the grandmother's testimony recounting B.R.'s statements violated her rights under *Crawford*.

Without addressing the great body of case law holding that statements to family and friends are nontestimonial, the court stated:

Although some uncertainty remains regarding the exact definition of "testimonial statements," *we are certain* that, in this case, B.R.'s statement to her grandmother falls within the purview of the ruling of *Crawford* and is governed by the protections of the confrontation clause. It is true that certain types of hearsay statements, *i.e.*, "an offhand, overheard remark," may not qualify as statements at which the confrontation clause was directed, but it does apply against "those who bear testimony." Here, the declarant, B.R., bore accusatory testimony against E.H. which was offered to prove the truth of the matter asserted, specifically, that E.H. sexually assaulted her.¹¹⁶

The court acknowledged that B.R. did not make the statement to a governmental official but concluded that "this fact alone does not remove this case from the scrutiny of the confrontation clause."¹¹⁷ The court went on to find support for its ruling in the court's earlier decision in *In re T.T.*¹¹⁸ The court characterized that case as holding that "accusatory" statements made by child victims to medical personnel were testimonial in nature¹¹⁹ and stated that its focus was on the nature of the testimony and not on the official or unofficial nature of the person to whom the declarant made the statement. It concluded:

In the case at bar, the out-of-court statements of B.R., which accused E.H. of making her suck her "puckets" and "lick her front behind" and "back behind," were statements concerning the fault and identity of E.H. and these "accusatory statements" involve the protections of the confrontation clause. We believe it is the nature of the testimony rather than the official or unofficial nature of the person testifying that determines the applicability of *Crawford* and the confrontation clause.¹²⁰

The notion of focusing on the accusatory nature of statements finds support in the post-*Crawford* literature.¹²¹

116. *Id.* (citation omitted) (emphasis in original).

117. *Id.*

118. 815 N.E.2d 789 (Ill. App. Ct. 2004).

119. This aspect of *In re T.T.* is discussed *supra* at § IIIA14c.

120. The court went on to hold unconstitutional under *Crawford* a state statute that allowed into evidence the out-of-court statements of a child under the age of thirteen who does not testify, if the court finds that the statements provide "sufficient safeguards of reliability" after considering the time, content, and circumstances within which the statements were made.

121. See Robert Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005).

e. Other Statements by Children

United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) (child victim's statements to "forensic interviewer" were testimonial; center that performed interview videotaped it and as a matter of course, provided one copy of the tape to law enforcement; it is not clear who the interviewer was or with what organization he or she was associated).

People v. Harless, 22 Cal. Rptr. 3d 625, 636–37 (Ct. App. 2004) (child's statements to district attorney's investigator, made in the course of the district attorney's investigation of child abuse allegations against defendant, were testimonial; same holding as to child's statements to a child abuse interview specialist).

Somervell v. State, 883 So. 2d 836 (Fla. Dist. Ct. App. 2004) (statements of autistic child made while child was pretending to speak with the defendant on the telephone and overheard by the child's mother about a sexual assault by defendant were not testimonial).

15. Wiretap Recordings

In *United States v. Hendricks*,¹²² the Third Circuit held that statements on federal wiretap recordings were nontestimonial. First, the court reasoned, the recorded conversations "neither fall within nor are analogous to any of the specific examples of testimonial statements mentioned by the [*Crawford*] Court." Second, it continued, the recorded statements "do not qualify as 'testimonial' under any of the three definitions mentioned by the Court."¹²³ Finally, the court found support for its holding in the post-*Crawford* cases concluding that statements to private parties and to co-conspirators are not testimonial.¹²⁴

16. Statements to Prosecutors

At least two post-*Crawford* cases have held that statements to prosecutors were testimonial.¹²⁵ Other cases have held that a victim's statements to a district attorney investigator were testimonial.¹²⁶

122. 395 F.3d 173 (3d Cir. 2005).

123. See *supra* at § II.

124. See *supra* at §§ IIIA11 & IIIA3.

125. See *People v. Martinez*, 810 N.E.2d 199 (Ill. App. Ct. 2004) (witness's written statement given to State's attorney was testimonial), *appeal denied*, ___ N.E.2d ___ (Ill. Oct. 6, 2004); *United States v. Saner*, 313 F. Supp. 2d 896 (S.D. Ind. 2004) (co-conspirator's statements inculcating himself and defendant were testimonial; statements were made when, in the course of an investigation of defendant and declarant, an Antitrust Division attorney and paralegal conducted a noncustodial interview of declarant at his home; "[t]he involvement of the prosecutor in procuring the *ex parte* statement from [declarant] 'with an eye toward trial' presents the risk of prosecutorial abuse that the Supreme Court highlighted in *Crawford*.").

126. See *People v. Ochoa*, 18 Cal. Rptr. 3d 365, 372 (Ct. App. 2004), *review granted*, 101 P.3d 478 (Cal. 2004); *People v. Harless*, 22 Cal. Rptr. 3d 625, 636–37 (Ct. App. 2004) (child's statements to district attorney's investigator, made in the course of the district attorney's investigation of child abuse allegations against defendant, were testimonial; same holding as to child's statements to a child abuse interview specialist).

17. Redacted Co-Defendants' Statements Not Offered against Defendant

At least two post-*Crawford* cases have held that statements made by co-defendants that have been properly redacted to delete references to the defendant are not testimonial evidence with respect to the defendant.¹²⁷ As one court explained: “The statements were admitted into evidence against the declarants, the co-defendant[]s themselves, not against this defendant. Thus, they were not ‘testimonial’ evidence against this defendant and *Crawford* is inapplicable.”¹²⁸

18. Miscellaneous Cases

State v. Burchfield, 892 So. 2d 191 (Miss. 2004) (label on nonprescription medication is nontestimonial).

People v. Morgan, 23 Cal. Rptr. 3d 224 (Ct. App. 2005) (statements of telephone caller asking to buy drugs that were heard by an officer who answered the phone while executing a search warrant on the premises were not testimonial).

B. Exceptions to the *Crawford* Rule

1. Forfeiture by Wrongdoing

Crawford recognized a forfeiture by wrongdoing exception to the confrontation clause.¹²⁹ Post-*Crawford* cases have found forfeiture by wrongdoing when the defendant engaged in an affirmative act separate from the crime being tried that resulted in the witness’s unavailability at trial.¹³⁰ Other cases have declined to so rule when there was no

127. See *People v. Khan*, ___ N.Y.S.2d ___, 2004 WL 1463027 (Sup. Ct. June 23, 2004) (statements made by co-defendants, which were properly redacted so as not to reference defendant, are not testimonial evidence against defendant and thus *Crawford* is inapplicable; statements were admitted as evidence against the co-defendant declarants, not against defendant); *United States v. Cuong Gia Le*, 316 F. Supp. 2d 330 (E.D. Va. 2004) (same); see also *United States v. Chen*, 393 F.3d 139 (2d Cir. 2004) (co-defendant declarant’s statements inculpate defendants “only in the context of the substantial evidence used to link them to [the] statements” and the “attenuation of [the] statements from [defendant’s] guilt . . . serves to prevent *Crawford* error”).

128. *Khan*, ___ N.Y.S.2d ___, 2004 WL 1463027.

129. See *supra* at § II; see also *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004) (post-*Crawford* case noting this exception), *cert. denied*, ___ S. Ct. ___ (Mar. 7, 2005). Unlike the North Carolina Rules of Evidence, the Federal Rules of Evidence contain a hearsay exception for “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” FED. R. EVID. 804(b)(6).

130. See *Francis v. Duncan*, 2004 WL 1878796 *17–19 & n.8 (S.D.N.Y. Aug. 23, 2004) (unpublished) (defendant waived his right of confrontation by making threatening phone calls to the witnesses which directly caused her to refuse to testify at trial); *State v. Fields*, 679 N.W.2d 341 (Minn. 2004) (defendant forfeited his constitutional right to cross-examination; after hearing evidence “that was highly suggestive

conclusive link between the defendant’s actions and the witness’s unavailability.”¹³¹

Several post-*Crawford* decisions have concluded that the wrongdoing alleged to support a forfeiture may be the very crime for which defendant is on trial.¹³² Others have recognized the bootstrapping objection that may be asserted as to these cases.¹³³

of threats and intimidating overtures directed towards [the witness] by [the defendant],” the trial court concluded that defendant engaged in wrongful conduct and that he intended to and did procure the unavailability of the witness).

131. See, e.g., *State v. Alvarez*, 98 P.3d 699, 704–05 (N.M. 2004) (the fact that defendant absconded before trial, causing a seven-year delay in the trial during which time the declarant was deported, was insufficient to support a finding of forfeiture by wrongdoing; State failed to show that defendant’s absconding procured the deportation or that defendant absconded with the specific intent of preventing the declarant from testifying), *cert. denied*, 125 S. Ct. 1334 (2005); *State v. Page*, 104 P.3d 616 (Or. Ct. App. 2005) (rejecting the state’s contention that forfeiture by wrongdoing applied because “defendant may have been responsible [for the declarant’s] refusal to testify”; State’s “hypothesi[s]” regarding facts was not sufficient; “[State] must point to facts in the existing record or to inferences that are considerably less speculative than the one in the present case”).

132. See *United States v. Johnson*, 354 F. Supp. 2d 939 (N.D. Iowa 2005) (rejecting defendant’s contention that forfeiture by wrongdoing exception contained in Federal Rule of Evidence 804(b)(6) cannot apply unless the wrongdoing upon which the exception is based is different from the wrongdoing charged in the case; going on to hold that the confrontation clause stands as no bar to the admission of any statements falling within this hearsay exception); *State v. Giles*, 19 Cal. Rptr. 3d 843, 847 (Ct. App. 2004) (admission of murder victim’s statements to the police during an earlier domestic violence investigation did not violate confrontation rights; because defendant murdered the victim, he forfeited his confrontation clause claim; rejecting defendant’s argument that forfeiture only applies when a defendant wrongfully procures the witness’s absence with the intent of preventing testimony about the crime), *as modified by* (Cal. Ct. App. Nov. 22, 2004), *review granted*, 102 P.3d 930 (Cal. 2004); *State v. Jiles*, 18 Cal. Rptr. 3d 790 (Ct. App. 2004) (admission of murder victim–declarant’s statements to officer who arrived at scene did not violate confrontation clause; because defendant killed the victim, his confrontation clause claim was extinguished on equitable grounds under the forfeiture by wrongdoing exception), *review granted*, 103 P.3d 270 (Cal. 2004); *State v. Meeks*, 88 P.3d 789 (Kan. 2004) (declining to decide if victim–declarant’s statement responding to officer’s question about who shot him was testimonial and holding that because the defendant shot the victim–declarant, defendant forfeited his confrontation clause rights); *People v. Moore*, ___ P.3d ___, 2004 WL 1690247 *4 (Colo. Ct. App. July 29, 2004) (murdered domestic violence victim’s statement implicating defendant in a prior instance of domestic violence admissible under forfeiture rule; “a defendant is not to benefit from his or her wrongful prevention of future testimony from a witness, regardless whether that witness is the victim in the case”); *Gonzalez v. State*, 155 S.W.3d 603 (Tex. Crim. App. 2004) (“A defendant whose wrongful act renders a witness unavailable for trial benefits from his conduct if he can use the witness’s unavailability to exclude otherwise admissible hearsay statements. This is true whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.”).

133. See *People v. Pantoja*, 18 Cal. Rptr. 3d 492 (Ct. App. 2004) (noting “potential for bootstrapping” when “the predicate wrongdoing is the very crime for which the defendant is being tried” but declining to rule on the issue), *as modified on denial of rehearing* (Oct. 6, 2004).

*State v. Giles*¹³⁴ is one of the cases holding that wrongdoing alleged to support a forfeiture may be the very crime for which the defendant is being tried. Notwithstanding this expansive application of the forfeiture doctrine, the *Giles* court expressly limited application of the doctrine in several respects. First, the *Giles* court held that a defendant only can be deemed to have forfeited his or her right of confrontation through an intentional criminal act.¹³⁵ It stated: “Although we have concluded that the defendant need not . . . possess the purpose of rendering the witness unavailable for trial, it is not enough to commit some act that incidentally produces that result.”¹³⁶ Turning to the facts before it, the court noted that because the defendant killed the declarant by intentionally firing a gun at her, forfeiture was appropriate. A different result would have obtained, it noted, if the declarant had been killed in an unintentional automobile accident while the defendant was driving. Second, the *Giles* court noted that because forfeiture by wrongdoing is an equitable doctrine, it cannot be applied “when it would be unjust to do so,” as where the statements are unreliable and untrustworthy.¹³⁷ And finally, the court held that when forfeiture applies, the jury shall not be advised of the finding.¹³⁸ Other courts have not limited application of the doctrine in this way.¹³⁹

When a forfeiture issue is raised, the trial court may need to hold a hearing, outside the presence of the jury, in order to take additional evidence.¹⁴⁰ When the wrongdoing alleged to support the forfeiture is the same wrongdoing for which the defendant is on trial, a possible alternative procedure would be a conditional admission of the evidence.¹⁴¹

2. Statements Offered for a Purpose Other Than Truth of the Matter Asserted

Crawford recognized an exception for evidence offered for a purpose other than for the truth of the matter asserted.¹⁴² A number of post-*Crawford* cases have applied this exception to the following other purposes:¹⁴³

- To establish that the declarant was lying¹⁴⁴
- To explain the course of an investigation or arrest¹⁴⁵
- As the basis of an expert’s opinion¹⁴⁶
- For impeachment purposes¹⁴⁷
- To show an officer’s state of mind¹⁴⁸
- To explain circumstances in which the defendant admitted culpability¹⁴⁹

because the trial judge did not give a limiting instruction; “[b]ecause the jury could have considered this evidence for the truth of the matter asserted, we cannot presume it was offered and received as corroborating evidence”), *review denied*, 358 N.C. 734 (2004), *appeal dismissed*, 359 N.C. 192 (2004). *But see* United States v. Massino, 319 F. Supp. 2d 295, 299 (E.D.N.Y. 2004) (inexplicably stating: “After *Crawford*, the right to confrontation does not depend on whether a particular statement is being admitted for the truth of the matter asserted; the right to confrontation depends solely upon the nature of the statement sought to be admitted.”).

144. *See* United States v. Trala, 386 F.3d 536, 545 (3d Cir. 2004) (statements established that declarant was lying to the police about her identity and the source of the money).

145. *See* United States v. Eberhart, 388 F.3d 1043 (7th Cir. 2004) (statement offered to explain the course of the investigation); United States v. Cromer, 389 F.3d 662, 676 (6th Cir. 2004) (statements offered to explain “how certain events came to pass or why the officers took the actions they did”); *Dednam v. State*, ___ S.W.3d ___, 2005 WL 23329 (Ark. Jan. 6, 2005) (statements admitted to show the basis of detective’s actions in seeking an arrest warrant); *People v. Ruis*, 784 N.Y.S.2d 558 (Sup. Ct. App. Div. 2004) (testimony was properly admitted for the purpose of explaining the sequence of events leading to the defendant’s apprehension).

146. *See* United States v. Stone, 222 F.R.D. 334 (E.D. Tenn. 2004) (even if statements used by expert to form opinion were testimonial, they were offered for purpose other than the truth of the matter asserted and therefore were not covered by the confrontation clause); *In re Doe*, 103 P.3d 967 (Idaho Ct. App. 2004) (“*Crawford* does not apply where, as in the case of foundational evidence, the probative value of a statement is not dependent on its reliability.”); *People v. Goldstein*, 786 N.Y.S.2d 428 (App. Div. 2004) (*Crawford* does not preclude admission of the prosecution’s forensic psychiatrist’s testimony regarding the background information upon which she relied in arriving at her expert opinion as to defendant’s sanity), *motion seeking leave to file sur reply granted*, 2004 WL 2738825 (N.Y. App. Div. Dec. 2, 2004). *But see* *Rollins v. State*, 866 A.2d 926 (Md. Ct. Spec. App. 2005) (not discussing this exception but stating that any reference made by testifying medical examiner to conclusions rather than objective findings contained in autopsy report prepared by another would violate confrontation clause rights).

147. *See* United States v. Taylor, 328 F. Supp. 2d 915, 926 (N.D. Ind. 2004) (use of statements for impeachment purposes does not implicate the confrontation clause); *Le v. State*, ___ So. 2d ___, 2005 WL 487443 (Miss. Mar. 3, 2005) (noting that trial court gave limiting instruction); *People v. McPherson*, 687 N.W.2d 370 (Mich. Ct. App. 2004).

148. *See* *People v. Reynoso*, 781 N.Y.S.2d 284 (App. Ct. 2004) (statement admitted to show officer’s state of mind was not subject to the confrontation clause).

149. *See* *People v. Lewis*, 782 N.Y.S.2d 321 (Sup. Ct. App. Div. 2004) (trial judge properly allowed two officers to testify that they had informed defendant during interrogation that his co-defendant had implicated him; although the co-defendant’s statement to the officers was testimonial, it was not offered for the truth of the facts asserted therein, but was instead offered to set forth the circumstances in which defendant admitted his culpability after initially denying all involvement in the crimes), *leave to appeal denied*, 821 N.E.2d 980 (N.Y. 2004).

134. 19 Cal. Rptr. 3d 843 (Ct. App. 2004), *as modified on denial of rehearing* (Nov. 22, 2004), *review granted*, 102 P.3d 930 (Cal. 2004).

135. *See id.* at 850.

136. *Id.*

137. *Id.* at 850–51.

138. *See id.*

139. *See, e.g., Gonzalez*, 2004 WL 2873811.

140. *See Giles*, 19 Cal. Rptr. 3d at 849 (noting that court may hold a hearing).

141. *See* United States v. Johnson, 354 F. Supp. 2d 939 n.7 (N.D. Iowa 2005) (describing a procedure for conditional admission of evidence pursuant to Federal Rule of Evidence 804(b)(6) (federal forfeiture by wrongdoing exception to hearsay rule)).

142. *See Crawford*, 124 S. Ct. at 1369 n.9. (“The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”); *supra* at § II.

143. *See also* United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005) (noting this exception); *cf.* *State v. Clark*, ___ N.C. App. ___, 598 S.E.2d 213 (July 6, 2004) (noting but not applying this exception

- As a verbal act¹⁵⁰
- To supply meaning to the defendant's conduct or silence in the face of a co-defendant's accusations¹⁵¹

Not surprisingly, some attempts to categorize evidence as falling within this exception have been rejected.¹⁵²

3. Dying Declarations

The *Crawford* Court acknowledged cases supporting a dying declaration exception to the confrontation clause, but declined to rule on the issue.¹⁵³ To date, only the California Supreme Court has addressed this issue. In *People v. Monterroso*,¹⁵⁴ police arrived at a crime scene to find the victim-declarant shot in the back. The victim-declarant, who later died as a result of his wounds, told the police that he had been robbed and that the shooter was a short Mexican male who had arrived in a car. Those statements were admitted at trial as dying declarations. On appeal, the defendant argued that their admission violated his confrontation rights under *Crawford*. Noting that *Crawford* left open the question of whether the Sixth Amendment incorporates an exception for testimonial dying declarations, the *Monterroso* court concluded that it does. The court read *Crawford* as requiring that the scope of the confrontation clause's protections be determined with reference to common law at the time of the founding. That being so, the court concluded that "it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amend-

ment."¹⁵⁵ It therefore held that admission of the dying declaration was not error. For a discussion of the related issue of forfeiture by wrongdoing, see *supra* at § IIIB1.

4. Defendant's Own Statements

Several post-*Crawford* cases have concluded that a defendant cannot successfully assert a confrontation clause claim as to the introduction of his or her own statements.¹⁵⁶

C. Availability for Cross-Examination

No confrontation clause violation occurs when the declarant is present at trial and testifies fully.¹⁵⁷ Under *Crawford*, assertion of a privilege—in that case, the marital privilege—can render a declarant unavailable. Consistent with pre-*Crawford* case law, post-*Crawford* cases have held that invocation of the Fifth Amendment privilege against self-incrimination renders a witness unavailable for cross-examination.¹⁵⁸ Also

155. *Id.*

156. See *State v. Lloyd*, 2004 WL 2445224 (Ohio Ct. App. Oct. 22, 2004) (confrontation clause does not apply when the witness is the accused himself); *People v. Brown*, 785 N.Y.S.2d 277 (County Ct. 2004) (statements made by the defendant do not implicate confrontation clause rights); *People v. Thoma*, 23 Cal. Rptr. 3d 644 (Ct. App. 2005) (admission of the defendant's adoptive admissions do not implicate the confrontation clause). *But cf.* *United States v. Lopez*, 380 F.3d 538 n.6 (1st Cir. 2004) (defendant's post-arrest remarks to officers were not testimonial because they were not the result of an interrogation and do not fall within *Crawford*'s three formulations of testimonial evidence; court does not address whether a confrontation clause claim can be asserted against one's own statements), *cert. denied*, 125 S. Ct. 924 (2005), *rehearing denied*, 125 S. Ct. 1379 (2005).

157. See *Crawford*, 124 S. Ct. 1354 at 1369 n.9 ("The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."); see also *People v. Argomariz-Ramirez*, 102 P.3d 1015 (Colo. 2004) (reversing trial court's pretrial ruling that testimonial statements could not be admitted under *Crawford* even though both declarants were scheduled to testify at trial; *Crawford* does not require that all testimonial statements must be subject to cross-examination at the time they were made; if the declarant will appear at trial "cross-examination on the witness stand remains sufficient"); *People v. Morrison*, 101 P.3d 568 (Cal. 2004) (no *Crawford* issue when declarant appears for cross-examination at trial), *rehearing denied* (Feb. 23, 2005); *State v. Carothers*, 692 N.W.2d 544 (S.D. 2005) (reversing the trial court, citing many other post-*Crawford* cases on point, and holding that testimonial statements need not be subject to cross-examination at the time they were made if the witness is available and subject to cross-examination at trial); *Carter v. State*, 150 S.W.3d 230 (Tex. Crim. App. 2004); *Robinson v. State*, ___ S.E.2d ___, 2005 WL 313701 (Ga. App. Ct. Feb. 10, 2005) (because witnesses testified at trial, *Crawford* does not apply); *State v. Thach*, 106 P.3d 782 (Wash. App. Ct. 2005).

158. See *State v. Cutlip*, 2004 WL 895980 (Ohio Ct. App. Apr. 28, 2004) (because accomplices invoked their Fifth Amendment privileges, they were unavailable); *State v. Carter*, 2004 WL 2914921 (Ohio Ct. App. Dec. 16, 2004) (co-defendant invoked Fifth Amendment privilege); *People v. Bell*, 689 N.W.2d 732 (Mich. Ct. App. 2004) (invocation of Fifth Amendment privilege); *People v. Ryan*, ___ N.Y.S.2d ___, 2005 WL 486846 (App. Div. Mar. 3, 2005) (same); see also *Clark v. State*, 891 So. 2d 136 (Miss. 2004) (declarant refused to testify to anything concerning the robbery, even after ordered to do so by the court), *rehearing denied* (Jan. 20, 2005).

150. See *Commonwealth v. Eichele*, 2004 WL 2002212 n.6 (Pa. Com. Pleas. June 15, 2004) (to the extent witness testified that she heard declarant asking defendant to leave, "this is the equal of a command or verbal act and not hearsay," and thus *Crawford* does not apply).

151. See *People v. Combs*, 101 P.3d 1007 (Cal. 2004) (statements offered in connection with adoptive admission rule).

152. See *Cromer*, 389 F.3d at 676–78 (testimony, which put before the jury information provided by a confidential informant, was not offered merely to explain why an investigation was undertaken or to demonstrate the effect of the out-of-court statement on officers; the purpose of the testimony was to establish that a person nicknamed "Nut" or "Peanut," which the prosecution already had established was defendant's nickname, had been involved in the crime; other testimony, that related physical description of perpetrator recounted by informant, also was offered for the truth of the matter asserted); *United States v. Solomon*, 399 F.3d 1231 (10th Cir. 2005) (rejecting the government's argument that statement of nontestifying vehicle passenger recounted by testifying officer was offered to explain why the officer searched the vehicle; court noted that the officer already had probable cause to search the vehicle and, in fact, the search had already begun when the statement was made); *People v. Ryan*, ___ N.Y.S.2d ___, 2005 WL 486846 (App. Div. Mar. 3, 2005) (rejecting prosecution's argument that because the defendant opened the door to the statements on cross-examination, statements were not introduced for their truth but rather to "elaborate on matters incompletely or misleadingly touched upon by defendant" on cross-examination).

153. See *supra* at § II; see also *State v. Nix*, 2004 WL 2315035 (Ohio Ct. App. Oct. 15, 2004) (concluding that dying declarations were nontestimonial and noting that *Crawford* left unanswered the question of whether its analysis applies to testimonial dying declarations).

154. 101 P.3d 956 (Cal. 2004), *rehearing denied* (Feb. 16, 2005).

consistent with pre-*Crawford* case law are the post-*Crawford* cases holding that lapses in a witness's memory do not render the witness unavailable.¹⁵⁹ At least one post-*Crawford* case has indicated that a mental impairment that does not render the witness incompetent to testify also does not interfere with the defendant's opportunity to cross-examine.¹⁶⁰

Other post-*Crawford* cases deal with related issues. At least one case has rejected the contention that a witness's denial of prior inconsistent statements left the defendant with no meaningful opportunity to cross examine.¹⁶¹ That situation is distinguishable from one in which the declarant refuses to "assert ownership" of prior statements. In the latter situation, at least one case has held, over a dissent, that a declarant's refusal to "assert ownership" of prior statements that inculpated the defendant prohibited full and effective cross-examination.¹⁶²

One potentially controversial issue that has been raised in only a few post-*Crawford* cases is whether a witness who is not put on the stand by the State can be deemed to be available for cross-examination. In *State v. Starr*,¹⁶³ the Georgia Court of Appeals held that a declarant need not be put on the stand by the State to be deemed available for cross-examination, provided that the declarant is otherwise available. *Starr* involved a child molestation prosecution. Although she did not testify, the four-year-old victim's videotaped statement was admitted at trial. On appeal, the Georgia court rejected the defendant's *Crawford* argument, concluding that although the victim did not testify, the record revealed that she was available for cross-

examination. Specifically, the record revealed that "[t]he prosecutor stated that the victim was in the courthouse and 'available if necessary.'"

In contrast to *Starr* is the Texas Court of Appeals' decision in *Bratton v. State*.¹⁶⁴ In that case, the defendant appealed his convictions for aggravated robbery, claiming a *Crawford* error in the admission of the written statements of two nontestifying accomplices. The State did not dispute that the accomplices' statements were testimonial. Instead, the State argued that *Crawford* did not apply because the accomplices were present at trial and "could have been confronted" by the defendant. According to the State, because the defendant "chose" not to call them as a matter of trial strategy, he could not complain that he was denied his right to confront them. The Texas court rejected that contention, holding:

[T]he State provides no authority for this contention, and we find nothing in *Crawford* or elsewhere suggesting that a defendant waives his right to confront a witness whose testimonial statement was admitted into evidence by failing to call him as a witness at trial. In fact, as the party seeking to admit [the accomplices'] statements, it was the State's burden to show their statements were admissible, that is, that [the accomplices] were *unavailable* and that [defendant] had been afforded a prior opportunity to cross-examine them. By the State's own admission though, [the accomplices] were available to testify . . .

Bratton relied on a post-*Crawford* Louisiana case rejecting the prosecution's argument that the defendant waived a *Crawford* objection by failing to subpoena the nontestifying declarant as a witness.¹⁶⁵

Two post-*Crawford* cases have dealt with allegations that a judge's limitation on cross-examination rendered a witness unavailable for cross-examination. In *United States v. Wilmore*,¹⁶⁶ the Ninth Circuit held that a witness's assertion of her Fifth Amendment privilege coupled with the trial judge's restriction on cross-examination made the witness unavailable for cross-examination. After the trial judge determined that the witness would invoke her Fifth Amendment privilege regarding whether her prior grand jury testimony was truthful, the judge cautioned counsel against asking question after question to which the witness would invoke the privilege. The court concluded that the trial judge's restrictions on counsel's ability to cross-examine the witness about her grand jury testimony prohibited the defendant from probing the witness's motivations behind the testimony. By contrast, in *Del Pilar v. Phillips*,¹⁶⁷ a New

159. See *supra* at § II; *State v. Carter*, 91 P.3d 1162 (Kan. 2004) (notwithstanding witness's memory failures, he was available for cross-examination); *State v. Gorman*, 854 A.2d 1164, 1177–78 (Me. 2004) ("a witness is not constitutionally unavailable . . . when a witness who appears and testifies is impaired or forgetful") (citation omitted); *Mercer v. United States*, 864 A.2d 110 (D.C. 2004) (declarant suffered a head injury and a series of strokes and was unable to recall in any meaningful way the events of the day of the crime, her testimony before the grand jury, or her testimony in the first trial), *cert. denied*, 125 S. Ct. 1425 (2005); *State v. Plantin*, 682 N.W.2d 653 (Minn. Ct. App. 2004) (no confrontation clause violation when the declarant testified at trial; although defendant was not satisfied with the declarant's answers and lapses in memory, "that does not mean that he was denied his constitutional right of confrontation"), *review denied* (Sept. 29, 2004); *People v. Warner*, 14 Cal. Rptr. 3d 419 (Ct. App. 2004) (child witness was available for cross-examination notwithstanding the fact that she did not remember giving prior statements; noting however that some children may be too young or frightened to allow for cross-examination), *review granted*, 97 P.3d 811 (Cal. 2004); *People v. Harless*, 22 Cal. Rptr. 3d 625, 637 (Ct. App. 2004) (defendant had an opportunity to cross-examine child witness, not withstanding that her memory at trial was "somewhat selective").

160. See *Gorman*, 854 A.2d at 1177 ("a witness is not constitutionally unavailable . . . when a witness who appears and testifies is impaired or forgetful") (citation omitted).

161. See *People v. Butler*, 25 Cal. Rptr. 3d 154 (Ct. App. 2005).

162. See *State v. Armstrong*, 2004 WL 2376467 (Ohio Ct. App. Oct. 22, 2004), *stay granted*, 819 N.E.2d 1122 (Ohio 2004).

163. 604 S.E.2d 297 (Ga. Ct. App. 2004).

164. 156 S.W.3d 689 (Tex. Crim. App. 2005).

165. See *State v. Cox*, 876 So. 2d 932 (La. Ct. App. 2004) ("Defendant should not be required to call [the declarant] as a witness simply to facilitate the State's introduction of evidence against the Defendant.").

166. 381 F.3d 868 (9th Cir. 2004).

167. 2004 WL 1627220 *15–19 (S.D.N.Y. July 21, 2004) (unpublished).

York federal district court held that the defendant's right to confront witnesses was not violated by the trial judge's limitation of the defendant's cross-examination of a witness during a hearing held outside the jury's presence. The court concluded that the judge's ruling sustaining the prosecutor's objection merely prevented repetitive questioning and was within the judge's discretion.

In *Maryland v. Craig*,¹⁶⁸ the United States Supreme Court upheld, in the face of a confrontation clause challenge, a Maryland statute that allowed a child witness to testify through a closed-circuit television. In upholding the statute, the *Craig* Court required that certain findings be made before such a procedure could be employed. Only one post-*Crawford* case has addressed what effect, if any, *Crawford* has on the *Craig* rule. In *United States v. Bordeaux*,¹⁶⁹ a child sexual abuse victim testified at trial by way of a two-way closed-circuit television, and certain statements made by her to a "forensic interviewer" were admitted. On appeal, the defendant argued that the statements to the interviewer were testimonial and that because the trial court did not comply with *Craig* in allowing the closed-circuit testimony, the victim had not appeared at trial. The Eighth Circuit agreed that the statements to the interviewer were testimonial. It further held that because the trial court had not made the findings required by *Craig*, the use of the closed-circuit television was unconstitutional and that the victim therefore could not be deemed to have appeared at trial. The court noted in dicta that when the trial court complies with *Craig*, the witness has appeared at trial for purposes of the confrontation clause.

D. Establishing Unavailability

According to pre-*Crawford* law, a witness is not unavailable unless the State has made a "good faith" effort to obtain the witness's presence at trial.¹⁷⁰ *Crawford* did not indicate one way or the other whether this standard governs in its new confrontation test. At least two post-*Crawford* cases, including one in North Carolina, have imported the "good faith" standard into a *Crawford* unavailability inquiry. In the North Carolina case,¹⁷¹ the State offered hearsay statements of a nontestifying declarant. The prosecutor informed the trial judge that the declarant was unavailable, stating: "The [declarant] was a Hispanic and has left, we tracked, pulled the record, he's left the state and possibly the country." The court held that this "evidence" did not establish a good faith effort to obtain the witness's presence at trial.¹⁷²

168. 497 U.S. 836 (1990); see generally *In re Stradford*, 119 N.C. App. 654 (1995).

169. 400 F.3d 548 (8th Cir. 2005).

170. *Barber v. Page*, 390 U.S. 719, 724–25 (1968); *supra* at § II.

171. See *State v. Bell* 359 N.C. 1 (2004).

172. See also *Howard v. State*, 816 N.E.2d 948 (Ind. Ct. App. 2004) (trial court was not required to force twelve-year-old child sexual

One other post-*Crawford* case dealing with the State's burden of establishing unavailability warrants discussion. In *State v. Clark*,¹⁷³ the North Carolina Court of Appeals indicated that a prosecutor's statements about his attempts to find a nontestifying witness were insufficient to support a finding of unavailability but held that unavailability had been established by evidence presented at trial. At a hearing on the State's motion to have the witness declared unavailable, the prosecuting attorney stated that he had visited the areas that the transient witness frequented, that the State had attempted to contact her through her friends, and that a law enforcement officer had attempted to locate her. However, the State did not offer any witnesses or other evidence to support these claims. Notwithstanding this, the court relied on the fact that prior to admission of the statement at trial, the State offered evidence regarding unavailability—including an officer's testimony that he repeatedly tried to find the witness—to conclude that there was sufficient evidence of unavailability.

A final issue regarding unavailability is whether the prosecution should be prohibited from introducing testimonial evidence when it caused the declarant's unavailability. Some might argue that if a defendant can forfeit confrontation rights by wrongdoing, a parallel rule should apply to the prosecution.¹⁷⁴ The post-*Crawford* case law in this area is very thin.¹⁷⁵

E. Prior Opportunity to Cross-Examine

Under *Crawford*, if the defendant had a prior opportunity to cross-examine an unavailable, nontestifying declarant about his or her testimonial statements, there is no confrontation clause violation.¹⁷⁶ *Crawford* did not address what constitutes a prior opportunity to cross-examine. The following post-*Crawford* cases explore this issue.

1. Prior Trials

State v. Clark, __ N.C. App. __, 598 S.E.2d 213 (July 6, 2004) ("[declarant's] prior testimony, which was given at

assault victim to testify to establish unavailability; victim took the stand at trial but when the State asked about the crime, victim started crying and asked to take a break; during the break, the victim vomited, became distraught, and said she could not continue her testimony; after speaking with the victim, the trial court determined that nothing could be done to allow the victim to continue; also rejecting, on factual grounds, defendant's argument that because the State had a prior warning that the victim might be an unwilling witness at trial, it did not make a good faith effort to obtain her presence at trial).

173. __ N.C. App. __, 598 S.E.2d 213 (July 6, 2004), *review denied*, 358 N.C. 734 (2004), *appeal dismissed by* 359 N.C. 192 (2004).

174. See *supra* at § IIIB1 (discussing forfeiture by wrongdoing).

175. Research revealed one case on point: *United States v. Sharif*, 343 F. Supp. 2d 610 (E.D. Mich. 2004) (no confrontation violation when material witnesses were deported after giving depositions), *reconsideration denied*, 352 F. Supp. 2d 814 (E.D. Mich. 2005).

176. See *supra* at § II.

an earlier trial where defendant was present and cross-examined the witness, satisfies the cross-examination requirement under Crawford”), review denied, 358 N.C. 734 (2004), appeal dismissed, 359 N.C. 192 (2004).

Mercer v. United States, 864 A.2d 110 (D.C. 2004) (“Because a complete cross-examination was conducted at the first trial, the requirements set forth in *Crawford* were met.”), *cert. denied*, 125 S. Ct. 1425 (2005).

State v. Hale, 691 N.W.2d 637 (Wis. 2005) (defendant did not have a prior opportunity to cross-examine a witness at an accomplice’s prior trial; rejecting the State’s “confrontation by proxy” theory).

2. Depositions

United States v. Sharif, 343 F. Supp. 2d 610, (E.D. Mich. 2004) (defendant had a prior opportunity to cross-examine at pre-indictment material witness depositions, notwithstanding claims of ineffective assistance of counsel, government’s alleged noncompliance with the applicable rule of criminal procedure governing such depositions, and alleged failure to provide *Brady* material), *reconsideration denied*, 352 F. Supp. 2d 814 (E.D. Mich. 2005).

Blanton v. State, 880 So. 2d 798 (Fla. Dist. Ct. App. 2004) (in a case in which the State conceded that a child victim’s statement to a police officer was testimonial, the court held that defendant had a prior opportunity to cross-examine the child witness during a prior deposition), *review denied* (Fla. Dec. 8, 2004).

Lopez v. State, 888 So. 2d 693 (Fla. Dist. Ct. App. 2004) (declining to follow *Blanton*, discussed immediately above, and concluding that a discovery deposition does not provide a prior opportunity to cross-examine), *rehearing denied* (Dec. 22, 2004).

Howard v. State, 816 N.E.2d 948 (Ind. Ct. App. 2004) (defendant had a prior opportunity to cross-examine in pretrial deposition, even though defendant was not personally present at the deposition), *rehearing denied* (Feb. 14, 2005).

3. Preliminary Hearings

Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005) (admission of nontestifying child sexual assault victim’s hearsay statements to police during an interview violated *Crawford*; at a preliminary hearing, the victim claimed not to remember what happened or that she had spoken with the police and was determined to be unavailable).

People v. Fry, 92 P.3d 970 (Colo. 2004) (en banc) (due to the limited nature of the preliminary hearing under state law (that is, to matters necessary to a determination of probable cause), the opportunity for cross-examination was insufficient to satisfy the confrontation clause; trial court therefore erred in admitting deceased declarant’s testimony at the preliminary hearing).

People v. Price, 15 Cal. Rptr. 3d. 229 (Ct. App. 2004) (no confrontation clause violation when defendant had an

opportunity at the preliminary hearing to cross-examine the witness about statements she made to the police; not only did defendant have the opportunity to cross-examine the witness but he also “vigorously exercised” that opportunity and later presented that preliminary hearing testimony to the jury in support of his defense), *review denied* (Oct. 13, 2004).

People v. Ochoa, 18 Cal. Rptr. 3d 365, 372–374 (Ct. App. 2004) (rejecting defendant’s argument that he did not have an adequate prior opportunity to cross-examine the victim-declarant at a preliminary hearing even though witnesses testified at trial to statements made by the victim that were not elicited at the preliminary hearing; although agreeing that defendant would not have had the opportunity to cross-examine the victim regarding prior statements that were not identified or otherwise brought to his attention during or prior to the preliminary hearing, the court found no confrontation violation because the “additional” statements introduced at trial either were “virtually co-extensive with the evidence elicited in advance of or at the preliminary hearing” or nonmaterial or noninflammatory), *review granted*, 101 P.3d 478 (Cal. 2004).

State v. Murray, 2004 WL 2244444 (Ohio Ct. App. Sept. 22, 2004) (defendant had a prior opportunity to cross-examine the declarant at a preliminary hearing; noting that the trial court did not limit cross-examination in any way and that it was extensive).

F. Waiver and Invited Error

At least two cases have concluded that when the defense elicits the challenged testimonial statements, the confrontation clause claim must fail.¹⁷⁷ In *United States v. Cromer*,¹⁷⁸ for example, the Sixth Circuit stated that “a party may not complain on appeal of errors that he himself invited or provoked.”¹⁷⁹

Two courts have addressed the issue of whether or not opening the door to testimonial evidence constitutes a waiver of a *Crawford* claim. In *Cromer*, the defendant lodged a confrontation clause challenge to evidence admitted during the government’s re-direct. On cross-examination, the defense had introduced the existence of an informant and a description provided by the informant, in an attempt to show that the informant’s description did not match the defendant’s appearance. Even after the trial judge warned the defense that this questioning would open the door to allow the government to question the witness about the exact content of the informant’s statements, the defense

177. See *United States v. Cromer*, 389 F.3d 662 n.11 (6th Cir. 2004); *State v. Robinson*, 146 S.W.3d 469 (Tenn. 2004) (because defendant both elicited and opened the door to the testimony at issue, he is not entitled to relief).

178. 389 F.3d 662.

179. *Id.* at 679 n.11 (quotation omitted).

persisted. On re-direct, the government clarified the exact nature of the informant's description. It was admission of these statements on re-direct that the defendant challenged as violating his confrontation clause rights. The *Cromer* court concluded that the fact that the defense may have opened the door to the challenged testimony did not preclude consideration of the defendant's confrontation clause argument on appeal, citing *Crawford* for the proposition that the confrontation clause is not dependent on the law of evidence. It held: "the mere fact that [the defense] may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation."¹⁸⁰

In contrast to *Cromer* is the Mississippi Supreme Court's decision in *Le v. State*.¹⁸¹ In that case, the defendant offered into evidence statements allegedly made by a deceased accomplice to other inmates. In rebuttal, the State moved to introduce a tape recording and transcript of the accomplice's statement to law enforcement. The trial court allowed the evidence, with a limiting instruction that it was to be used for impeachment purposes only. On appeal, the Mississippi Supreme Court rejected the defendant's *Crawford* argument as to the accomplice's statement to law enforcement, concluding, in part, that the defendant had opened the door to the evidence.¹⁸² Of course, if the defendant did not open the door to the evidence, the conflict between these cases is moot.¹⁸³

Other related case law is summarized below.

Parson v. Kentucky, 144 S.W.3d 775 (Ky. 2004) (defendant waived his right to confront the State's medical witness at trial when defense counsel, with defendant's acquiescence, agreed that the testimony of medical witnesses could be presented by deposition either in exchange for a continuance or for the purpose of obtaining pretrial discovery to which he otherwise was not entitled; because the State relied on this agreement, the principles of estoppel and fundamental fairness precluded defendant from claiming a denial of his right of confrontation under these circumstances), *as modified on June 21, 2004*.

See *supra* at § IIIC for a discussion of cases in which it is alleged that the defendant waived his or her confrontation clause claim by failing to call a witness.

180. *Id.* at 679.

181. ___ So. 2d ___, 2005 WL 487443 (Miss. Mar. 3, 2005).

182. See *id.* (also concluding that the statement was offered only for impeachment purposes).

183. See *People v. Ryan*, ___ N.Y.S.2d ___, 2005 WL 486846 (App. Div. Mar. 3, 2005) (concluding that defendant did not open the door to the statements on cross-examination).

G. Retroactivity

Crawford was decided on March 8, 2004. It applies to future cases as well as those that were pending on direct review or not yet final at the time the decision was rendered.¹⁸⁴ As to cases that had already become final by the time *Crawford* was decided, the relevant retroactivity test is that set forth in *Teague v. Lane*.¹⁸⁵ In *State v. Zuniga*,¹⁸⁶ the North Carolina Supreme Court adopted the *Teague* test for determining whether new federal rules apply retroactively in state court motion for appropriate relief proceedings.¹⁸⁷ Under *Teague*, if a rule is both new and procedural, it does not apply retroactively unless it is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

The majority of cases that have considered the issue have concluded that *Crawford* does not operate retroactively to cases that became final before the decision was issued (March 8, 2004). Significantly, however, a split has developed among the federal circuit courts on the question. Both the Second and Tenth Circuits have held that *Crawford* is not retroactive,¹⁸⁸ while the Ninth Circuit has held that it is.¹⁸⁹ The Ninth Circuit based its decision on the conclusion that although *Crawford* was a new rule, it fell within *Teague's* watershed rule of criminal procedure exception.¹⁹⁰ The Tenth Circuit also found *Crawford* to be a new rule. Its reasoning diverges with the Ninth Circuit in that it found *Crawford* not to be a watershed rule of criminal procedure.¹⁹¹ Finally, the Second Circuit assumed that *Crawford* was a new rule¹⁹² but agreed with the Tenth Circuit that it

184. See *Griffith v. Kentucky*, 479 U.S. 314 (1987); see also *United States v. Solomon*, 399 F.3d 1231 (10th Cir. 2005) (*Crawford* applies to cases pending on direct review); *United States v. Borden*, 2005 WL 31949 (S.D.N.Y. Jan. 5, 2005) (*Crawford* applies to cases pending on direct review); *Davis v. United States*, 848 A.2d 596 (D.C. 2004) (*Crawford* applies to cases pending on direct review or not yet final); *People v. Hardy*, ___ N.E.2d ___, 2005 WL 387127 (N.Y. Feb. 17, 2005) (same); *State v. Hale*, 691 N.W.2d 637 (Wis. 2005) (*Crawford* applies because defendant properly preserved the constitutional issue and his case was pending on direct appeal when *Crawford* was decided); *People v. Bell*, 689 N.W.2d 732 (Mich. Ct. App. 2004) (*Crawford* applies to cases that were pending on appeal when it was decided); *State v. Scacchetti*, 690 N.W.2d 393 (Minn. Ct. App. 2005) (same).

185. 489 U.S. 288 (1989); see generally Jessica Smith, *Retroactivity of Judge-Made Rules*, ADMINISTRATION OF JUSTICE BULLETIN 2004/10 (School of Government, UNC Chapel Hill, Dec. 2004) (discussing *Crawford* retroactivity in detail).

186. 336 N.C. 508 (1994).

187. See *id.* at 510, 513.

188. See *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004); *Brown v. Uphoff*, 381 F.3d 1219, 1225–27 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 940 (2005). A Sixth Circuit decision is in accord with these holdings, although it contains no analysis. See *Dorchy v. Jones*, 398 F.3d 783 (6th Cir. 2005) ("*Teague* thus prohibits [defendant] from availing himself of the new rule articulated in *Crawford*.").

189. See *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005).

190. See *id.*

191. See *Brown*, 381 F.3d at 1225–27.

192. It appears that the petitioner in *Mungo* conceded this issue, arguing only that *Crawford* fell within the watershed rule exception.

did not fall within the watershed rule of criminal procedure exception.¹⁹³

The relevant cases are summarized below. Note that the New York cases go both ways on this issue.

Cases Concluding that *Crawford* Is Not Retroactive

Mungo v. Duncan, 393 F.3d 327 (2d Cir. 2004).

Brown v. Uphoff, 381 F.3d 1219, 1225–27 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 940 (2005).

Dorchy v. Jones, 398 F.3d 783 (6th Cir. 2005) (so concluding with no analysis).

Hutzenlaub v. Portuondo, 325 F. Supp. 2d 236 (E.D.N.Y. 2004).

Garcia v. Unites States, 2004 WL 1752588 *2–4 (N.D.N.Y. Aug. 4, 2004) (unpublished).

Murillo v. Frank, 316 F. Supp. 2d 744, 749 (E.D. Wis. 2004).

People v. Edwards, 101 P.3d 1118 (Colo. Ct. App. 2004), *cert. granted*, 2004 WL 2784662 (Colo. Dec. 6, 2004).

People v. Vasquez, __ N.Y.S.2d __, 2005 WL 429807 (Sup. Ct. Jan. 18, 2005).

People v. Khan, __ N.Y.S.2d __, 2004 WL 1463027 (Sup. Ct. June 23, 2004).

Wheeler v. Dretke, 2004 WL 1532178 n.1 (N.D. Tex. July 6, 2004) (suggesting that *Crawford* is not retroactive) (unpublished).¹⁹⁴

Cases Concluding that *Crawford* Is Retroactive

Bockting v. Bayer, 399 F.3d 1010 (9th Cir. 2005).

Richardson v. Newland, 342 F. Supp. 2d 900 (E.D. Cal. 2004) (concluding that *Crawford* is not a new rule but finding that conclusion “not critical to the resolution” of the case).

People v. Dobbin, __ N.Y.S.2d __, 2004 WL 3048648 (Sup. Ct. Dec. 22, 2004) (*Crawford* is a new rule that falls within the “bedrock procedural guarantee” exception to the *Teague* anti-retroactivity rule).¹⁹⁵

193. See *Mungo*, 393 F.3d 327. The level of disagreement among federal circuit court judges on this issue is amplified by an examination of the separate opinions in the Ninth Circuit’s *Bockting* case. See *Bockting*, 399 F.3d 1010. Judge McKeown, writing for the court, held that although *Crawford* was a new rule, it fell within *Teague*’s watershed rule of criminal procedure exception. Concurring, Judge Noonan argued that because *Crawford* is not a new rule, *Teague*’s anti-retroactivity bar did not prevent application to the case before it. He continued, however, stating that “[a]s an alternative . . . and in order to provide a precedent for this court, I also concur in Judge McKeown’s analysis and opinion.” See *id.* (Noonan, J., concurring). Judge Wallace dissented, arguing that *Crawford* was a new procedural rule that did not qualify as a watershed rule of procedure. See *id.* (Wallace, J., dissenting).

194. See also *Evans v. Luebbers*, 371 F.3d 438 (8th Cir. 2004) (within the framework of deciding whether a state court’s decision was “contrary to, or an unreasonable application of, clearly established federal law,” the court stated that it “doubt[ed]” that *Crawford* applied because it “does not appear” to be excepted from the *Teague* rule, *cert. denied*, 125 S. Ct. 902 (2005).

195. See also *Brown v. Dretke*, 2004 WL 2538474 (W.D. Tex. Nov. 8, 2004) (in the context of applying the time bar in 28 U.S.C. § 2244(d)

H. Proceedings to Which *Crawford* Applies

By its terms, the Sixth Amendment applies to “criminal prosecutions.”¹⁹⁶ The following subsections explore the scope of this term.

1. Penalty Phase of Capital Trials

In *State v. Bell*,¹⁹⁷ the North Carolina Supreme Court applied *Crawford* to a capital sentencing proceeding.¹⁹⁸

2. Noncapital Sentencing

At least one case has had occasion to consider *Crawford*’s application to noncapital sentencing proceedings. That case declined to apply *Crawford* to these proceedings.¹⁹⁹

3. Proceedings to Revoke Probation or Supervised Release

Two federal circuit courts, a federal district court, and several state appellate courts have concluded that *Crawford* does not apply in probation, parole, and related revocation hearings.²⁰⁰ These holdings rely on the text of the confrontation clause, which applies only to “criminal prosecutions,” and on cases such as *Morrissey v. Brewer*,²⁰¹ which held that parole and parole revocation are not part of a criminal

to a federal habeas petition, concluding that *Crawford* did not recognize a new constitutional rule).

196. U.S. CONST. amend. VI.

197. 359 N.C. 1 (2004).

198. For other cases dealing with *Crawford* in the capital context, see *United States v. Corley*, 348 F. Supp. 2d 970 (N.D. Ind. 2004) (concluding that is “highly unlikely” that *Crawford* would not apply to reliability hearings used in federal court to screen the admissibility of information offered in the penalty phases of capital cases); *United States v. Jordan*, __ F. Supp. 2d __, 2005 WL 399679 (E.D. Va. Jan. 28, 2005) (*Crawford*’s applicability in penalty phase of a federal capital case), *motion for reconsideration denied*, (Feb. 9, 2005).

199. *People v. Vensor*, __ P.3d __, 2005 WL 170753 (Colo. Ct. App. Jan. 27, 2005) (“*Crawford* involves the constitutional right to confront witnesses at trial, not at sentencing.”).

200. See *United States v. Martin*, 382 F.3d 840 (8th Cir. 2004) (*Crawford* does not apply in proceedings to revoke supervised release, notwithstanding the “minimum requirements of due process” applicable to such proceedings); *United States v. Aspinall*, 389 F.3d 332 (2d Cir. 2004) (*Crawford* does not apply in probation revocation hearings); *United States v. Barraza*, 318 F. Supp. 2d 1031 (S.D. Cal. 2004) (inapplicable to release revocation); *People v. Johnson*, 18 Cap. Rptr. 3d 230, 232–33 (Ct. App. 2004) (probation revocation hearings are not criminal prosecutions to which the Sixth Amendment applies; recognizing that probationers have a limited right of confrontation through the due process clause but concluding that even if *Crawford* is used to determine the scope of this more limited right, evidence at issue was nontestimonial), *review denied* (Nov. 10, 2004); *Young v. United States*, 863 A.2d 804 (D.C. 2004) (probation revocation governed only by the minimum requirements of due process); *People v. Turley*, __ P.3d __, 2004 WL 2503584 (Colo. Ct. App. Oct. 21, 2004) (*Crawford* does not apply in probation revocation proceedings); *Marsh v. State*, 818 N.E.2d 143, 147 (Ind. Ct. App. 2004) (same); *Smart v. State*, 153 S.W.3d 118 (Tex. Crim. App. 2004) (*Crawford* does not apply in proceeding to revoke community supervision); *State v. Michael*, 891 So. 2d 109 (La. Ct. App. 2005) (probation revocation).

201. 408 U.S. 471 (1972); see also *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

prosecution.²⁰² They note that although a parolee is entitled not to have his or her parole revoked without due process, the full panoply of rights due in a criminal prosecution does not apply to these proceedings.²⁰³ They conclude that nothing in *Crawford*—which dealt with a criminal trial—altered these standards. One federal district court has held otherwise, rejecting the distinction between Sixth Amendment confrontation rights and confrontation as a component of due process and holding that *Crawford* applies in parole revocation proceedings.²⁰⁴

4. Proceedings to Find Minor Abused and Dependent

In re C.M., 815 N.E.2d 49 (Ill. App. Ct. 2004) (*Crawford* did not apply to proceeding under state law finding minor abused and dependent and making him a ward of the court; proceedings under the state Juvenile Act are civil and no Sixth Amendment right to confront witnesses is implicated).

5. Sex Offender Proceedings

Commonwealth v. Given, 808 N.E.2d 788, 793 nn.8–9 (Mass. 2004) (*Crawford* is not implicated in proceeding to commit individual as a sexually dangerous person, because the proceeding is civil; declining to use *Crawford* to guide a due process analysis because “the reasoning of the case rests almost exclusively on the historical background of the Confrontation Clause and the particular concerns motivating its ratification”), *cert. denied*, 125 S. Ct. 366 (2004).

People v. Brown, 785 N.Y.S.2d 277 (County Ct. 2004) (applying *Crawford* to a hearing under a Sex Offender Registration Act to redetermine defendant’s classification under that act).

I. Harmless Error Review

As a general rule, constitutional error warrants reversal unless it is found to be harmless beyond a reasonable doubt. The United States Supreme Court’s seminal decision on harmless error is *Chapman v. California*.²⁰⁵ *Chapman* rejected the contention that the federal Constitution required automatic reversal for all constitutional error. Instead, it held that constitutional errors should be evaluated against

a harmless error standard. Under that standard, the error will require reversal unless the court is convinced “beyond a reasonable doubt” that it was harmless. An error is harmless if it “did not contribute to the verdict obtained.”²⁰⁶ The *Chapman* harmless error rule is designed to avoid “setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial”²⁰⁷ and to “promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.”²⁰⁸ In North Carolina, this standard has been incorporated into the statutory provisions pertaining to motions for appropriate relief and appeal.²⁰⁹

Certain structural errors have been held to fall outside of the scope of the *Chapman* harmless error standard and warrant automatic reversal.²¹⁰ However, the post-*Crawford* cases have not held *Crawford* violations to be in that category; instead, they have applied harmless error review to *Crawford* violations.²¹¹

J. Confrontation Test for Nontestimonial Evidence

In *State v. Blackstock*,²¹² the North Carolina Court of Appeals indicated that although *Crawford* overruled *Roberts* as to testimonial statements, *Roberts* remains good law regarding nontestimonial statements. A number of cases from other jurisdictions have come to the same conclusion.²¹³ Other cases suggest, however, that nontestimonial statements are exempt from confrontation clause challenge altogether.²¹⁴

206. *Id.* at 24.

207. *Id.* at 22.

208. *Rose v. Clark*, 478 U.S. 570, 577 (1986) (quotation omitted).

209. *See* G.S. 15A-1420(c)(6); G.S. 15A-1443(b).

210. *See Arizona v. Fulminante*, 499 U.S. 279 (1991).

211. *See State v. Morgan*, 359 N.C. 131 (2004); *State v. Clark*, ___ N.C. App. ___, 598 S.E.2d 213 (July 6, 2004), *review denied*, 358 N.C. 734 (2004), *appeal dismissed*, 359 N.C. 192 (2004); *see also* *United States v. McClain*, 377 F.3d 219, 222 (2d Cir. 2004); *Porter v. State*, 606 S.E.2d 240 (Ga. 2004); *State v. Hale*, 691 N.W.2d 637 (Wis. 2005); *Stancil v. United States*, 866 A.2d 799 (D.C. 2005); *People v. Hardy*, ___ N.E.2d ___, 2005 WL 387127 (N.Y. Feb. 17, 2005); *People v. R.F.*, ___ N.E.2d ___, 2005 WL 323718 (Ill. App. Ct. Feb. 10, 2005).

212. 165 N.C. App. 50 n.2 (2004).

213. *See, e.g., McClain*, 377 F.3d at 221 n.1; *State v. Dedman*, 102 P.3d 628 (N.M. 2004) (citing similar cases, including *Blackstock*); *People v. Garrison*, ___ P.3d ___, 2004 WL 2278287 (Colo. Ct. App. Oct. 7, 2004) (citing similar cases from other federal and state courts); *State v. Arita*, ___ So. 2d ___, 2005 WL 474298 (La. Ct. App. Mar. 1, 2005); *State v. Nix*, 2004 WL 2315035 n.9 (Ohio Ct. App. Oct. 15, 2004).

214. *See, e.g., Burchfield v. State*, 892 So. 2d 191 (Miss. 2004); *see generally supra* at § II.

202. *See, e.g., Aspinall*, 389 F.3d 332.

203. *See id.*

204. *See Ash v. Reilly*, 354 F. Supp. 2d 1 (D.D.C. 2004) (holding limited to when unfronted testimonial evidence is the sole basis of a decision to revoke parole), *motion for reconsideration denied*, 354 F. Supp. 2d 11 (D.D.C. 2005) (with opinion).

205. 386 U.S. 18 (1967).

Appendix

A Tool for the Trial Judge: The *Crawford* Inquiry

Note: In most post-*Crawford* confrontation clause cases, the central inquiry will be whether the statement was testimonial or nontestimonial. Because of the difficulties that issue might present, this tool begins with some predicate questions that may obviate the need to make the testimonial/nontestimonial distinction.

1. Is the declarant subject to cross-examination at the current trial? *See supra* at §§ II & IIIC.

If yes, there is no confrontation clause violation. *See supra* at §§ II & IIIC.

If no, proceed to the next question.

2. Is the evidence being admitted for a purpose other than for the truth of the matter asserted?

If yes, there is no confrontation clause issue. *See supra* at §§ II & IIIB2.

If no, proceed to the next question.

3. Does a confrontation clause exception apply? *Crawford* identified the following exceptions and possible exceptions to the confrontation clause:

- Dying declarations. *See supra* at §§ II & IIIB3.
- Forfeiture by wrongdoing. *See supra* at §§ II & IIIB1.

Also, a statement by the defendant being tried raises no confrontation clause issue. *See supra* at § IIIB4.

If yes, admission of the evidence does not violate the confrontation clause.

If no, proceed to the next question.

4. Is the statement “testimonial”? *See supra* at §§ II & IIIA.

If the evidence is nontestimonial, apply *Ohio v. Roberts*. *See supra* at §§ II & IIIJ.

If the evidence is testimonial, proceed to the next question.

5. Is the declarant unavailable? *See supra* at §§ II & IIID.

If the State has not established unavailability, the testimony must be excluded. *See supra* at § II.

If the State has established unavailability, proceed to the next question.

6. Did the defendant have a prior opportunity to cross-examine? *See supra* at §§ II & IIIE.

If yes, there is no confrontation clause violation. Proceed to the next question.

If no, admission would violate the confrontation clause. *See supra* at §§ II & IIIE.

7. Is the evidence otherwise admissible?

If yes, admit the evidence.

If no, exclude the evidence.

About the Author

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