Confrontation After *Crawford v. Washington*

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I. The *Crawford* Case

In *Crawford v. Washington*, 124 S. Ct. 1354 (2004), 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, 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 statement 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, Scalia turned to the historical background of the Confrontation Clause in order to understand its meaning. He noted that the immediate source of the concept of confrontation was the English common law, with its tradition of live testimony in court and subject to adversarial testing. This was in contrast to the civil law, which allowed private examinations by judicial officers. He 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 lead 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.

Justice Scalia noted that when controversial examination practices were used in the Colonies, they too were criticized. Moreover, although many declarations of rights adopted around the time of the 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, Scalia concluded, supports two inferences about the meaning of the 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." *Crawford,* 124 S. Ct. at 1363. 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, he wrote, 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." *Id.* at 1364. Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 1365. This was, he noted, the practice in 1791.

Stating that the Court's cases have been largely consistent with these principles, Scalia acknowledged that *White v. Illinois*, 502 U.S. 346 (1992), is "arguably in tension" with them. *White* involved, in part, statements of a child victim to an investigating police officer admitted as spontaneous declarations. Scalia found it "questionable" whether testimonial statements "would ever have been admitted on that ground in 1791." *Id.* at 1368 n.8. However, he distinguished *White* on the basis that it only addressed whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. According to Scalia, *White* did not address whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. Scalia did acknowledge, however, that his opinion "casts doubt on that holding."

Turning to *Ohio v. Roberts,* 448 U.S. 56 (1980), the Court noted that under *Roberts,* 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. Scalia 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, Scalia 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." *Id.* at 1370.

Scalia went on to state that two options have been proposed to revise the Court's doctrine to reflect more accurately the original understanding of the Clause. First, that the Court apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law. Second, that it impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine. Scalia noted that in *White,* the Court considered the first proposal and rejected it. Acknowledging that the Court's opinion casts doubt on *White*, Scalia said it was not necessary to resolve whether *White* remained good law because the statements in the case before the Court were clearly testimonial under any definition. Although not expressly overruling *Roberts* as it applies to non-testimonial hearsay, Scalia left open the possibility that the Court might one day adopt the first option. Specifically, he 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." *Id.* at 1374. The case at hand, however, squarely implicated the second proposal, and as to that, he held: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374.

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, *id.* at 1374; (2) plea allocutions showing existence of a conspiracy, *id.* at 1372; and (3) police interrogations, *id.* at 1374. The Court noted that it used the term interrogation "in its colloquial, rather than any technical legal, sense." *Id.* at 1365 n.4. Also, the Court identified four categories of non-testimonial evidence: (1) off-hand remarks, *id.* at 1364 ("An off-hand, overheard remark . . . bears little resemblance to the civil-law abuses the Confrontation Clause targeted."); (2) a casual remark to an acquaintance, *id* at 1364 ("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." *Id.* at 1364 (citation and quotation omitted); (3) business records, *id.* at 1367; and (4) statements in furtherance of a conspiracy, *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 non-testimonial).

The Court went no further than this in delineating what constitutes testimonial versus non-testimonial 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 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. *Id.* at 1364. However, it did not adopt any of these formulations. In other portions of the opinion, the Court noted that the fact that a statement is not sworn is not dispositive of the testimonial/non-testimonial inquiry, *id.* at 1364, and that "[i]nvolvement of government officers in the production of testimony with an eye toward trial represents unique potential for prosecutorial abuse . . . ." *Id.* at 1367 n.7; *see also id.* at 1365. However, having categorized three types of evidence as testimonial and four as non-testimonial, the Court left the testimonial/non-testimonial determination as to the many other categories of evidence to be sorted out by the lower courts.

The Court did make clear that if the declarant is subject to cross-examination at trial, there is no Confrontation Clause violation. *See id.* at 1369 n.9. Pre-*Crawford* law provided that the Confrontation Clause guarantees only "an opportunity for effective cross-examination." United States v. Owens*,* 484 U.S. 554, 559 (1988). Under these cases, the Confrontation Clause does not bar testimony concerning a prior, out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification. *See id.* Normally, a witness is subject to cross-examination "when he is placed on the stand, under oath, and responds willingly to questions." *Id.* at 561 (discussing Fed. R. Evid. 801). 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." *Id.* at 561-62 (noting parallel between Rule 801 and the constitutional prohibition). 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. Barber v. Page, 390 U.S. 719, 724-25 (1968).

Significantly, *Crawford* recognized several exceptions to its 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. *See Crawford,* 124 S. Ct. at 1369 n.9. Under traditional evidence rules, such purposes would include, for example, impeachment, corroboration, and basis for an expert's opinion. Second, *Crawford* acknowledged cases supporting a dying declaration exception but declined to rule on the point. *See id.* 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.*"). Even if the Court ultimately declines to adopt a dying declaration exception, many dying declarations may not be testimonial and thus not covered by *Crawford* for that reason. *See id*. Examples might include dying declarations made to a friend or family member. Third, the Court noted that a defendant may forfeit his or her Confrontation rights by wrongdoing. *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 (1879)). An example would be killing a witness to prevent the witness from appearing at trial.

Of course, a *Crawford* violation results only when the defendant had no prior opportunity to cross examine the unavailable declarant. A defendant has had an opportunity to cross-examine when, for example, the declarant testified at the defendant's earlier trial, *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*), or preliminary hearing. *See Green*, 399 U.S. at 165-66. And finally, even if a no *Crawford* violation is found, the evidence still must be otherwise admissible.

If the evidence is non-testimonial, *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 non-testimonial evidence. *But see Crawford,* 124 S. Ct. at 1374 (Rehnquist, concurring) (dissenting from the Court's "decision to overrule [*Roberts*]."). 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." *Id.* at 1358. *United States v. Inadi,* 475 U.S. 387 (1986), and later *White,* clarified that under *Roberts,* unavailability only is required when the challenged statement was prior testimony.

II. 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. Testimonial/Non-Testimonial Distinction

1. Grand Jury Testimony, Plea Allocutions & 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. *See* State v. Clark*,* __ N.C. App. __ (July 6, 2004) (prior trial testimony); State v. Bruno*,* 383 F.3d 65

(2nd Cir. 2004) (government did not dispute that plea allocution and grand jury testimony were testimonial); People v. Patterson, 808 N.E.2d 1159 (Ill. Ct. App. 2004) (grand jury testimony); People v. A.S. Goldmen, Inc., 779 N.Y.S.2d 489 (N.Y. App. Div. 2004) (plea allocutions); People v. Carrieri, 778 N.Y.S.2d 854 (N.Y. Sup. Ct. 2004) (plea allocutions of co-defendants); People v. Woods, 799 N.Y.S.2d 494 (N.Y. App. Div. 2004) (same).

Similarly, at least two post-*Crawford* cases have indicated that declarations included in court filings are testimonial. *See* People v. Pantoja, 18 Cal. Rptr. 3d 492 (Cal. App. Ct. 2004) (concluding that murdered victim's declaration included in an application for a restraining order that was filed several days before she was killed and stating that defendant had threatened to kill her was testimonial, but resting holding on non-constitutional 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.].

2. Co-Defendants and Co-Conspirators' Statements During Police Interrogation or While in Custody

Based on the facts of *Crawford*, the North Carolina Court of Appeals and courts in other jurisdictions easily have concluded that statements made by co-defendants and co-conspirators during interrogation or while in police custody are testimonial. In *State v. Pullen,* __ N.C. App. __ (April 20, 2004), 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,* __

N.C. App. __ (Sept. 21, 2004), 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, given 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 defendant and that defendant knew it was stolen. *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); Haymon v. New York, 332 F. Supp. 2d 550 (W.D.N.Y. 2004) (accomplice's statements to police interrogators); People v. McPherson, __ N.W.2d __, 2004 WL 1632056 (Mich. Ct. App. July 20, 2004) (accomplice's post-arrest statement to police); Brooks v. State, 132 S.W.3d 702 (Tex. Ct. App. 2004) (co-defendant's written statement given during custodial police interrogation); Jahanian v. State, __ S.W.3d __, 2004 WL 1877723 *3 (Tex. Ct. App. Aug. 24, 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. Ct. App. 2004) (statement by co-defendant during a non-custodial 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); State v. Cutlip, 2004 WL 895980 (Ohio Ct. App. April 28, 2004) (co-defendants' statements given during custodial police interrogation); Hale v. State, 139 S.W.3d 418 (Tex. Ct. App. 2004) (written statement by non-testifying accomplice during a custodial 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); State v. Cox, 876 So.2d 932 (La. Ct. App. 2004) (co-defendant's statement during a police interrogation).

3. Co-Conspirator's 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 not testimonial. *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); People v. Cook*,* 815 N.E.2d 879 (Ill. App. Ct. 2004) (statements made in furtherance of conspiracy are not testimonial); United States v. Cozzo, 2004 WL 1151630 (N.D. Ill. April 28, 2004) (co-conspirator statements are non-testimonial); *see also* United States v. Rashid, 383 F.3d 769 (8th Cir. 2004) (noting that co-conspirators statements are not testimonial).

Consistent with *Crawfor*d's citation of *Bourjaily v. United States*, 483 U.S. 171 (1987) (admitting statements of co-conspirator to an FBI informant), for the proposition that statements in furtherance of a conspiracy are non-testimonial, two post-*Crawford* cases have held that a declarant's statements in furtherance of a conspiracy to an informant whose true status is unknown to the declarant are non-testimonial. *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); United States v. Saget, 377 F.3d 223, 229-30 (2d Cir. 2004) (statements to confidential informant whose identity is not known).

4. Business Records

In *Crawford*, Justice Scalia indicated that business records are non-testimonial. Sometimes the question of whether a document is a business record is not disputed. *See* Riner v. Virginia, 601 S.E.2d 555 (Va. 2004) (parties agreed that pawn shop journal was a business record excepted from *Crawford*). In other cases, such as those dealing with autopsy, blood tests and related reports and affidavits, which are discussed below, the issue is vigorously litigated. Two additional cases pertaining to the business records exception are summarized below.

> *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y. 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).
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> *Johnson v. Renico*, 314 F.Supp.2d 700 (E.D. Mich. 2004) (stating, in dicta, that statements made to police during bookings were non-testimonial).

5. Autopsy, Blood Test, and Related Reports and 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.

a. Blood Testing

> *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).
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> *People v. Rogers*, 780 N.Y.S.2d 393 (N.Y. 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) [Author's Note:

> Even if the report was testimonial, if it was used only as the basis for the expert's opinion, it would fall within *Crawford*'s exception for evidence admitted for a purpose other than the truth of the matter asserted. *See Crawford,* 124 S. Ct. at 1369 n.9.].

b. Autopsy Reports

In North Carolina, the pre-*Crawford* case of *State v. Watson*, 281 N.C. 221 (1972), 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 post-*Crawford* Alabama case seems to be in accord with this holding. *See* Smith v. State, 2004 WL 921748 (Ala. Crim. App. April 30, 2004) (autopsy evidence and autopsy report was non-testimonial; 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). However, another Alabama case decided by the same court on the same day simply held an autopsy report to be non-testimonial without addressing the cause of death issue. *See* Perkins v. State, 2004 WL 923506 (Ala. Crim. App. April 30, 2004) (autopsy report is a non-testimonial business record).

c. Drug Testing

People v. Johnson, 18 Cap. Rtpr. 3d 230, 231-33 (Cal. 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 non-testimonial documentary evidence; "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 (Oregon 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).

6. Victims' Statements to Police Officers

In *State v. Forrest,* __ N.C. App. __ (May 18, 2004), the North Carolina Court of Appeals held that statements made by a victim at a crime scene were non-testimonial. In that case, law enforcement officers rescued Cynthia Moore from defendant, her kidnapper. 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 defendant had done to her. Moore did not testify at trial. Turning to the issue whether Moore's statements to Blalock were testimonial, the court found instructive a post-*Crawford* New York case holding that a 911 call was non-testimonial. Concluding that Moore's conversation with Blalock was not a testimonial "police interrogation" under *Crawford,* the court stated:

> 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 defendant. When the statement was taken, the scene was secure, 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, he disagreed with the majority's statement that the 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*, __ N.C. App. __ (October 19, 2004), 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,* __ N.C. App. __ (April 20, 2004) (oral and written confessions of a non-joined accomplice, given during a police interrogation at the police station, were testimonial), and *State v. Clark,* __ N.C. App. __ (July 6, 2004) (witness's statement to officer

and affidavit identifying defendant as the individual she saw walking with the victim were testimonial), 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."

Recently, the North Carolina Supreme Court considered the issue and held that a statement by a victim to an officer was testimonial. In *State v. Bell,* __ N.C. __ (October 7, 2004), the state called an officer to testify about incident that was offered in support of the capital murder 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 tool 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. Therefore, [the] statement is testimonial in nature . . . ."

A number of other jurisdictions have analyzed whether victims' statements to police officers are testimonial. The cases are summarized below.

For cases dealing with 911 calls, see *infra* p. 19. For cases involving child victims' statements to police officers and others, see *infra* p. 26.

Cases From Other Jurisdictions Holding That Victims' Statements Are Not Testimonial[1]

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 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).

Cassidy v. State, __ S.W.2d __, 2004 WL 1114483 *4 (Tex. Ct. App. May 20, 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 (Cal. App. Ct. 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 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").

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 pre-trial 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

[1] *See also* State v. Wright, __ N.W.3d __, 2004 WL 2050528 *6-9 (Minn. App. Sept. 3, 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).

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").

Rogers v. State, 814 N.E.2d 695 (Ind. App. Ct. 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 5 minutes and saw the victim with blood coming from her nose and what appeared to be blood on her shirt and pants; approximately 10 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 immediately 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 non-testimonial).

Cases From Other Jurisdictions Holding That Victims' Statements Are 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).

Wall v. State, 143 S.W.3d 846 (Tex. App. Ct. 2004) (disagreeing with *Cassidy*, discussed above, and holding that assault victim's statements about assault and identifying 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).

People v. Pirwani, 14 Cal.Rptr.3d 673 (Cal. 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 statements, 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 (Cal. 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' . . . ").

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

7. 911 Calls

A number of decisions have dealt with 911 calls, with a majority holding them to be non-testimonial.[2] The one reported decision holding that a 911 call is testimonial is a New York case that is at odds with another decision from the same court. *Compare* People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) (testimonial) *with* People v. Conyers, 777 N.Y. S.2d 274 (N.Y. Sup. Ct. 2004) (non-testimonial). Although the North Carolina appellate courts have not yet addressed the issue, the Court of Appeals has favorably cited a New York case holding that 911 calls are non-testimonial. *See supra* p. 14 (discussing *State v. Forrest*). For case dealing with excited utterances more generally, see *infra* p. 24.

[2] *But see* State v. Meeks, 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, 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 challenge to the victim's statements as heard on the call).

Cases Holding That 911 Calls Are Non-Testimonial

State v. Wright, 686 N.W.3d 295 (Minn. App. 2004) (statements made by assault victims, defendant's girlfriend and her 15-year-old sister, during 911 call made immediately after an assault were not testimonial; stating that even under the broadest definition of 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).

State v. Corella, 18 Cal. Rptr. 3d 770 (Cal. App. Ct. 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. Conyers, 777 N.Y.S. 2d 274 (N.Y. Sup. Ct. 2004) (911 calls by third-party witness were non-testimonial; 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 (N.Y. Crim. Ct. 2004) (911 call made by the female victim in a domestic assault case was non-testimonial; 911 call typically is initiated not by the police, but by the victim of a crime, is not generated by the desire of the prosecution or police to seek evidence against a suspect but rather has it genesis in 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 is bearing witness but that is not usually the case with a 911 call where typically "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").

Cases Holding That 911 Calls Are Testimonial

People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) (without mentioning *Conyers* or *Moscat*, court holds 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. Witnesses' Statements During Investigations

In *State v. Clark,* __ N.C. App. __ (July 6, 2004), the North Carolina Court of Appeals held that a witness's statements and affidavit identifying 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. *See also* State v. Morton, __ N.C. App. __ (Sept. 21, 2004) (discussed *supra* at p. 9). This decision is consistent with holdings from other jurisdictions that witness' statements to officers during investigations are testimonial. *See* Brawner v. State, 602 S.E.2d 612 (Ga. 2004) (declarant-eyewitness's statement to police within 2-3 days of the homicide, made during the course of a police investigation was testimonial; there was no evidence that the declarant was involved in the shooting); Samarron v. State, __ S.W.3d __, 2004 WL 1932787 *5 (Tex. Ct. App. Sept. 1, 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).

9. Statements to Friends, Family, and Other Private Parties

In *State v. Blackstock,* __ N.C. App. __ (July 6, 2004), the North Carolina Court of Appeals held that a deceased victim's statements to his wife and daughter were non-testimonial.

The statements at issue described the robbery and the shooting that lead to the charges against the defendant. The court noted that the statements were made in personal conversations, when the victim's physical condition was improving. The court concluded it was unlikely that the victim made the statements under a reasonable belief that they would later be used prosecutorially because at the time, the victim could have fully expected to testify at trial himself. Moreover, the court continued, 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.

Cases from other jurisdictions unanimously hold that if the declarant's statements were made to family members or friends, they are not testimonial. *See* Horton v. Allen, 370 F.3d. 75 (1st Cir. 2004) (declarant's statements during a "private conversation" were not testimonial); 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 were comments "made to loved ones or acquaintances" and "not the kind of memorialized, judicial process-created evidence of which *Crawford* speaks"); United States v. Lee, 374 F.3d 637 (8th Cir. 2004) (declarant's statements to his mother confessing the murders and other criminal activities were non-testimonial; declarant made the statements to his mother over a year before she had any contact with law enforcement agents; the statements were more like casual remarks to an acquaintance than formal testimonial statements to a law enforcement officer); McKinney v. Bruce, 2004 WL 1730326 *6 (D. Kan. July 29, 2004) (murder victim's statement made to his uncle minutes before his death indicating his intention to go see the defendant was non-testimonial; statement was made in a private conversation and in circumstances in which "no objective person" would know that it would subsequently be used at trial); State v. Rivera, 844 A.2d 191 (Conn. 2004) (co-defendant's

statement to his nephew was non-testimonial; statement was not *ex parte* in-court testimony or its functional equivalent; it was not contained in any formalized testimonial materials such as affidavits, depositions or prior testimony, it was not a confession resulting from custodial examination, and unlike a statement to the police, the circumstances under which the statement was made would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial; the declarant made the statement in confidence and on his own initiative to a close family member); Miller v. State, __ P.3d __, 2004 WL 2073286 *5 (Ok. App. Ct. Sept. 17, 2004) (declarant's confession to witness was not testimonial; relationship between the two was that declarant lived in a car parked in witness's parents' back yard); People v. Compan, 2004 WL 1123526 (Colo. Ct. App. May 20, 2004) (domestic violence victim's excited utterances to her friend about her husband's conduct were not testimonial; 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); People v. Cervantes, 12 Cal.Rptr.3d 774 (Cal. Ct. App. 2004) (co-defendant declarant's statement to third party was non-testimonial; third party, who was a surgical medical assistant, was the declarant's neighbor and knew him for 12 years; statement was made when declarant sought medical attention from "a friend of long standing" who had come to visit his home; statement was made without any reasonable expectation that it would be used later); State v. Manuel, 685 N.W.2d 525 (Wis. Ct. App. 2004) (declarant's statement to girlfriend was non-testimonial); People v. Griffin, 93 P.3d 344 at n.19 (Cal. 2004) (statement made by murdered child victim to a friend at school, stating that defendant was fondling her, was not testimonial); Brooks v. State, 2004 WL 1516503 (Miss. Ct. App. June 29,

2004) (declarant's statement to half-sister, made under great distress, that implicated defendant in the crime was not testimonial); People v. Rivera, 778 N.Y.S.2d 28 (N.Y. 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); 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 non-testimonial").

10. Excited Utterances

Regardless of the speaker, some post-*Crawford* cases have found statements to be non-testimonial 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." Commonwealth v. Eichele, 2004 WL 2002212 (Pa. Com. Pleas. June 15, 2004). The following cases are illustrative. However, as the case summaries in other sections clearly reveal, a significant number of courts have declined, either explicitly or implicitly, to find the spontaneous nature of the statements dispositive.

For cases dealing with 911 calls, *see supra* p. 19.

State v. Forrest, __ N.C. App. __ (May 18, 2004) (victim's "spontaneous" statement to a police officer "immediately after a rescue" was non-testimonial).

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 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. Corella, 18 Cal. Rptr. 3d 770 (Cal. App. Ct. 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 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").

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 pre-trial 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").

Rogers v. State, 814 N.E.2d 695 (Ind. App. Ct. 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 immediately 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 non-testimonial).

State v. Orndorff, 95 P.3d 406, 408 (Wash. App. Ct. 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 non-testimonial; statement was a spontaneous declaration made in response to a stressful incident she was experiencing).

People v. Compan, 2004 WL 1123526 (Colo. Ct. App. May 20, 2004) (domestic violence victim's excited utterances to her friend about her husband's conduct were not testimonial; 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);

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 non-testimonial;" court states: "conceptually, an excited utterance is at the opposite end of the hearsay spectrum from testimonial hearsay").

11. Children's Statements to Social Workers, Doctors, and Police Officers

As the cases summarized below reveal, difficult issues have arisen in other jurisdictions in prosecutions involving child victims and child witnesses.

a. Statements to Police Officers

All of the post-*Crawford* cases that have analyzed children's statements to police officers have found them to be testimonial.[3]

[3] One case is to the contrary. *See* People v. Cage, 15 Cal. Rptr. 3d 846 (Cal. Ct. App. 2004) (distinguishing *Sisavath*, discussed below, and holding that 15-year-old child victim's statement to law enforcement officer at hospital was non-testimonial; 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

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).

People v. Sisavath, 13 Cal. Rptr. 3d 753 (Cal. 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).

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 that 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).

People ex rel. R.A.S., 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, 2004 WL 1352647 (Colo. Ct. App. June 17, 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 non-testimonial 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

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interrogation,' however colloquially, they have in mind something far more formal and focused."). However, the Westlaw KeyCite feature indicates, without citation, that on October 13, 2004, review was granted in that case and the opinion has been superceded.

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).

Somervell v. State, __ So.2d __, 2004 WL 1697711 (Fla. Dist. Ct. App. July 30, 2004) (autistic child's statements to a police officer who interviewed the child 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

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 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 investigators 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; 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; 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 non-testimonial).

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] and owie?" that stated "yes, [defendant] hurts me there," and pointing to her vaginal area was non-testimonial; after father noted injury, he contacted Children's Protective Services, which arranged to have 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 non-testimonial 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 of its functional equivalent).

Snowden v. State, 846 A.2d 36 (Md. App. 2004) (child victims' statements to a licensed social worker employed by the Child Protective Services Division were testimonial; the children were interviewed to develop their testimony under a state "tender years statute" providing that the social worker's testimony could be offered in lieu of the children's testimony in sex offense and other cases), *cert. granted*, 851 A.2d 596 (2004).

People v. Sisavath, 13 Cal. Rptr. 3d 753 (Cal. 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 notes that it was not holding that every MDIC interview is testimonial).

People v. Warner, 14 Cal. Rptr. 3d 419 (Cal. Ct. App. 2004) (three-year-old child victim's statements during interview by a multi-disciplinary 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 notes 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, law enforcement was involved in the training of the specialists, a detective observed the interview, and it was reasonably expected that the interview would be used at trial).[4]

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 that 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).

c. Statements to Medical Personnel

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 non-testimonial 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, 2004 WL 1352647 (Colo. Ct. App. June 17, 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

[4] This case is on appeal on an unrelated issue. 97 P.3d 811 (Cal. 2004). State court rules provide that it may not be cited.

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 is a child abuse prosecution).

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 non-testimonial; 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 and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, 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.").

d. Statements to Family and Friends

People v. Vigil, 2004 WL 1352647 (Colo. Ct. App. June 17, 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).

e. Other Statements by Children

Somervell v. State, __ So.2d __, 2004 WL 1697711 *2 (Fla. Dist. Ct. App. July 30, 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).

12. Statements to Prosecutors

At least two post-*Crawford* cases have held that statements to prosecutors are testimonial. *See* People v. Martinez, 810 N.E.2d 199 (Ill. Ct. App. 2004) (witness's written statement given to state's attorney was testimonial); United States v. Saner, 313 F.Supp.2d 896 (S.D. Ind. 2004) (co-conspirator's statements inculpating 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 non-custodial 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*.").

Additionally, *People v. Ochoa*, 18 Cal. Rptr. 3d 365, 372 (Cal. Ct. App. 2004), held that a victim's statements to a district attorney investigator were testimonial.

13. Miscellaneous Cases Dealing With the Testimonial/Non-testimonial Distinction

United States v. Nielsen, 371 F.3d 574 n.1 (9th Cir. 2004) (noting that 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).

People v. Newland, 775 N.Y.S.2d 308 (N.Y. App. Div. 2004) (statement given by declarant, who was not a witness, to an officer canvassing for possible witnesses was not testimonial; "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") (quotation and citations omitted).

B. Exceptions to the *Crawford* Rule

1. Forfeiture By Wrongdoing

Crawford recognized a forfeiture by wrongdoing exception to the Confrontation Clause. Post-*Crawford* cases have found forfeiture by wrongdoing when the defendant engaged in an affirmative act separate from the crime to be tried that results in the witness's unavailability at trial. *See* Francis v. Duncan, 2004 WL 1878796 *17-19 & n.8 (S.D.N.Y. Aug. 23, 2004) (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 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).

Other cases have declined to so rule when was no conclusive link between the defendant's actions and the witness's unavailability. *See* United States v. Hendricks, 2004 WL 1125143 (D. Virgin Islands April 27, 2004) (rejecting government's argument that defendants forfeited their Confrontation Clause rights by wrongdoing; allegation was that defendants were responsible for the murder of the declarant, thereby causing his unavailability; trial court found no conclusive link between the case and the declarant's murder).

Notwithstanding the fact that it appears to be bootstrapping, a few courts have been willing to conclude that the wrongdoing alleged to support a forfeiture may be the very crime for which defendant is on trial. *See* State v. Jiles, 18 Cal. Rptr. 3d 790 (Cal. 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); State v. Meeks, 88 P.3d 789 (Kan. April 23, 2004) (declining to decide if victim-declarant's statement responding 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 (Col. App. Ct. July 29, 2004) (murdered domestic violence victim-declarant'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"); *see also* People v. Pantoja, 18 Cal. Rptr. 3d 492 (Cal. 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).

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

A number of jurisdictions have applied the confrontation exception recognized by *Crawford* for evidence offered for a purpose other than for the truth of the matter asserted. *See* State v. Clark, __ N.C. App. __ (July 6, 2004) (noting but not applying this exception 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"); 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); 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); People v. McPherson, __ N.W. 2d __, 2004 WL 1632056 (Mich. Ct. App. July 20, 2004) (same); People v. Reynoso, 781 N.Y.S.2d 284 (N.Y. App. Ct. 2004) (statement admitted to show officer's state of mind was not subject to the Confrontation Clause); People v. Gomez, 12 Cal.Rptr.3d 398, 406 (Cal. App. 2004) (hearsay statements of police officers introduced at suppression hearing to establish collective knowledge of officers supporting probable cause was non-testimonial); Waltmon v. State, 2004 WL 1801793 *6 (Tex. Ct. App. Aug. 12, 2004) (*Crawford* does not apply to statement by anonymous informant in 9ll call reporting a car "all over the road" and giving the car's license plate number; statement was not admitted for the truth of the matter asserted but rather to show how the officers happened to be in the area); 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).

3. Redacted Co-Defendants' Statements Not Offered Against Defendant

People v. Kahn, 2004 WL 1463027 (N.Y. 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).

4. Defendant's Own Statements

People v. Brown, __ N.Y.S.2d __, 2004 WL 1949042 *2 (N.Y. County Ct. Aug. 23, 2004) (statements made by the defendant do not implicate confrontation rights).

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 note that a Confrontation Clause claim cannot be asserted against one's own statements).

C. Availability for Cross-Examination

Consistent with pre-*Crawford* case law, at least one post-*Crawford* case has held that invocation of the Fifth Amendment privilege against self-incrimination renders a witness unavailable for cross-examination. *See* State v. Cutlip, 2004 WL 895980 (Ohio App. April 28, 2004) (because accomplices invoked their Fifth Amendment privileges, they were unavailable).

Also 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. *See* 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); 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"); People v. Warner, 14 Cal.Rptr. 3d 419 (Cal. 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);[5] State v. Courtney, 682 N.W.2d 185 (Minn. Ct. App. July 6, 2004) (domestic assault victim, who recanted her pretrial statements to the police and testified for the defense, was available for cross-examination).

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. *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).

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,* 381 F.3d 868 (9th Cir. 2004), the Ninth Circuit held that a witnesses' assertion of her Fifth Amendment privilege coupled with the trial judge's restriction on cross examination made 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,* 2004 WL 1627220 *15-19 (S.D.N.Y. July 21, 2004), a New York federal district

[5] This case is on appeal on an unrelated issue. 97 P.3d 811 (Cal. 2004). State court rules provide that it may not be cited.

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.

One post-*Crawford* case holds that a declarant need not put on the stand by the state to be deemed available for cross-examination, provided that the declarant is otherwise available. *See* Starr v. State, __ S.E.2d __, 2004 WL 1949469 *3 (Ga. Ct. App. Sept. 3, 2004) ("Although the victim did not testify, the record shows that she was available for cross-examination. The prosecutor stated that the victim was in the courthouse and 'available if necessary.'").

One final case suggests that when the declarant testifies at a preliminary hearing, a defendant does not have an opportunity to cross-examine the declarant regarding prior statements that "were not identified during, or otherwise brought to his attention prior to, the preliminary hearing." People v. Ochoa, 18 Cal. Rptr. 3d 365, 373 (Cal. Ct. App. 2004) (going on to hold, in part, that defendant had been adequately alerted to the statements).

D. Unavailability

In *State v. Clark,* __ N.C. App. __ (July 6, 2004), the North Carolina Court of Appeals indicated that a prosecutor's statements about his attempts to find a non-testifying witness were insufficient to support a finding of unavailability but went on to hold that in the case before it, sufficient evidence of unavailability was presented. At a hearing on the state's motion to have the witness declared unavailable, the prosecuting attorney stated that he had visited the areas where 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 her, to conclude that there was sufficient evidence of unavailability.

State v. Bell, __ N.C. __ (October 7, 2004), is a more recent case on point. In *Bell,* when the state offered hearsay statements of a non-testifying 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.

E. Prior Opportunity to Cross-Examine

If the defendant had a prior opportunity to cross-examine an unavailable, non-testifying declarant about his or her testimonial statements, there is no Confrontation Clause violation. The following cases apply this rule.

> *State v. Clark,* __ N.C. App. __ (July 6, 2004) ("[declarant's] prior testimony, which was given at an earlier trial where defendant was present and cross-examined the witness, satisfies the cross-examination requirement under *Crawford*").
>
> *People v. Price*, 15 Cal.Rptr. 3d. 229 (Cal. 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 also he "vigorously exercised" that opportunity and later presented that preliminary hearing testimony to the jury in support of his defense).
>
> *People v. Fry*, 92 P.3d 970 (Col. 2004) (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) (*en banc*).
>
> *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 prior deposition).

People v. Ochoa, 18 Cal. Rptr. 3d 365, 372-374 (Cal. 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 during 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 non-material or non-inflammatory).

F. Waiver of the Right to Confrontation

Parson v. Kentucky, __S.W.3d__, 2004 WL 1361894 (Ky. June 21, 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; the state relied on this agreement and the principles of estoppel and fundamental fairness preclude defendant from claiming a denial of his right of confrontation under these circumstances).

G. Retroactivity

All of the cases from other jurisdictions that have addressed the issue of *Crawford's* application to cases that became final before it was decided have held that the decision is not retroactive. The relevant cases are summarized below.

Brown v. Uphoff, 381 F.3d 1219, 1225-27 (10th Cir. 2004) (*Crawford* is not retroactive).

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

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

People v. Edwards, 2004 WL 1575250 (Col. Ct. App. July 15, 2004) (same).

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

Wheeler v. Dretke, 2004 WL 1532178 n.1 (N.D. Tex. July 6, 2004) (suggesting same).

H. Proceedings to Which *Crawford* Applies

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).

People v. Johnson, 18 Cap. Rtpr. 3d 230, 232-33 (Cal. 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 non-testimonial).

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).

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").

People v. Brown, __ N.Y.S.2d __, 2004 WL 1949042 *2 (N.Y. County Ct. Aug. 23, 2004) (applying *Crawford* to a hearing under a Sex Offender Registration Act to redetermine defendant's classification under that Act).

I. Confrontation Test for Non-Testimonial Evidence

State v. Blackstock, __ N.C. App. __ at n.2 (July 6, 2004) ("Although *Crawford* overrules the *Roberts* framework to the extent that it applies to testimonial statements, *Roberts* remains good law regarding nontestimonial statements).

J. Miscellaneous

United States v. Stewart, 323 F. Supp. 2d 606 (S.D.N.Y. 2004) (Secret Service ink examiner who tested a document under the supervision of a testifying expert need not testify; because no statement of the ink examiner was received in evidence, there was no Confrontation Clause issue).

Appendix

A Tool for Trial Judges & Litigants: *Crawford* Inquiry

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

1. Is the declarant subject to cross examination at the current trial?

The Confrontation Clause guarantees only "an opportunity for effective cross-examination." United States v. Owens*,* 484 U.S. 554, 559 (1988). Thus, under pre-*Crawford* cases, it does not bar testimony concerning a prior, out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification. *Id.* Normally, a witness is subject to cross-examination "when he is placed on the stand, under oath, and responds willingly to questions." *Id.* at 561 (discussing F.R. Evid. 801). 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." *Id.* at 561-62 (noting parallel between Rule 801 and the constitutional prohibition).

> **If yes, there is no Confrontation Clause violation.** *See Crawford,* 124 S. Ct. at 1369 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").
>
> **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 id.* at 1369 n.9 (Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). Under traditional evidence rules, such purposes would include, for example, impeachment, corroboration, and basis for an expert's opinion.
>
> **If no, proceed to the next question.**

3. Does a Confrontation Clause exception apply?

Crawford identified the following exceptions to the Confrontation Clause:

- Dying declarations. *Crawford* acknowledged cases supporting a dying declaration exception but declined to rule on the point. *See id.* 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*."). Even if the Court ultimately declines to adopt a dying declaration exception, many dying declarations may not be testimonial and thus not covered by

Crawford for that reason. *See id; see also infra* Question 4 (discussing what constitutes "testimonial" evidence). Examples might include dying declarations made to a friend or family member. Also, a victim-declarant's dying declaration to a law enforcement officer may fall under the forfeiture by wrongdoing exception noted directly below.

- Forfeiture by wrongdoing. *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 (1879)). An example would be killing a witness to prevent the witness from appearing at trial.

  Also, a statement of the defendant being tried raises no Confrontation Clause issue.

If yes, admission of the evidence does not violate the Confrontation Clause.

If no, proceed to the next question.

4. Is the statement "testimonial"?

Crawford expressly declined to provide a comprehensive definition of the term "testimonial." *Id.* at 1374 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"). It did, however, indicate that the term includes:

- Prior testimony at a preliminary hearing, before a grand jury, or at a former trial, *id.* at 1374;
- Plea allocution showing existence of a conspiracy, *id.* at 1372; and
- Police interrogations, *id.* at 1374.

Regarding police interrogations, the Court noted that it used the term interrogation "in its colloquial, rather than any technical legal, sense." *Id.* at 1365 n.4.

The Court indicated that the following are non-testimonial:

- Off-hand remarks. *See id.* at 1364 ("An off-hand, overheard remark . . . bears little resemblance to the civil-law abuses the Confrontation Clause targeted.");
- "[A] casual remark to an acquaintance, *id* at 1364 ("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.");
- Business records, *id.* at 1367; and
- Statements in furtherance of a conspiracy, *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 non-testimonial).

With regard to categorizing the many other types of evidence that are presented, the trial judge should consider the following language in *Crawford*:

- "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." *Id.* at 1364 (citation and quotation omitted).

- "Various formulations of this core class of 'testimonial' statements exist" including:
  - 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;
  - Extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and
  - 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. *Id.* at 1364.
- The fact that the statements are not sworn is not dispositive. *Id.* at 1364.
- "Involvement of government officers in the production of testimony with an eye toward trial represents unique potential for prosecutorial abuse . . . ." *Id.* at 1367 n.7; *see also id.* at 1365

If the evidence is non-testimonial, apply *Ohio v. Roberts*.

Although there is some question as to the future viability of *Roberts, Crawford* did not overrule *Roberts* as it applies to non-testimonial evidence. *But see Crawford,* 124 S. Ct. at 1374 (Rehnquist, concurring) (dissenting from the Court's "decision to overrule [*Roberts*]."). 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." *Id.* at 1358. *United States v. Inadi,* 475 U.S. 387 (1986), and later *White,* clarified that under *Roberts,* unavailability only is required when the challenged statement was prior testimony.

Note: while the majority opinion stated that where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to apply *Roberts,* it also stated that it would be consistent with that design to completely exempt non-testimonial statement from Confrontation Clause scrutiny altogether. Relying on this language, prosecutors may press for rulings that non-testimonial hearsay poses no Confrontation Clause issue at all.

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

5. Is the declarant unavailable?

A witness is not unavailable unless the state has made a "good faith" effort to obtain the witness's presence at trial. Barber v. Page, 390 U.S. 719, 724-25 (1968).

If the state has not established unavailability, the testimony must be excluded. *Crawford,* 124 S. Ct. at 1367-68.

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

6. Did the defendant have an opportunity to cross-examine?

A defendant has had an opportunity to cross-examine when, for example, the declarant testified at the defendant's earlier trial, *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*), or preliminary hearing. *See Green*, 399 U.S. at 165-66.

> **If yes, there is no Confrontation Clause violation.** *See Crawford,* 124 S. Ct. at 1374. **Proceed to the next question.**
>
> **If no, admission would violate the Confrontation Clause.** *See id.*

7. Is the evidence otherwise admissible?